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LABOR RELATIONS BOARDS

LABOR RELATIONS BOARDS

The Regulation of Collective Bargaining under the
National Industrial Recovery Act

BY

LEWIS L. LORWIN

AND

ARTHUR WUBNIG

Supplied by-

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DIRECTOR'S PREFACE

This is the sixth of a series of studies dealing with the NRA undertaken by the Institute of Economics under the immediate direction of Leverett S. Lyon. The study is an analysis of the effects which Section 7(a) of the National Recovery Act had on the development of the theory of collective bargaining in the United States, and of the growth of administrative institutions aiming to put the statutory requirements into operation. In order to give a comprehensive account of the development, it is necessary to include labor boards, some of which (in fact, the most important) lay outside the NRA.

A large number of the many new developments in the sphere of industrial relations in this country since the summer of 1933 trace back to Section 7(a) of the Recovery Act. By affirming the right of the workers to organize and to bargain collectively, that provision of the act stimulated among trade unions a concerted organizational drive which called forth counter-movements on the part of employers. Those who drafted the act may have supposed that Section 7(a) spoke for itself and that its intent was clear. But it soon became evident that the language of the statute was not at all clear and that its meaning had to be elucidated in the midst of the intense controversy which it aroused. This task of elucidation was undertaken at first by the NRA, but it soon fell almost entirely to a series of general and special labor boards, established in part under the NRA, in part independently of that body.

Between August 1933 and May 1935, the various Recovery Act labor relations boards tried to put specific content into the term "collective bargaining" as em-

bodied in Section 7(a) of the NIRA. Although operating independently, most of these boards reached similar conclusions and developed a more or less homogeneous mass of rules and practices which may be regarded as the body of a "common law" of collective bargaining. Despite some precedents, these developments represented a new departure in federal policy on labor relations. They indicate the direction in which labor relations seem likely to develop under the supervision and with the aid of the federal government.

The present study is concerned with these new developments. The authors have attempted to describe the principles and practices which the several labor boards evolved, and to explain the conditioning factors underlying the interpretation of Section 7(a) by these boards. The Labor Relations Act of 1935 was largely based upon the experience of the boards and projects a particular formulation of their working rules into the law of the land. The act was passed while this study was in press, and no attempt has been made to forecast its administrative or legal interpretation.

In the preparation of this study the authors have been generously aided by the members and staffs of the various labor boards. They have had ample opportunities for observing the boards in session, for interviewing members, and for examining documents. For this aid they wish to express their deepest appreciation.

Paul T. Homan and Charles O. Hardy have acted with Mr. Lyon as an advisory committee on the study.

EDWIN G. NOURSE
Director

Institute of Economics
July 1935

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PART I
THE NIRA AND SECTION 7(a)

CHAPTER I

THE BACKGROUND

New as the "New Deal" may appear, many of its elements have their roots deep in the past. This is especially true of the provisions of the National Industrial Recovery Act (NIRA) contained in Title I, Section 7, which deal with the right of workers to organize and bargain collectively. A brief survey of the main developments in labor relations since 1900 is thus required for a clear understanding of the problems raised by these provisions and of the questions of labor policy which are at issue today.

PRE-WAR TRENDS

Toward the close of the nineteenth century, industrial relations in the United States were almost entirely governed by individual bargaining between employer and employee. Only small groups of workers in a few of the skilled trades had established trade unions as "going concerns" by 1900. The range of collective bargaining was severely limited, and collective agreements between unions and employers were few and far between.¹

Law and public opinion combined to hamper the growth of a system of industrial relations based on collective bargaining through trade unions. The turbulent labor movement of 1884-87 and the big strikes of 1892-94² produced an intense public fear of and resentment

¹ Unions of molders, printers, bakers, iron and steel workers, carpenters, and cigarmakers had local agreements. Regional and district agreements were in force in soft coal mining and railroad transportation. The stove foundry agreement was national. Few collective agreements were put into writing. Machinery for the adjustment of disputes under agreements was generally scant and ineffective.

² See Lewis L. Lorwin, *The American Federation of Labor*, 1933, pp. 32-37.

against trade unions. The general revolt against monopolies, trusts, and combinations in restraint of trade, culminating in the Sherman Anti-Trust Act of 1890,³ also played a part in the matter. The courts saw in trade unions monopolistic features similar to those of industrial combinations, and issued a series of decisions which put serious restraints on union activities. These decisions supported the individualistic theory of industrial relations, and were based on the idea that the right of individuals to make contracts was the touchstone of social and individual well-being.⁴

During the early years of the twentieth century, the situation changed somewhat. Buoyed by a business boom and by the general trend towards industrial consolidation, many employers, eager to expand their markets, were willing to enter into agreements with unions if promised security against strikes. A number of trade agreements were concluded between national employers' associations and national unions. The National Civic Federation was formed for the purpose of mediating industrial disputes and promoting collective negotiations between employers and workers. The Industrial Commission appointed by President McKinley made recommendations in favor of collective bargaining in its report published in 1901. President Theodore Roosevelt's intervention in the strike of the anthracite miners in 1902, resulting in the establishment of the Anthracite Board of Conciliation, and ultimately in consolidating the strength

³ 26 Stat. L. 209.

⁴ John R. Commons and John B. Andrews, *Principles of Labor Legislation*, 1920, p. 245. But in 1898, Congress passed the Erdman Act (30 Stat. L. 424) applying to interstate railroad transportation, which, *inter alia*, prohibited requiring anti-union promises as a condition of employment. This provision of the law was held unconstitutional in *Adair v. U. S.*, 208 U. S. 161 (1908). A Kansas state law to similar effect was held unconstitutional in *Coppage v. Kansas*, 236 U. S. 1 (1915).

of the United Mine Workers of America, gave official approval to the idea of collective bargaining. The American Federation of Labor, which emerged during the 1900's as the accredited representative of organized labor in the United States, was hopeful that the principles of collective bargaining might be extended to all industry. To achieve this end the A. F. of L. was willing to abrogate the anti-trust laws, not only because the courts had been turning these laws against the trade unions, but also to permit employers' associations to deal more readily with labor organizations.

A radical reversal in the situation occurred between 1904 and 1908. Three large national employers' associations—the National Association of Manufacturers, the Citizens' Industrial Alliance, and the American Anti-Boycott Association—and also a number of employers' associations in particular trades started a legal and economic drive against trade unions. Pitted against the employer groups were the now numerous international craft unions headed up in the A. F. of L. It was during this period that the employers, with the aid of their lawyers, formulated most of the arguments which are current today against such union practices as limitation of apprentices and output, interference with the employer's right to hire and fire, alleged corruption of "walking delegates" and "business agents," violence in strikes, the boycott, inter-union jurisdictional disputes, and above all the closed shop. The arguments were that practices such as these increased labor costs; undermined morale in the shop; interrupted production; penalized the more scrupulous business man; and violated those fundamental principles of constitutional law, the "inalienable" rights of "property" and "liberty."

The five years preceding the outbreak of the World

War witnessed a considerable extension of trade unionism, as well as new developments in the forms and methods of collective bargaining.⁵ Large groups of semi-skilled workers, until then unorganized, succeeded in forming new types of unions which called for a modification of some of the older union methods. New schemes of "industrial self-government" were developed in the garment trades while the practice of arbitrating disputes through bi-partisan boards of employers and workers was applied on a larger scale than ever before in the building trades, the printing industry, and elsewhere. There was much talk during these years that industry could govern itself by developing a system of law based on its own special needs and administered through special agencies of its own, and that employers and workers could settle their difficulties by adjustment machinery introducing such new devices as "protocols of peace," the "preferential union shop," and permanent boards of arbitration with paid impartial chairmen.

In 1914 the A. F. of L., under the favorable auspices of the Wilson Administration, then friendly to organized labor, brought about the passage of the labor provisions of the Clayton Anti-Trust Act.⁶ This was regarded as a far-reaching legislative triumph for trade unionism in its struggle against the courts, which had turned the Sherman Anti-Trust Act against trade unions. The Clayton Act professed to exempt trade unions from the force of the Sherman law by declaring in Section 6 "that the labor of a human being is not a commodity or article of commerce," and that "nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid their in-

⁵ For the character and causes of this movement, see Lorwin, *The American Federation of Labor*, Chap. V.

⁶ 38 Stat. L. 730.

dividual members from lawfully carrying out the legitimate objects thereof." Moreover, Section 20 of the Clayton Act purported to limit the power of the courts to issue injunctions in labor disputes. Because of its later interpretation by the courts, the Clayton Anti-Trust Act neither relieved the unions from their liabilities under the Sherman law nor seriously inhibited federal judges from issuing labor injunctions.⁷ In 1914, however, the unions were hailing the Clayton law as a "Magna Charta of labor."

The years preceding America's entry into the World War were years of widespread labor unrest. During 1915-16 there occurred a growth of labor unions and an increase in strikes stimulated largely by the upsurge in production and employment attributable to war orders from abroad accompanied by rising prices. Not only the A. F. of L. but also the radical labor organizations outside its ranks, principally the Industrial Workers of the World, were forging ahead. The coincidence, as well as the undoubted interconnection of these developments, led many employers about this time to consider the possibilities of alternatives to trade unionism. Thus in October 1915, as a result of a violent strike the year before in its mines, the Colorado Iron and Fuel Company established one of the pioneer employee representation plans in the United States.⁸ This plan was destined to become

⁷ For a discussion of the legal consequences of the anti-trust laws on trade unions, see A. T. Mason, *Organized Labor and the Law*, 1925. For a discussion of the use of injunctions in labor disputes, see Felix Frankfurter and Nathan Greene, *The Labor Injunction*, 1930.

⁸ The plan was devised by W. L. Mackenzie King, former Minister of Labor and subsequently Premier of Canada, at the invitation of John D. Rockefeller, Jr. The operation of the plan up to 1924 is elaborately discussed in one of the Russell Sage Foundation's Industrial Relations Studies, Ben M. Selekman and Mary Van Kleeck, *Employees Representation in Coal Mines*, 1924. The first employee representation plan—Filene Co-Operative Association—was seemingly established in 1898 by Wm. Filene Sons, Boston department store.

the forerunner of many shop committees, works councils, company unions, and other plans in later years.

THE WAR EXPERIENCE

After the United States entered the World War, it became necessary to reorganize production in terms of military needs and to assure the continuous movement of armaments, munitions, raw materials, and supplies. To obtain these ends, a moratorium on labor disputes was essential. But organized labor was determined to protect existing union standards, to extend organization as much as possible, and to obtain representation on government boards dealing with war production. Employers in contrast were opposed to measures that might strengthen the labor unions.

For a short while after America's entrance into the war, the government managed to maintain a balance between these conflicting forces. Government adjustment boards dealing with wages, hours, output standards, and employer-employee relations were established in the industries which had a direct bearing on war production. On these boards, organized labor was given representation. But labor unrest nevertheless grew alarmingly. Most of the strikes during 1917-18 occurred in the building, metal, and clothing trades, but many industries and areas until then undisturbed by industrial disputes were also affected.

The causes of this labor unrest lay primarily in the industrial strains created by the war. New industries were being organized from the ground up, and old industries were growing at tremendous speed. There were large-scale geographic shifts in the distribution of factories and workers. War contracts on a "cost-plus" basis led to bidding up for the services of such workers as were available in the market, especially skilled workers. Without

a nation-wide system of employment bureaus to guide them, men went from place to place in search of the highest wages. Wages in most industries, although moving upward, lagged behind retail prices and the rapidly advancing cost of living.

In the summer of 1917 President Wilson appointed a Mediation Commission to investigate into and effect a settlement of some of the most troublesome labor disputes of the time: in the California oil fields, the Arizona copper mines, the packing industry, the Pacific Coast telephone industry, and the lumber camps of the Pacific Northwest. The Commission issued its findings in January 1918. In summing up, it recommended that the government commit itself to a national labor relations policy based on three principles: first, that some form of collective bargaining between workers and management be declared to be indispensable; second, that a continuous administrative machinery be established for the orderly adjustment of labor disputes; and third, that a single central board be set up for the duration of the war to give a unified direction to labor policy. The Commission also urged that the trade unions should cease all practices tending to restrict maximum output.

In accordance with these recommendations, and in view of further experience with various committees and conferences, the National War Labor Board was established in April 1918.⁹ This Board was to have a dual function; (1) to mediate and conciliate in labor disputes threatening war production; (2) to act as a court of appeals for the special government adjustment agencies created in different industries. The War Labor Board was composed of twelve members; five chosen by employers' associations; five by the A. F. of L.; and two

⁹ For a history and analysis of the work of the Board, see *U. S. Bureau of Labor Statistics Bulletin No. 287*.

“public” representatives, one selected by the members for industry, the other by the members for labor.

The principles and policies to guide the Board were formulated in a series of propositions as follows:

1. There should be no strikes or lockouts during the war.
2. The right of workers to organize in trade unions and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever.¹⁰
3. The right of employers to organize in associations or groups and bargain collectively, through chosen representatives is recognized and affirmed. This right shall not be denied, abridged, or interfered with by any of the workers in any way whatsoever.
4. Employers should not discharge men for membership in trade unions, nor for legitimate trade union activities.
5. The workers, in the exercise of their right to organize, shall not use coercive measures of any kind to induce workers to join their organizations, nor to induce employers to bargain or deal therewith.
6. In establishments where the union shop exists the same shall continue and the union standards as to wages, hours of labor, and other conditions of employment shall be maintained.
7. In establishments where union and non-union men and women now work together and the employer meets only with employees or representatives engaged in the establishments, the continuance of such conditions shall not be deemed a grievance. This declaration, however, is not intended in any manner to deny the right, or discourage the practice of the formation of labor unions, or the joining of the same by the workers in said establishments as guaranteed in the last paragraph, nor to prevent the War Labor Board from urging, or any umpire from granting, under the machinery herein provided, improvement of

¹⁰ In construing propositions 2 and 3, the War Labor Board developed in many decisions the doctrine that majority rule should govern collective bargaining (Dockets No. 111, 122, 129, 130, 274, 297, 393, 641). In its outstanding decision, the Bridgeport Munitions case, the Board formulated a plan of collective bargaining procedure expressly based on majority rule (Docket No. 132).

their situation in the matter of wages, hours of labor, or other conditions, as shall be found desirable from time to time.

8. Established safeguards and regulations for the protection of the health and safety of the workers shall not be relaxed.

The National War Labor Board continued in existence for over a year, from April 8, 1918 to May 1919, but its main activities were concentrated within the period of active hostilities. The guiding rule of the Board's strategy was to maintain the *status quo* in industrial relations.¹¹ Where trade unions had existed before the creation of the Board, the employer was to bargain collectively with the union. But where no trade unions had earlier existed, the Board avoided any action which might force trade unions on non-union employers. Nevertheless, the tendency of the Board's awards was to stimulate collective bargaining through trade unions. Of a total of 490 awards by the Board, 226 provided for collective bargaining either through trade unions or shop committees. In some cases wherein the question of collective bargaining was not originally involved—that is where disputes were confined to wages, hours, and other working conditions—in order to avert future controversies, the Board directed the establishment of a system of collective bargaining through shop committees.

Union recognition was the most perplexing issue with which the War Labor Board had to deal. It did not try to force employers to recognize unions in shops where no union had been recognized before. Nevertheless it sought to permit the employees the widest latitude in selecting their representatives. The Board, by way of

¹¹ It was all the easier to put this strategy into effect because the A. F. of L. agreed to refrain from attempting to organize non-union shops for the duration of the war emergency. The A. F. of L. was of the belief that after the war had ended it would be able to "capture" the works councils set up by the Board. For an expression of the A. F. of L. attitude, see *American Federationist*, September 1918, pp. 809-10.

compromise, ruled that meeting with union workers did not constitute "recognition."¹² In dealing with disputes in establishments where unions were not recognized, the Board's formula was to recommend the establishment of a shop committee, and to hold that it was the employer's duty to negotiate with the representatives of such committee. The shop committees were to be elected by secret ballot.¹³

The shop committees initiated by the Board met with only limited immediate success. Employers opposed them as a possible entering wedge to trade unionism. Nevertheless, the shop committee movement made a cer-

¹² In view of the importance of the issue of union recognition the following ruling of the Board in the case of the Omaha and Council Bluffs Street Railway is of interest:

"The words 'recognition of the union' have had artificial and an improper meaning given to them by employers. They have been too technical in their treatment of committees of their employees who have come to them to represent their union employees, when they have said to such a committee 'Do you represent the union' and 'if you do we decline to deal with you.' The question is not whether they represent the union. The question is whether they, being employees represent other employees, and if that is the fact, their mere refusal to say that they do not represent the union or their admission that they do, does not imply a contract dealing with the union or any organization in the sense in which the War Labor Board understands the term." (*U. S. Bureau of Labor Statistics Bulletin No. 287*, pp. 66-67.)

¹³ On Oct. 4, 1918 the joint chairmen of the Board approved a plan for election of shop committees which provided for the selection of one committeeman for each 100 employees in each department or section of the shop, for the nomination of candidates, for the holding of elections in the shop or such convenient building as the chief examiner should decide. Elections were to be by secret ballot and the foremen and other officials of the company were to refrain from being present at elections. After the first election, the procedure might be changed by agreement between the employer and the committee. In awards made subsequent to the formulation of this plan, however, modification of the original plan was usually made to fit the particular circumstances. Usually the awards provided for the election of three committeemen to a department even if it were composed of a small number of men, rather than 100 men. In some cases several departments were combined under one representation.

tain amount of headway, thanks to the Board, and became in the sequel the nucleus for many of the company unions established during the immediate post-war period.¹⁴

Where the War Labor Board was primarily concerned with industrial disputes, the War Labor Policies Board, organized in May 1918, tried to develop a set of principles to guide the wage and employment policies of the government war agencies. These principles were conceived of as a "labor code" which could be extended in time to all industry. The "code" provided for an eight-hour day, a minimum wage, extra pay for overtime, legal holidays, and wage differentials. In so far as the settlement of disputes was concerned, the "code" contemplated a series of adjustment agencies working in close co-operation with one another, and co-ordinated into a permanent and unified system.

The War Labor Policies Board hoped that the President would proclaim these principles as a permanent basis for a system of industrial relations in the United States. But President Wilson delayed considering them, and after the Armistice they were shelved.

THE PERIOD OF "RECONSTRUCTION"

Nearly two years of government intervention in industrial relations extended the principle and practices of collective bargaining in industry. The government adjustment boards promoted collective agreements in the industries in which they were established. The War

¹⁴ It is noteworthy, in view of current controversies between proponents of majority rule and proportional representation, that the War Labor Board advocated majority rule in its formulation of a general plan for electing shop committees. See *Report of Secretary of National War Labor Board to the Secretary of Labor for the Twelve Months Ended May 31, 1919*, p. 61.

Labor Board directly and indirectly promoted trade unions and shop committees.¹⁵ The United States Railroad Administration, which took over the railroads for the time being, signed national agreements with the railroad brotherhoods and with the craft unions in the repair shops.

Nevertheless, large sections of organized labor, especially the unions of skilled craftsmen in the American Federation of Labor, became impatient with government regulation. Their traditional distrust of government intervention was now strengthened by their feeling that the government boards had exercised a restraining influence on efforts to raise wages.¹⁶ At the same time employers and business men also demanded that government control be ended, on the ground that the activities of the government boards were helping to spread trade unionism.

With the approval of both organized labor and employers, the war-time industrial boards and agencies were allowed to go out of existence soon after the war ended.

¹⁵ According to a survey made by the National Industrial Conference Board in 1919, out of the total 225 works councils then in existence, 86 had been established by the War Labor Board. Virtually all of the works councils were formed after Jan. 1, 1918.

¹⁶ In November 1918, the National Industrial Conference Board, the Metal Trades Department of the American Federation of Labor, and the War Labor Policies Board reached an agreement to establish a national metal trades board for the stabilization and control of wages, hours, and conditions in the metal trades. President Wilson was expected to issue a proclamation establishing the board. But the A. F. of L. at its convention soon afterwards disapproved of the scheme. The statement of the convention was as follows: "While accepting and supporting during the war all agencies, private and public, to aid in adjusting differences between employer and employees, whether in governmental or private establishments, the workers cannot yield to governmental agencies the power to control wages, hours, and conditions of employment." The project was dropped. On January 3, 1919, Mr. Gompers told the Senate Committee on Education and Labor that the organized workers did not want a national tribunal to deal with industrial disputes, since such procedure might develop into compulsory arbitration.

At once both sides found themselves engaged in the greatest industrial battle witnessed in American history. The number of labor disputes in 1919 was 3,630, and they involved 4,160,000 employees. In 1920, there were 3,411 disputes involving 1,463,000 workers. Many of these strikes overleaped the boundaries of shop and factory and swept into their orbit basic questions of industrial organization and economic policy, which were part of the general movement for "reconstruction." There was an enormous volume of talk about the "new world" which the "war for democracy" was to usher in. A vague but widespread feeling was at large that fundamental economic and social changes were imminent, and that these changes would raise labor to a new and higher status.

In October 1919, President Wilson convened in Washington a National Industrial Conference to formulate principles for a "genuine and lasting co-operation between capital and labor."¹⁷ The conference met in a tense atmosphere. Several hundred thousand iron and steel workers were on strike under radical leadership. The United Mine Workers were on the verge of calling a strike in the soft coal industry and were demanding the nationalization of mines. The railroad unions were agitating for national ownership and management of the railroads, under the proposed Plumb Plan. Major strikes were in force in the garment industries, in the building trades, among shipping and dock workers, and in cotton textile mills. The membership of trade unions was increasing by leaps and bounds. The radical elements in the labor movement were seemingly gaining strength and were vociferous in their demands for industrial

¹⁷ The conference was composed of an employers' group of 17 members; of a labor group of 19 members; and of a public group of 21 individuals selected by the President of the United States.

unionism, general strikes, a political labor party, social legislation, workers' control in industry, and the recognition of Soviet Russia. The American Federation of Labor was trying to stem the tide of labor radicalism by offering a moderate program of "reconstruction" in which were stressed the rights of workers to organize and to be represented by trade unions in their negotiations with employers.

The National Industrial Conference soon came to grief because the employer and labor groups could not agree on the meaning and methods of collective bargaining. Three days after the conference opened, the labor group introduced a resolution of eleven points proposing an industrial program acceptable to labor. The following were the points of particular interest:

1. The right of wage earners to organize in trade and labor unions for the protection and promotion of their rights, interests, and welfare.

2. The right of wage earners to bargain collectively through trade and labor unions with employers regarding wages, hours of labor, and relations and conditions of employment.

3. The right of wage earners to be represented by representatives of their own choosing in negotiations and adjustments with employers in respect to wages, hours of labor, and relations and conditions of employment.

4. The right of employers to organize into associations or groups to bargain collectively through their chosen representatives in respect to wages, hours of labor, and relations and conditions of employment.

5. A method should be provided for the systematic review of industrial relations and conditions by those directly concerned in each industry. To this end, there should be established by agreement between the organized workers and associated employers in each industry a national conference board, consisting of an equal number of representatives of employers and workers, having due regard to the various sections of the industry and the various classes of workmen engaged, to have for its object the

consideration of all subjects affecting the progress and well-being of the trade, to promote efficiency of production from the viewpoint of those engaged in the industry and to protect life and limb, as well as to safeguard and promote the rights of all concerned within the industry.

With a further view of providing means for carrying out this policy, the federal government, through its Department of Labor, should encourage and promote the formation of national conference boards in the several industries where they did not already exist. To encourage still further the establishment of these national conference boards in each industry, these conference boards should be urged, whenever required, to meet jointly to consider any proposed legislation affecting industries in order that employers and workers might voluntarily adopt and establish such conditions as were needful, and might also counsel and advise with the government in all industrial matters wherever needful legislation was required.¹⁸

The employer group opposed this resolution on the ground that, as used by the labor group, the terms "right to organize" and "bargain collectively" meant organization in and bargaining through trade unions exclusively. The employers were willing to grant collective bargaining but only through some form of shop councils or the equivalent thereof; that is, a system whereunder the representatives would be chosen from the workers in the establishment. The representatives of the public tried to mediate the differences between the partisan groups, but without success.¹⁹ President Wilson was

¹⁸ The other points of the program demanded an eight-hour day, extra pay for overtime, legal holidays, the abolition of child labor, and a living wage.

¹⁹ The following passages from the letter to the President by the public group which appeared in the *New York Times*, Oct. 25, 1919, are worth quoting:

"The important principle of collective bargaining cannot be sharply separated from other elements of the great problem of the relation of employer and employee. The right of organization, the protection in the exercise of their lawful rights, of those who seek to organize the workers, the careful definition of the various forms of organization

also unable to break the deadlock, and the conference collapsed.

At the suggestion of the public group, President Wilson named a commission to consider the problems which had caused the collapse of his conference. This commission was composed of public representatives only. It issued a preliminary report on December 29, 1919, the main recommendation of which was the establishment of a system of tribunals to investigate and adjust industrial disputes. Arbitration was to be compulsory in the case of public utility industries; elsewhere the right to strike was to be preserved. The American Federation of Labor opposed the plan. The controversy led no-

through which the right may be exercised, and the machinery necessary for the adjusting of disputes arising in connection with that right must all be taken into account in their proper relation.

"We believe that the experience of this conference, and of similar conferences elsewhere, clearly showed the futility of attempting to deal with this great question in a piecemeal way by adopting detached and unrelated resolutions. The only efficient method in our judgment is that of formulating a comprehensive and systematically developed program.

"We believe that the right of workers to organize for the purpose of collectively bargaining with their employers through representatives of their own choosing, cannot be denied or assailed. As representatives of the public, we can interpret this right only in the sense that wage earners must be free to choose what organization or association, if any, they will join for this purpose.

"In the recognition of the right of workers to organize, to be represented by representatives of their own choice, difficulties will from time to time arise. We believe that it will be possible for a properly constituted arbitral authority to adjust such difficulties with justice and fairness to all parties concerned.

"It is impossible to discuss in detail the numerous schemes for affording to workers representation in the regulation of the conditions of labor, the plan for profit sharing, the many forms of shop councils, and the like. We respectfully suggest that a very great service could be rendered to the nation, employers and employees alike, if in the Department of Labor there were established a bureau for the purpose of gathering and making available accurate information concerning all such experiments and their results. Such a bureau could give expert advice and assistance to any person desiring to undertake plans for bettering labor conditions in particular establishments."

where. The commission submitted a final report to the President in March 1920. This had no practical effect whatever. The government for the time being ceased its fruitless efforts to bring labor and capital into a common enterprise for defining a national labor policy.

POST-WAR DEVELOPMENTS

After reaching a membership peak in 1920, the American trade union movement was forced into retreat by the depression of 1920-21, by the concerted anti-union drive of employers' associations, and by a series of adverse court decisions.²⁰ By 1923 the membership of the A. F. of L. had fallen from over 4 million to less than 3 million.²¹ Thereafter until the depression years it remained stagnant between 2.7 and 2.9 million. Except in a few industries, the unions lost in power; and the system of collective bargaining through trade unions was very much reduced in extent and importance. Moreover the post-war decade witnessed a striking development of employee representation plans and of various devices for personnel management which seemed to indicate that trade unions might possibly cease to be of importance in American industry.

While losing in membership the trade unions nevertheless gained several legislative and legal victories. The first notable gain was the passage of the Railway Labor Act in 1926.²² Two provisions of this act were especially

²⁰ See Lorwin, *The American Federation of Labor*, Chap. IX.

²¹ For general statistical materials, see Leo Wolman, *The Growth of American Trade Unions, 1880-1923, 1924.*

²² 44 Stat. L. 577. The Transportation Act of 1920 (41 Stat. L. 456) had earlier provided that all railroad labor "disputes shall be considered and if possible, decided in conferences between representatives designated and authorized so to confer by the carriers, or the employees . . . thereof directly interested in the dispute." (Sec. 301.) To implement this act, the United States Railroad Labor Board was established. Relying on Sec. 301, the Board enunciated majority rule in language as

significant. The first provision of Section 2 made it the mutual duty of the carriers and their employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." Provision 3 of the same section stated the rights of the workers to choose representatives for purposes of collective bargaining in language which was to serve as a model for subsequent legislation. The provision read:

Representatives, for the purposes of this act, shall be designated by the respective parties in such manner as may be provided for in their corporate organization or unincorporated association, or by any other means of collective action, without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other.

In 1930 this provision was the occasion for a United States Supreme Court ruling generally regarded at the time by American trade unions as their most notable triumph in the struggle against company unionism. In 1927 the railway clerks' union, basing its action on Section 2 of the Railway Labor Act, brought suit for in-

follows: "The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances whether in person or by representatives of their own choice." (*International Association of Machinists v. Atchison, Topeka and Santa Fe Railway*, Decision No. 119, 2 U.S. RRLB 87, 96.) To this version of majority rule, substantially identical with that later read into Sec. 7(a) by the Recovery Act labor boards, the Railroad Labor Board held consistently. (See Decisions Nos. 173, 174, 218, 220, and 3117.) Two of the majority rule cases came before the U. S. Supreme Court, which refrained from ruling on the rights of the parties in interest, but which held, nevertheless, that the general principles affirmed by the Board were "just and reasonable." *Pennsylvania R.R. v. U.S. RRLB*, 261 U.S. 72 (1923); *Pennsylvania Federation No. 90 v. Pennsylvania R.R. Co.*, 267 U.S. 203 (1925).

junction against the Texas and New Orleans Railroad Company. The company was charged with having violated the Railway Labor Act by seeking to replace the trade union by a company union as the representative for collective bargaining. The trial court granted an injunction restraining the company from interfering in the choice of representatives. The railway company failed to comply, and after contempt proceedings, the trial court issued a mandatory order for the disestablishment of the company union as an agency for collective bargaining. This order was upheld, first by the Circuit Court of Appeals, and finally in 1930 by the United States Supreme Court.²³ The Supreme Court held unanimously that the attempt of the employer to impose a company union upon his employees constituted interference with their right to designate representatives for collective bargaining.²⁴

A further step in favor of the trade union movement was taken by Congress in 1932 with the passage of the Norris-LaGuardia Anti-Injunction Act.²⁵ The act contained a declaration of policy which was particularly significant and which read:

... Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associa-

²³ *Texas and New Orleans R.R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930).

²⁴ Chief Justice Hughes, writing for a unanimous court, observed: "The legality of collective action on the part of employees in order to safeguard free choice is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. . . . Congress was not required to ignore this right of employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interference with freedom of choice."

²⁵ 47 Stat. L. 70.

tion, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, although he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization and designation of representatives of his own choosing, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .²⁴

The language of this declaration was truly extraordinary. It expressed a thoroughgoing change of previous legislative policy with regard to labor organization. The act was premised on the idea that there could ordinarily be no equality or liberty of contract between employer and employee except on the basis of organized and collective bargaining. That the act contemplated collective bargaining in accordance with trade union practices is clear from the fact that it was sponsored by the A. F. of L. and that specific provisions were directed against many of the practices whereby the courts in the past had made it difficult for trade unions to organize and to carry on their activities.

The Anti-Injunction Act was passed at the depth of depression, when trade unionism in the United States was at a very low ebb. Such action by Congress is explained in part by the desire of the party in control to meet the political exigencies of an approaching election under conditions of economic stress. But it also indicated a change in the attitude of Congress with regard to industrial relations; a change induced by the new interest in economic and social reform which grew out of the debacle of 1929 and the years of depression.

²⁴ It may be noted that much of the language of Sec. 7(a) of the Recovery Act is lifted bodily from this declaration of policy.

THE EVE OF THE NIRA

On the eve of the passage of the National Industrial Recovery Act, the situation with regard to collective bargaining in American industry was spotty and confused. Collective bargaining by trade unions was effective over a limited area of American industry. At most, not over 3 million workers, including A. F. of L. unions, the railway brotherhoods, "left-wing" unions, and a small number of independent unions, were operating under collective agreements with their employers. This was from 10 to 15 per cent of the theoretically organizable groups of wage earners and salaried workers. The A. F. of L. unions still maintained a strong position in the building and printing trades, and in a number of miscellaneous skilled occupations. The coal miners' union, long the most powerful international union in the A. F. of L., seemed to be crumbling, and the semi-industrial unions in the clothing trades were apparently losing their hold.

Most of the basic mass production industries were closed tight against trade union organization. In the iron and steel industry, the union was restricted to a handful of skilled workers in a few tin-plate mills. There were no unions in the automobile industry. Trade unionism was practically non-existent in the public utility enterprises except on street railways. On the railroads, the train service workers were solidly organized in the brotherhoods. But in the shop crafts, company unions were numerous. Moreover, many occupations had never been seriously affected by the trade union movement. Such were the unskilled workers in the mechanical occupations, "white-collar" workers, and agricultural laborers. In brief, trade unionism was confined to groups of semi-skilled and skilled workers, organized more along "craft" than "industrial" lines.

At the same time, about a million and a half workers were organized under company unions. Some of the employee representation plans were leading a fairly active existence.²⁷ But with the onrush of the depression many company unions had become inactive.

Most of the collective agreements made by trade unions were of a strictly local character. Even on the railroads agreements were negotiated between individual carriers and district federations of crafts. In the vast majority of enterprises in which the bulk of American wage earners were employed, wages and working conditions were determined by individual bargaining. More exactly, they were established by management, and individual workers were free to accept them or to look elsewhere for their jobs.

Not much change or growth was perceivable among such trade unions as still continued to function. Craft unionism, with its "job-conscious" outlook, was still the rule in the dominant unions, notably in the building trades. In the coal mining industry the system of annual wage negotiations continued on much the same basis as it had been for two decades, except that the union was continually losing ground in territory previously organized. The unions in the garment industries were continuing to develop the arbitration machinery which they had evolved before 1914. The printing trades unions were habituated to an elaborate system of wage agreements and adjustment apparatus. And some of the railroads, like the Baltimore and Ohio, were experimenting with "labor-management co-operation," based on a sys-

²⁷ Examples were those of the Colorado Fuel and Iron Co., Bethlehem Steel Co., International Harvester Co., Pennsylvania R.R., General Electric Co., and similar plans in various public utility enterprises. For a general description, see National Industrial Conference Board, *Collective Bargaining through Employee Representation Plans*, 1933.

tem of conferences between unions and management.

At the beginning of 1933, trade unionism was fighting a desperate battle for survival. So far as the term implies trade union practices and procedures, collective bargaining was losing ground. In the basic industries, indeed, management no longer regarded trade unions as a serious danger to undisputed control over industrial conditions, and had even ceased promoting employee representation plans as an offset to outside labor organizations. The A. F. of L. and its affiliated unions were seriously worried about the outlook for the immediate future, and feared a return to the conditions of the days before 1900 when the labor movement had to fight for its very existence. Nevertheless, the employers' associations which had long fought the advance of organized labor were still in the field, and their activities centered more than ever before around Congress and state legislatures. In this complex of forces, Congress had thrown some weight in favor of labor organization by passing the Railway Labor and Anti-Injunction Acts. These two acts seemed to presage a new departure of public policy on industrial relations.

CHAPTER II

THE PURPOSES OF SECTION 7

In the preceding chapter we described the background against which the labor provisions of the National Industrial Recovery Act were conceived and formulated. In this chapter we shall consider the manner in which Section 7 was made, so far as the story throws light on the legislative intent of Congress in enacting the statute.

THE FIRST DRAFT

The first draft of the proposed National Industrial Recovery Act was transmitted to Congress by the President on May 17, 1933. The bill was known at the time as H. R. 5664.¹ As submitted to the House, the bill contained Section 7(a) with three clauses on labor and collective bargaining which read as follows:

1. That employees shall have the right to organize and bargain collectively through representatives of their own choosing.
2. That no employee and no one seeking employment shall be required as a condition of his employment to join any organization or to refrain from joining a labor organization of his own choosing.
3. That employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.²

But Section 7(a) was not all. The tradition of determining labor standards by collective bargaining was already established in a number of industries, trades, or subdivisions thereof: for example, building trades, printing trades, and coal mining. In recognition of this fact,

¹ The designation was later changed to H. R. 5775 and S. 1712.

² 73 Cong. 1 sess., H. R. 5664, May 17, 1933.

Section 7(b) was included in the bill. This section instructed the President to encourage the making of collective agreements on wages, hours, and other working conditions. Such agreements, when approved by him, were to have the force of codes.³ Finally, Section 7(c) prescribed a procedure for determining labor standards in the absence of such collective agreements as might, after presidential approval, possess the force of codes. The President, in this event, was authorized to investigate "labor practices, policies, wages, hours of labor, and conditions of employment," and upon the basis of such investigations and after hearing, "to prescribe" a code limited to labor provisions. Section 7(c) was probably intended to apply under circumstances where no satisfactory voluntary code of fair competition was forthcoming.

The NIRA bill, as thus transmitted to Congress, contained somewhat general and confusing statements on collective bargaining. With respect to the control of wages and hours, the measure was put forward as a substitute for the Black-Connery bill aiming to establish a 30-hour work week.⁴ The provisions for collective bar-

³ It may here be noted that extensive use was made of Sec. 7(b) by two union groups: the United Mine Workers in their Appalachian agreements supplemental to the bituminous coal code; and the building trades unions in the various regional agreements supplemental to the construction code. See Leverett S. Lyon and others, *The National Recovery Administration*, 1935, Chap. XVII.

⁴ 73 Cong. 1 sess., H. R. 4557 and S. 158. The substitute Black bill, as reported out by the House Labor Committee, contained extremely forceful provisions on collective bargaining. Thus, according to Sec. 4(a), the Federal Regulation Board was to issue licenses to transport goods in interstate commerce in the event, *inter alia*, that the national trade association in question "has entered into an agreement . . . with respect to wages, working conditions, and limitation of production with the national labor union representing the workers in such industry." According to Sec. 7, no licensee might ". . . transport . . . in interstate commerce . . . any goods in the production of which any worker who was a signatory to any contract of employment prohibiting such worker

gaining were grafted on as a matter of course, reaffirming, for the most part, already existing rights but without any clear idea of the possible functions of collective bargaining under a system of codes of fair competition. It was suggested in Section 7(b) that the labor standards of codes might be the outcome of collective bargaining; but this was not mandatory. In fact, Section 7(c) presupposed that in many cases it would not be possible to fix wages, hours, and other working conditions by voluntary agreements between employers and employees. Thus, the logical relationships of Sections 7(b) and 7(c) to Section 7(a) were vague and uncertain.⁵

THE INTENT OF CONGRESS

On May 18, 1933, the House Ways and Means Committee began hearings on the bill which lasted until May 20 and resulted in important amendments to Section 7(a). These amendments were destined to become the center of future discussion and debate.

HEARINGS BEFORE THE HOUSE COMMITTEE

Representatives of the American Federation of Labor, not entirely satisfied with Section 7(a) as it then read, appeared before the House committee to urge amendments clarifying and strengthening the language from the trade union point of view. William Green, president

from joining a labor union or employees' organization, was employed, or any goods . . . produced by any person whose employees were denied the right of organization and representation in collective bargaining by individuals of their own choosing." 73 Cong. 1 sess., H. rep. 124 (by Mr. Connery, to accompany S. 158).

⁵ But Senator Walsh of Massachusetts, in proposing certain amendments to the Recovery Act, said: "The major purpose of the bill is to restore employment and maintain purchasing power. The most important safeguard for the maintenance of purchasing power is the preservation of labor's right of collective bargaining. Section 7(a) has been properly inserted for the provision of this safeguard." (*Cong. Record*, June 2, 1933, Vol. 77, Pt. 5, p. 4799.)

of the A. F. of L., appearing on May 19, declared that the bill as drafted did not protect sufficiently the interests of organized labor. He demanded that it be amended in two specific ways. In provision one of Section 7(a), which read that "employees shall have the right to organize and bargain collectively through representatives of their own choosing," the A. F. of L. asked for the insertion of the following: "and shall be free from the *interference, restraint, or coercion* of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁶ The American Federation of Labor asked that provision two of Section 7(a), which read "that no employee and no one seeking employment shall be required as a condition of employment to join any labor organization or to refrain from joining a labor organization of his own choosing," be changed to read as follows: "That no employee and no one seeking employment shall be required as a condition of employment to join a *company union*, or to refrain from joining a labor organization of his own choosing."⁷

In proposing these amendments, William Green claimed that he was merely asking for a restatement of principles already recognized as part of American public policy. Referring to the amendment that the workers shall be free from the "interference, restraint, or coercion" of employers, he said:

This amendment does not include in it any form of new legislation. It is a verbatim statement taken from the declared public policy of the government as set forth in the Norris-LaGuardia anti-injunction law. Congress adopted this declaration by an overwhelming vote when it passed the Norris-LaGuardia Act. It is now a part of the law of the land. We ask, labor asks, that

⁶ Italics ours.

⁷ Italics ours.

it be included in this emergency legislation. Labor believes it necessary in order to confirm and emphasize the guaranty of the right of organization and of the exercise of collective bargaining.⁸

In offering the amendment to provision two of Section 7(a), Green asserted that the committee which drafted the section genuinely desired to outlaw the exacting of membership in company unions as a condition of employment. Later, Green admitted that his proposed amendment had not been submitted to the drafting committee and that he did not know the attitude of the committee. But he maintained, nevertheless, that Senator Wagner favored it. His statement was confirmed by Senator Wagner.⁹

The amendments asked for by the A. F. of L. officials were designed to strengthen the specific powers of organized labor to use the general right guaranteed in the bill. The amendment to provision one imposed an obligation on employers not to interfere with the trade union activities of their employees. The amendment to provision two substituted the specific term "company union" for the general term "organization" and went beyond the Anti-Injunction Act by outlawing entirely the use of "yellow dog" contracts.¹⁰

No representatives of organized employers appeared before the House Ways and Means Committee to take issue with William Green. Senator Wagner, appearing as the sponsor of the bill, used language which suggested entire sympathy with the position of the A. F. of L.¹¹ On May 23 the bill was reported to the House by the

⁸ 73 Cong. 1 sess., *National Industrial Recovery*, Hearings on H.R. 5664 before House Committee on Ways and Means, pp. 117-18.

⁹ The same, p. 122.

¹⁰ The Anti-Injunction Act merely prohibited the issuance of injunctions in support of such contracts.

¹¹ The same, p. 93.

Ways and Means Committee, amended with respect to the labor clauses in accordance with the suggestions of the A. F. of L.

HEARINGS BEFORE THE SENATE COMMITTEE

William Green's success in persuading the House Ways and Means Committee to accept the amendments sponsored by the A. F. of L. aroused apprehension among anti-union employers. Although organized industry had been silent on the collective bargaining provisions in the hearings before the Ways and Means Committee, it was active in opposing these provisions, as amended, before the Senate Finance Committee. Several representatives of employers' organizations appeared at the hearings of this committee between May 22 and June 1 and voiced their opposition to the proposed changes in the collective bargaining provisions.

The first to appear on behalf of employers was James A. Emery, counsel to the National Association of Manufacturers. Mr. Emery attacked the wording of Section 7(a), which, he feared, tended to identify collective bargaining with trade unionism. Mr. Emery claimed that the section as amended seemed destined "to hold the employment relations of the United States into a single form, to the manifest advantage of a particular form of organization" (the trade union).¹² Continuing with some words in favor of "employee representation plans" (company unions), he raised the issue of the employee's liberty to choose his own form of employment relationship. He declared:

The trade union is a recognized part of our social life, yet at times it frankly sets itself up as a separate and distinct governing agency to control those who believe they can advance their own

¹² 73 Cong. 1 sess., *National Industrial Recovery*, Hearings on S. 1712 and H. R. 5755 before Senate Committee on Finance, p. 284.

interests through other forms of organization and relationship. To deny them the right to continue to do so is violating Lincoln's famous declaration, "No man is good enough to govern a man without that other's consent."¹⁸

Mr. Emery also thought it unjust that employers alone should be subject to regulation by the Administrator, while employees alone should enjoy mandatory rights. His position was made clear when Senator Gore inquired:

Is this your point, that there are certain rights of labor guaranteed in this bill, and not entrusted to the discretion of the Administration, while on the other hand there are certain fundamental rights of the employers not expressly guaranteed, but are committed to the discretion and power of the Administrator?

"Exactly," was Mr. Emery's reply.¹⁴ In accordance with these views, he then suggested striking out Section 7 altogether, and adding the following amendment as part (e) of Section 3:

In every code of fair competition in any trade or industry or subdivision thereof approved by the President under either sub-section (a) or sub-section (d) of this section the provisions for the protection of employees shall include the following conditions: (1) That employers and employees shall have the right to organize and bargain collectively in any form mutually satisfactory to them through representatives of their own choosing. (2) That no employee and no one seeking employment shall be required as a condition of employment to join or refrain from joining any legitimate organization, nor shall any persons be precluded from bargaining individually for employment.¹⁵

E. L. Michael, representing the Virginia Manufacturers' Association, was quite outspoken in expressing his fear lest the government interpret collective bargaining as synonymous with trade unionism. He said:

¹⁴ The same, pp. 284-85.

¹⁵ The same, p. 289.

¹⁶ The same, pp. 288-89.

It is common knowledge that in the federal and state labor departments the words "collective bargaining" have been universally interpreted to mean collective bargaining by and through organizers or representatives of labor unions, whereas we know collective bargaining is practised every day between employers and employees in thousands of individual establishments.¹⁶

Mr. Michael continued to argue that if a federal agency were empowered to administer the industrial relations provisions proposed,

... There would immediately be established the influence of the federal and state governments toward the compulsion of unionization of the vast majority of employees in industry, who are not at present unionized, and it would be difficult in many cases for them to continue their expressed and demonstrated preferences and actual existing practices of making mutually satisfactory agreements with employers.¹⁷

In support of this contention Mr. Michael cited his experiences as a member of the War Labor Board. Finally, he endorsed Mr. Emery's proposal for eliminating Section 7(a) and adding a provision (e) to Section 3.¹⁸

Charles R. Hook, president of the American Rolling Mills Company, was mainly concerned with what seemed to him the inequitable character of Section 7(a). "While there is a prohibition on the part of industry from interference with the employee's right to choose," he declared, "there is no prohibition on those who are not employees from interfering with the free exercise of the employees of that corporation."¹⁹ In order, therefore, to inhibit the union agent or delegate (as well as management) from interfering with the free expression of the employees' will, Mr. Hook proposed the following amendment to the bill:

¹⁶ The same, p. 379.

¹⁷ The same, p. 379.

¹⁸ The same, pp. 380-81.

¹⁹ The same, p. 390.

"And each employer and his employees shall be free from the interference, restraint, or coercion exercised by either party or by non-employees as against either, in the designation of such representatives or in self organizations, or in other concerted activities for the purpose of collective bargaining."

He also wished to strike out from the bill the words "company union," "whatever that may be," as he put it, and to insert the more neutral and general term "organization," because, in his words "there is no reason why the words 'company union' . . . should be retained, and any other organization left out."²⁰

Robert P. Lamont, representing the American Iron and Steel Institute, made but a brief appearance before the Senate Finance Committee, but what he said was unequivocal and to the point. It was as follows:

The industry [iron and steel] stands positively for the open shop; it is unalterably opposed to the closed shop. For many years it has been and now is prepared to deal directly with its employees collectively on all matters relating to their employment. It is opposed to conducting negotiations concerning such matters otherwise than with its own employees; it is unwilling to conduct them with outside organizations of labor or with individuals not its employees. The industry accordingly most strongly objects to the inclusion in this pending bill of any provisions which will be in conflict with this position of the industry, or of any language which implies that such is the intent of the legislation. If this position is not protected in the bill, the industry is positive in the belief that the intent and purpose of the bill cannot be accomplished.²¹

Organized labor was apparently satisfied with the results it had achieved before the House Ways and Means Committee. In any event, its only representative to appear before the Senate Finance Committee was John L. Lewis, president of the United Mine Workers of

²⁰ The same, p. 390.

²¹ The same, p. 395.

America, who spoke as a representative both of his own organization and of the American Federation of Labor. Mr. Lewis devoted himself principally to an attempt to refute the statement made earlier that same day by Mr. Lamont. Mr. Lewis began by affirming the support of organized labor for Section 7(a) as amended by the House Ways and Means Committee. He declared:

. . . I appear here to sum up briefly the position of organized labor in America with regard to this industrial recovery bill. We stand squarely behind Section 7 as reported to the Senate in the House bill, as amended by the Ways and Means Committee. It will place upon the statute books a good safe declaration in the form of a statute that will give to the workers of this country some rights, the same rights now enjoyed by the employers and the corporations, the right to organize, and to bargain collectively for their labor, and to be represented by the representatives of their own choosing, in precisely the same form, gentlemen, that the American Iron and Steel Institute is represented before the committee this morning by a former distinguished Secretary of Commerce, Mr. Lamont, a representative of their own choosing.²²

Mr. Lewis further emphasized that Section 7(a) was merely a way of equalizing the rights of labor with those granted by the bill to employers. He said:

Organized labor in America wants the right to organize. Every employer has the right to join these trade associations, and the enactment of this bill will make it almost mandatory upon every substantial employer of labor and producer of commodities transported in interstate commerce to join an organization for his protection, and through this legislative enactment there will be a closed shop to employers and industrialists in this country in every trade and industry, and yet distinguished gentlemen have the effrontery to come before this committee and propose that, after securing these privileges for themselves, they will deny to

²² The same, p. 404.

the workmen engaged in those industries the same rights and privileges which they arrogate to themselves.²³

Mr. Lewis was the last person to appear at the hearings of the Senate Finance Committee. This was on June 1. Between that date and June 5, when the committee reported the bill back to the Senate, two amendments, each of a major substantive character, were introduced. The first, evidently a concession to the demands of the representatives of industry, was the addition to Section 7(a) of a proviso as follows:

That nothing in this title shall be construed to compel a change in existing satisfactory relationships between the employees and employers of any particular plant, firm, or corporation, except that the employees of any particular plant, firm, or corporation shall have the right to organize for the purpose of collective bargaining with their employer as to wages, hours of labor, and other conditions of employment.²⁴

The second amendment was the addition of the words "organizing and assisting" to provision 2 of Section 7(a) so that it read: "No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing or assisting a labor organization of his own choosing."²⁵ This was an extension of the rights of the workers, and presumably a further concession to the A. F. of L.

The Finance Committee amendment—the provision

²³ The same, p. 405.

²⁴ 73 Cong. 1 sess., H. R. 5755, Calendar No. 130 (S. rep. 114) as reported by Mr. Harrison with amendments, p. 10; also *Cong. Record*, June 8, 1933, Vol. 77, Pt. 6, p. 5257.

²⁵ The addition of these important words was proposed by Senator Walsh of Massachusetts, who pointed out that "the right of collective bargaining cannot be assured without the abolition of the 'yellow dog' contract, which not only prohibits . . . employees from joining but also from organizing and doing anything that might lend assistance to labor organizations." (*Cong. Record*, June 2, 1933, Vol. 77, Pt. 5, p. 4799.)

on existing satisfactory relations in industry—was intended as a compromise to persuade both anti-union employers and organized labor to accept Section 7(a) more readily. For as Section 7(a) would have read with the addition of the proviso, it first reassured the workers of their right to organize and bargain collectively, and then reassured employers of their right to maintain employee representation schemes, where they were in force. The amendment was acceptable to the representatives of industry, but was criticised by representatives of organized labor as a means to “legalize the company union.” The A. F. of L. was prepared to seek the defeat of the bill if the proviso were not withdrawn.²⁸

THE DEBATE IN CONGRESS

The NIRA bill went through both the House and the Senate with extraordinary speed, except for Section 7(a). In the House, true, this section like most other sections was treated summarily and perfunctorily. In the Senate, however, it was the occasion of an extended and spirited controversy. Should one wish to establish the intent of Congress in enacting Section 7(a), almost the only available material—outside of the record of the hearings before the two committees—would be the debate in the Senate with reference to the proviso on “existing satisfactory relationships.”

Debate in the House

The debate in the House was carried on under the stringent provisions of the “closed rule,” with an arbitrary allotment of time to both sides and a restriction against amendments other than those offered by the committee. For the most part, the debate concerned it-

²⁸ *Proceedings of the 53d Annual Convention of the A. F. of L.*, p. 16.

self with the features of the bill which related to taxation, public works, and the suspension of the anti-trust laws.

Among the extremely few statements referring to Section 7(a) that of Clyde Kelly, representative from Pennsylvania, deserves notice as expressive of what the statute implied to sympathizers with the labor movement. Mr. Kelly declared:

I have heard it said, that this is not the time to make any changes in labor relations, no matter how just these changes may be. The argument is that we should wait until this emergency is over before attempting to establish labor standards. Nothing could be more illogical. This emergency is, in part, due to the neglect of the importance of fair wages and balanced hours of labor in maintaining prosperity in a machine age. Now is the best time to make sure that better methods will prevail in the future. . . . It is the purpose [of Section 7] to encourage the settlement of the vitally important questions of hours, wages, and working conditions by mutual agreements between organizations of employers and employees. . . . We are here frankly recognizing the right of workers to organize and bargain collectively. . . . There is constructive statesmanship in these provisions that every worker shall be free to join a labor organization of his own choosing. . . . This measure, when enacted into law, will make trade unionism in America a better instrumentality for the advancement of social justice and human freedom.²⁷

It is clear that Mr. Kelly expected Section 7(a) to promote and encourage trade unionism. How far, if at all, the other members of the House who voted in favor of the measure held similar views cannot be ascertained because of the sparsity of pertinent references.

Debate in the Senate

On the first day of the Senate debate, Senator Robert F. Wagner of New York spoke at length with reference

²⁷ *Cong. Record*, May 25, 1933, Vol. 77, Pt. 4, pp. 4220-221.

to the topic of collective bargaining. As one of the authors of the proposed act, he developed the theme that the codes were to be voluntary, both as to their fair trade practice and labor provisions. Further, he declared, the success of the measure depended upon voluntary cooperation. Nevertheless, he pointed out, the interests of labor were especially safeguarded by the fact that the provisions of Section 7 were mandatory. He said:

The interests of the laboring man are adequately protected under the voluntary codes. No code will be approved unless it embodies the following: (1) Recognition of the right of employees to organize and bargain collectively through representatives of their own choosing. (2) Prohibition of the anti-union or yellow dog contract as a condition of employment. (3) Acceptance of the maximum hours of labor and minimum rates of pay and other standards of working conditions approved by the President.²⁸

On June 8, Section 7(a) became the occasion of a successful attack upon the amendment on "existing satisfactory relationships" proposed by the Senate Finance Committee. Senator Norris of Nebraska was the first to speak against acceptance of the amendment. He began by pointing out that, as chairman of the Senate Judiciary Committee, he had helped to frame the Anti-Injunction Act of 1932, during the course of the hearings of which committee, he declared, it was found that the "company union" was "one of the greatest evils we had to provide against." He was afraid that the proposed proviso to Section 7(a) would make it extremely difficult for labor to express its demands through organizations of its own choosing.²⁹

Upon questioning by Senator Costigan of Colorado, Senator Norris agreed that the chief difficulty with the

²⁸ The same, Pt. 5, p. 5153.

²⁹ The same, Pt. 6, p. 5279.

proviso was the ambiguity of the expression "satisfactory relationships." "Might that language," Mr. Costigan wished to know, "not perhaps be regarded as affirming that all existing relationships are satisfactory?" Mr. Norris replied that he feared that the language might be used to justify the company union; and although the company union on the surface might appear to express a satisfactory relationship, it was in reality "one of the methods that capital has been using for years to destroy labor unions."⁸⁰ Senator Norris continued with a plea to the effect that the Senate face the trade union issue frankly and unequivocally:

Some honest people, a great many of them, believe that there ought to be no such thing as organized labor. If their view be the correct one, then we ought to strike out this whole section and say nothing about it; but if we are proceeding on the modern theory . . . then we ought to provide that the laboring men shall be permitted to organize in their own way without any coercion, without any influence from their direct employers, and that they shall be permitted to select representatives of their own choice to represent them in controversies where they must continuously meet with organized wealth. I do not think there is a senator here but who believes that the right thing to do and the necessary thing to do, if we are to protect labor, is to get away from the company union.⁸¹

Senator Norris was opposed by Senator Clark of Missouri, a member of the Finance Committee which had drafted the proviso. Senator Clark told the Senate something about the history of the "existing satisfactory relationships" proviso; it had, he said, the approval of Mr. Richberg, who thought it would be "beneficial," and of General Johnson, who thought it was "constructive." Senator Clark explained:

⁸⁰ The same, p. 5279.

⁸¹ The same, p. 5279.

The proviso was adopted by the unanimous vote of the committee. Mr. Richberg, one of the authors of the bill, well known as one of the leading labor lawyers and a leading representative of labor unions, was present and not only accepted the amendment but said he thought it was very beneficial to the bill. He suggested only the insertion of the word "satisfactory." . . . General Johnson, who has been designated as the administrator of the bill, was present and said he thought the addition of the proviso would be most beneficial, and that he considered it an exceedingly constructive amendment.²²

Having made this explanation, Senator Clark proceeded to argue in favor of retaining the proviso. Its only purpose, he said, was "to clarify and state in the bill what was the consensus of opinion of practically every witness who appeared before the committee . . . namely that Section 7 merely guaranteed to employees the right to bargain collectively" and to "organize in any way in which they might see fit." It was not the purpose of Section 7, he declared, "to compel the employees to organize in a particular way against their wishes." Evidently, Senator Clark did not believe that the trade union should be promoted at the expense of the company union; and felt that with the inclusion of the proviso it would be made clear that Section 7(a) was neutral as between rival types of labor organization. "I hope," he concluded, "the motion of the Senator from Nebraska [to eliminate the proviso] will be voted down."²³

Senator Wheeler of Montana then joined in the de-

²² The same, p. 5280. Senator Clark's statement implies that originally the proviso must have run to the effect that nothing should be construed to compel a change in "existing relationships" between employers and employees. This would probably have rendered the whole of Sec. 7(a) meaningless. Mr. Richberg's insertion at least made it possible for the bill to be construed as compelling a change in "existing relationships" which could be shown to be "unsatisfactory."

²³ The same, p. 5280.

bate to speak against the proposed amendment. Expressing astonishment that Mr. Richberg should have found it satisfactory, Mr. Wheeler said: ". . . if the amendment is adopted, labor gets nothing under this section of the bill, because, as the Senator from Nebraska has declared, the laboring men who belong to a company union do not dare to say their souls are their own."³⁴ Senator Wagner followed Senator Wheeler to voice his doubts as to the wisdom of the proposed amendment: "The words employed are 'existing satisfactory relationships.' The word 'relationship' is an all-embracing word and includes hours of labor, wages, methods of employment, and so forth. I fear, and the more I reflect the more the fear grows, that it may be regarded as a nullification of the other provisions of the bill which outlaw the yellow dog contract."³⁵

The discussion continued for some time, with Senators LaFollette of Wisconsin, Wheeler of Montana, Norris of Nebraska, and Bone of Washington pressing the attack against the proposed amendment, and Senators Clark of Missouri, King of Utah, and Hastings of Delaware arguing in its defense. Senator King came forward with a novel interpretation of the proviso, suggesting that in reality it was intended to safeguard the interests of trade unions in establishments where the workers were already organized. He said:

The language . . . properly interpreted as I believe, declares that where satisfactory relationships exist between employer and employee there shall be no compulsion to disturb such relations. Under this provision it is obvious that if a plant is unionized the employer may not interfere with such union organization or restrain or coerce in any way the members of such union. The

³⁴ The same, p. 5280.

³⁵ The same, p. 5280.

employees are free to maintain their union, free from any interference of any kind at the hands of the employer.²⁸

On roll call the amendment was defeated by a vote of 46 to 31. The alignment found most of the so-called "progressives" on the nay side, and most of the so-called "conservatives" on the yea side. Party lines were ignored.²⁹

The debate preceding the vote drew a clear-cut line between two points of view. Those voting to reject the "existing satisfactory relationships" proviso saw in Section 7(a) a device for promoting the free trade union as the agency best suited to carry on collective bargaining. Those voting to accept the amendment wanted Section 7(a) to put company unions on an equal status with trade unions. If one is justified in judging the intent of Congress by the debate and vote on the proviso, then it was the purpose of Congress to relax existing difficulties in the way of the trade union movement. There is no evidence of any intent to "outlaw" the company union as such; although there was clearly the intent of outlawing the yellow dog contract, and thus to obstruct the functioning of company union plans. Nothing was said which would enlighten the student, one way or the other, on the following question: Did Congress contemplate a throughgoing organization of all labor into trade unions parallel with a thoroughgoing organization of industry

²⁸ The same, p. 5282.

²⁹ For record of the vote, see the same, p. 5284. It is worthy of note that the Senate rejected an amendment proposed by Senator Wheeler which would have added to Sec. 7(a) a fourth clause to read as follows: "(4) that employers shall not transport, or assist in transporting, employees from one state, county, city, or place to another, for the purpose of taking the place of men out on strike." (The same, p. 5284.) However the Senate felt on the question of trade and company unions, it was not, seemingly, of the opinion that the use of strikebreakers should be outlawed.

into trade associations? The question whether employers would be obliged to "recognize" trade unions under the act, and to seek to negotiate collective agreements with them, was not raised; nor was the issue whether Section 7(a) legalized or invalidated "closed shop" contracts.³⁸

³⁸ It will help to evaluate the temper of Congress on collective bargaining and to re-create the mental climate of Sec. 7(a)'s making, to quote from two other pieces of legislation enacted during the early part of 1933, the first by the expiring Congress, the second by the new Congress. First, Sec. 77, paragraphs (p) and (q) of an act approved Mar. 3, 1933 (47 Stat. L. 1481; U.S.C., Title 11, Sec. 205). These paragraphs provide: "[p] No judge or trustee acting under this act shall deny or in any way question the right of employees on the property under his jurisdiction to join the labor organizations of their own choice and it shall be unlawful for any judge, trustee, or receiver to interfere in any way with the organizations of employees, or to use the funds of the railroad under his jurisdiction, in maintaining so-called 'company unions,' or to influence or coerce employees in an effort to induce them to join or remain members of such company unions." "[q] No judge, trustee, or receiver acting under this act shall require any person seeking employment on the property under his jurisdiction to sign any contract or agreement promising to join or refuse to join a labor organization; and if such contract has been enforced on the property prior to the property coming under the jurisdiction of said judge, trustee, or receiver, then said judge, trustee, or receiver, as soon as the matter is called to his attention, shall notify the employees by an appropriate order that said contract has been cancelled and is no longer binding on them in any way."

The second relevant quotation is Sec. 7(e) of the act establishing a federal co-ordinator of transportation (48 Stat. L. 214; U.S.C., Title 49, Sec. 257-e), which reads: "Carriers whether under the control of a judge, trustee, receiver, or private management, shall be required to comply with the provisions of the Railway Labor Act and with the provisions of Sec. 77, paragraphs (o), (p), and (q) of the act approved Mar. 3, 1933. . . ." Joseph B. Eastman, federal co-ordinator of transportation, later ruled that this section required railroads not to subject to pressure or discipline, on that account, workers who join a labor union or solicit membership therein; to annul and discard all anti-union contracts; to cease contributing financially to the support of any labor organization; to withdraw from any participation in or control over any labor organizations (presumably, employee representation plans); to extend any special privileges like group insurance or relief fund contributions, payable to members of some specific labor organization, to all employees; to discontinue auditing the accounts and books of any labor organizations; to discontinue assisting in the collection of fees, dues, or assessments on behalf of any labor organization. (See *New*

WHAT THE LAW SAYS

The National Industrial Recovery Act, Section 7(a) therein included, became law when it was signed by the President on June 16, 1933.⁹⁹ The provisions of the law relating to labor and collective bargaining, which were henceforth to influence industrial relations, appear in several sections of the act. Section 1 contains the "declaration of policy" which states the general purpose of the act in relation to labor in the following words:

It is hereby declared to be the policy of Congress . . . to induce and maintain united action of labor and management under adequate governmental sanctions and supervision . . . to reduce and relieve unemployment, to improve standards of labor.

Another reference to industrial relations is contained in clause (a) of Section 4 of the act, which authorizes the President to enter into agreements with labor organizations and to approve voluntary agreements between or among labor organizations and trade associations.

The most significant labor provisions of the National Industrial Recovery Act are contained in Section 7. This section is divided into three parts, (a), (b), and (c), which together cover the essential rights with reference to collective bargaining which the act grants. The three clauses of Section 7 read as follows:

Sec. 7(a) Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the

York Times, Dec. 9, 1933.) Mr. Eastman's interpretation of Sec. 7(c) of the Emergency Transportation Act may be compared with the interpretation of Sec. 7(a) of the Recovery Act by the National Labor Board and the National Labor Relations Board. See Chaps. VI, VII, and XI.

⁹⁹ 48 Stat. L. 214; U.S.C., Title 15, Sec. 707(a).

interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

(b) The President shall, so far as practicable, afford every opportunity to employers and employees in any trade or industry or subdivision thereof with respect to which the conditions referred to in clauses (1) and (2) and sub-section (a) prevail, to establish by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy of this title; and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President under sub-section (a) of Section 3.

(c) Where no such mutual agreement has been approved by the President he may investigate the labor practices, policies, wages, hours of labor, and conditions of employment in such trade or industry or subdivision thereof; and upon the basis of such investigations, and after such hearings as the President finds advisable, he is authorized to prescribe a limited code of fair competition fixing such maximum hours of labor, minimum rates of pay, and other conditions of employment in the trade or industry or subdivision thereof investigated as he finds to be necessary to effectuate the policy of this title, which shall have the same effect as a code of fair competition approved by the President under sub-section (a) of Section 3. The President may differentiate according to experience and skill of the employees affected and according to the locality of employment; but no attempt shall be made to introduce any classification according to the nature of the work involved which might tend to set a maximum as well as a minimum wage.

A SECOND MAGNA CHARTA?

In view of its legislative history, Section 7(a) must be considered a victory for the forces of American trade unionism. More particularly, it was a triumph for the American Federation of Labor. First, the amendments suggested by William Green to the House Ways and Means Committee were incorporated into the act. Second, the "existing satisfactory relationships" proviso opposed by the A. F. of L. was defeated in the Senate. Third, the Walsh Amendments strengthened the force of the prohibition against anti-union contracts.

That a measure like Section 7(a) should be able to pass at all was made possible by the mental climate of the New Deal. In this climate, characterized above all by widespread disillusionment concerning the ideals of "rugged individualism," it was easy for notions of collectivist action to make headway. Congress was in the mood to experiment with fundamental reforms aiming at considerable reconstruction of the economic system. The mental climate of the time was not, to be sure, the sufficient cause of Section 7(a)'s enactment; but it was the necessary condition thereof.

At the same time, the Recovery Act exempted employers, so far as they observed code provisions, from the force of the anti-trust laws. This was a concession of the first magnitude to the forces of organized business which had been pressing for many years past for the repeal of these laws. The American Federation of Labor, taking advantage of the bargaining possibilities thus created, was enabled to demand major concessions for the benefit of the organized labor movement. From this point of view, Section 7(a), which put the stamp of governmental approval on collective bargaining under the codes, was designed to win the support of organized

labor for a law which encouraged associative action on the part of employers.⁴⁰

As for the powerful employers' associations, they acquiesced in Section 7(a) without more opposition than they displayed publicly, probably because the phrasing of the provisions seemed capable of an interpretation which would not disestablish company unions, force the making of collective agreements, compel union agreements, or strengthen the closed-shop demand. Despite the advantages which the act seemingly offered organized labor, it did not rule out individual bargaining; it did not legally preclude the existence of company unions; it did not designate trade unions expressly as the agents for collective bargaining; it did not call for wage agreements, bilaterally binding; it did not call for an organization of labor in trade unions parallel with the organization of industry in trade associations. Finally, part of its language, if considered outside of the context, might seem to be directed against the closed shops.⁴¹

Nevertheless, Section 7(a) was generally recognized as a major gain for the trade unions. The phrase "Magna Charta for labor" soon won its way into popular usage as a description of Section 7 in its entirety, but more particularly of the provisions on collective bargaining.⁴²

⁴⁰ The A. F. of L., it should be stressed, had thrown its support behind the Black 30-hour bill. So far as the Recovery Act may be regarded as a substitute for this bill, Sec. 7 in its entirety represented what the A. F. of L. got in return for waiving any attempt to press the passage of the Black proposal. This holds true not only of the collective bargaining requirements but also of the provisions on wages and hours and of the provisions which permit collective contracts, under certain circumstances, to enjoy the force of codes.

⁴¹ Compare what is said in this chapter with Paul F. Brissenden, "Genesis and Import of the Collective Bargaining Provisions of the Recovery Act," *Economic Essays in Honor of W. C. Mitchell*, 1935, Chap. 2.

⁴² Representative Koppleman of Connecticut, in the course of the House debate used the phrase "magna charta for labor" to characterize

Twenty years before the passage of the NIRA, it will be recalled, organized labor supposed it had won a Magna Charta for itself in forcing the enactment of the Clayton Anti-Trust Act. At that time, the trade unions believed they were at the dawn of a new day, inasmuch as the act specifically declared that labor was not a "commodity" and sought in general to relieve the trade unions from the burdens of the Sherman Anti-Trust Act directed against conspiracies in restraint of trade. But in a notable series of decisions, the federal courts turned the act against the very trade unions which thought they would benefit from it, with the result that organized labor became thoroughly disillusioned. As for the Anti-Injunction Act of 1932, it was still too early to say how the law would work out in practice.

Here, nevertheless, was another federal statute purporting to be a Magna Charta.⁴² Would it truly promote the trade union movement? Would it genuinely throw the force of the government in support of organized labor? Would it in fact, as in intent, expand the rights of workers in the matter of collective bargaining? The chapters which follow attempt to give an answer to these questions. Our study centers upon Section 7(a) and its interpretation and application by the various labor relations boards.

the whole Recovery Act. He was referring in particular to the provisions on hours and wages. *Cong. Record*, May 26, 1933, Vol. 77, Pt. 5, p. 4342.

⁴² The significance of Sec. 7(a) for the existing body of labor law is discussed in Chap. XVI.

CHAPTER III

THE FIRST INTERPRETATIONS

Section 7 of the Recovery Act raised many basic issues of industrial relations without answering them. A struggle for its interpretation was thus inevitable. The early phases of this struggle are discussed in the present chapter.

CONFLICTING ATTITUDES

Organized labor at once sought to read into the law the strongest possible endorsement of the trade union as the agency best suited for collective bargaining. Commenting editorially on the act soon after its passage, the President of the American Federation of Labor declared: "Trade associations and trade unions are the obvious agencies through which employers and employees can act collectively. Through the act . . . trade unions gain the acceptance . . . [of the government] . . . as the normal agency through which wage earners carry on their business enterprises."¹ From this point of view, Congress, in enacting Section 7, meant to encourage wage earners to form trade unions.

Employers, in contrast, generally refused to see in the statute any encouragement of the trade union at the expense of the company union. They stressed the permissive character of the provisions on collective bargaining, and insisted that the law did not in any way predetermine the forms to be taken by the instrumentalities of collective bargaining. In an address before the Ohio Manufacturers' Association at Columbus on June

¹ *American Federationist*, July 1933, pp. 677-78. Similar statements may be found in practically all trade union journals for July and August 1933.

20, 1933, the associate counsel to the National Association of Manufacturers charged that the trade unions were misinterpreting Section 7(a) when they claimed that it required employees to affiliate with unions, and that it outlawed the company union. He maintained the section did not change the existing law with respect to trade unions, except by imposing "a limitation upon the employer's right to prescribe as a condition of employment that the employee shall join a company union, or shall refrain from joining a labor organization of his own choosing. But the right of individual bargaining still exists, and the employee is still free to exercise it, or to join a company union, if he so desires."²

These conflicting statements reflected more than a battle of words. Immediately after the enactment of the NIRA, both the A. F. of L. acting through newly organized "federal" locals and many of its affiliated international unions, especially in the mining, textile, iron and steel, and clothing industries, began an organizational drive exceeding in scope and intensity anything attempted since the World War. Equally quick to respond, employers in many industries, notably in the iron and steel, rubber, chemical, and automobile plants, began to promote company unions. A struggle between the two groups and their forms of organization was thus precipitated, each side holding to its own interpretation of Section 7(a).

In view of these conflicting attitudes, it at once became necessary for the Administration to construe the debated provisions. What was needed was a clear, precise statement which would illuminate the meaning of "collec-

² Address by John C. Gall, published by the National Association of Manufacturers, pp. 22-23. See also *Nation's Business*, October 1933; and *National Industrial Conference Board Bulletin*, August 1933.

tive bargaining" as used in the statute. So pressing was the need that, for several months after the passage of the NIRA, some of the most important statements issued by General Hugh S. Johnson, the administrator of the act, and by Mr. Donald R. Richberg, then general counsel to the National Recovery Administration, dealt with this issue. Moreover, the procedures adopted by the NRA in the making of the earlier codes gave practical content to the meaning of the term, "collective bargaining."

RECOVERY AND RECONSTRUCTION

In seeking to give a reasoned account of the formulation of an administrative policy with respect to collective bargaining during the early months of the NRA, we must bear in mind the twofold purpose of the Recovery Act. On the one hand, NIRA was an emergency measure intended to accelerate recovery from the depression. On the other hand, it also contemplated far-reaching reforms in the organization of American industry, including the character of industrial relations, as part of a long-run program of economic reconstruction.

From the outset, this twofold character of the act was recognized as a problem in administration. In the message issued in connection with his signing of the NIRA on June 16, 1933, President Roosevelt pointed out its dual objectives, but called for a concentration of energies for the time being on re-employment. "The law I have just signed," he declared, "was passed to put people back to work, to let them buy more of the products of farms and factories, and start our business at a living rate again. This task is in two stages—first, to get many hundreds of thousands of the unemployed back on the payroll by snowfall, and second, to plan for a better future in the long run. While we shall not neglect the

second, the first stage is an emergency job. It has the right of way."⁹ Nevertheless, the President did not fail to refer to the reconstruction aspects. The law, he said, was "a challenge to industry which has long insisted that, given the right to act in unison it could do much for the general good which has hitherto been unlawful. From today it has that right." And further: "This law is also a challenge to labor. Workers, too, are given a new charter of rights long sought and hitherto denied."¹⁰

Section 7(a) thus had a part to play in the recovery program as well as in reconstruction. Provision 3 of the section required employers to comply with the maximum hours, the minimum wages, and other working conditions fixed in the codes of fair competition. Presumably, this provision was to be used as an instrument for augmenting purchasing power. But the exact role therein of provisions 1 and 2 was not so clear. It might be argued, indeed, that strong labor organizations were necessary to raise and maintain wages and to shorten hours. But in the light of the history of industrial relations in the United States, it was inevitable that provisions like these should lead to labor disputes. And strikes and lockouts, however they might be judged on other grounds, were hardly conducive to the immediate maximizing of employment and payrolls. Again the act posited the "united action of labor and management" in its declaration of public policy. Collective bargaining might be regarded as the most effective means for consummating such an end. But if the attempt to establish collective bargaining relationships led to strife between employers and employees, then it would be rather difficult to achieve "united action."

⁹ *NRA Bulletin No. 1.*

¹⁰ *The same.*

Whether or not the NRA was fully aware of the potentialities of conflict between the objectives of recovery and reconstruction, it is impossible to say. None of the leading spokesmen of the Administration would have admitted this; and so far as the record shows, none did openly admit it. Yet it was possible to foresee that contradictions might arise in a program which involved campaigning among employers to persuade them to add to their labor forces and payrolls, and which at the same time set before employees the encouragement to collective bargaining provided by Section 7(a). But whether conscious of the issue or not, whether willing to state it openly or not, the Administration was forced to reckon with it on all occasions when it became necessary publicly to interpret the application of Section 7(a) to the circumstances of particular controversies.

CODE MAKING AND COLLECTIVE BARGAINING

What place should collective bargaining have in the making of codes of fair competition? This was the first practical problem with which the NRA had to contend. Employers and representatives of trade associations regarded code making as exclusively their province. But union leaders, especially in the better organized trades, had the idea that they should meet in conference with employers to formulate at least the labor provisions of the codes for their respective trades.

These union leaders claimed that it was the intent of Congress and the purpose of the act that the labor provisions of every code should be arrived at through collective bargaining. As a matter of fact little was said on the subject in the course of the congressional hearings and debates, and what was said was rather vague. The

main reference to the subject occurred when Donald R. Richberg appeared before the Senate Finance Committee on May 22, 1933 and was questioned by Senator Robert M. LaFollette, who wished to know if the act contemplated labor participation in the drafting of codes of fair competition.⁵ Mr. Richberg replied as follows:

The contemplation of this particular section is, I think—although it is not so stated—that the code of an industry is ordinarily, so far as its practices are concerned with the management of operations, to be representative of management. But in that code there is a requirement that the employees shall have the right of organization and collective bargaining, which means that the employees would have in such an industry the right to bargain with the management as to terms or conditions affecting labor.⁶

Not altogether satisfied with this answer, Senator LaFollette pressed the question: "You do not contemplate that labor is to participate in or to have representation in those groups [that is, trade association groups] in formulating the code?" Mr. Richberg's answer was somewhat evasive. "I would say that in so far as the code dealt only with management problems as to marketing or production, it would not necessarily follow that there would be labor representation in there."⁷ But the Senator wanted to know what procedure would be followed in regard to problems of labor management, "working practices either fair or unfair in relation to employment." Mr. Richberg replied: "I have this vision of it, and that is—that either labor will participate in the consideration as to whether such codes are fair, and

⁵ The discussion at this point was not on Sec. 7 directly, but on Sec. 3, which deals with the President's power of approving codes.

⁶ 73 Cong. 1 sess., *National Industrial Recovery*, Hearings on S. 1712 and H. R. 5755 before Senate Finance Committee, p. 16.

⁷ The same, p. 26.

perhaps management will regard it as desirable to have labor participate at the first stage rather than at the second.⁸ Pressed a little more closely Mr. Richberg explained:

I say it would be either a choice of labor participation in the original preparation or labor participation in the consideration of the codes. Unfortunately, there is such an attitude toward labor in many industries that perhaps the easiest practical method is to work out a labor correction code which is a code of what is fair rather than of original labor participation. In some instances they do these things.⁹

But whatever may have been the ideas in the minds of the proponents of the Recovery Act early in June, the NRA had to act in response not to abstract ideas but to concrete realities. It was facing a condition, not a theory. The immediate effect of the passage of the NIRA was to stimulate both a growing aggressiveness on the part of trade unions and concerted resistance thereto on the part of many employers. Experience with the officials of the United Textile Workers' union during the early phases of the making of the cotton textile code (the pioneer code) seemed to indicate that the participation of organized labor in the preparatory stages of code making would raise many difficult problems and delay the process. The urgent consideration of the Recovery Administration was speed in code making. Equally important, and in a sense a prerequisite, was the need of reassuring employers that the labor provisions of their codes would not be drafted exclusively in accordance with trade union demands. Otherwise, it was questionable that employers could be persuaded to come forward voluntarily with codes for their industries.

⁸ The same, p. 27.

⁹ The same, p. 27.

General Johnson did not delay in meeting this situation. On June 19, three days after its enactment, he caused to be issued a special bulletin in which trade associations and industrial and labor groups were informed how to secure the benefits of the NIRA. He emphasized that the Administration proposed to allow the business men in each industry or trade to determine, as far as was practicable, the content of their codes. He declared that it was not the purpose of the Administration "to compel the organization either of industry or labor." The terms of each code relating to wages, hours, and working conditions, he explained, need not be determined by collective bargaining. "Basic codes containing provisions respecting maximum hours of labor, minimum rates of pay, and other conditions of employment, which are in themselves satisfactory, will be subject to approval, although such conditions may not have been arrived at by collective bargaining."¹⁰ Here was the first interpretation of the meaning of Section 7 and of labor's part in industrial self-government. The Administrator took the position that it was not necessary that the labor provisions of each code be the result of a collective agreement between employers and organized workers.

General Johnson's ruling elicited a protest from the Labor Advisory Board. This was to be expected since the membership of the Board consisted largely of A. F. of L. union officials. The Board announced that henceforth it would be not merely "an advisory board to Johnson, but also an agency to be ever alert to the interests of labor."¹¹ In other words, if collective bargaining was not to be used in formulating the labor provisions of codes, the Labor Advisory Board would act as

¹⁰ *NRA Bulletin No. 2*, p. 2.

¹¹ *New York Times*, June 22, 1933.

the special representative of labor's interests in code making.

General Johnson's ruling and the resulting policy of the Labor Advisory Board fixed the code-making procedure from that time on in regard to the labor provisions of the majority of the codes. Codes would be formulated by employers' groups, which would meet voluntarily in each of the trades or industries and specify minimum wages, maximum hours, and other working conditions. These terms would be subject to scrutiny, correction, and adjustment by the NRA. Organized labor would not necessarily have a hand in the original formulation of the labor terms. If trade unions were not powerful enough in a given industry to make their weight felt in the formulation of these terms, then the job of protecting labor was up to the Labor Advisory Board alone.

A handful of NRA codes may be said to be the fruit of collective bargaining. In this category would fall the principal needle trades codes, like coat and suit, dress manufacturing, and men's clothing; the legitimate theater code; to a large degree, the bituminous coal code; and the various regional agreements in the building trades supplemental to the construction code. These codes no doubt express the trade union concept of collective bargaining to the full. Taking the NRA as a whole, however, "collective bargaining" codes are exceptional. They occur in industries wherein the tradition of wage agreements was already long established and where the union was long entrenched.

It is not the intent of this study to consider the *modus operandi* of the Labor Advisory Board, or to describe the *modus vivendi* worked out between the NRA and the trade unions.²² What concerns us here is the theory of

²² See Leverett S. Lyon and Others, *The National Recovery Administration*, 1935, Pt. IV.

collective bargaining as worked out first by the NRA and later by the various industrial relations boards. And here, in the first official pronouncement on the subject, the Administrator held that Section 7(a) did not require collective bargaining between employers and workers directly as a preliminary condition in formulating the labor provisions of codes.

THE BATTLE IN THE BASIC CODES

Over and again, during the first weeks of NRA, General Johnson and his chief aides stressed the theme that Section 7(a) must be written into all codes, but that NRA did not intend to function as an agency for forcing labor self-organization upon codified industries. To this effect, Dudley Cates, then assistant administrator, informed the United Typothetae of America on June 22, 1933.²⁸ "We are not trying to establish public management of private business." Mr. Richberg said to the Merchants' Association of New York on July 6, "We are not trying to fix prices or wages by government orders. We are not trying to unionize labor by federal command."²⁹

On June 23 in an address to executives of national chain stores General Johnson informed them that: "Under Section 7(a) . . . no code can escape an acknowledgment of the right of labor to bargain collectively through representatives of its own choosing. . . . There is no use arguing about that. I have a law to execute and I am going to execute it."³⁰

On July 7 the Administrator affirmed what was by then a familiar theme. It was not the business of NRA to act as a promotional agent for trade unions. Furthermore, workers were not required, if they wished to en-

²⁸ *NRA Release No. 7.*

²⁹ *NRA Release No. 30.*

³⁰ *The Chain Store Industry under the NRA, 1933, p. 51.*

joy the benefits of the act, "to join this or that union."
In sum:

It is the duty of this Administration to see that all labor, organized and unorganized, gets a square deal. . . . It is not the duty of the Administration to act as an agency to unionize labor in any industry. . . . It is the duty of this Administration to require the inclusion in all codes of the mandatory provisions of Section 7. . . .¹⁶

By taking this attitude the NRA reduced the right of collective bargaining to a simple concept: the language of the statute must be contained in all codes. Although essentially innocuous, this concept did not pass unchallenged by anti-union employers. By seeking to amend and qualify the language of the statute, as incorporated into codes, they precipitated a major struggle, some aspects of which we shall consider below.

THE IRON AND STEEL CODE

It was generally known that the employers in the iron and steel industry were greatly concerned over Section 7(a).¹⁷ Not only had the industry followed an anti-trade union policy for many years, but most of the larger companies (with the exception of the Bethlehem Steel Company) had also opposed employee representation plans and favored an unmodified system of individual bargaining. Feeling became still more tense when the American Federation of Labor, through the Metal Trades Department and the Amalgamated Association of Iron, Steel, and Tin Workers, began a campaign to unionize the workers in the mills around Pittsburgh, along the Great Lakes, and in some of the Mid-

¹⁶ *NRA Release No. 34.*

¹⁷ See Mr. Lamont's statement before the Senate Finance Committee, Chap. II, p. 34.

Western cities. At the same time there was an internal struggle of rival groups for the control of the Iron and Steel Institute. The group which finally won out, led by the Bethlehem Steel Company, was in favor of developing employee representation plans as a mode of collective bargaining, and planned to incorporate a policy of this kind in the iron and steel code.

On July 15, 1933 the proposed code for the iron and steel industry was publicly announced. It was evident at once that Article 4 of Section 2 of the proposed code represented a radical attempt so to interpret Section 7(a) as to legalize and endorse the open non-union shop and employee representation plans. Article 4 first recited the mandatory provisions from Section 7(a), and then continued as follows: "The plants of this industry are open to capable workmen without regard to their membership or non-membership in any labor organization. The industry firmly believes that the unqualified maintenance of this principle is in the interest of its employees." Further, the section declared, employee representation was an adequate fulfillment of the requirement as to collective bargaining under the NRA. Reference was then made to a Schedule C in which was outlined a plan of employee representation to apply to all units of the iron and steel industry. This plan, intended to be an integral part of the code, provided that: "Nominations and elections of representatives of the employees shall be on the premises of the employer"; that "the representatives elected shall be chosen from among the employees . . . of their employer"; that none but these elected representatives might "confer jointly with one or more representatives of their employer at regular intervals," in order to discuss "any topics of mutual interest." Moreover, if these representatives of the em-

ployees and of the employer could not agree on wages, hours, and other working conditions, the questions at issue were to be appealed to the employer "with a view to final decision."¹⁸

This was indeed a direct challenge to the trade union concept of the meaning of Section 7(a). The leaders of the A. F. of L. declared at once that they intended to fight the open-shop provisions of the steel code, and that "company unions will never be accepted."¹⁹ The A. F. of L. could not hope to enforce its demands by calling a strike, or even by threatening to call one, since its organization of the workers in the industry was weak. Its principal hope was to bring the weight of the Labor Advisory Board to bear upon the NRA and to stir up favorable public opinion. The Labor Advisory Board appointed William Green, president of the A. F. of L., labor adviser for the public hearings on the iron and steel code. He engaged experts to prepare the case for the workers in the industry. As part of this preparation, the A. F. of L. solicited and obtained opinions from professors of law and of labor economics throughout the country, to substantiate its claim that the proposals of the code on labor policy were in violation of Section 7(a).²⁰

In its brief prepared for the public hearing on the code, the A. F. of L. argued that the proposed provisions of the iron and steel code, if put into effect, would constitute "interference" with collective bargaining, and would limit the workers in their right to have "representatives of their own choosing." The brief stressed the point that under the proposed code there was not even "freedom of

¹⁸ For full text of the proposed code, see *New York Times*, July 16, 1933.

¹⁹ The same, July 17-18, 1933.

²⁰ *American Federationist*, September 1933, pp. 950-52.

place of meeting to elect representatives"; that the selection of representatives was unduly restricted to employees of each plant or employer; that in cases of disagreement, the workers had no opportunity of taking the matter up through unions or their own representatives, but had to appeal to the employer whose decision would be conclusive.²¹

Public hearings on the iron and steel code were scheduled to begin July 31, 1933. On July 29, in the midst of a tense atmosphere created by anticipations of the hearings, General Johnson granted a press interview in which he discussed, among other things, the open shop. He said:

As I understand it, an open shop is a place where any man who is competent and whose services are desired will be employed regardless of whether or not he belongs to a union. That is exactly what the law says. . . . The law clearly states that there shall not be any requirement as to whether or not a man belongs to a union. Is anything clearer needed?²²

General Johnson's statement did not touch the real issues raised by organized labor with reference to the proposed iron and steel code: the meaning of "interference," the meaning of "representatives of their own choosing," and the extent to which amendments and qualifications of 7(a) were permissible in codes. Instead the statement raised a different issue altogether: Did provision 2 of Section 7(a) call for the open shop; did it preclude the closed shop?

General Johnson's intervention only accentuated the element of conflict in the situation. Largely owing to the conciliatory intervention of the Secretary of Labor, a breakdown in the negotiations was prevented. At the

²¹ The same, August 1933, pp. 916-17.

²² *NRA Release No. 136.*

public hearing on the code the representatives of the industry agreed to omit from the proposed code the provisions most offensive to organized labor, namely Article 4 of Section 2 and Schedule C.²³ Nevertheless, it was not yet entirely certain that the iron and steel employers would cease their attempts to modify Section 7(a). After the conclusion of the public hearings, conferences and negotiations continued, but were not marked by a spirit of co-operation. Thus, when the Secretary of Labor called a conference on August 15 to which William Green, as the labor adviser on the code, was also invited, the heads of the various steel companies walked out.²⁴ This had the effect of a double demonstration: it symbolized the attitude of these companies toward organized labor, and it emphasized that code making was the exclusive prerogative of the employers.

As negotiations dragged on without bearing fruit, both the NRA and the Secretary of Labor sought to bring further pressure on the industry to modify its stand on labor policy. The press reported that President Roosevelt was planning to prescribe a code for the iron and steel industry if an agreement with the NRA was not reached soon. On August 19 a code acceptable to the industry and to the government was finally approved by President Roosevelt. All clauses purporting to modify Section 7(a) were omitted.²⁵

²³ But the Iron and Steel Institute proclaimed: "It should be distinctly understood that the omission of this section does not imply any change in the attitude of the industry on the points therein referred to; that the industry believes that the employee representation plans now in effect are desired by the employee; that the members of the industry will naturally do everything in their power to preserve the satisfactory relationship now existing with their employees." (*New York Times*, Aug. 1, 1933.)

²⁴ The same, Aug. 16, 1933. There is some evidence, however, that the incident involved a misunderstanding; that Mr. Green was invited "by mistake."

²⁵ NRA Code No. 11 (code of fair competition for the iron and steel

Undoubtedly, organized labor in this case won a victory. The A. F. of L. prevented official sanction of code provisions which would have strengthened the basis for employee representation plans, not only in the iron and steel industry, but in many other industries. Certain code provisions offensive to organized labor had been excluded; Section 7(a), whatever it connoted, remained intact.

THE AUTOMOBILE CODE: "INDIVIDUAL MERIT" CLAUSE

About two weeks after the original iron and steel code was proposed, namely on July 28, 1933, the National Automobile Chamber of Commerce put forward a tentative code of fair competition for the automobile manufacturing industry. This code also sought to amend Section 7(a). Article 6 of the code, after reciting the mandatory labor provisions of Section 7(a), continued as follows:

In accordance with the foregoing provisions, the employers in the automobile industry propose to continue the open-shop policy heretofore followed and under which unusually satisfactory and harmonious relations with employees have been maintained. The selection, retention, and advancement of employees will be on the basis of individual merit, without regard to their affiliation or non-affiliation with any labor or other organization.²⁶

The language of Article 6 was evidently a declaration of war against the trade unions, and against their interpretation of Section 7(a). In the past, as was well known, "the open-shop policy heretofore followed" in the automobile industry had meant the complete exclu-

industry, approved by President Roosevelt on Aug. 19, 1933). See statement by Deputy Administrator Simpson, p. 2.

²⁶ See mimeographed copy of the code of fair competition for the automobile industry submitted by the National Automobile Chamber of Commerce, July 28, 1933.

sion of all trade unions. It was also known that the A. F. of L. was preparing to renew its attempts to unionize the automobile workers. Under NRA pressure originating in the Labor Advisory Board, Article 6 was revised prior to the public hearing on August 18.²⁷ The language most objectionable to the trade unions was excised, and the enunciation of open-shop policy was softened. To follow such a policy was no longer declared to be the intent of the industry; instead, it was made the permissive right of the individual employer. As presented at the public hearing on August 18 the amended version read: "Employers may continue the open-shop policy under which the selection, retention and advancement of employees will be on the basis of individual merit without regard to their affiliation or non-affiliation with any labor or other organization."

Even this version, however, was unacceptable to organized labor. Apparently the A. F. of L. communicated its objections to the NRA through the Labor Advisory Board in no uncertain terms. In any event, the NRA was brought around to the position that no code should be allowed to refer to the critical issue of the open shop. When the article in question was reached at the public hearing on August 18, 1933, Mr. Richberg arose and stated that no codes would be permitted to contain references to the open shop. On the basis of this statement of NRA policy and after the public hearing had ended, the automobile code was again amended. As finally approved, it first recited the mandatory provisions of Section 7(a), and then added the following paragraph:

Without in any way attempting to qualify or modify, by interpretation, the foregoing requirements of the NIRA, em-

²⁷ For notice of such revision, see *NRA Release No. 345*, Aug. 17, 1933.

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ployers in this industry may exercise their right to select, retain, or advance employees on the basis of individual merit, without regard to their membership or non-membership in any organization.²⁸

This paragraph, which came to be known as the "individual merit clause," was quite innocuous as compared with the earlier versions of the code. It said nothing about the open shop, contained no praise for the harmonious and satisfactory industrial relations in the industry, expressly denied any intent to modify Section 7(a), and merely affirmed a right which few would have thought had been denied by the Recovery Act. Nevertheless, organized labor continued to be opposed to the clause on the ground that it gave aid and comfort to the enemies of trade unionism.²⁹ This interpretation of the clause by the A. F. of L. was soon seen to have a basis in fact. No sooner had announcement been made of its approval in the automobile code than the NRA began to be bombarded with demands by employer groups that similar clauses be included in other codes. Clearly for the same reasons that organized labor regarded the clause as a defeat for their cause, employers considered it a tactical victory.

The Labor Advisory Board was not backward in expressing its opinion against the wisdom of permitting the individual merit clause to be included in the automobile code. On August 28, 1933 William Green, speaking for

²⁸ NRA Code No. 17 (code of fair competition for the automobile manufacturing industry, approved by President Roosevelt on Aug. 28, 1933), p. 8.

²⁹ The Labor Advisory Board accepted the clause in the automobile code on the understanding that "no section or sentence contained therein modifies, qualifies or changes Section 7(a) . . . [or establishes] a precedent to be followed in the preparation or acceptance of any other code. . . ." (*New York Times*, Aug. 27, 1933.)

the Board, let it be known that the Board would resist any future attempts to modify the mandatory labor provisions of Section 7(a) in other codes.²⁰ On August 31, 1933 Mr. Green made a formal announcement to this effect on behalf of the Labor Advisory Board. He stated the Board's opposition to individual merit clauses in the following terms:

The Board opposed this clause in one code. Now it finds it in 29 other codes recently submitted. Codes are being revised on the eve of hearings to get this clause in. . . . As practical men with long experience with this very clause, we know the misuse to which "efficiency" and "merit" are put. The terms have served as a screen behind which employers opposed to any organization by their employees have intimidated and eliminated wage earners favoring organization. The terms as applied have left the sole determination of what constitutes efficiency or merit to the employer without adequate appeal by the workmen who have been discriminated against.²¹

Even General Johnson, who seems to have been responsible for the inclusion of this clause—because of a gentleman's agreement with the automobile manufacturers—soon came to entertain doubts as to its wisdom. On September 6, 1933 he was quoted as saying that endless trouble had been caused by this clause in the automobile code. He was afraid that an erroneous interpretation of the clause had been broadcast through the automobile and other industries. He was of the belief, therefore, that it would be best to prohibit this or any other language interpretative of Section 7(a) in all future codes. The individual merit clause, however, would not be removed from the automobile code, because it was there on the Administrator's own responsibility. He had promised it, he said, "in an unguarded moment."²²

²⁰ *New York Times*, Aug. 29, 1933.

²¹ *NRA Release No. 548*.

THE SOFT COAL CODE

Proposed codes for the bituminous coal industry—some 30 different codes were proposed—began to be submitted to the NRA in the middle of July 1933. Not until September 18, two months later, was a code of fair competition for the industry finally approved. There were many reasons why the code was so retarded in the making. Perhaps the outstanding reason for the delay was the issue of collective bargaining as raised between the United Mine Workers of America and anti-union operators.

At the time of the enactment of the NIRA the soft coal industry was part union and part non-union. In the so-called Central Competitive Field (principally in Illinois) the United Mine Workers of America had long operated under collective agreements with the mine owners. Into the great Appalachian and Southern areas, however, as well as into the "captive mines" of western Pennsylvania, the union had been unable to penetrate.²³ Upon the enactment of the NIRA, the United Mine Workers began to extend its organization into both the Appalachian and Southern areas and the captive mines. This the union sought to accomplish, and finally did accomplish in large measure, against the stubborn resistance of some of the most determined anti-trade union employers in the United States. Thus, when the time came for making the soft coal code, the question of the status of the United Mine Workers in the industry was put squarely before the NRA.

On July 26, 1933 the non-union operators of the Northern Coal Control Association and of the Smoke-

²³ *New York Times*, Sept. 7, 1933.

²⁴ The "captive mines" of Pennsylvania (and Alabama) are properties owned and operated by the iron and steel companies.

less and Appalachian Coal Association, representing some 70 per cent of the national output, put forward a code of fair competition. Article 3, Sections 1 and 2 of this code,⁵⁴ ventured into a radical reinterpretation of Section 7(a). The provisions of this section on collective bargaining, it was provided, were to apply only to the relations between an individual employer and his own employees. The employer would not be required either to deal jointly with other employers or to negotiate with representatives of other than his own employees. Moreover, no worker was to be required to join a union, and his right to refuse to join was to be free from the interference of any labor organization or its agents.⁵⁵ Such qualifications were unacceptable to the NRA not only because it had the vigorous opposition of the United Mine Workers to reckon with, but also on account of the precedents that were being set in the iron and steel and automobile codes. As a result, the operators presently withdrew the first ver-

⁵⁴ The authors paraphrase mimeographed copies of the same which were publicly distributed.

⁵⁵ Similarly, Article 2 of the code proposed by the Western Kentucky Association, after reciting Section 7(a) read:

"The foregoing requirements shall apply to each employer in his relations to his own employees, but no employer shall be required to deal jointly with other employers, or with representatives of any employees other than his own, and any collective bargaining shall be on behalf of only those employees participating therein, the employer being equally free to deal separately with any other of his employees not so participating."

Article 2 went on to say:

"It is a condition of this code that no person shall be required to join any labor organization to retain or secure employment or to receive the benefits of this code, and the right of every individual to refuse to join a labor organization and his right to bargain either individually or collectively with his fellow employees, free from interference, coercion or restraint of any labor organization are hereby expressly recognized." The authors quote from mimeographed copies of the same which were publicly distributed.

sion of Article 3, Sections 1 and 2, for which they substituted an individual merit clause. As late as September 9, 1933, shortly before the final approval of the code, they informed the NRA that "this clause must be included in any code of fair competition to which we are to agree."³⁶

The attitude of the anti-union operators in the soft coal industry represented one extreme of opinion. In contrast to it, other operators entertained a friendly attitude toward the United Mine Workers. Typical of this attitude was the code submitted by the Vermillion County Small Coal Operators of Danville, Ill., a group of union operators.³⁷ The code submitted by these operators did not attempt to qualify Section 7(a) in any manner whatsoever. Indeed, a letter which accompanied the code expressed complete satisfaction with the system of established collective agreements with the United Mine Workers in the state of Illinois. Furthermore, after declaring that rates of pay should be "reasonable," the code provided that the actual schedules in state contracts should be worked out by agreement with the United Mine Workers. Here, in opposition to the proposals advanced by the Appalachian operators, was an unqualified acceptance of the trade union idea of what "collective bargaining" should be.

Such were the two extremes of opinion under which negotiations on the soft coal code began. To complicate the issue the United Mine Workers' organizational campaign in the Appalachian mine areas was rushing ahead full speed. At the same time, labor unrest was brewing, and toward the end of July a violent strike broke out in

³⁶ *Statement* addressed to NRA by Appalachian group of coal operators, Sept. 9, 1933, p. 5.

³⁷ The authors quote from mimeographed copies of the same in their own possession.

the captive mines of western Pennsylvania. Throughout August and the first half of September, the struggle over the coal code went on. What happened in Washington was conditioned at all times by the conflict in the field—in the Appalachian and in the captive mines.

In brief, a major industrial dispute on a nation-wide scale seemed to be impending, when on September 16 word came that agreement on a soft coal code had been reached late that night and that the Appalachian operators and the United Mine Workers were progressing toward an understanding with reference to a supplementary agreement. William Green for the A. F. of L. and John L. Lewis for the United Mine Workers, however, had filed a statement protesting an interpretation of collective bargaining introduced into the codes jointly by General Johnson and Mr. Richberg on behalf of the NRA.²⁸

Finally, on September 18, 1933, the President approved the soft coal code, at the same time that the United Mine Workers of America and the Appalachian operators came to a final understanding. As one of the conditions of his approval of the code, the President ordered the elimination of the Johnson-Richberg interpretation from paragraph (b) of Article 5,²⁹ "because it is evident that attempts by those submitting codes to interpret Section 7(a) of the NIRA have led to confusion and misunderstanding," and "such interpretations should not be incorporated in codes of fair competition." But the President took pains to remark that he was ordering

²⁸ For details of this statement, see p. 79.

²⁹ The Johnson-Richberg interpretation was put into a Schedule B, later eliminated from official copies of the code. This interpretation, which will be discussed below, p. 79, may be found in the text of the code reprinted in the *New York Times*, Sept. 19, 1933; also in the text published by the Chamber of Commerce of the United States. Compare a virtually identical statement on Sec. 7(a) broadcast by Gen. Johnson on Aug. 23, 1933, *NRA Release No. 463*.

this interpretation excluded "without, by this exclusion, indicating disapproval in any way of the joint statement of the Administrator and General Counsel of the NRA."⁴⁰

On September 21, 1933 the President, pursuant to Section 7(b), approved a formal agreement on wages, hours, and other working conditions between the Appalachian coal operators and the United Mine Workers. This agreement, the symbol of union recognition, was undoubtedly one of the outstanding triumphs in the history of the United Mine Workers. It meant that practically the entire national coal tonnage would in the future be produced under trade union conditions. By virtue of the presidential approval the terms of the Appalachian agreement became equivalent to a code of fair competition binding on employers concerned.⁴¹

IN SEARCH OF "PERFECT NEUTRALITY"

The controversies aroused by the steel, automobile, and soft coal codes put the question of Section 7(a) be-

⁴⁰ NRA Code No. 24 (code of fair competition for the bituminous coal industry, approved by President Roosevelt in executive orders of Sept. 18, 1933 and Sept. 29, 1933), pp. iii-iv.

⁴¹ It still remained to bring the captive mines into the original code and/or the Appalachian agreements. This was finally done, but only after prolonged controversies involving in the main the question of union recognition, which brought the National Labor Board into the picture. On October 30 the steel companies, proprietors of the captive mines, agreed with the President to permit their workers to elect representatives of their own choosing who would then proceed to negotiate a formal agreement to follow the lines of the September 21 pact. Accordingly, the striking mine workers began to return to the pits early in November. Elections were held November 22 and 23, under the auspices of the National Labor Board. Representatives of the United Mine Workers were chosen in approximately two-thirds of the mines. The check-off and union recognition led to further difficulties, which were referred to the National Labor Board for final determination. The National Labor Board held hearings on Jan. 4 and Jan. 8, 1934 and handed down a decision Jan. 19. Subsequently, contracts were negotiated in accordance with the terms of this decision. Whether or not these contracts implied recognition of the United Mine Workers was an open question.

fore the NRA in a new light. These controversies of July, August, and early September 1933 brought into focus concrete questions such as the open versus the closed shop, the trade union versus the company union, limitations upon the employer's right to hire and fire, and union recognition.

General Johnson grappled with issues of the open versus the closed shop and the company versus the trade union in a radio speech broadcast on August 23. His remarks were general and broad. He said:

The words "open shop" and "closed shop" are not used in the law and cannot be written into the law. These words have no agreed meaning and will be erased from the dictionary of the NRA. The law requires in codes and agreements that "employees shall have the right to organize and bargain collectively through representatives of their own choosing." This can mean only one thing, which is that employees can choose anyone they desire to represent them, or they can choose to represent themselves. Employers likewise can make collective bargains with organized employees, or individual bargains with those who choose to act individually.

Further, he asserted,

The law does not prohibit the existence of a local labor organization which may be called a company union. But it does prohibit an employer from requiring, as a condition of employment, that any employee join a company union and it prohibits the maintenance of a company union or any other labor organization, by the interference, restraint or coercion of any employer.⁴²

A few days later, Donald R. Richberg made a more definite attempt to reconcile opposing interpretations of the NIRA. In a radio broadcast of August 29, 1933 he defended the NIRA against those who were attacking it as a pro-labor law, and at the same time threw out the

⁴² *NRA Release No. 463*. Compare the Richberg-Johnson interpretation of Sec. 7(a) in the soft coal code, p. 79.

idea that the success of the NRA experiment implied "labor participation." His observations were:

The NIRA did not incorporate the provisions of Section 7(a) . . . as the expression of a social idea, or as an attraction for labor support of the act. General Johnson and I worked with others on the drafting of the act. It was and is clearly evident that the whole scheme of self-government would fall to the ground without labor participation. It was and is clearly evident that without labor participation there would result neither security for the employer and investor, nor freedom for the worker.⁴⁸

This statement was sympathetic in tone to the contentions of the trade unions. Nevertheless, it was vague enough to be regarded as innocuous by employers, for it did not specify what was meant by "labor participation." Organized labor was also encouraged by the stand taken at about the same time by General Johnson in a controversy aroused by one of his chief aides, Dudley Cates, on the trade union issue. On August 30, 1933 Mr. Cates resigned from his position as assistant administrator because of disagreement with other NRA officials. Mr. Cates thought that the craft unions of the A. F. of L. were not designed to further the purposes of the Recovery Act, or to fit into the scheme of industrial self-government. The set-up of American industry, he thought, called for vertical or industrial unions. Moreover, he was of the belief that labor organizations should be just as responsible to the government as was industry under NIRA.⁴⁹ On September 1 General Johnson issued a statement on Mr. Cates' resignation. The Administrator did not disapprove of the theory of vertical unions responsible to the government, but pointed out that the Recovery Act, despite its guaranty of collective bargain-

⁴⁸ *NRA Release No. 536.*

⁴⁹ *New York Times*, Aug. 31, 1933.

ing, did not endorse any particular form of labor organization. General Johnson declared:

Mr. Cates' statement . . . discloses a theme which many of us here entertain: that, with an industry organized vertically, the logical labor organization is vertical also with overhead control in labor, as responsible to government as it is in industry, and that craft organization is obsolete. The difficulty in passing from theory to practice is that the law says of labor organizations that they shall be of the workers' "own choosing." I early determined that it was the function of NRA, as prescribed by the statute, to maintain an attitude of perfect neutrality, to lend itself to no theory, but to execute the law. Mr. Cates quite recently wrote me that he thought existing trade unionism obsolete, and that he had set himself to stop it at "every turn." Obviously, that attitude is in violation of the law which we were both sworn to enforce.⁴⁵

General Johnson's remarks on this occasion demonstrated again that the NRA was seeking a neutral attitude; that it would insist upon having the mandatory labor provisions included in all codes; but that beyond this it would not try to apply any general theory of industrial relations. Neither organized labor nor organized industry could acquiesce in such an attitude, for the organizational conflict between company and trade unions was going on apace. On September 3, 1933, for example, Henry I. Harriman, president of the Chamber of Commerce of the United States, urged that all NRA codes contain individual merit clauses, in order to safeguard the open shop in industry. On September 4, William Green, speaking for the A. F. of L., replied to Mr. Harriman that the A. F. of L. would invoke court penalties against any employer who violated the collective bargaining provisions of the statute.⁴⁶ This was about

⁴⁵ *NRA Release No. 602.* (Italics ours.)

⁴⁶ *New York Times*, Sept. 4-5, 1933.

the time the negotiations to secure a soft coal code were apparently in a state of deadlock.

In the hope of dispelling the growing confusion, the two chief spokesmen of the NRA availed themselves of the opportunity presented by Labor Day to suggest lines of policy that would meet the issues. In an address at Chicago, General Johnson voiced the following comments:

The law establishes the right of workers to organize and to deal with their employers through any representatives whom they may choose. Workers are not compelled to do this. They can deal with their employers individually if they so choose. And whether they are organized or not, their interests will be protected as to maximum hours and minimum wages in every hearing under a code. The obligation of employers is not to seek to interfere with efforts of workers to organize or with their choice of representatives. Employers cannot refuse to bargain about conditions of employment with the self-chosen representatives of their workers. But employers are not compelled to agree on any particular scale of wages or conditions of employment merely because they are bargaining with self-chosen representatives of organized workers. And no employer can be denied the right to bargain individually with any worker if the worker so chooses. It is, however, the worker's choice as to whether he shall bargain individually or collectively through representatives. If any employer should make a contract with a particular organization to employ only members of that organization, especially if that organization did not have 100 per cent membership among his employees, that would in effect be a contract to interfere with his workers' freedom of choice of their representatives or with their right to bargain individually, and would amount to employer coercion on these matters, which is contrary to law.⁴⁷

Mr. Richberg in an address that same day at Ottumwa, Iowa tried to present the case for trade unionism

⁴⁷ *NRA Release No. 625, Sept. 4, 1933.*

in modern economic society. Modern business, he said, developed to the accompaniment of a

never ending war between capital and labor, between employers and employees. Labor unions were the natural outgrowth of this internal war. They provided the necessary mobilization of man power against money power. . . . Labor organizations are even more important today than they ever were. They are necessary, not only to advance the interests of industrial workers, but to protect and promote the security and freedom of all those who live in the modern world. The organizers and directors of industrial and financial enterprises that serve modern life can neither safely nor intelligently meet their responsibilities without the aid and corrective guidance of the self-organized groups of workers and consumers. . . . Industrial workers should be organized, transportation workers should be organized, farmers should be organized, all the great competing and co-operating interests, whereby we serve each other and through which we are dependent upon each other must be organized so that they can express their needs, can compel recognition and satisfaction of their needs, and so that no element, no group of minority or majority interests, in our civilization can dominate and exploit another group. . . . Accordingly, there were written into the act opportunities and protections for all three interests. The owners of industry could associate themselves together and write a code or law of self-government. The workers could associate themselves together, and by collective bargaining with employers write into the individual code the law for self-governing labor relations. . . .

Mr. Richberg went on to discuss the theory that business should be organized primarily to yield an adequate livelihood to workers rather than profits to owners. But, he continued,

It is not the purpose of the NIRA to put into operation such a theory of the true purpose of industry. . . . It is the clear purpose of the act to require recognition by those who manage industry of the undeniable fact that the chief beneficiaries and customers of industry are the workers themselves, and that their

right to participate in shaping the policies of industries which vitally affect their lives cannot be denied with the sanction of democratic government.⁴⁶

General Johnson and Mr. Richberg made a more definite attempt to grapple with the underlying issues in connection with the interpretation of Section 7(a) which they wished to incorporate into the soft coal code. After repeating the language already broadcast by General Johnson on August 23, the statement then referred to the decision of the United States Supreme Court in the *Railway Clerks* case as a criterion of what was meant by "interference, restraint, or coercion." Company unions, the statement declared, were not prohibited by the statute; what was forbidden was the employer's requiring, as a condition of employment, that an employee join such a union. Moreover, it was declared, the law prohibited "the maintenance of a company union, or any other labor organization, by the interference, restraint, or coercion of any employer." The statement concluded by expressing the readiness of the NRA to settle representation disputes by secret ballot, with the qualification, however, that it would "not undertake in any instance to decide that a particular contract should be made, or should not be made between lawful representatives of employers and employees, or to decide that a contract which has been lawfully made should not be enforced."

Another attempt to meet the same issues, particularly with regard to the individual merit clause, was made about the same time by the Labor and Industrial Advisory Boards of the NRA. Seemingly, the two boards came together for the first time early in September at the urging of General Johnson. They sought to work

⁴⁶ *NRA Release No. 624, Sept. 4, 1933.*

out a statement on the individual merit clause, but failed to reach agreement at once. After further conferences, however, an agreement was reached, and by September 13, 1933 the two boards had prepared a statement intended to clarify many of the issues separating them, particularly the interpretation of Section 7(a). This statement was signed by members of both groups; but publication was withheld pending a statement of policy by President Roosevelt.⁴⁹ The statement was never made public because on September 15 the President let it be known that he would bar all further attempts to interpret Section 7(a). Specifically he vetoed the interpretation agreed on earlier in the week by the two advisory boards. The President was reported to entertain the view that Section 7(a) spoke plain English and did not require general interpretation in the abstract.⁵⁰

The President's broad hint virtually closed all open dispute over the individual merit clause. Nevertheless the clause came up for administrative consideration in at least two codes approved subsequent to the approval of the automobile code. The draft of the boot and shoe code, approved October 3, 1933, contained an Article 4 on employer-employee relationships as follows:

In so far as consistent with the foregoing provisions [mandatory labor requirements] employers . . . may continue present employer and employee relations and the selection, retention and advancement of employees shall be on the basis of individual merit without regard to their affiliation or non-affiliation with any labor or other organizations.⁵¹

⁴⁹ This information was contained in a *New York Times* dispatch of Sept. 13, 1933, evidently inspired by the NRA.

⁵⁰ See *New York Times* dispatch of Sept. 16, 1933, evidently inspired by the White House.

⁵¹ NRA Code No. 44 (code of fair competition for the boot and shoe manufacturing industry, approved Oct. 3, 1933 by President Roosevelt), p. 2.

This article was eliminated from the code, however, in the President's executive order, which granted approval subject to the following condition:

Because it is evident that attempts by those submitting codes to interpret Section 7(a) of the NIRA have led to confusion and misunderstanding, such interpretation should not be incorporated in codes of fair competition. Therefore Article 4 must be eliminated.⁵²

That same day the President granted his approval to the farm equipment code, subject to a similar condition; that a merit clause supplemental to Section 7(a) be excised. The clause occurred in the second paragraph in Article 8 and copied the language of the automobile code.⁵³

The President made clear his reasons for these rulings in a letter transmitted to General Johnson dated October 19, 1933.⁵⁴ In this letter the President prohibited the incorporation in any codes of interpretations of Section 7(a) and set forth his own understanding of the statute. The text of the letter was as follows:

Following our recent discussion of various misunderstandings and misinterpretations of Section 7(a) . . . I wish to advise you of my position.

Because it is evident that the insertion of any interpretation of Section 7(a) in a code . . . leads only to further controversy and confusion, no such interpretation should be incorporated in any code. While there is nothing in the provisions of Section

⁵² The same, p. iii.

⁵³ NRA Code No. 39 (code of fair competition for the farm equipment industry, approved Oct. 3, 1933, by President Roosevelt), p. 6. The President's elimination of this clause may be found in the executive order appended to the code, p. iii.

⁵⁴ The letter was not made public until October 23. General Johnson then gave out the letter in connection with his statement on the executive approval, October 21, of the retail trade code. Evidently the issue must have arisen again here.

7(a) to interfere with the bona fide exercise of the right of an employer to select, retain, or advance employees on the basis of individual merit, Section 7(a) does clearly prohibit the pretended exercise of this right by an employer simply as a device for compelling employees to refrain from exercising the rights of self-organization, self-designation of representatives, and collective bargaining which are guaranteed to all employees in said Section 7(a).⁵⁵

The official announcement of the President's position definitely brought the controversy over individual merit clauses to an end. So far as it went, the announcement was a victory for the contentions advanced by the Labor Advisory Board and the trade unions. But, although it settled the individual merit issue with respect to inclusion in codes, the statement did not settle the issue as part of the practical technique of administering industrial relations in codified industries. There was nothing in Section 7(a) to prohibit the "bona fide" exercise of the employer's right, the President said, but the "pretended" exercise of this right was forbidden. But the President did not, and of course could not, state specifically how to distinguish the one from the other.⁵⁶ Because of the somewhat indefinite language of the President's statement both employers and employees could reasonably believe that they had won important concessions.⁵⁷

⁵⁵ *NRA Release No. 1335*, Oct. 23, 1933.

⁵⁶ General Johnson, however, thought the President's statement was perfectly clear. On Dec. 7, 1933, for example, he explained to the National Association of Manufacturers in New York City: "There is no ambiguity here. There is not a man here who does not know what the reservation means. At least I am sure that there is no man in our old Illinois Manufacturing Association who does not know. It means that—pretending an open shop—you cannot hire a man, and then, discovering that he has a union card in his pocket, fire him for dropping a monkey wrench." (*NRA Release No. 2126*, p. 9.)

⁵⁷ The individual merit controversy did not, however, wholly die down. It came up again, many months later, in the making of the chemical manu-

Thus, after four months, the NRA was practically back where it had been in the beginning so far as the interpretation of Section 7(a) was concerned. In the attempt to maintain a formal neutrality as between the claims of capital and labor, vague, confusing, and sometimes meaningless statements had been put forward. Whether organized labor or industry profited more by this policy of "perfect neutrality," it is hard to say. Attempts by employers to modify the language of Section 7(a) had been repulsed. This was a gain for organized labor. Beyond this, however, NRA succeeded in raising the issues inherent in collective bargaining rather than settling them. By raising them, moreover, it accentuated them. These issues could not be settled by a policy of "perfect neutrality." They were already flaring up in strike after strike. Thus the question of Section 7(a) came back in a new form, the settlement of strikes; and also under a new jurisdiction, that of the National Labor Board.

facturing code. Over the protests of the Labor Advisory Board, the employers succeeded in writing into the code a weak version of the individual merit clause reading as follows:

"In all activities under this code, the peculiar relations of the chemical industry to national defense, national health, national industry and national agriculture must be constantly borne in mind by its employers, stockholders, directors, executives, and employees. The present products of this industry should be regarded as only by-products; its main product and purpose the extension of chemical knowledge in the public interest. It is recognized that the chemical industry, if it is to keep abreast of chemical progress in the world, requires employees capable of constant advancement in their technical skill and of high and loyal character. Therefore, conscious of the great purpose of the industry, by presenting this code the employers in this industry shall not be deemed to have waived any of their constitutional and legal rights to engage, promote, or release employees, and the members of the industry shall not be deemed to have waived any other constitutional rights." NRA Code No. 275 (code of fair competition for the chemical manufacturing industry, approved on Feb. 10, 1934), Art. IX, pp. 399-400.

PART II
THE NATIONAL LABOR BOARD

CHAPTER IV

RISE AND DECLINE OF THE NATIONAL LABOR BOARD

No machinery for handling labor disputes was included in the first set-up of the NRA. There were several reasons for that. First, the law itself was silent on the subject of strikes or lockouts. Second, those who assumed direction of the NRA in June 1933 had their minds fixed on the single objective of getting industries under codes as fast as possible. Third, ever since 1925 the United States had experienced industrial peace, and possibilities of acute industrial strife between labor and management seemed remote. Fourth, it was believed by many that labor would have little to strike for, since the codes would fix maximum hours and minimum wages, abolish child labor, and improve working conditions generally. And fifth, few if any of the authors of Section 7(a) had a clear idea as to its precise meaning or possible effects on industrial relations.

Before long, however, it became clear that the NIRA had given a new turn to industrial relations, a turn which was of major importance to the recovery program itself. Within a month after the passage of the act, Section 7(a) as incorporated into the President's Re-Employment Agreement (PRA) was the storm center of many strikes, and threatened to cause many more.¹ There was serious danger that the whole re-employment campaign would collapse under the growing pressure of labor disputes.

To allay this unrest and to bring about a state of in-

¹ Employers subscribing to the PRA had to agree to observe the requirements of Sec. 7(a).

dustrial relations favorable to the success of the re-employment campaign, the National Labor Board was created on August 5, 1933. Originally intended as an agency for mediating labor disputes arising under the PRA, the Board soon expanded its functions to dealing with disputes arising under the codes, although it had no express authority to do so until December 16, 1933. At the same time the Board took upon itself the exercise of quasi-judicial functions, that is, of interpreting Section 7(a) in the light of the circumstances of particular disputes. In its quasi-judicial functions, once again assumed without an express grant of authority, the NLB soon overshadowed the NRA itself as an interpreter of the statute.

The activities of the National Labor Board thus form the second stage in the history of collective bargaining under Section 7(a). In view of their importance, we shall consider these activities and their effects in some detail in the chapters which immediately follow. To begin with, we shall describe briefly the main events in the life of the Board, from its origin to its demise. This will serve as an introduction to a more detailed analysis of its operations and their results.

THE STRIKE WAVE OF JULY 1933

The Recovery Act was hardly a month old when progress toward re-employment was endangered by the sudden outburst of strikes. The curve of industrial disputes, which had been at a low level during 1930-32, suddenly turned sharply upward. The newspapers began to talk of a strike wave. There was some exaggeration in this talk. The statistics for strikes beginning in July 1933 show² that of the total of 125,088 workers involved,

²The strike statistics of 1932-33 show that December 1932 was a month of extraordinarily few industrial disputes. No more than 35 dis-

111,587 were concentrated in four industries: 68,026 were clothing workers, principally in New York and other Eastern metropolitan markets; 25,643 were textile workers, mainly hosiery workers in eastern Pennsylvania; 11,245 were miners, for the most part workers in the captive coal mines of western Pennsylvania; and 6,671 were motion picture and theatrical workers, principally in the Hollywood studios.⁸ Thus both the industrial and the geographical scope of the July strikes was limited, most of the disputes occurring in industries peculiarly subject to them. Nevertheless, there were elements in the situation which suggested the reawakening in labor ranks of an aggressive temper hardly calculated to further the "united action of labor and management" contemplated by the Recovery Act.

Three principal factors were responsible for the strike movement of July 1933. First, there was the business "boomlet" caused by anticipation of the effects of the Recovery Act, processing taxes, and the monetary poli-

putes involving 3,425 workers began during that month. The total of man-days lost in disputes during the month was 40,492. These low figures show what amounts to a virtual cessation of open conflicts between employers and employees. In part, this may be explained by the seasonal factor; in part, by the extensive unemployment due to the depression. In January 1933 the number of man-days lost in disputes rose rapidly to a total of 240,912, an increase of some 500 per cent over December. In February there was a recession but in March the figure advanced sharply again to 445,771. This advance may have been due to the upward spurt in production and prices which began shortly after the bank holiday. The number and severity of industrial disputes continued to increase in April (535,039 man-days lost) and May (603,723 man-days lost). In June, the month of the enactment of the NIRA, the figure declined to 504,362. In July and August, however, the upward swing of the curve was resumed at an extremely rapid rate. Man-hours lost reached 1,375,574 in July and 2,377,886 in August. No fewer than 201 disputes involving 125,088 workers began during July. In August 152 disputes involving 141,193 workers began in the course of the month. See *Monthly Labor Review*, Vol. 37, No. 4, October 1933, p. 869.

⁸ The same, p. 870.

cies of the government. Anticipating higher costs and prices, employers were "stepping up" production, and as a result trade unions felt in a position to make demands with respect to wages and hours. Second, there was the factor of seasonality. For reasons which we need not examine here, strikes in the United States commonly reach a peak in the late spring and remain at a relatively high level during the summer months.

The third factor, and this was fundamental, was the impact of Section 7(a) upon the attitudes both of trade unions and of employers. Organized labor, represented by the A. F. of L., had been hard hit by the depression; its membership and financial resources had been greatly depleted and morale was low. The promise of Section 7(a), which the unions interpreted to mean that the government was behind them, resulted in a vigorous organizational drive.* At the same time, some of the stronger unions were determined to play an active part in code making in the hope that the codes would incorporate the usual terms of collective trade agreements, and would help to extend unionism into areas hitherto open shop.

The trade union campaign met with a vigorous counter-offensive on the part of employers. In part this offensive took the form of reviving old and establishing new company unions and of determined opposition to the recognition of outside labor organizations. In part it took the form of fighting the efforts of some of the unions to

* Some of the unions most active in this drive which made the greatest gains in membership were the United Mine Workers, International Ladies' Garment Workers, United Textile Workers (especially the American Federation of Full Fashioned Hosiery Workers), and (outside the A. F. of L. at the time) the Amalgamated Clothing Workers of America. An even more striking development was the mushroom growth of A. F. of L. federal unions among workers in the automobile, rubber, chemical, and some other industries. During July and August 1933 alone, the A. F. of L. issued 340 new charters to local trade and federal labor unions directly affiliated with the Federation.

shape the labor provisions of the codes. Given such an atmosphere, industrial conflicts were bound to grow in number, extent, and severity.

THE CREATION OF THE BOARD

Under the impulse of the July strikes, the idea that the NRA should establish code machinery for maintaining industrial peace under the PRA and the codes came to the fore. The first steps toward the establishment of such machinery were taken forthwith upon the approval of the pioneer code, cotton textile.⁵ The idea of creating similar machinery was also projected for the needle trades, where the unions were on the verge of a general strike. Early in August 1933 a mediation board was proposed to adjudicate labor disputes in the soft coal industry.

At the same time, the Industrial and the Labor Advisory Boards of the NRA were engaged in conferences for the establishment of more general machinery applicable to industry at large. At these conferences, it would appear, the idea of a National Labor Board was first advanced. Several proposals were worked out which it was agreed to place before the President. On August 5, 1933 these proposals were approved by the President, who told the press that he was not certain as to the best permanent form for carrying on mediation under the NRA. He suggested the possibility, however, that a single board might later be replaced by separate boards in the various codified industries.⁶

The President's statement announcing the establishment of the National Labor Board contained two parts: first, it set forth the joint proposal of the Industrial and

⁵ See Chap. XV.

⁶ For this and other statements by the President, see *New York Times*, Aug. 6, 1933.

Labor Advisory Boards;⁷ and second, it gave the President's approval.⁸ In accordance with the recommenda-

⁷ "The country in the past few weeks has had remarkable evidence of co-operation in the common cause of restoring employment and increasing purchasing power. Industrial codes are being introduced, considered, and put into effect with all possible dispatch, and the number of firms coming under the President's Re-Employment Agreement is inspiring.

"This gratifying program may be endangered by different interpretations of the President's Re-Employment Agreement by some employers and employees.

"The Industrial and Labor Advisory Boards jointly appeal to all those associated with industry—owners, managers, and employees—to unite in the preservation of industrial peace. Strikes and lockouts will increase unemployment and create a condition clearly out of harmony with the spirit and purpose of the Industrial Recovery Act. Through the application of the act the government is sincerely endeavoring to overcome unemployment through a nation-wide reduction in the hours of work and to increase purchasing power through an increase in wage rates. This objective can only be reached through co-operation on the part of all those associated with industry. In order to develop the greatest degree of co-operation and the highest type of service on the part of management and labor, we urge that all causes of irritation and industrial discontent be removed so far as possible; that all concerned respect the rights of both employers and employees; avoid aggressive action which tends to provoke industrial discord and strive earnestly and zealously to preserve industrial peace pending the construction and adoption of industrial codes applicable to all business, large and small. Exceptional and peculiar conditions of employment affecting small employers and others whose business circumstances merit special consideration will be handled with due regard to the facts of the situation and with the desire to achieve increased employment and purchasing power.

"This appeal is made to the sound judgment and patriotism of all our people in the belief that even the most vexatious problem can be settled with justice and expedition where employers and employees act in accord with the letter and spirit of the National Recovery Act, without fear that any just rights will thereby be impaired. In that way only can the Re-Employment Agreement be made to apply with fairness pending the adoption of the codes."

⁸ "Of importance to the recovery program is the appeal to management and labor for industrial peace, which has just been sent to me for approval.

"With compelling logic, it calls upon every individual in both groups to avoid strikes, lockouts, or any aggressive action during the recovery program.

"It is a document on a par with Samuel Gompers's memorable wartime demand to preserve the status quo in labor disputes—and in addition to the signature of the President of the American Federation of

tions of the Industrial and Labor Advisory Boards, the powers and jurisdiction of the National Labor Board were defined in the following terms:

This Board will consider, adjust and settle differences and controversies that may arise through differing interpretations of the President's Re-Employment Agreement and will act with all possible dispatch in making known their findings. In return, employers and employees are asked to take no disturbing action pending hearings and final decision. This Board will promptly proceed to establish such central and local organizations as it may require to settle on the ground, such differences as arise in various parts of the country.

The President, it should be stressed, did not issue a formal executive order on August 5, 1933. Thus the exact administrative status of the National Labor Board was vague and uncertain until December 16, 1933, when the first executive order bearing upon the NLB was issued. The Board's powers were limited by the statement to "differences and controversies" arising out of the President's Re-Employment Agreement. This limitation notwithstanding, the Board went ahead in the sequel to dealing with "differences and controversies" which arose out of approved codes. When dealing with labor difficulties the Board was to "consider, adjust and settle" them. On the basis of this somewhat vague grant of powers, the Board later proceeded not only to medi-

Labor it carries the signature of every great labor leader and every great industrial leader on the two advisory boards of the Recovery Administration. It is an act of economic statesmanship. I earnestly commend it to the public conscience.

"This joint appeal proposes the creation of a distinguished tribunal to pass promptly on any case of hardship and dispute that may arise from interpretation or application of the President's Re-Employment Agreement. The advantages of this recommendation are plain and I accept it and hereby appoint the men it proposes whose names will carry their own commendation to the country."

ate and conciliate in disputes between employers and employees, but also to hand down a number of formal "decisions." The statement did not expressly say that the Board was empowered to adjudicate on cases involving Section 7(a).⁹ The Board nevertheless took it upon itself to exercise quasi-judicial functions so far as concerned rulings on the statute. And in exercising these functions, it did not distinguish between PRA and code cases.

In sum, the NLB soon transcended all the limitations inherent in the statement of August 5, 1933. It did so upon its own initiative, although by the force of events rather than by conscious choice. From August 5 to December 16, 1933, in other words, the NLB assumed a multitude of responsibilities without being granted express power to assume them. It informally expanded its jurisdiction to include mediating in every conceivable type of strike situation, to cover code labor disputes as well as PRA labor disputes, and to comprehend the interpretation of Section 7(a) as well. Later in its history the Board's position was at length regularized by a series of executive orders. But until these orders were handed down by the President, the express commission of the NLB was extremely vague and its formal powers extremely amorphous.

To membership on the National Labor Board, the President appointed three "labor" representatives;¹⁰ three "industry" representatives;¹¹ and an impartial

⁹ Because all employers subscribing to the PRA bound themselves to observe the requirements of Sec. 7(a), it might be argued that the NLB was indirectly empowered to adjudicate on cases wherein the statute was at issue.

¹⁰ Dr. Leo Wolman, chairman of the Labor Advisory Board; William Green; John L. Lewis.

¹¹ Walter C. Teagle, chairman of the Industrial Advisory Board; Gerard Swope; Louis E. Kirstein.

chairman.¹² The "labor" members were named on the recommendation of NRA's Labor Advisory Board; the "industry" members on the recommendation of the Industrial Advisory Board. Despite occasional changes in the personnel of its membership, the NLB at no time in its history deviated from the original pattern of structure: equal voice to bi-partisan interests plus a decisive public voice. This structural fact was of primary importance to the Board's operative ability. The bi-partisan composition was to prove an advantage in the work of mediating and conciliating labor disputes; but it was to hinder the Board for some time in its evolution into a quasi-judicial tribunal which sought to "lay down the law" of Section 7(a).

FIRST STEPS

Confronted with an ominous strike situation, the National Labor Board had to act quickly and as best it could. An executive secretary, Dr. William M. Leiserson, was appointed at once. Several special mediators were secured; an office and a field staff were quickly got together. Because the number of strikes was too large for its small staff, the Board entered into arrangements to co-operate with the Conciliation Service of the United States Department of Labor, and with similar services in the labor departments of some of the states. For the time being, also, a number of disputes were left to mediation by the local NRA boards which were springing up throughout the country as the President's Re-Employment Agreement drive progressed.¹³

The first big task of the Board was mediation in the widespread strike in the hosiery mills of Berks County,

¹² Senator Robert F. Wagner.

¹³ For the organization of local NRA boards, see Charles L. Dearing and Others, *The ABC of the NRA*, 1934, Chaps. IV and V.

Pennsylvania, more particularly in the environs of the city of Reading. Within a week after its establishment, the Board succeeded in settling this strike by an agreement which came to be known as the "Reading Formula." This was an auspicious beginning. The Reading Formula set a precedent. For many months thereafter the Board's line of policy in regard to industrial relations was determined by the principles implicit therein. In view of the importance which this formula thus acquired in the work of the Board, it is necessary to review briefly its formulation and meaning.

By 1929 the American Federation of Hosiery Workers,¹⁴ under aggressive and militant leadership, had organized about 50 per cent of the fast-growing hosiery industry, principally in the mills situated around Philadelphia. The union then held contracts with some of the largest manufacturers. Between 1929 and 1933, like many other unions it suffered substantial losses in membership and morale. To retrieve lost ground and to conquer open-shop territory never before organized, chiefly around Reading, Pennsylvania, it engaged in an aggressive organizing campaign in June 1933. Refusal by employers to grant "recognition" or to bargain collectively with union representatives led to strikes. By July 5 all the full fashioned hosiery mills in Berks County, Pennsylvania were reported shut down. More than 10,000 workers were out on strike. The struggle continued throughout July and early August, growing in scope and intensity. It was accompanied by disturbances of the public peace.

¹⁴ Although technically a division of the United Textile Workers of America, in substance the union is autonomous. At the time of the Reading strikes in 1933, it was known as the American Federation of Full Fashioned Hosiery Workers. It later changed its name to the present form, when it extended its jurisdiction to include seamless hosiery workers.

Such was the controversy which the National Board undertook as its first problem. Telegrams were sent to leading employers and to the president of the union, asking them to submit the strike to the Board's mediation. Responses from both sides were favorable. In Washington on August 10 the Board held a hearing attended by 25 employers and numerous representatives of the union. As a result of this hearing, a tri-partite agreement among the employers, the union, and the Board was announced on August 11. It read as follows:

Agreement between the National Labor Board and the hosiery manufacturers of Reading, Pennsylvania, and the representatives of the employees each agreeing with the National Labor Board but *not* with each other as follows: 1. The strike to be called off immediately and the employees to report to work as quickly as work is available. 2. The employees are to return to work without prejudice or discrimination. 3. Conditions of work and wages will be as agreed upon. 4. During the week beginning Tuesday, August 15, 1933, and throughout that week, employees on the payroll of the last day on which they worked at each company shall hold a meeting, elect their own chairman by secret ballot, and elect their representatives to deal with the management in working out agreements dealing with the relationships of employees and employer. 5. Each works will send to each employee on the payroll on the last day that he was at work a notice to that effect, which will entitle him to be present and vote at the meeting aforesaid. 6. This election is to be held under the supervision of the National Labor Board. 7. Any disagreement in interpretation arising will also be settled by the National Labor Board. 8. Both employers and employees agree to accept the decision of the National Labor Board as final and binding.¹⁵

The Reading Formula comprehended four points which later became an integral part of the policy of the National Labor Board. First, the strike was to be called off at once. This was primarily a concession to employ-

¹⁵ *NRA Release No. 285.*

ers. From the point of view of the Board, however, it was essential as a means to industrial peace and re-employment. Besides, the Board acted on the assumption that a truce must precede elections and negotiations, later steps in the formula.

Second, the striking workers were to be reinstated in their jobs without prejudice or discrimination. This was a safeguard to the employees. No former striker was to suffer a loss of his job for having participated in a walk-out. But the qualifying condition that workers were to be rehired "as fast as work is available" opened the way to controversy, particularly if an employer did not act in good faith.

Third, an election was to be held by the employees for the purpose of designating representatives for collective bargaining. The election was to be held at a specific date; it was to be under the auspices of the Board; the balloting was to be secret; all workers on the payroll at the time the strike began, but none hired thereafter, were to be permitted to vote; workers were to be given adequate notice of the time and place of the election. Most important of all, the representatives chosen were to be authorized to negotiate with the employer with a view to executing agreements concerning wages, hours, and working conditions. This was the crux of the Reading Formula and the heart of the interpretation of Section 7(a) later elaborated by the Board in a series of rulings.¹⁶

Fourth, workers and employers consented to submit all differences arising under the agreement to the National Labor Board for final decision. This provision was similar to those commonly found, in trade union agree-

¹⁶ See Chaps. VI and VII.

ments, providing for voluntary arbitration of grievances and differences thereunder.

In accordance with this agreement, elections were held in 45 Reading hosiery mills throughout the week beginning August 15, 1933. About 14,000 workers participated in the poll. The union elected its representatives in 37 mills having 13,362 workers. Eight mills with 720 workers elected non-union representatives.¹⁷ But in 36 mills the management refused to work out agreements with the elected representatives. On September 27, accordingly, the Board handed down a decision wherein it ruled that the agreement called for the working out of written agreements between the representatives and the managements.¹⁸ After some further difficulties, the employers complied with this decision, and many agreements were later made. Thus in its first big test, the National Labor Board succeeded in adjusting a serious strike by voluntary agreement. Moreover, the result of this adjustment was that a trade union achieved the equivalent of "recognition" in a previously non-union territory.¹⁹

EARLY SUCCESS

During the first three months after its establishment, the National Labor Board was fairly successful in meeting the various tasks which it encountered. The Reading Formula supplied a workable basis for adjusting most of the disputes which came before the Board during this period. Adjustments by mutual agreement between contending parties were readily made; but little recourse was

¹⁷ *NRA Release No. 510*, Aug. 26, 1933.

¹⁸ *NRA Release No. 942*. Senator Wagner stressed, however, that the decision did not purport to be a precedent on the necessity for written agreements between employers and representative labor organizations.

¹⁹ But in the elections, it should be noted, individuals were chosen as representatives. They were listed on the ballot under the heading "union," without the union's being named.

had to "decisions," and only one basic interpretation of Section 7(a) was deemed necessary.²⁰ Disputes involving hundreds of thousands of workers, and covering a wide range of industries—hosiery, wool and silk mills, dress and clothing shops, street railways, grain elevators, and machine shops—were successfully adjusted.

October 1933 was a turbulent month. Strikes in the Pennsylvania captive mine, in the silk mills at Paterson and Allentown, in the soft coal mines of Illinois, in the Detroit automobile tool and die shops, in the Ford plants at Edgewater (New Jersey) and Chester (Pennsylvania), in the Weirton, West Virginia plant of the Weirton Steel Company, all combined to create tension in industrial relations. Nevertheless the Board generally rose to the occasion. It initiated negotiations which eventuated in the settlement of the Paterson and Detroit labor troubles. On October 16, 1933 the Board brought about an agreement ending the Weirton strike, the essential element in the agreement being a provision for election under Board auspices of employee representatives for collective bargaining during the second week of December 1933.²¹ On October 30, 1933 the value of the

²⁰ The Berkeley Woolen Mills decision, *NRA Release* dated Sept. 6, 1933 (no number), wherein the Board ruled that workers were not restricted to fellow employees in their choice of representatives.

²¹ See *NRA Release* dated Oct. 16, 1933 (no number). The agreement read: "It is agreed 1. That the strike . . . be called off immediately. 2. The striking employees are to be permitted to return to work without discrimination, prejudice, or physical examination. 3. *An election will be held during the second week of December under the supervision of the National Labor Board, the procedure and methods of election to be prescribed by the Board.* 4. The employees shall be permitted . . . to select representatives of their own choosing, and the employers agree to bargain collectively with the representatives so selected. 5. In the event that any dispute arises out of this agreement . . . the same shall be submitted to the National Labor Board for decision." (Italics ours.) The agreement was signed by E. T. Weir, "representing Weirton Steel Company," William J. Long, "representing striking employees," and Robert F. Wagner, "chairman of NLB."

Reading Formula was recognized in the agreement by means of which President Roosevelt succeeded in ending the strike in the captive mines. The agreement called for the election of employee representatives under the auspices of the National Labor Board, the employers engaging themselves to bargain collectively with these representatives until bilateral contracts, containing provisions at least as favorable to the workers as those of the Appalachian Agreement of September 21, 1933, were executed.²²

During the latter part of October the National Board began to establish regional boards at various centers of labor trouble throughout the country. The establishment of these regional boards followed a certain amount of jurisdictional difficulty with the NRA. For some time it was not altogether certain whether local labor disputes were to be handled by the Labor Board or by the NRA compliance boards established to administer the President's Re-Employment Agreement. By the end of September the Labor Board succeeded in establishing its exclusive jurisdiction in this field. In order to simplify the administrative tasks connected with such jurisdiction, the National Board proceeded to devise a nationwide system of regional boards.²³

In terms of efficient operation, November 1933 marked what was perhaps the high point in the life of the National Labor Board. The strike movement was subsiding somewhat. Most of the spadework in the original adjustment of labor disputes was being trans-

²² See *New York Times*, Oct. 31, 1933.

²³ At the time the National Labor Board was finally abolished, regional boards were functioning in Atlanta, Boston, Buffalo, Chicago, Cleveland, Detroit, Indianapolis, Kansas City, Los Angeles, Minneapolis, Newark, New Orleans, New York, Philadelphia, Pittsburgh, St. Louis, San Antonio, San Francisco, Seattle, and Toledo.

ferred to the several regional boards. The National Board was free to devote most of its energies to major controversies and to questions of policy. On November 22 and 23, 1933 the Board conducted the most important series of elections in its history—those in the captive mines—approximately 14,000 workers participating therein.²⁴ The elections passed off in perfect order and quiet. For the time being it seemed that, thanks to the Board's application of Section 7(a), an ideal of industrial democracy was in process of realization in the field of industrial relations.

CRISIS

This hopeful outlook, however, was soon dispelled. The first signs of possible difficulties had occurred during October when a number of employers refused to appear at hearings called by the Board. Significant also was the fact that on November 1, 1933 the National Association of Manufacturers made a vigorous public attack on the Board.²⁵

But the real crisis in the history of the Board came early in December in connection with two cases which were to be of outstanding importance for some time to come; namely, the so-called Weirton and Budd cases. On November 15, 1933, certain employees of the Weirton Steel Company filed an affidavit with the Board in

²⁴ The United Mine Workers of America polled 10,000 votes and elected its representatives in 20 mines. "Inside" labor organizations polled 4,000 votes and elected their representatives in 9 mines. The overwhelming majority of the "inside" union votes was cast by workers employed in H. C. Frick properties. (*NRA Release No. 1905*, Nov. 24, 1933.)

²⁵ The statement in part was as follows: "Sound employment relationships must be established and maintained by mutual agreement between employer and employee in the light of local plant and community conditions. . . . The policies of the National Labor Board tend to prevent the prompt and peaceful settlement of industrial disputes and to prevent the development of sound systems of employment relations, thus increasing the number of such disputes. . . ." (*New York Times*, Nov. 2, 1933.)

which they charged that the company was "coercing" them into voting for the company union at the elections which were to be held in December.²⁶ Specifically, the employees charged that the company was circulating communications, presumably from buyers of Weirton products, in which these buyers said that they would refuse to purchase these products if the company dealt with the trade union. The National Labor Board referred these charges to the Pittsburgh regional board.

Early in December the issue was aggravated still further. The Weirton Steel Company then made it clear that it did not understand the agreement of October 16, 1933²⁷ to imply that the NLB was to conduct an election at which the workers would choose between representation by the Amalgamated Association of Iron, Steel, and Tin Workers and the employee representation plan. Instead the company took the stand that the agreement meant nothing more than that an election should be held—under the supervision of the NLB—at which the employees would designate representatives under the employee representation plan.

Hearings had been called by the Board on December 7, 1933, at which it became clear that the Company Plan Committee would not agree to the rules of the election as worked out by the NLB and would refuse to participate in any such referendum. The delegate of the Company Plan Committee was asked if his committee would flout the Board, to which he replied "yes." Asked further if he meant that it would flout the government, he replied "if that's the way you take it, yes."²⁸

On December 11 Mr. Weir, chairman of the com-

²⁶ *New York Times*, Nov. 16, 1933.

²⁷ See p. 100.

²⁸ *NRA Release No. 2149.*

pany, wrote to Senator Wagner that the company did not feel bound by the Labor Board's interpretation of the agreement of October 16. "The election," he declared, "will proceed in accordance with the rules adopted by the employees' organization" (that is, the company union). In reply Senator Wagner said: "The Board will see to it that the agreement will be carried out. We are determined to have a fair election. . . ." At an executive meeting of the Board on December 13, the Weirton case was considered in detail. Should injunction proceedings be instituted? Should criminal prosecution be undertaken? Should an appeal be made to General Johnson to intervene? Opinions of the members of the Board differed. When the company proceeded with its plans to hold its own elections, General Johnson on December 14 advised Mr. Weir by telegram that, "in my opinion you are about to commit a deliberate violation of federal laws, and that if you do so, I shall request the Attorney General to proceed against you immediately." That same day Senator Wagner asked the Attorney General to take charge of the case, and the NLB ordered a postponement of the election due the next day.²⁹

Notwithstanding all this, the Weirton Company held elections on December 15, 1933 at its three plants—Weirton, West Virginia; Clarksburg, West Virginia; and Steubenville, Ohio. About 11,500 employees participated in electing representatives under the employee representation plan.³⁰ The National Labor Board began to prepare materials for an early court test against the company, and General Johnson, pending the completion of the Board's preparations, postponed action to deprive

²⁹ *New York Times*, Dec. 12, and Dec. 14-15, 1933.

³⁰ The same, Dec. 16, 1933.

the company of the right to display the Blue Eagle.²¹ Thus began a protracted legal controversy which had not yet ended when the Recovery Act was held unconstitutional by the United States Supreme Court in the Schechter case decision of May 27, 1935.²²

The defiance of the Budd Manufacturing Company was first manifested by its refusal to comply with a decision of the Philadelphia regional board. This decision called for a settlement of a strike on condition that all strikers be re-employed, and ordered an election at which the workers might choose between representation by the United Automobile Workers Union (affiliated with the A. F. of L.) and an employee representation plan. When the case came before the National Labor Board on December 7, 1933, officers of the company refused to attend the hearings. Mr. Budd wrote to the National Labor Board with reference to its suggestion that it might be desirable to mediate the strike: "Your kind offices are unnecessary since our plants are fully supplied with men."²³ Eight days later the National Labor Board handed down its decision in the Budd case, repeating in substance the recommendations of the Philadelphia Board.²⁴ In this decision for the first time the Board attempted to give a more specific interpretation of the meaning of "interference," "representatives of their own choosing," "company unions," and "collective bargain-

²¹ Later efforts by the NLB to conduct a referendum were blocked by the company's refusal to permit the Board to use its property and by its further refusal to submit its payroll to the Board.

²² On May 29, 1934 Federal Judge Nields refused to grant a preliminary injunction on *technical* grounds; on Feb. 27, 1935 he refused to issue an injunction on the *merits* of the case. An appeal to the U. S. Supreme Court remained to be taken by May 27, 1935.

²³ *New York Times*, Dec. 8, 1933.

²⁴ *NRA Release No. 2283*, Dec. 15, 1933. The decision is discussed at length in Chaps. VI and VII.

ing." Compliance with the decision, however, was not forthcoming. From December 15 until well into the spring of 1934 the Budd case became one of the major tests of the Board's powers.

The effect of these two cases was felt immediately in the attitude of other employers toward the Board. Thus, after four months of activity, the Board had finally run into a refusal by employers to recognize its authority to interpret Section 7(a) and to settle disputes arising under the collective bargaining provisions of the Recovery Act.

The President was called upon to meet this critical situation, and on December 16, 1933 he issued an executive order⁸⁵ which for the first time gave the Board a definite administrative standing. The order provided that the National Labor Board "shall continue to adjust all industrial disputes, whether arising out of the interpretations or operation of the President's Re-Employment Agreement or any duly approved industrial code of fair competition, and to compose all conflicts threatening the industrial peace of the country." Thus the order confirmed the already established practice of the Board in acting as an *omnium gatherum* for labor disputes of every character. As if to give point to this confirmation of existing practices, the order "approved and ratified" all actions "heretofore taken by this Board in the discharge of its functions." Further, the order defined the functions of the Board as follows: settlement of labor disputes by mediation, conciliation, and (voluntary) arbitration;⁸⁶ establishment of bi-partisan local or regional

⁸⁵ No. 6511. No executive order accompanied the President's statement of Aug. 5, 1933. See p. 93.

⁸⁶ But the Board might decline cognizance of disputes in which an existing means of adjustment had not been explored.

boards; review jurisdiction over the determinations of such boards; and power to make administrative rules and regulations.

Despite the executive order of December 16, the Labor Board came close to collapse during the month of January 1934. The machinery of the Board began to creak; members failed to attend hearings; the handling of cases became chaotic, protracted, and indecisive. Rumor spread that Senator Wagner would resign. In the meantime, the Weirton and Budd companies continued their "defiance"; and the example once given was infectious. Not only the National Board, but even more so the regional boards, ran head-on into an attitude of stubborn resistance on the part of many employers. The National Board was forced into direct contact with the harassing cases of the Harriman (Tennessee) Hosiery Mills⁸⁷ and the National Lock Company of Rockford, Illinois,⁸⁸ in both of which the Board was finally driven to have the Blue Eagles removed by the Compliance Division of the NRA.⁸⁹ Moreover, the strike situation was becoming ominous once more. There were labor troubles in the anthracite coal fields of eastern Pennsylvania; among

⁸⁷ A hearing was held on January 4 and a decision handed down on January 10 (*NRA Release No. 2663*). The case came to the National Board because of failure to comply with a decision of the Atlanta regional board.

⁸⁸ Hearings on Jan. 24 and Jan. 25; decision on Feb. 21, 1934 (*NRA Release No. 3433*, dated Feb. 23). The case came to the National Board because the company had procured an injunction forbidding intervention by the Chicago regional board.

⁸⁹ The Harriman Blue Eagle was removed on Apr. 20, 1934 (*NRA Release No. 4540*). This led to the shutdown of the plant on June 25, 1934, which threw more than 650 workers out of employment. On July 20, 1934 the Blue Eagle was restored by virtue of an agreement with NRA (*NRA Release No. 6618*). The National Lock Blue Eagle was removed on May 22, 1934 (NRA Compliance Division data), after the Board had so recommended on May 16, 1934. (*NRA Release No. 5094*.)

restaurant employees and taxi drivers in New York; and the Weirton case seemed like a sore from which infection might spread to the steel industry as a whole. Despairing of any further progress with the Budd case, the Board on January 11, 1934 referred the matter to the National Compliance Board,⁴⁰ thus for the first time having formal recourse to the Compliance Division of the NRA. The Weirton case, however, remained in a deadlock.

In this impasse, and with more labor troubles threatening, the Board once again turned to the President for help. The President responded by issuing Executive Order No. 6580 of February 1, 1934. This order was intended to meet the situation brought to a head in the Weirton and Budd controversies. It empowered the Board to conduct elections of employee representatives for collective bargaining whenever the Board was requested to do so by a "substantial number" of employees entitled to the benefits of Section 7(a). Further, it was provided that majority rule should govern at these elections.⁴¹ Finally, the order empowered the Board to report to the NRA Administrator "for appropriate action" any employer who refused to "recognize or to deal" with the authorized representatives of the employees.

Because of what were believed to be deficiencies in the prescribed procedure for compliance, Executive Order

⁴⁰ Thereafter the Labor Board never reopened the case. The National Compliance Board held a hearing *on the merits* on Jan. 24, 1934. After many false starts and misadventures, the case was finally settled by the NRA in accordance with the President's automobile settlement of Mar. 25, 1934. See Chap. XIII.

⁴¹ "Thereafter the Board shall publish promptly the names of those representatives who are selected by a vote of at least a majority of the employees voting, and have thereby been designated to represent all the employees eligible to participate in such an election for the purpose of collective bargaining or other mutual aid or protection in their relations with their employer."

No. 6580 was amended on February 23, 1934.⁴³ The provisions bearing on the reference of cases to the Administrator were struck out. Instead, the Board was empowered to refer cases to the Compliance Division of the NRA and/or the Attorney General "whenever . . . [it] . . . shall find that an employer has interfered with the Board's conduct of an election or has declined to recognize or bargain collectively with the representatives of the employees . . . selected in accordance with Section 7(a) or has otherwise violated or is refusing to comply with said Section 7(a)." The Compliance Division of the NRA was instructed not to review the Board's findings, and was authorized to take "appropriate action based thereon." This provision definitely deprived the NRA of any review authority over the National Labor Board, and transformed the Compliance Division for certain purposes into an enforcement agency of the Labor Board.⁴⁴

The executive order of February 1, while strengthening the formal administrative powers of the Board, brought into the open a conflict of opinion between General Johnson and Mr. Richberg on the one hand, and the Labor Board on the other. Many groups of organized employers⁴⁵ protested against the order on the ground that it violated the rights of minority groups, threatened the existence of company unions, and might lead to the establishment of the closed shop. Their protests were directed particularly against a statement (issued by the NRA in connection with the order) which spoke of com-

⁴³ By Executive Order No. 6612-A.

⁴⁴ Perhaps the principal reason for instructing the Compliance Division not to review the findings of the NLB was that in the Budd case the Compliance Division held a new hearing on the merits, after the NLB had issued its decision.

⁴⁵ Notably the Iron and Steel Institute and the National Association of Manufacturers.

pany unions in disparaging terms.⁴⁶ On February 3, 1934, General Johnson and Donald R. Richberg issued a statement interpreting the order to mean that it made no change in the meaning of Section 7(a) as previously interpreted by them. The order, they contended, simply provided for a procedure whereby the majority of the employees could designate their representatives. But minority groups and individuals still retained intact their rights of bargaining separately with employers.⁴⁶ This interpretation was ambiguous; if it meant anything at all, it meant that the Labor Board's Reading Formula elections were pointless. For if minority groups were entitled to execute separate collective agreements notwithstanding the expression of a preference by the majority, then the majority was just where it was before any representatives were elected.

The Labor Board, aware of the consequences that might ensue from adopting the Johnson-Richberg interpretation, preferred to ignore it and to take the order at face value. On March 1, 1934, accordingly, the Board came out openly for majority rule for the first time. It ruled in the Denver Tramway decision of that date that the representatives elected by the majority of workers were entitled to bargain collectively on behalf of all the employees.⁴⁷ This exhibited the Board in open variance with the chief officials of the NRA. It was all the more meaningful, therefore, that the executive order amendment of February 23 (not made public until March 3)

⁴⁶ See *NRA Release No. 3078*, Feb. 1, 1934, further discussed in Chap. X. This statement was not authorized by Messrs. Johnson and Richberg; it crept in inadvertently, on the initiative, seemingly, of subordinate employees in the press section of the NRA.

⁴⁷ See *NRA Release No. 3125*, discussed further in Chap. X.

⁴⁸ *NRA Release No. 3589* (dated Mar. 3). Mr. du Pont, member for industry, dissented, writing an opinion based on the Johnson-Richberg interpretation. For further discussion, see Chaps. VI and VII.

took away from the Administrator such discretionary power over cases referred to him by the Labor Board as he had enjoyed by virtue of the order of February 1.

Fortified by the executive order of February 23, the Board, after some internal dissension as to what was the best course of action, decided to stake its prestige on a firm prosecution of the Weirton case. Consequently, on February 27 the Board turned the case over to the Department of Justice with a recommendation for immediate action.⁴⁸ At the same time, Senator Wagner introduced his Labor Disputes bill⁴⁹ intended to put the Board upon a permanent statutory basis and incorporating principles of industrial relations leading toward union recognition and collective agreements on the one hand and to the probability of extinguishing company unions on the other. Simultaneously with the announcement on March 3 of the February 23 amendment by executive order, a reorganization was consummated in the internal structure of the Board—a reorganization for the purpose of implementing it more adequately for effective administrative action.⁵⁰

FINAL COLLAPSE

By the beginning of March the Board thus seemed to have surmounted a crisis, and to be ready to function thereafter as the unquestionably dominant factor in the governance of collective bargaining. Significantly the Board advanced to a more vigorous development of its theory of industrial relations. The Denver Tramway de-

⁴⁸ *NRA Release No. 3556*, Mar. 1, 1934.

⁴⁹ 73 Cong. 2 Sess., S. 2926, Mar. 1, 1934. See Chap. IX.

⁵⁰ Two vice-chairmen, Leon C. Marshall and S. Clay Williams, were appointed; three new members for industry were appointed to replace inactive members. The Board's final composition was: chairman, Senator Wagner; vice-chairmen, Dr. Marshall and Mr. Williams; employer members, Messrs. Dennison, Draper, du Pont, Kirstein and Teagle; employee members, Mr. Berry, Mr. Green, Dr. Haas, Mr. Lewis, and Dr. Wolman.

cision of March 1, 1934 was followed in rapid succession by the Hall Baking Company decision of March 8,⁵¹ the Houde Engineering Company decision of the same date,⁵² and the Republic Steel decision of March 16.⁵³

The Board, however, was soon precipitated into a series of difficulties which ended its career. Troubles arising from the refusal of the Michigan automobile manufacturers to recognize the United Automobile Workers, an organization of A. F. of L. federal unions, plus the insistence of the manufacturers in maintaining company union plans, led in early March to the threat of a general strike in the automobile industry. Specifically, the A. F. of L. workers were eager in demanding an election of employee representatives to which the employers were opposed. The Labor Board intervened, held hearings⁵⁴ which failed to achieve a settlement, and saw the controversy pass from its hands into those of President Roosevelt and General Johnson.⁵⁵ Finally, on March 25, the White House announced an agreement settling the controversy. The main points of this agreement were (1) no provision was made for the election of employee representatives; (2) an Automobile Labor Board was established to adjudicate questions of representation and discriminatory discharge; (3) majority rule was ignored

⁵¹ *NRA Release No. 3716*, March 9. Decision deals with union recognition and the execution of collective agreements.

⁵² *NRA Release No. 3705*. Decision deals with the obligation of an employer to meet union officials even if the union refuses to divulge the names of the employees it professes to represent.

⁵³ *NRA Release No. 3870*. Decision deals with the effect on the rights of workers of company unions established prior to the enactment of Section 7(a).

⁵⁴ See *NRA Release No. 3817*, Mar. 14, 1934, and *No. 3817*, Mar. 15, 1934.

⁵⁵ General Johnson, it should be noted, was seeking to compose the dispute on his own account before the NLB hearings were concluded.

as a device to govern the selection of employee representatives; (4) it was provided that all organized groups among the employees were entitled to similar privileges with respect to collective bargaining; and (5) the possibility of establishing a system of works councils, based on proportional representation, was projected.⁶⁶ The automobile settlement apparently was in conflict with the Labor Board's interpretation of Section 7(a) and seemed to affirm the rulings of General Johnson and Mr. Richberg. Because the settlement, supported by the prestige of the President, apparently committed the government to a labor policy at variance with that worked out by the NLB, it was a staggering blow to the prestige and authority of the Board.

Following the March 25 settlement, the NLB lapsed into a lethargy and torpor from which it never emerged. It continued to go through the motions of dealing with labor disputes—mostly petty cases involving alleged discriminatory discharges of union workers. It made several theoretically important decisions and succeeded in persuading the NRA Compliance Division to remove the Blue Eagles of four recalcitrant employers.⁶⁷ But despite this appearance of activity, the Board was falling into an administrative paralysis. The main currents of industrial disputes were passing it by. And the Board received another staggering blow when on May 29, 1934

⁶⁶ The settlement is discussed at length in Chap. XIII.

⁶⁷ A. Roth and Co. of Chicago, Apr. 3, 1934; Harriman, Tenn. Hosiery Mills, Apr. 20, 1934; National Lock Co., Rockford, Ill., May 22, 1934; Milwaukee Electric Light and Railway Co., June 6, 1934. (Information based on records of the NRA Compliance Division.) On June 30, after the settlement of a strike, the Board recommended the return of the Milwaukee company's Blue Eagle (*NRA Release No. 6166*). On July 20 the Harriman Blue Eagle was returned pursuant to an agreement between the company and the NRA (*NRA Release No. 6618*).

Federal Judge Niels in the Delaware District Court handed down a decision in which he rejected, on technical grounds relating to the Anti-Injunction Act, the government's request for a preliminary injunction against the Weirton Steel Company—an injunction which in substance would have compelled the company to permit an election to be held under the Reading Formula.⁵⁸ Thus the case on which the Board had staked its prestige, and which it regarded as a conclusive test of its interpretation of Section 7(a), was brought to a temporary stalemate.⁵⁹

The spring and early summer of 1934 were months of mounting labor unrest. A strike in the Electric Autolite Plant, Toledo, Ohio brought to a culmination a series of sporadic walkouts in the automobile and automotive equipment industry—the settlement of March 25 notwithstanding. The Toledo strike was characterized by rioting and violence. For a time it threatened to develop into a general strike of all the A. F. of L. unions in the city. A critical situation also developed as the result of the walkout of union truck drivers in Minneapolis. Early in May the International Longshoremen's Association called a dock strike in San Francisco and other Pacific Coast ports. Other unions of maritime workers joined in the walkout. The port of San Francisco was shut until early July, when an attempt was made to open it by force. This led to more rioting and later to a general strike involving virtually all the labor unions of the city.

For a time, also, it seemed likely that the Amalga-

⁵⁸ For text of the decision, see *New York Times*, May 30, 1934.

⁵⁹ Almost a year later, on Feb. 27, 1935, Judge Niels held: (1) That Sec. 7(a) was unconstitutional, and (2) that the Weirton Co. was not guilty of coercion, in any event. The election question was no longer an issue by that time. For text of decision, see *New York Times*, Feb. 28, 1935.

mated Association of Iron, Steel and Tin Workers would bring about a general steel strike of equal magnitude with that of 1919. At a convention in April, the Amalgamated laid down a seven-point program. On the basis of this program, recognition demands were presented to the employers during the latter part of May. The employers, standing fast by their company union plans, ignored or rejected these demands; and the Amalgamated began to prepare for a strike to be called June 16. At the last minute, however, the strike call was suspended, upon the urging of William Green, who put before the union delegates certain proposals, regarded as quasi-official, for the establishment of a Steel Labor Board.⁶⁰

In all of these difficulties the National Labor Board no longer played the predominant role it had once enjoyed, although its representatives helped to settle the Toledo and Minneapolis strikes. Public attention was shifting from the activities of the Board to the enactment of legislation and the establishment of new agencies for the maintenance of industrial peace. The Labor Disputes bill which Senator Wagner introduced in the Senate to put the National Labor Board on a permanent basis was put aside; and, as a substitute therefor, Joint Resolution No. 44 was passed on June 16 and approved by the President on June 19.⁶¹ The joint resolution, a stop-gap measure, empowered the President to create, for the duration of the Recovery Act, a board or boards vested with the authority to investigate labor disputes and to arrange and conduct elections.

The enactment of Joint Resolution No. 44 presaged the end of the National Labor Board, whose activities by that time had virtually come to a dead stop. On June

⁶⁰ These events are discussed in detail in Chap. XII.

⁶¹ 48 Stat. L. 1183.

26 the President established the National Longshoremen's Board on the basis of the joint resolution, thus removing possible NLB jurisdiction over the outstanding labor dispute of the day.⁶² On June 28 the President established the National Steel Labor Relations Board, also on the basis of the joint resolution, removing the labor troubles of the steel industry from the National Labor Board's scope.⁶³ On June 29, finally, the President established the National Labor Relations Board to take the place of the National Labor Board.⁶⁴ The old Board went out of existence and the new one entered upon the discharge of its functions on July 9, 1934.

Thus, approximately eleven months after its establishment, the National Labor Board passed from the scene. It had enjoyed a short "honeymoon" period of high hopes, followed by an attack of difficulties which led to crisis, protracted inner struggle, and administrative decomposition. Just when the Board had seemingly surmounted the worst of the crisis, it was laid low again by a blow from which it never recovered. But the proposed Labor Disputes bill led to the enactment of a measure which substituted for the NLB a successor tribunal which was to pursue a similar line of Section 7(a) interpretation.

Although not successful in the end, the National Labor Board made substantial contributions to the understanding of industrial relations. Its experience is significant for the light it throws on the problems of peace and labor relations in industry which the nation must continue to face, codes or no codes.

An examination of this experience and an evaluation

⁶² Executive Order No. 6748.

⁶³ Executive Order No. 6751.

⁶⁴ Executive Order No. 6763.

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of its significance are thus of importance as part of the story of collective bargaining under the New Deal and as a basis for future policy. Our task in the chapters immediately following will be to find out what the National Labor Board did to clarify the concept of collective bargaining and what contribution it made to the solution of the problems of industrial relations.

CHAPTER V

THE NATIONAL LABOR BOARD IN ACTION

The work of the National Labor Board and the results accomplished were determined partly by the organization of the Board itself—its structure, powers, and procedures—partly by the nature of the disputes brought before it and the issues they involved, and partly of course by personal factors, in particular the initiative and ideas of its chairman. To follow more clearly the nature of the issues which the Board faced and the principles which it applied in settling them, it will be helpful to consider the Board's machinery and its methods of operation.

STRUCTURE OF THE NLB SYSTEM

The National Labor Board in Washington was the center of a nation-wide system which comprised, at the end, a score of regional and sub-regional labor boards. Six boards functioned in the Northeast; eight in the Mid-West and Northwest; three on the Pacific Coast; and three the Southern states.¹

From its beginning to its end, the National Labor Board was constructed along "joint conference" lines. A given number of employer representatives was set off against an equal number of labor representatives. An impartial chairman—aided later by two vice-chairmen—had the decisive voice.² Decisions went by majority rule.

¹ For list of regional boards, see Chap. IV, p. 101.

² Originally there were three employer and three labor representatives. In the end there were five members of each group. For membership lists, as of the Board's beginning and as of its end, see Chap. IV, p. 94 and p. 111.

Important consequences flowed from the fact that the labor members of the Board were either A. F. of L. leaders or reputed sympathizers with organized labor, while the employer members came from the field of non-union business—mostly big business. The Board was thus of two minds on all fundamental issues. Senator Wagner sought, nevertheless, to avoid any public expressions of differences in viewpoint. His idea was that the Board's influence depended largely on public opinion. To command public opinion, it would be well to make a display of unanimity. Such a display would exhibit the co-operation of management and labor in the interests of the recovery program.

Largely because of the influence of its chairman, it became the Board's practice at first to hand down unanimous decisions on all cases involving Section 7(a). The practice was not broken until the Denver Tramway decision of March 1, 1934.³ As long as the practice lasted, the Board's ability to work out clearly defined policies and principles and to act decisively was somewhat hampered. The practice once broken, the Board could proceed to more positive and unequivocal interpretations of the statute. By this time, however, a chain of events which was later to strangle the Board was already under way.

Each regional board, like the National Board, was composed on a "joint conference" basis. The employer members, as a rule, were chosen from the business leaders of the local community. The labor members were in most cases leaders of local A. F. of L. unions. The impartial chairmen were selected from among outstanding citizens of the local community, known for their interest in the public welfare.

³ See Chap. IV, p. 110.

The regional boards were dependent on the National Board both in policy and procedure. The National Board formulated the regulations for dealing with labor disputes; issued interpretations of moot points with regard to the meaning of Section 7(a); and determined whether the mediation of a given dispute was to be handled locally or in Washington. Largely instruments for the adjustment of local labor disputes, the regional boards were discouraged from making express statements that the company had or had not violated Section 7(a). They were, however, instructed to make findings of fact which would clearly indicate whether or not a violation had been committed. Occasionally, a regional board did hand down such a finding of guilt or innocence, or would attempt to construe Section 7(a). In general, however, it was the National Labor Board itself which exercised such functions.⁴

POWERS AND FUNCTIONS

By March 1934 the legal status of the National Labor Board had come to rest on four documents. First, there was the President's statement of August 5, 1933, which approved the proposal to create the Board. Second, there was the President's executive order of December 16, 1933, which fixed the scope of the Board's work more clearly than before and gave retroactive sanction to its activities since August 5. Third, there was the executive order of February 1, 1934, which gave the Board authority to conduct elections at which employees might choose representatives for the purpose of collective bar-

⁴ No sharp and clear lines were ever drawn, however, between regional board "decisions" and "recommendations." A large proportion of National Board cases originated in the defiance of employers of rulings—whether "recommendations" or "decisions"—handed down by a regional board. It should be kept in mind that true enforcement proceedings could not begin unless and until the *National Board* ruled that an employer had contravened the requirements of Sec. 7(a).

gaining. And fourth, there was the executive order of February 23, 1934 which defined the Board's procedure for enforcing compliance.

These four documents each helped to determine the administrative status of the Board as a tribunal for dealing with labor disputes. This brings us to two questions: (1) with what sort of cases was the Board empowered to deal? and (2) in what way could the Board deal with such cases?

TYPES OF CASES

As evolved by the summer of 1934, the formal jurisdiction of the National Labor Board embraced four types of cases: (1) all labor disputes involving a strike or a lockout, whether arising under the PRA, under a code, or otherwise; (2) all disputes between employers and employees, whether individual or collective, involving charges of violations of Section 7(a), whether threatening or causing a strike or not; (3) all cases involving rulings handed down by a regional labor board;⁵ and (4) all cases involving decisions handed down by joint industrial relations boards operating under codes of fair competition.⁶

⁵ For jurisdiction in cases under (1) see paragraph one of the executive order of Dec. 16, 1933; for jurisdiction in cases under (2) see executive order of Feb. 1, paragraph two and executive order of Feb. 23; for jurisdiction in cases under (3) see Art. B and C, paragraph 2, executive order of Dec. 16, 1933.

⁶ This claim was based on the executive order of Dec. 16, 1933. That order gave the Board power to "compose all conflicts threatening the industrial peace of the country." This power would appear to be general and unqualified and therefore superior to the limited power of any joint industrial relations board. Also paragraph 2 of the same order read that:

"The powers and functions of said Board shall be as follows:

"(a) To settle by mediation, conciliation, or arbitration all controversies between employers and employees which tend to impede the purposes of the National Industrial Recovery Act; provided, however, the Board may decline to take cognizance of controversies between employers and employees in any field of trade or industry where a means of settlement,

With respect to cases under (1) and (2) the Board had "original" jurisdiction. In practice it exercised such jurisdiction only when there was no convenient regional board to which the controversy might be referred or when no joint industrial relations board had been established under the code.⁷ It was entirely within the discretion of the Board, however, to decide whether or not it should exercise original jurisdiction in the event that a convenient regional board or an appropriate joint industrial relations board was available.

With respect to cases under (3) and (4) the Board had jurisdiction of "review." It might or might not exercise such jurisdiction at its discretion. In practice the Board would ordinarily sit in review upon rulings of one of its regional agencies, provided the regulations concerning appeals had been satisfied.

THE NATURE OF THE BOARD'S POWERS

The National Labor Board performed the functions (1) of mediation and conciliation, (2) of voluntary arbitration, (3) of quasi-judicial interpretation of Section 7(a), and (4) of conducting referendums for the choice of employee representatives. The primary activities of the Board were those of mediation and conciliation.⁸

provided for by agreement, industrial code, or federal law, has not been invoked."

Since the Board might "decline to take cognizance" of controversies where a means of settlement provided by an industrial code had not been invoked, presumably the Board had optional authority to intervene or not. The inference was that the Board's jurisdiction was superior to that of the means of settlement provided by an industrial code.

⁷ It should be noted that the NLB made it a practice not to handle disputes arising for reasons other than alleged violations of Sec. 7(a), for in the absence of such violations, the NLB would be incapable of invoking such sanctions as it possessed. Regional boards, however, attempted to mediate all disputes.

⁸ This was still more true of the regional boards.

The Board's main efforts were to settle strikes, preferably by agreement between the parties concerned. The Board also sought to settle on a voluntary basis labor difficulties which had not yet reached the strike state. From time to time, the Board functioned also as an arbitral body. Here its authority was confined to "voluntary" arbitration. It could make an enforceable award only when both parties to the dispute had jointly agreed to submit the issues to the Board for determination and to abide by the decision.*

The Board was not a court of law. Nevertheless most of its cases involved charges to the effect that some employer was violating Section 7(a). When disputes like these could not be settled by agreement, the Board assumed the power to make a theoretically enforceable decision. In all such decisions it sought to apply Section 7(a) to the facts of the case. Such interpretations, however, were not enforceable in the same manner that a judicial interpretation by a court would have been.¹⁰

From the very beginning the Board was confronted with the question of how to determine who, in any given case, were the freely chosen representatives of the employees. Its solution of this question, as described elsewhere, was the Reading Formula, that is, in substance, secret elections. There was nothing in the Recovery Act which expressly authorized the holding of elections to determine the identity and authority of employee representatives. In evolving the election procedure, the Board

* The executive order of December 16, which defined the powers of the Board, said nothing about voluntary or compulsory arbitration. Since, however, the NIRA did not limit the right to strike or to declare lockouts, it was taken for granted that the Board had no powers of compulsory arbitration.

¹⁰ Not until the executive orders of February 1 and 23 could the Board be said to possess express authority to put a "decision" into effect.

was administering the statute in accordance with its own understanding of what Section 7(a) meant.¹¹

The jurisdiction and powers of the Board were thus never quite clearly defined. This must be kept in mind in considering its problems and history.

PROCEDURES FOR SETTLING DISPUTES

The National Labor Board gradually developed procedures which became essential elements in the performance of its functions. To understand the work of the Board, it is necessary to have in mind a picture of these procedures in handling a labor dispute from inception to settlement, if possible, or, in any event, final disposal. Such a picture is presented here under three headings: procedure for settling disputes; types of adjustments; and the enforcement of decisions. In the present section, the first of these is taken up, while the others are dealt with in the two sections which follow.

In broad outline, the course of dealing with a labor dispute after the fall of 1933 was more or less standardized. Each regional board undertook to settle local disputes by voluntary agreement. If such a settlement was impossible, in cases wherein Section 7(a) was at issue, the regional board handed down a preliminary "decision" in which it recommended a formula for adjustment. If both parties were satisfied and complied, the case was ended. But if the decision was unacceptable, two possibilities were open: refusal to comply, usually on the part of the employer; and/or appeal from the decision. Each of these possibilities led to the third step, reference of the dispute to the National Board. Like the regional board before it, the National Board would first try to achieve a settlement by agreement and pass from this to

¹¹ Sanction for such administrative activities was first contained in the executive order of Feb. 1, 1934.

the making of a decision. If the decision involved the employer's responsibility under Section 7(a), and he failed to comply, the Board would take whatever steps it could be enforce its ruling.

The Board was dominated by the idea that the best way to settle a dispute was by bringing about a voluntary agreement between the parties concerned. It, therefore, always strove to avoid every appearance of "taking sides" and of being vested with powers of enforcement or of coercion. The guiding principle of action was that the Board must not assume an attitude which might "spoil the chances" for an agreement.

Accordingly, the Board's procedure was to arrange informal conferences between employers and employees. At these conferences, the Board members stressed the points on which it seemed both sides could be of one mind. The Board members were also constantly on the alert to stop formal proceedings (that is, hearings) as soon as a possibility of reaching an agreement appeared. Only when all efforts to bring the contending parties together failed did the Board take the case "under advisement" preparatory to formulating a decision. And even then, the decision was usually phrased in cautious language, so as not to preclude the possibilities of a voluntary settlement by agreement in the future. More than that, the decision generally expressed the Board's idea as to the terms that should properly be included in any settlement by agreement. Only in extreme cases did the Board "lay down the law" of Section 7(a).

The National Labor Board had at its disposal a small staff of trained mediators and conciliators to assist in the settlement of labor disputes. Recourse could also be taken, and frequently was taken, to the staff of the Conciliation Service of the United States Department of

Labor. The executive secretaries of the regional boards were also, as a rule, adept in the technique of mediation and conciliation. But the dependence was not altogether on the professional adjusters of labor disputes. The Board members, in the cases of both the national and regional tribunals, were supposed to throw the weight of their abilities and prestige behind the voluntary adjustment of employer-employee difficulties.

Hearings, as held by the NLB, may be described as informal discussions and administrative inquiries. Witnesses were not under oath; there was no power in the Board to compel by subpoena the attendance of persons or the production of records. The introduction of testimony, statements, and affidavits was not limited by the rules of evidence which hold in the courts; and because the primary intent of the hearing was to compose a dispute, not to make findings as to guilt or innocence, the Board did not adhere to very strict canons of fact finding. So far as the Board deliberately tried to guide the submittal of evidence, statements, affidavits, and interchange of opinions, it aimed (1) to extract the fundamental issues of the dispute; (2) to find a common ground of agreement between the two parties; (3) to persuade each party to make a voluntary settlement; and (4) to arrange, as soon as possible, for negotiations looking toward such settlement.

The hearing was not necessarily before the full Board, or even before an equal number of members representing industry and labor plus the impartial chairman or one of the vice-chairmen. The members of the Board were all busy men. They were occupied with their daily affairs as labor leaders, as industrialists, as members of the Labor or the Industrial Advisory Board. Thus, only in exceptional cases was a full complement of the Board

present. Most hearings were held in the presence of only a few members, occasionally only one or two, without any regard for numerical equality of representation as between the members from industry and labor. A stenographic record of the proceedings was kept.

If the chairman was present, he presided at the hearing; if not, one of the Board members presided. The presiding officer, as well as the other members of the Board in attendance, participated actively in the conduct of the hearing. They not only asked questions to elicit information, but made suggestions from time to time on what appeared to them to be a proper formula for settling the dispute. Moreover, they intervened with appeals to both employers and employees to respect the purposes of the recovery program; to retreat from stubborn positions; and not to impede the progress of re-employment by keeping men out of work. If, at any time during the course of the hearing, the discussion reached a point where both sides appeared willing to compromise, the hearing was forthwith recessed. The parties to the dispute were asked to go into conference, with the view to working out an agreement, and to report back to the Board as soon as practicable. In sum, the principal animating purpose of a hearing before the National Labor Board was to lead to an amicable conference from which an agreement might issue.

Informal as the hearings may appear from this description, there has been some criticism that many of them were too formal and resembled court procedure too closely. This criticism was based largely on externals. The members of the Board at a hearing were often seated on a high platform looking down upon the two tables to the right and to the left; at these tables the disputants were seated. The representatives of the two parties—

often lawyers—were permitted to make long speeches and to harangue “the tribunal.” It is claimed that such procedure could not create the calm and reasonable spirit required for conciliation, which, it is said, has better chances of success when both parties meet behind closed doors and touch elbows at the same table.

If the case was settled by voluntary agreement, the Board regarded its work as having been successfully completed. But there were two other possibilities: (1) either the parties to a dispute refused to accept the agreement suggested by the Board or even to meet in conference; or (2) the parties agreed to a conference, but the conference did not bear fruit. In either event, the National Labor Board took the case “under advisement” as a preliminary to issuing a decision. The decision was not handed down immediately. Frequently, after the formal hearing had been terminated, the Board persisted in its efforts to bring the parties together.²² Only as a last resort, after all attempts at mediation and conciliation and at persuading both parties to submit their controversy for formal arbitration had failed, was a decision issued.

After a case had been taken “under advisement” it was turned over to the legal staff, which studied the files of the case, the stenographic record of the proceedings, and other cases which might bear on it. The legal staff also consulted with the Board member or members most familiar with the case. Presently, the legal staff would formulate a “draft decision” which was circulated among the members of the Board for approval or disapproval. Decisions of the Board were by majority vote; failure of a member to disapprove a “draft decision” was taken

²² This practice prevailed during the early life of the NLB but was not pursued to any extent during the later months.

to indicate his approval. Furthermore, if the case was of consequence, the decision was likely to be discussed in detail at one of the executive meetings held by the Board from time to time. If the "draft decision" was approved by at least a majority of the members of the Board, it became the Board's official decision and was promulgated as such. Copies of the decision were sent to parties concerned; and its text was given out in the form of an NRA release.¹³

In its work of mediation and conciliation, the Board found it necessary to act not only through its regional boards, but directly through a field staff of its own mediators and conciliators. Here the Board employed a number of mediators who sought to settle disputes on the spot. These mediators played a dual function; on the one hand, they sometimes succeeded in achieving a settlement, in which event the Board did not have to consider the case further; on the other hand, if a case came up for a hearing, the mediators were able to assist the Board by their reports on the facts.¹⁴ The Board's mediators constituted a staff, suited for its task by familiarity with the procedure, principles, and problems of industrial relations.

TYPES OF ADJUSTMENTS

The adjustments which grew out of the work of the labor board system were of four types: (1) informal set-

¹³ Decision procedure in the early days of the Board was much more informal than might be surmised from this description. The decision was ordinarily reached by consultation among the Board members at some executive session or sessions. By June 1934, although consultations of this kind continued, decision procedure in the National Board had become highly formalized and routinized. It still remained informal, for the most part, in the regional boards, subject to the submittal of legal points to the legal staff of the National Board.

¹⁴ Decisions, however, were based exclusively on the transcript of evidence brought out at the hearings.

tlements; (2) voluntary agreements; (3) decisions; and (4) awards. The first three types resulted from the Board's intervention in labor disputes where the parties to the dispute were not willing to submit to arbitration. The fourth type followed a voluntary submission of a labor dispute to the Board for arbitration.

A large number, if not most, of the informal settlements have left but scant record in the files of the Board. Perhaps the most effective work of the Board as an agency for preserving industrial peace was represented by these informal settlements made over the telephone, through personal interviews, or by letters.

The formal agreement which emerged after the process of conferences and hearings described above was usually a bi-partite agreement between the employer and the employees. This was true of all cases where the employer was willing to make an agreement with his employees directly. Here the Board entered into the agreement, if at all, by provision made for the holding of an election or by provision made that all disputes arising out of the agreement should be submitted to the Board for determination.¹⁵ Occasionally, however, employers refused to make an agreement with the workers directly. Such refusal was usually based on the belief that this would be tantamount to union recognition. In such cases both employers and employees entered separately into an identical agreement with the National Labor Board. An agreement of this kind might be called tri-partite.¹⁶

An NLB decision represented both a finding on the facts of a dispute between employers and employees, and a recommendation urging what line of action should be

¹⁵ The Weirton agreement was of this type. It provided both for an election and for submitting differences to the Board. See Chap. IV, p. 100.

¹⁶ The first example of such a tri-partite agreement was the settlement of the hosiery strikes in Reading, Pa. See Chap. IV, p. 97.

pursued in order to compose the dispute according to the requirements of Section 7(a).¹⁷ The National Labor Board did not issue decisions unless it was forced to do so through inability to work out an agreement because of the recalcitrance of one or both of the parties to a dispute. This recalcitrance ordinarily involved the failure of the employer to comply with the recommendations of a regional labor board.¹⁸

The NLB handed down arbitrational awards only when asked to do so by the parties to a controversy. Its procedure in such cases was that of the usual arbitration board. It heard the case, investigated the facts, and rendered an award. Virtually all the cases that went to the NLB for arbitration involved wage scales or interpretation of a collective agreement between a union and employers.¹⁹ The arbitration cases coming before the Board were few in number and secondary in the significance of issues involved.

In general, we may say that the bi-partisan agreement was the most characteristic type of Labor Board settle-

¹⁷ If Sec. 7(a) was not at issue or was found not to apply, the decision could not in theory be enforced. Nor could the recommendation be enforced, in theory, if the charge of violating Sec. 7(a) was not sustained. In cases like these, the Board merely urged equitable considerations upon the parties in interest. They were free to observe or not to observe, as they saw fit.

¹⁸ The Budd case decision (p. 105) was of this nature.

¹⁹ As examples the following cases may be cited: (1) The New Orleans Public Bridge case in which the NLB fixed a wage scale for skilled artisans on a project financed by the Reconstruction Finance Corporation. (2) The wage dispute between the American Federation of Full Fashioned Hosiery Workers and the Full Fashioned Hosiery Manufacturers of America, Inc. The NLB granted the workers a wage increase of 5 per cent. (3) The arbitration between the Mason Builders Association of Greater New York, and several locals of the Bricklayers, Masons' and Plasterers' International Union of America, in which the Board decided which of the two prior awards was binding on the parties. (4) The arbitration of the wage scales for airplane pilots wherein the Board had to determine between mileage and hourly rates.

ment. It was most in accord with the methods of the Board and with its own idea of its proper functions.

THE ENFORCEMENT OF DECISIONS

Except for what may be called its "honeymoon" period of the first few months, the National Labor Board always had to devote a large part of its energies to attempts to bring about compliance with its decisions.²⁰ Cases of this type usually began with the prior refusal of an employer to carry out the recommendations contained in a decision of some regional board. In describing enforcement procedure, accordingly, we assume that the case was one in which a regional board had exercised original jurisdiction. In the early phases of its handling of this type of case, the Board did not depart from the basic concept that its function was to bring about the voluntary composition of disputes. It was only in the later phases of the handling that the procedure departed significantly from that pursued in the settling of disputes.

As a rule, the National Board learned of the non-compliance of a local employer through the daily and weekly reports of the regional boards. Each regional board was instructed to report instances of non-compliance as soon as they occurred. Forthwith, the NLB would send a telegram to the non-complying party. This telegram did not state that the employer had refused to abide by the decision of the regional labor board, and that the NLB was summoning him with a view to pos-

²⁰ It should be stressed that the enforcement problem arose out of such decisions, and such decisions alone, wherein the Board found that an employer violated the requirements of Sec. 7(a). The Board also issued what it called "decisions" in cases (1) where Sec. 7(a) was not at issue, (2) where the statute did not apply, and (3) where the violation complaint was not sustained. Its decisions in cases like these, save of course arbitral awards, had moral force alone.

sible enforcement. Instead, it usually stated that the NLB had now assumed jurisdiction over the case, on which a hearing would be held on a given date; and the employer was requested to be good enough to transmit the name of his representative at the hearing. The form of the telegram was significant as indicating the psychological basis of the Board's procedure. The employer was not charged with any wrong; he was not hailed before a tribunal for punishment; he was not reproached for unwillingness to collaborate in the recovery program. To make such statements might spoil the Board's chances for a settlement by further antagonizing persons already antagonistic; hence the neutral and colorless form of the summons to the Board. The assumption was that if the Board avoided even the appearance of compulsion the defiant employer (or employees) would be more amenable to a friendly settlement.²¹

Whether the employer agreed to send a representative or not, the National Labor Board proceeded to a hearing. The procedure at the outset was essentially that of achieving a settlement. As in settlement procedure, the hearing, if necessary, was informal. It amounted essentially to a review of the facts of the dispute as submitted by representatives of both parties but subject to check-up from the regional board report. If a representative of the regional labor board appeared it was only to "sit in," not to entertain formal charges or defend the decision. It would have been inappropriate from the NLB point of view for a regional board representative to "play the advocate." The National Board claimed not to be passing judgment upon an offender, but to be adjusting a dis-

²¹ Also, it is important to note that the NLB lacked subpoena power. Within the limits made necessary by this lack of power, the telegram might be said to give the impression of authority rather than of conciliation.

pute which one of its regional agencies had been unable to adjust.

Should no voluntary settlement result from the hearing, the National Labor Board issued a decision which might or might not run parallel, term for term, with that of the regional board. If the employer continued his refusal to abide by such decision, the National Board did not immediately cease its efforts to bring about a voluntary settlement. Only after all means for adjustment had been tried without success did the Board turn over the case to the proper agencies for enforcement.

Thus, the Board dealt with cases of non-compliance as if they were essentially problems of arriving at a settlement. It ostensibly ignored the assumption that settlements might be impossible because some employers were firmly opposed to recognizing the authority or accepting the principles of the Board. Perhaps this was the main reason why the work of the Board after November 1933 was necessarily dilatory and disjointed. But, as we have seen, the Board lacked even nominal enforcement authority until late in its history. In large measure, the NLB's attempts to secure settlements rather than to "lay down" the law of Section 7(a) were caused by its complete lack of enforcement power and by the difficulty of persuading the enforcement agencies to act.

Moreover, the members of the Board were not all of one mind on the enforcement issue. Some members believed that the Board would do well to use legal sanction to enforce its decisions, while others believed that it should rely on public opinion, by presenting the facts of a case in the press. Still others were opposed to the Board's going further than to negotiate and mediate.

Nevertheless, the Board eventually came to adopt the policy of attempted compulsion as a method of last resort. The procedure here was to refer the case either to

the Compliance Division of the NRA and/or to the United States Attorney General.²² Early in March 1934 the Board for the first time introduced formal procedure preliminary to setting the machinery of enforcement into movement. This was the "show cause" hearing, a procedure based on the executive order of February 23, 1934.²³

The Board did not have recourse to a "show cause" order except in cases where the employer had failed to appear at the formal hearing. The order was used in the hope that the form of the notice might persuade the employer to appear. The "show cause" hearing thus came as the sequence to long drawn-out controversies, after all prior efforts to achieve a settlement were unsuccessful, and at a stage where the Board stood ready to invoke disciplinary measures. But the order was intended, essentially, to give the Board one more chance to achieve the settlement.

The first step in a "show cause" hearing was to send a telegram to the employer who had refused to comply with a decision, informing him that he must appear on a specified date to "show cause" why his case should not be referred to the Compliance Division of the NRA for removal of the Blue Eagle and/or to the Attorney General for appropriate action.²⁴ In some few instances, the mere threat of initiating disciplinary action was enough to induce the employer to comply with the Board's decision.²⁵ In this event, and upon receipt of information to the effect that compliance was forthcoming, the Board cancelled the proposed hearing. Otherwise the hearing

²² See Chap. VIII for a more detailed discussion.

²³ For text of four "show cause" orders, see *NRA Release No. 3603*, Mar. 3, 1934.

²⁴ This could take the form of an application for an equity injunction or decree; or even (in theory) the form of criminal proceedings.

²⁵ For one such instance, see *NRA Release No. 3737*, Mar. 9, 1934.

was held. At the hearing the employer was asked to present evidence bearing on the charge that he had violated Section 7(a) either under the code of fair competition to which he was subject or under the President's Re-Employment Agreement, if he subscribed to that. If the evidence was sufficient to persuade the Board that the employer was not guilty, the charges against him were dropped. If the evidence was conclusive, the Board handed down a formal "finding of fact" together with a "conclusion," which it transmitted to the Attorney General and to the Administrator of the NRA.

The "finding of fact" began with a recital to the effect that the company in question was subject to a code of fair competition or to the PRA, and was engaged in interstate commerce. It then recited the manner in which and the circumstances under which the company had failed or refused to comply with Section 7(a) of the Industrial Recovery Act.²⁶ The "finding of fact" was followed by a "conclusion" which summed up in what respect the employer had violated the law.²⁷

²⁶ Refusal to abide by a decision of the NLB was not in itself a violation of Sec. 7(a) of NIRA.

²⁷ Thus, in the case of the Harriman Hosiery Mills the "conclusion" read:

"The Harriman Hosiery Mills has infringed the rights of its employees to bargain collectively through representatives of their own choosing, as recognized by Sec. 7(a) of the NIRA, by entering negotiations in bad faith and with the definite intention not to make any agreements with the representatives of its employees." (*NRA Release No. 3812, Mar. 13, 1934.*)

Again, in the case of the Roth Company of Chicago the "conclusion" read:

"A. Roth and Co. has interfered with the right of self-organization of its employees, and has infringed the right of its employees to bargain collectively through representatives of their own choosing by refusing to deal with the duly chosen representatives of the employees. It has thus violated Sec. 7(a) of the National Industrial Recovery Act included in the President's Re-Employment Agreement and the codes to which the company has been subject." (*NRA Release No. 3881, Mar. 17, 1934.*)

After a case had been referred to the Attorney General, the Board's immediate connection with it ceased. Nevertheless, the legal staff of the Board might cooperate with the agents of the Department of Justice in preparing the materials on which the prosecution was to be based.²⁸ Similarly, after a case had been referred to the Compliance Division, further steps depended immediately on the action taken by the NRA.

Thus the Board could initiate enforcement proceedings and it might even lend a helping hand to the agencies charged with the enforcement of the statute. But the ultimate power of procuring compliance with decisions, and of administering discipline in the event of non-compliance, lay outside the Board's reach. This was a serious obstacle to speedy and effective enforcement. First, it was late in the history of the Board before its jurisdictional differences with the NRA Compliance Division were composed. Second, legal proceedings through the Attorney General's Office and the Department of Justice depended on the slow, prolonged, and precise procedures of the federal courts. And we should not forget, third, that the Board was not given formal enforcement powers until February 1, 1934. Finally, and perhaps most important, the President at no time officially announced that the government's enforcement powers would be thrown wholeheartedly behind the Board.

In sum, therefore, the Board had to place its chief reliance in enforcement and compliance on the factor of public opinion. This factor did not carry great weight in view of the solidarity of sentiment among many employers, especially in non-unionized industries, who defied the Board because they believed that its theory of industrial relations had a bias in favor of trade unions.

²⁸ As in the suit for an injunction against the Weirton Company.

CHAPTER VI

“REPRESENTATIVES OF THEIR OWN CHOOSING”

Most of the disputes handled by the National Labor Board had their roots in the collective bargaining provisions of Section 7(a) of the National Industrial Recovery Act. Three questions were involved: (1) how could the identity of workers' representatives, freely chosen, be determined? (2) What did interference, restraint, and coercion mean? And (3) what was the nature of collective bargaining? We shall consider the first two questions together because they were inseparable in most of the disputes arising under Section 7(a). The third question will be considered separately in Chapter VII.¹

FREEDOM OF CHOICE

As is related elsewhere,² the National Labor Board at the beginning of its career devised the Reading Formula as a scheme for determining employees' representatives in cases of dispute. This formula, however, did not prove as simple and as easy of application as had at first appeared likely. To begin with, many employers refused to permit elections. Also, not only was it necessary to devise a proper mechanism for applying the formula, but in most cases a quasi-judicial construction of Section 7(a) was needed in order to give precise meaning to the phrase

¹The various decisions quoted in this and the following chapters will be found, except where elsewhere noted, in *Decisions of the National Labor Board*, Pt. I (August 1933-March 1934) and Pt. II (April 1934-June 1934). We shall refer to these published adjudications as *Decisions*, Vol. I and Vol. II. A summary statement of the NLB interpretation of the statute will be found in *National Labor Board Principles with Applicable Cases*, distributed by the National Labor Relations Board, Aug. 21, 1934.

²See Chap. IV, pp. 96-99.

"representatives of their own choosing." The issue was between employees who claimed complete freedom of choice and employers who sought in one way or another to qualify and limit such freedom. The specific issues revolved around several points which are considered below.

FELLOW EMPLOYEES OR OUTSIDERS?

One of the first questions which arose was whether or not employees were limited by Section 7(a) in their choice of representatives to fellow employees, that is to persons working in the same plant or establishment. This question was important because of its bearing on the issue of trade versus company unions.³ It was the subject matter of the first decision rendered by the Board on September 6, 1933 in the case of the Berkeley Woolen Mills of Martinsburg, West Virginia and the United Textile Workers of America.⁴ The management of the mills declared that it had no objection to dealing with the authorized representatives of its employees, but that it "would deal with no representative of the employees unless such representative were an employee of the mill."

As the NLB saw it, the question at issue was "whether employees are in any way limited in their choice of representatives to deal with employers." Its answer was emphatically, *no*. The Board ruled:

We fail to see how it is possible to put any interpretation on the phrase "representatives of their own choosing" which would make it necessary for employees to choose these representatives

³ Employee representation plans, being confined to a single plant, ordinarily provide that the representatives for collective bargaining must be workers in the establishment covered by the plan. Trade unions operate through salaried officers, paid out of union funds, and not in the hire of the employer. It is a basic tenet of the organized labor movement that collective bargaining can be successful only where the representatives of the employees are independent of employers.

⁴ *Decisions*, Vol. 1, pp. 5-6.

from a particular class or a particular group. The statement to the effect that representatives must be chosen *by* the employees cannot by any reasonable interpretation be deemed to mean that the representatives must be chosen *from* the employees. To give the code the interpretation sought by the company would nullify the employees' right to organize as they choose, for, in effect, it would limit each employees' organization to the individual plant, and would prevent the employees of a plant from joining any organization already in existence. Such a result would be opposed to both the letter and the intent of the NIRA.⁵

On the basis of this reasoning the Board held that "employees have the right to choose anyone they wish as their representatives, and are not limited in their choice to fellow employees." The Board held further that the employer's refusal to deal with employee representatives, unless these representatives were workers in the mill, was "an attempt to interfere with and restrain the employees in the designation of their representatives, and is a violation of the code . . . as well as a violation of the . . . act."

From the doctrine set forth in this first decision, the Board never deviated. Indeed its whole theory of collective bargaining was founded on this basic premise: the unconditioned freedom of the workers to "choose anyone they wish as their representatives."⁶

⁵ Our italics.

⁶ The same issue was involved in the case of A. Roth and Company of Chicago and the International Ladies' Garment Workers' Union. After a dispute between the company and the union, the Chicago regional labor board ordered an election to determine the workers' representatives. The attorney for the company wrote:

"Roth and Company will permit its employees to hold an election under the supervision of your board and let them choose by secret ballot their representatives to deal with the company, provided that only employees now on the payroll will be eligible to vote, and provided that the representative chosen is an employee of A. Roth and Co."

The National Labor Board to which the case was referred because of the refusal of the company to comply with the decision of the local board, gave its ruling on Feb. 2, 1934:

INDIVIDUALS OR ORGANIZATIONS?

If employees were entitled to choose representatives from inside or outside an establishment, were they in either case restricted in their choice to individual persons? The statute speaks of "representatives" without defining the term. The question therefore arose whether or not workers had the right to name a labor organization as their representative.

The question was of critical importance. On the one hand, it led to the issue of "union recognition,"⁷ a basic issue in most of the disputes with which the Board had to deal. On the other hand, it was necessary to answer the question in order to clarify the meaning of elections under the Reading Formula; namely, whether an election was intended merely to designate a list of individual representatives or was intended to offer the workers a choice between a trade and a company union.

Not until late in its history, on the occasion of the Hall Baking case,⁸ decided March 8, 1934, did the Board state

"The statute imposes no restriction on the choice of representatives. The workers may select whomsoever they please to represent them in bargaining collectively with their employers. The mandate of the law is clear and unequivocal. The wording of the statute leaves no room for reservation or qualification. It is for Congress and not the employer to rewrite the law. Whether employees shall be represented by fellow workers or by outsiders is a question for them alone to determine, and the attempts of respondent to limit their freedom of choice are interdicted by the law." (*Decisions*, Vol. I, pp. 75-77.)

Similar decisions were made in the cases of *United Rubber Workers' Federal Labor Union No. 18683 v. Eagle Rubber Co.*, Vol. II, pp. 31-33; *International Brotherhood of Teamsters v. Philadelphia Rapid Transit Co.*, Vol. I, pp. 66-67; *International Union of Mine, Mill and Smelter Workers v. Republic Steel Corporation*, Vol. I, pp. 88-89; *Federal Labor Union No. 18830 v. National Lock Co.*, Vol. I, pp. 15-20; and in a number of others.

⁷ For a discussion of this theme, see Chap. VI, pp. 185-91.

⁸ *Bakery Drivers' Union Local No. 264 v. Hall Baking Co.*, *Decisions*, Vol. I, pp. 83-84. But long before March the NLR in its elections was permitting the unions to be named on ballots as representatives who

and answer the question clearly. The employer in the Hall case did not refuse to meet with the union officers, in their individual capacities as representatives of the employees, to discuss with them the terms of a collective agreement. The employer was not opposed to concluding an agreement either with the employees or with their individual representatives. But where the union insisted on a contract naming it as a party thereto, the employer refused not only to execute an agreement with the union as such, but also to make an agreement with the union officers as representatives of the employees "if union titles are appended to their names." No question was raised as to the authority of either the union or its officers to speak for the employees.

Upon these facts, the National Labor Board ruled that "there is no limitation [under the statute] on the choice of representatives. Employees may be represented by individuals or by organizations. The term 'representatives' is used in the statute in a generic sense."⁹ By its ruling in this case, the Board expanded the idea of free choice to mean not only the freedom of employees to select either fellow workers or outsiders as their representatives, but also freedom to choose either individuals or a labor organization as such.¹⁰

COMPANY UNIONS

Perhaps the most basic, and certainly the most troublesome, question raised in connection with freedom of

might be chosen by the employees. This in effect meant that the Board considered that employees had the right to choose unions as their representatives.

⁹ We need not at this point discuss other features of the decision bearing on union recognition and the making of collective agreements.

¹⁰ A similar interpretation of freedom of choice was implied, although less clearly stated, in the rulings of the Board in the Budd case, *Decisions*, Vol. I, pp. 58-61; the National Lock case, Vol. I, pp. 15-20; and several other cases.

choice and with the phrase "representatives of their own choosing," was that of the company union.¹¹ The questions were: Might a company union be recognized as the representatives of employees? Under what circumstances did the existence or establishment of such a union indicate that the employer was exercising "interference, restraint or coercion?"

In trying to answer these questions, the National Labor Board developed a theory of the validity and invalidity of employee representation plans. If it could be shown that a company union was established or maintained by the employer's "interference, restraint, or coercion"; that the workers were not given a chance to accept or reject the employee representation plan; that the employees were denied the opportunity to choose between representation by the inside and an outside union—then the company union did not express the workers' free choice. Under such conditions, the Board would reject the claim that the company union was an authorized representative of the workers for collective bargaining, and would call for an election in accordance with the Reading Formula. If the findings on the three points were the reverse of those stated above, then the company union did express the workers' free choice. The Board would then regard it as authorized to function with all the powers and rights inherent in a representative. No new elections were required.

Invalid Company Unions

The first case in which the Board ruled directly on the issue of the company union concerned the Edward G. Budd Manufacturing Company (Philadelphia) and United Automobile Workers' Federal Labor Union No.

¹¹ The term "company union" is here used to include inside plant unions, employee representation plans, shop councils, employees' mutual benefit associations, and so forth.

18763.¹² A strike in the Budd plant was precipitated by the employer's refusal to recognize the trade union, and by his insistence that the employee representation plan devised by the company provided the employees with a lawful and adequate instrumentality for collective bargaining. Plans for the organization of a trade union began to take shape in August 1933, although the A. F. of L. charter was not granted until September 19. While the union was still in process of formation, and in order, so it would seem, to forestall it, the company announced on September 1, 1933 that in response to the wishes of a number of employees, a "shop organization" would be formed. On September 5, the effective date of the automobile code, the company distributed a plan of the proposed organization to the workers. The plan was devised by the management and provided that only fellow employees who had been continuously employed for one year or more should be eligible to election as representatives. On September 7, elections of representatives, by secret ballot, were conducted, 92 per cent of the eligible employees participating.

The company then drafted a constitution and by-laws, which were approved by the representatives. The idea of establishing the employee representation plan originated with the management; the workers were not consulted in the drafting of plans for setting it up, and at no time were they asked to approve or disapprove of the scheme as such. They were merely called in to elect representatives under the plans devised and promulgated by the management.¹³ As a result of this situation, a strike was called by the trade union on November 14, 1933. After fruitless efforts to mediate the dispute, the Philadelphia regional labor board on November 23 rendered a decision

¹² *Decisions*, Vol. I, pp. 58-61.

¹³ This statement of facts is condensed from the text of the NLB decision.

recommending that an election be held under its auspices within 90 days to designate representatives for collective bargaining. The management refused to comply. The National Board took jurisdiction and on December 7 held a hearing which company officials did not attend. In its decision of December 14, 1933 the NLB reasoned as follows:

Section 7(a) recognizes not only the right of employees to be free from interference . . . in their designation of representatives, but also in all activities relating to self organization. . . . The statute is explicit in forbidding interference by the employer with the self-organization of his employees. For an employer to sponsor a particular labor organization, to prepare a plan of organization, and to formulate a constitution whereunder the choice of representatives is limited²⁴ and the right to vote restricted²⁵ is hardly compatible with the self-organization which the statute sanctions. Where, in addition, the employees are not afforded an opportunity to express either their approval or disapproval of the proposed form of organization, it is evident that there has been no free exercise of choice on their part. Both the selection of a form of organization and the designation of representatives, as well as the method of organization, are placed by Section 7(a) within the exclusive control of the workers. The law does not tolerate any impairment of the freedom of self-organization.

The Board continued:

An election which permits an unrestricted choice of representatives should not be lightly set aside. But where, as here, there has been interference in the creation of an organization, the election, no matter how fair and free it may have been, should not be permitted to stand in the way of the formation of an organization of the employees' own choosing.

In accordance with this reasoning, and in response to the wishes of the complaining employees, the Board or-

²⁴ In this case to employees of certain qualifications with respect to age, citizenship, length of service with the company, and so forth.

²⁵ In this case to those in the company's employ for a specified minimum period.

dered that an election be held "under the supervision of the National Labor Board within 30 days, the nature, method and procedure of this election to be determined by the National Board."¹⁶

The principles enunciated in the Budd decision were reaffirmed by the National Labor Board in many other cases in which the general issues were the same although specific circumstances differed.¹⁷ In the National Lock case¹⁸ the employer established a company union during a strike for union recognition. The strike began on August 31, 1933; the company union was set up on October 3. The plan was promulgated by the company and explained to the employees for the first time less than an hour before the election of representatives was to be held. Employee meetings and election of representatives were called, department by department. All employees were instructed to vote. Section 7(a) was not read to them. Nominations of representatives were oral. Although the ballot itself was secret, the company was in a position to know whether or not individual employees voted. No constitution or by-laws were prepared for the plan, before or after the election, and no collective agreement was ever reached between the management and the elected representatives, of whom two at least were assistant foremen. In passing on the case, the Board ruled as follows:

¹⁶ The company refused to comply with this decision, as it had earlier declined to accept similar recommendations of the regional labor board. Eventually, the Board had to turn the case over to the National Compliance Board of the NRA. After a series of misadventures, the dispute was finally settled on the basis of the President's Automobile Settlement of Mar. 25, 1934. No election of the type sponsored by the Labor Board was ever held.

¹⁷ See, among others, the following cases: *Dresner, Decisions*, Vol. I, pp. 26-27; *Union Overall*, Vol. II, pp. 29-30; *Fifth Avenue Coach*, Vol. II, pp. 8-10; *Chicago Motor Coach*, Vol. II, pp. 74-77.

¹⁸ *Federal Labor Union No. 18830 v. National Lock Co., Decisions*, Vol. I, pp. 15-20.

Organization and representation are matters which concern the employees exclusively. The employer has no right to initiate a plan of organization, or to participate in any way, in the absence of any request from the employees, in their designation of representatives and their self-organization. In fact such actions are expressly forbidden by the statute. The record reveals a studied hostility to the purposes of Section 7(a) and a disinclination to observe its requirements.

The Board found, as a fact, "that the National Lock Company interfered with the right of its employees to organize and bargain collectively through representatives of their own choosing." To bring about "a condition in harmony with the law" the Board called for an election under its own supervision.¹⁹

An interesting case in which the Board applied similar principles was that of the Corcoran Shoe Company.²⁰ After an organizer of the Union was ejected from the plant, Mr. Corcoran, one of the owners, decided to hold an election and personally prepared a ballot as follows: "Do you wish to be represented in all matters pertaining to labor, prices, and conditions by a Shops Crew Committee of your own choosing?" 115 workers voted yes; 92 were opposed. The National Labor Board refused to accept this result as conclusive of the free choice of the workers. "The workers were given two hours' notice of the election. The ballot was explained to them by the foremen. . . . There appears to have been no request for an election from the workers; the idea of a poll originated with the management. The arrangements were made by the company and the form of the ballot . . . was

¹⁹ The employer in this case had procured from the Illinois state courts two severe injunctions against the strikers, and an injunction restraining the Chicago regional labor board from intervening in the dispute. Later the employer's Blue Eagle was removed.

²⁰ *Brotherhood of Shoes and Allied Craftsmen v. Joseph F. Corcoran Shoes Co.*, *Decisions*, Vol. I, pp. 78-80.

prepared by one of the owners." On the basis of these facts, the Board concluded that "there was thus no self-organization of employees; the balloting and organization was dictated and superimposed by the management with a haste that can be characterized as unseemly." In view of this attempt to impose an employee representation plan, the Board found that the employer was responsible for the strike because:

It is the exclusive concern of the workers whether or not they should organize, what form their organization should take and the manner in which their representatives should be designated. There can be no other meaning of the term "self-organization" as now used in the NIRA. It is not for the employer to initiate or prescribe the form of organization to be adopted by the employees. The designation of representatives and the formation of an organization should originate with the employees themselves. It is an unwarranted intrusion upon the freedom of action contemplated by the statute for the employer, without any request from his workers, to announce an election, to frame the issues, to prepare the ballots, and then to explain the purposes of the election. The reluctance of the company to discuss the question of [union] recognition and its proposal for postponement of negotiations stand out in marked contrast with the precipitate manner in which the poll was arranged. Such haste must necessarily have precluded any deliberation on the part of the employees, and prevented a true expression of their will.

In developing its interpretation of company unions, the Board singled out two elements as especially important in determining "interference" with the right of self-organization. One was the domination of an employee representation plan by an employer; the other was the imposition by an employer of such a plan upon his workers. In other words, if it could be shown that a plan was "dominated" by the employer and/or that the employer "imposed" a plan upon his workers, it followed that the workers were denied their freedom of

choice in the designation of representatives. Under such circumstances, the workers were not bound by the plan.²¹

Valid Company Unions

The National Labor Board never maintained that the existence of a company union was in itself evidence of interference by an employer or even of an employer's intent to interfere with the free choice of workers' representatives. In fact, the Board made it clear that, in its opinion, Section 7(a) did not outlaw the company union as such. When it could be demonstrated that an employee representation plan was the free choice of the employees, the Board invariably upheld the validity of such a plan. Under such circumstances, the Board would rule that the employer was not guilty of interference with his workers' statutory rights and that the representatives elected under the plan were clothed with the full authority possessed by representatives within the meaning of the statute.

Two cases may be cited here to illustrate the problem and the Board's action. One case was *Matter of Federal Knitting Mills et al and United Textile Workers of America*,²² decided on January 31, 1934. The case came before the National Board on the complaint of the union "that the companies by establishing company unions, had interfered with the employees' rights of self-organization and had thwarted their attempts to bargain collectively through representatives of their own choosing." The evidence brought before the Board revealed that the mills had held their own elections at which the employees were permitted to choose between representation by an

²¹ These points were formulated with particular clarity in the *Be Line Bus case*, *Decisions*, Vol. II, pp. 24-25, and in the *Chicago Motor Coach case*, Vol. II, pp. 74-77.

²² *Decisions*, Vol. I, pp. 69-70.

inside or an outside union. By an overwhelming majority, the employees had voted for the inside union. After the elections, an employee representation plan was prepared by the employees and representatives were chosen. The representatives negotiated collective agreements with the management for a period of three to six months. No satisfactory evidence was presented that the employers had exerted undue pressure, either in the initial referendum or in the formation of the union following the referendum. The Board found, accordingly, that there was no merit in the union's complaint. It ruled:

Section 7(a) of the Recovery Act grants employees the right to organize along any lines that they desire. Since there was no showing of any interference, restraint, or coercion, and since the workers were afforded an unrestricted choice of representatives in each plant, we believe that the complaint of the union has not been sustained.

The National Labor Board accordingly refused to order new elections.

The second case was *Matter of Cleveland Worsted Mills and United Textile Workers of America*,²² decided April 26, 1934. Early in February 1934 a constitution for a proposed employee representation plan was formulated at the Cleveland mill. A referendum on the proposed plan was held on February 14. The election was by secret ballot; it was supervised by a committee of employees containing several members of the union; and the workers were asked to vote "yes" or "no" on the following question: "Do you favor the employee representation plan as a means of bargaining collectively with the company?" There were 1,013 votes cast in the affirmative; 760 in the negative. Subsequently 24 representatives were elected for a term of six months. At

²² *Decisions*, Vol. II, pp. 17-19.

least half of the representatives were members of the union. On March 26, 1934 the union called a strike at the Cleveland and Ravenna plants of the company, while negotiations before the Cleveland regional labor board were still in progress.

The National Labor Board ruled that in this case:

The question whether the employees of the Cleveland Mill desired to adopt the representation plan was presented to them at the February election, and they were given an opportunity to express their choice. . . . The National Labor Board is therefore of the opinion that a new election should not be held during the six months term for which the representatives were selected.

The Board ruled further that in August 1934 an election should be held under the auspices of the regional labor board. At the new election, the workers were to enjoy a more complete freedom of choice than at the employer sponsored election, for the Board directed that the election "shall afford the employees full opportunity to indicate whether they desire to be represented through an employee representation plan or to adopt some other form of organization." In other words, the workers were to have a choice between a trade union and a company union.²⁴

Company Unions Antedating Section 7(a)

Many company unions were established prior to June 16, 1933, the effective date of the National Industrial Recovery Act. Did the existence of a company union which antedated the Recovery Act release the employer from any obligation to permit his employees to elect "representatives of their own choosing" in accordance with the doctrines of the Labor Board? The answer of

²⁴ For other decisions sustaining employees in the choice of inside unions, see the Bornot Cleaning and Dyeing case, *Decisions*, Vol. II, pp. 15-16, and Real Silk Hosiery case, *NRA Release No. 4647*, Apr. 27, 1934.

the Board was that the NIRA, in guaranteeing to workers the free choice of representatives for collective bargaining, created new rights. These rights had force, regardless of the prior existence of employee representation plans. The validity of an employee representation plan was open to question even if the plan antedated Section 7(a), and the workers were entitled to ask that their free choice be ascertained.

In the Republic Steel case (Thomas Furnace),²⁸ decided March 16, 1934, the employer initiated the employee representation plan on June 13, 1933, three days before Section 7(a) was enacted, and more than two months before the iron and steel code became effective on August 19, 1933. The National Labor Board described the plan without critical comment, as follows:

The plan is similar to that in effect in many industries. The management is represented upon a joint committee which is given broad powers in the adjustment of grievances, in settling controversies concerning nominations and elections, and in passing upon the recall of employee representatives and upon proposed amendments to the plan. The eligibility of representatives is limited to those who have been in the employ of the company for a period of one year, and only those who have been on the payroll for 60 days may vote in elections. . . . Representatives of the workers are compensated by the company for the time spent in attending meetings of committees and are deemed to have vacated their office on their transfer from one voting district to another or upon their appointment to positions of authority.

After the employee representation plan was put into effect, Local Union No. 137 was organized and petitioned the Board for an election. In deciding that an elec-

²⁸ *Raimund Red Ore Local No. 121 and Blast Furnace Division Local No. 137 of the International Union of Mine, Mill and Smelter Workers v. Republic Steel Corp.*, *Decisions*, Vol. I, pp. 88-89.

tion should be held, in view of the fact that a "substantial number of the employees" had asked for one, the Board overruled the argument that the representatives elected under the company union were elected as exclusive bargaining agents to serve for one year, and could not, therefore, be displaced by a later selected group. Further, the Board did not believe it relevant to the matter at hand that the employee representation plan was established prior to the enactment of the statute. The Board held:

Section 7(a) conferred new rights upon the employees and imposed new obligations upon the employer. Among these new rights are the privilege of self-organization and the right of employees to select representatives of their own choosing free from interference by employers. By the executive order of Feb. 1, 1934, whenever a substantial number of employees of any plant, which is subject to any code, requests the National Labor Board to conduct an election to enable them to choose representatives for the purpose of collective bargaining . . . it is the duty of this Board to make arrangements for and supervise the conduct of an election. . . . An organization sponsored by the management prior to the enactment of the statute cannot impair the new rights conferred on employees by the statute and the executive order.²⁰

Summary

The Board consistently ruled that any attempt on the part of employers to place limiting conditions on the qualifications of the workers' representatives, or on the manner in which they were to be elected, was contrary to Section 7(a) and constituted interference with the employees' freedom to choose their own representatives. This principle tended to make most company unions suspect, for employee representation plans usually impose restrictions on eligibility to vote and on the right to

²⁰ Decisions based on the same principle were rendered in the Norge case, *Decisions*, Vol. I, p. 82, and the Chicago Motor Coach case, *Decisions*, Vol. II, pp. 74-77.

hold office; allow joint participation by management in the administration of the plan; and place ultimate power of decision on essential matters in the hands of management. But this did not mean that the company union was illegal *de jure*. The conclusive question was whether or not the plan had been established and was maintained through the free expression of the workers' will. If the employees of their own free will chose to conduct their collective bargaining through such a plan, that was their privilege under Section 7(a). If, in contrast, the plan was foisted upon the employees by the management, the employer was guilty of "interference."

The attitude of the Board was that the will for labor representation should originate among the employees. If the employer first proposed a company union scheme, the employees should be given the opportunity by secret ballot to accept or reject it. Better still, they should be given the opportunity to accept or reject it as against the alternative of representation by an outside union. The employer had to refrain scrupulously from inhibiting the will of his employees by thrusting a plan of representation upon them, by failing to permit them to accept or reject it, or by refusing to allow a choice between representation by an inside or an outside union. He should not, whether for reasons of benevolence or out of a desire to frustrate some outside union, materially mould, shape, or fashion the will of his employees, or he would be guilty of interference. His obligation was to put the question of representation squarely before his employees; then to withdraw, while they made their choice. In short, the golden rule for every employer was "hands off." The "counsel of perfection" was for him to refrain from fostering, promoting, initiating, devising, promulgating, or maintaining any labor organization whatso-

ever, and to abstain from discriminating between members of contending organizations. If he fell short of the counsel of perfection,²⁷ the employer should at least leave it to the final and independent choice of his employees whether they wished to bargain collectively through some company union (devised by the management) or through some trade union (intent upon organizing the employees).

A company union was held to be lawfully entitled to speak for workers if one of the following conditions was satisfied: (1) the idea had to originate among the workers and be acted upon by them; or (2) it had to originate with the management, and be submitted to the workers for acceptance or rejection. In the latter event, the proof of acceptance or rejection depended upon the holding of a secret referendum at which (a) the employees were asked to say "yes" or "no" to the proposal, or (b) preferably, they were asked to choose between inside and outside union representation. In any event, it had to be demonstrated that the company union expressed the will of at least a majority of the workers.

A company union could not lawfully speak for the workers, and the employer was deemed guilty of interference in the event that the management devised the plan, failed to put it before the workers for their yea or nay, and refused to permit a referendum by secret ballot at which the workers could express their preferences. The mere fact that workers participated in the election of representatives under an employee representation scheme was not proof, from the point of view of the Labor Board, that they were thereby indicating their approval

²⁷ "Self-organization as used in the statute means organization free from any interference or participation by the management." *Decisions*, Vol. I, p. 56 (B/J and G/A case).

of it.²⁸ The only way in which approval could be demonstrated was by putting the blunt question to the workers: Do you want this plan or do you reject it? Do you prefer to bargain collectively through this instrumentality or through some other? And if an employer called upon the workers to elect representatives under such a company union arrangement, without consulting them in advance as to their desire in the establishment thereof, he was guilty of interference.

ELECTIONS

The conduct of elections at which workers selected representatives for collective bargaining was one of the Board's principal activities. The election of representatives by secret ballot was the crux of the Reading Formula. The dramatic struggles of the Board with the Budd and Weirton companies centered around the employers' refusal to permit referendums at which the workers might choose between representation by an inside or outside union. The Board reached the height of its prestige when it conducted the captive mines' elections pursuant to the terms of a presidential settlement. The Board's most serious defeat, in the automobile settlement of March 25, 1934, arose out of the efforts of the automobile workers' unions to avail themselves of the Board's election powers.²⁹

²⁸ This point of view was expressed in the Budd, Cleveland Knitting Mill, Republic Steel, Cleveland Worsted Mill, and Chicago Motor Coach decisions, and others. All these decisions are noted in Chaps. VI and VII.

²⁹ Cases in which the Board called for elections were: National Lock, *Decisions*, Vol. I, pp. 15-20; Brockton Shoe, Vol. I, p. 21; Dresner, Vol. I, pp. 26-27; New York Shoe, Vol. I, pp. 35-36; Pierson, Vol. I, pp. 53-54; B/J and G/A, Vol. I, pp. 55-57; Budd, Vol. I, pp. 58-61; Roth, Vol. I, pp. 75-77; Norge, Vol. I, p. 82; Houde, Vol. I, p. 87; Republic Steel, Vol. I, pp. 88-89; U.S.L. Battery, Vol. II, pp. 5-7; Fifth Avenue Coach, Vol. II, pp. 8-10; Cleveland Worsted Mills, Vol. II, pp. 17-19; Finck Cigar, Vol. II, pp. 26-27; Union Overall, Vol. II, pp. 29-30; New York Fur, *NRA Release No. 3314*, Feb. 15, 1934.

The Board formulated its basic concept of the meaning of elections in one of its rulings as follows: "The conduct of an election is an administrative device used by the Board whenever there is a serious dispute regarding the identity and authority of the employees' representatives. . . ." The employer "is obligated to bargain collectively with the representatives freely chosen at the Board's election."²⁰

In other words an election had a dual function. First it was a device to enable the workers to exercise free choice in selecting representatives. Second, it was a means for ascertaining and identifying specific persons and organizations as the representatives with whom the employer must bargain collectively.

The Board did not regard elections as an exclusive device for the purposes indicated above.²¹ The referendum was the principal device which the Board used, given one of two sets of circumstances; (1) in cases involving strikes, when the employer denied the representative character of a union committee, of union officers, or of the union itself; (2) in cases which might or might not involve strikes, wherein a substantial number of employees petitioned for a referendum. But it was always within the Board's discretion to decide whether or not an election was necessary to establish the representative character of a union committee or officers, and to say what proportion constituted a "substantial number" of employees.

²⁰ *Decisions*, Vol. I, p. 56 (B/G and G/A case).

²¹ Immediately after the automobile settlement, the Board issued election regulations in which it announced that: "An election is merely a device for determining the representatives of a majority of the workers for collective bargaining purposes. It is not the exclusive method for making such determination, and need not be employed except in those cases where no other adequate method exists." (*NRA Release No. 4118*, Mar. 29, 1934.)

In the conduct of elections, the most important element was to secure complete freedom of choice for the workers. With this in view, the Board built up a body of rules and practices which became the essence of electoral procedure.²²

ELIGIBILITY TO VOTE

To begin with, who was eligible to take part in an election? Most elections formed part of a formula to settle a strike in which trade or company union representation was the principal issue. Accordingly it became a fundamental rule of procedure that eligibility to vote should be restricted to those employees who were directly concerned in the question of representation at the time the dispute broke out into a strike. As a rule this meant that only those employees were eligible who were on the payroll immediately before the strike began. Employees who did not join in the strike were also eligible. But workers hired after the strike began were ineligible. Thus the employer could not pack the voting lists with strike-breakers or with temporary employees hired for the occasion.

Under the rules followed by the Board, the voting list generally included the following: (1) All employees who had walked out but had not been reinstated at the time the election was held. (2) All employees who had joined the strike and had been reinstated at the time the election was held. (3) All employees who were on the payroll at the time the strike began but did not join in the walkout. To determine the question of eligibility, therefore, it was only necessary to consult the payrolls.

²² For a detailed analysis of types of case in which elections were held, the issues involved, and the results obtained, see Emily Clark Brown, "Selection of Employees' Representatives," *Monthly Labor Review*, January 1935, Vol. 40, No. 1, pp. 1-18.

This necessitated the co-operation of the employer; and many employers were extremely reluctant to give co-operation of this kind.²³

VOTING PROCEDURE

Under the general procedure followed, as soon as an employee arrived at the polling place to vote he would be asked to identify himself by such means as were practicable. He might or might not be challenged by the watchers appointed by the various employee groups concerned in the outcome of the election. If he was challenged, his vote was segregated; and the Board's agent later decided whether or not it should be counted. After he had properly identified himself, the employee's name was checked against the payroll list, and he was given a ballot. He marked his ballot in absolute secrecy, indicating his choice by one of the usual methods; that is, marking an "X" against the name of a particular organization or individual; writing in the name of individuals or organizations not listed on the ballot; or, as happened in at least one election, scratching out the name of the organization which he did not desire to be his representative. The ballot, unsigned, was deposited with the supervisors of the election. After the voting ended, the ballots were counted in the presence of watchers from all parties concerned, and the results transmitted to the National (or regional) Board.

Whenever practicable, it was the custom to hold elections off company property, in a vacant store, a postoffice, a courthouse, a federal building, or some other public place. This was done on the assumption no doubt that if

²³ For example, one of the principal issues in the Board's dispute with the Weirton Steel Company was the company's refusal to make payrolls accessible to agents of the Board.

an election were held on company property, the voter would be subject to coercive influences of an elusive and intangible character. The employee, it was assumed, would find it difficult to dissociate the factory, mill, or mine in which he voted and which was his work place from the owner thereof. This might conceivably sway his judgment.

Electioneering within the vicinity of the polls was not permitted. More particularly, the employer was not to send his representatives, foremen, superintendents, gang bosses, or others to watch the men who came to vote. If this was permitted it was feared the workers might imagine that a "blacklist" was in the making which would inhibit them from voting.²⁴

The employer was to refrain from using "undue" influence on the eve of an election. He was not to suggest to his workers that it would be to their advantage to vote one way or the other; he was not to threaten them with closing down the plant if the outside union won; he was not to promise his workers that they might expect concessions in wages and hours if the company union won; he was not to express the belief that the Board or the government was in favor of this or that organization; he was not to promise individual employees rewards for casting their votes in favor of certain individuals or organizations. It was the Board's ideas that the election was

²⁴ See *Matter of Fifth Avenue Coach Co. (New York City) and Amalgamated Association of Street and Electric Railway Workers and Motor Coach Employees, Local No. 994*, decided Apr. 16, 1934 (*Decisions*, Vol. II, pp. 8-10). The company, the Board found, had interfered with the conduct of an election by the New York regional labor board. What the company did was to order its employees not to participate in the election upon penalty of discharge. Thereafter, "spotters" were sent to the polls. As a consequence only a handful of the employees voted. The National Board's decision ordered that an election be held under the supervision of the regional board and that the company co-operate in the conduct of said referendum.

nothing with which the employer need be concerned. It was a matter in which his employees alone had a stake.⁸⁵

FORM OF BALLOT

The form of ballot to be used was of decisive importance. The problem was how to make it clear to the workers that they were being offered the alternative between (1) representation by an inside or an outside organization, or (2) union or non-union representation. If the employer raised serious objections on the score of union "recognition," the ballot might be arranged in the form of two lists of individual representatives, each list put forward by a different organization. If the employer did not object, the naming of individual representatives might be dispensed with. In this case, the ballot called upon the workers, expressly and directly, to indicate their preference between two (or more) labor organizations as their agents for collective bargaining. In some elections the issue was not clearly drawn between an outside and an inside union, because the employer had not formally established any scheme of employee representation. The question would be put then between a trade union or no organization.

DECISION BY MAJORITY

The outcome of elections held under the auspices of the Labor Board was decided by majority vote. The Board took for granted the familiar procedure of collective bargaining whereby one and only one labor organi-

⁸⁵ The National Board voided the results of an election at the Hughes Tool Co., Fort Worth, Tex., on Dec. 2, 1933 on the basis that "undue influence" had been used. The workers were asked to choose between representation by the A. F. of L. and the Employees' Welfare Organization. The latter won, 1026 to 602. But the employer, prior to the election, had circulated a pamphlet among his employees. In this pamphlet he made it appear that in justice to themselves the employees had but one course of action open to them—to vote for the EWA, the company union.

zation speaks on behalf of a given group of employees in negotiating a collective agreement on wages, hours, and other working conditions.⁶⁶

Granted the principle of majority rule, the question of its interpretation arose. By a majority vote of whom were representatives to be elected? Two possibilities were open: a majority of those eligible to vote, or a majority of those actually casting ballots. If the first possibility were to prevail, it would be easy for an employer to pass the word around among his employees that those who were not in favor of the outside trade union should not vote. Abstaining from the poll in such a case would be equivalent to casting a vote against affiliation with an outside union. In order to establish its right to represent the employees, the outside union would need to poll a majority of all those on the payrolls. In such case, also, an employee who came to vote might be presumed to be favorable to representation by the outside union. Thus, the rule of absolute secrecy would be violated and the union worker might be exposed to discrimination by his employer.

Because of these considerations the Board rejected the first possibility and had recourse to the other. Elections were determined by a majority vote of all those participating in them. This assured an incentive to full participation in the election by all workers who were desirous of voting. Secrecy was also assured, since it could not be determined, from the mere fact that an employee appeared to cast his ballot, whether he intended to vote for representation by an outside or an inside union. Elections were held at such hours as would enable all work-

⁶⁶ As a formal principle, however, majority rule was not announced until the Denver Tramway decision of Mar. 1, 1934, discussed in Chap. VII, pp. 191-94.

ers to vote without being penalized for loss of working time.

DISCLOSURE OF MEMBERSHIP LISTS

In a number of cases employers professed a willingness to deal with a trade union, but refused to do so on the ground that they did not know for which of their employees the union or its officers were entitled to speak. In such cases, the employer usually demanded that the union first disclose its membership lists. Such demands were incompatible with the Board's formula of determining the "identity and authority" of representatives by means of a secret ballot election, and were uniformly denied by the Board.

The precedent was set in the Houde case,²⁷ decided March 8, 1934. The employer challenged the authority of the union to speak as the representative of his workers. The regional labor board proposed to determine this question by comparing the union membership list with the employer's payroll records. The union, acceding to the proposal, turned over its membership lists to the regional board; but the employer refused to open his payroll records unless he were first permitted to examine the union membership roll. The Board thereupon ruled that the union officials were the "accredited representatives" of a "certain group" of employees, and instructed the employer to deal with the union committee, in such capacity, "at once." The company declined to comply on the ground that it was entitled to know "for whom and for how many of its employees the committee is acting." The Board then proposed an election. The company replied that if any election were held, it "would demand

²⁷ *United Automobile Workers' Federal Labor Union No. 18839 v. Houde Engineering Co., Decisions*, Vol. I, p. 87.

the names of employees voting for elected representatives." This brought the case before the National Board, which ruled:

Since the company in the present case has challenged the right of the union or the union officials to represent its employees for the purpose of collective bargaining, the best method of determining this question is by a secret poll. The company is obliged to bargain collectively with the representatives selected by the majority in such a poll. Under these circumstances there will be no need for a disclosure of the names of those voting for the representatives so selected.

Two distinct ideas were involved in the decision: (1) that the holding of an election, by secret ballot, for the choice of employee representatives, relieves the union of the necessity to disclose its membership lists to the employer; (2) that the principle of majority rule, as applied to such elections, dispenses with the need for the disclosure, by individual workers, of the representatives for whom they voted. The Board held to these principles in all its rulings in which the issue was involved.³⁸

DUAL UNIONISM

Although the elections or attempts to hold elections which brought the NLB most vexation and notoriety involved controversies between "outside" trade unions and "inside company unions,"³⁹ the Board on several occasions ordered elections to decide controversies in which two or more independent trade unions claimed to be representatives of the same group of employees.⁴⁰ In all

³⁸ See, among others, the following cases: *U.S.L. Battery, Decisions*, Vol. II, pp. 5-7; *Union Overall*, Vol. II, pp. 29-30; and *Bear Brand Hosiery*, Vol. II, pp. 67-68.

³⁹ For example the *Budd, Weirton, Captive Mines*, and other cases.

⁴⁰ On Nov. 2, 1933, in the *Brockton Shoe* case, the Board called for an election to permit employees to decide whether they wished to be represented by the *Boot and Shoe Workers' Union* affiliated with the *A. F. of*

such cases which came before the National Board, a union affiliated with the A. F. of L. was opposed by a "left wing," "militant," "progressive," or "rank and file" union independent of the A. F. of L. In each such case the independent union sought an affirmation of its representative character in order to upset contractual privileges enjoyed by the A. F. of L. and to establish its own claim to such privileges. And in each case the A. F. of L. unions, forgetting entirely their impassioned demands for elections in company union controversies, objected to the holding of a Labor Board referendum.

At least five cases of this character came before the National Board. In three of these cases, as noted above, the Board ordered elections; in two, it refrained from doing so. Both of the latter involved the United Mine Workers of America. The more important of them arose out of the violent controversy in the soft coal fields of Illinois and Indiana between the United Mine Workers of America and the Progressive Miners of America.⁴¹ This dispute was characterized by constantly recurring strikes, culminating on occasions in riots and shootings.

L. or by the Brotherhood of Shoe and Allied Craftsmen, which was a "rump" union having broken away from the B.S.W.U. (*Decisions*, Vol. I, p. 21). In the New York Shoe decision of Nov. 2, 1933 the Board ordered an election which in the sequel permitted the employees to choose between representation by the Boot and Shoe Workers' Union of the A. F. of L. and the United Shoe and Leather Workers' Union, a "progressive independent" radical union whose New York locals were at one time affiliated with the Trade Union Unity League (*Decisions*, Vol. I, pp. 35-36). In the New York Fur Industry case the Board declared on Feb. 15, 1934 for a referendum at which employees might choose between representation by the radical Fur Department of the Needle Trades Workers' Industrial Union, affiliated with the Trade Union Unity League, and the International Fur Workers' Union, affiliated with the A. F. of L. (*NRA Release No. 3314*, Feb. 15, 1934).

⁴¹ See Lewis L. Lorwin, *The American Federation of Labor*, pp. 266-68. The other case involved a conflict between the U.M.W.A. and the United Anthracite Miners of Pennsylvania. See *Decisions*, Vol. I, p. 51.

Following a temporary truce in hostilities in the winter of 1933, the question arose: Which of the two labor organizations was authorized to hold the contracts as representative of the employees in the Peabody coal mine properties of Saline County, Illinois? The Progressive Miners of America, insisting that it was thus authorized, carried its claims before both the Divisional Coal Labor Board in Chicago and the National Bituminous Coal Labor Board.⁴² The divisional board, arguing that the existing United Mine Workers of America contracts were executed prior to the Recovery Act and that Section 7(a) therefore did not apply, refused to order an election. The National Bituminous Coal Labor Board sustained the ruling of the divisional board.

Instead of "deciding" the case, the National Labor Board refused to hear the appeal, because it did not, in view of certain facts, "feel justified" in doing so.⁴³ These facts, as set forth by the Board, were as follows: The original request for a referendum was rejected by the "divisional labor board whose three members were appointed by the President, the chairman representing the public." The appeal to the national coal board "whose 18 members are appointed by the President, was again unanimously rejected, only the six public representatives voting." The inference seemed plain that the Board would not go over the head of any board or boards appointed by the President, particularly when the decisions presented to it for review were decisions approved of by the impartial chairmen. The Board did not argue that it was without power to review the de-

⁴² These are joint industrial relations boards established under the bituminous coal code. (See Chap. XV.)

⁴³ *NRA Release No. 3695*, Mar. 8, 1934.

cision of the Bituminous Coal Labor Board, if it felt so inclined. The Board merely preferred not to intervene, exercising its prerogative of refusing to take cognizance of disputes in industries where "a means of settlement, provided for by the agreement, industrial code, or federal law has not been invoked." The Board ignored the fact that the Progressive Miners had distinctly and clearly invoked the existing means of settlement; not only the coal labor boards, but also, in the sequel, the courts, without being granted relief. True, there is no record of the NLB's reviewing a case decided by any board other than one of its regional tribunals. Apart from this circumstance, it would be difficult to justify the Board's refusal to order an election in this case. By refusing to take jurisdiction over the case, the Board missed an opportunity to make use of the election device under circumstances such that a referendum seemed clearly to be in order.

DISCRIMINATORY DISCHARGES

In controversies concerning the workers' freedom of choice there was almost invariably involved the troublesome issue of "discrimination." In most cases where a union maintained that the employer was interfering with the free choice of employees, it also complained that some of its members had been discharged for union activities and sympathies. From the trade union point of view, such discharges constituted "discrimination" and violated the statute.

Section 7(a) does not state expressly that an employer must not "discriminate" against individual employees because of their membership or activity in trade unions. But the language of the statute was interpreted by the

National Labor Board to mean that an employer must not discharge, lay off, or otherwise discipline workers because of their union activities. The employer was free to exercise his right of hiring and firing to the degree that he was motivated by the worker's skill, experience, good conduct, seniority, and similar "objective" factors. But if the discharge could be shown to be motivated by a bias against the worker's union affiliations, it was "interference" with self-organization and therefore unlawful.

Few issues coming before the Board called for a more delicate balancing of controversial statements of fact than that of "discrimination." Employers usually sought to prove that the discharges were due to inefficiency, dereliction in duty, violations of shop discipline, plant reorganization, seasonal fluctuations in employment, slackening of business, or kindred reasons. The union countered by the statement that the employer was intent on breaking up its organization by discharging union members, particularly local union officials. In these controversies the Board had to pick its way to the facts among a mass of conflicting statements, affidavits, and other evidence. It had to work out some canons by which the fact of "discrimination" could be adjudicated.⁴⁴

The Board formulated clearly its general concept of discrimination in the Lastowski case,⁴⁵ decided February 6, 1934. Ambrose Lastowski, an officer of Local No. 199 of the union, was discharged by his employer, and this resulted in a strike in December 1933. The Board was not convinced that Lastowski had been discriminated

⁴⁴ No less than 37 of the Board's published decisions touch directly upon discrimination.

⁴⁵ *Cigar Makers International Union of America v. General Cigar Co., Decisions*, Vol. I, pp. 71-2.

against, and sustained the discharge.⁴⁶ Nevertheless, the Board took advantage of the occasion to state in general terms its position on the issue as follows:

Under Section 7 (a) . . . an employee may not be required to refrain from joining, organizing, or assisting a labor organization of his own choice. The statute thus forbids the discharge of an employee for union activity. There is obviously no more effective way of interfering with the self-organization of employees than to discharge those who are active in the union of their own choosing. The statutory requirements may not be evaded by the ready reliance on other grounds for discharge. The employer, in dismissing an employee, must not be actuated in any degree whatsoever by the latter's union affiliation or activities. The statute does not impair the freedom of employers of labor to discharge their employees for infractions of company rules or for other proper and adequate business reasons. To safeguard the privileges conferred by the statute, however, it is imperative that the circumstances of a discharge be carefully scrutinized and that its validity be determined by the appropriate agencies of the government entrusted with the administration and enforcement of the law.⁴⁷

Thus, the Board put forth the test of anti-union bias and intent as a basis for determining discrimination charges. In applying this canon to concrete cases the Board weighed the specific circumstances which indicated such bias. An analysis of the various cases determined shows that the Board gave greatest weight to three main factors: (1) known hostility of employer towards unionism; (2) previous threats of dismissal for union activi-

⁴⁶ "The evidence presented . . . is conflicting and obscure. The employment record of Lastowski reveals several infractions of company rules. Testimony was offered that he had been guilty of certain improprieties of language, but this charge was emphatically denied. No persuasive evidence was offered establishing the claim of discriminatory discharge."

⁴⁷ For another and more succinct statement of the same principle see *Cigar Makers' International Union of America v. Finck Cigar Co., Decisions*, Vol. II, pp. 26-27.

ties; and (3) the service record of employees prior to the times of their affiliation with a union and subsequent discharge. The significance of these factors can best be made clear by a few illustrations.

In the Lyndhurst and Jersey City Bus case,⁴⁸ two employees were dismissed following a fight on company premises with a third employee who was also dismissed. The fight occurred during a meeting at which the employees were assembled for the purpose of choosing the organization to represent them in collective bargaining. The company made no attempt to fix responsibility for the fight. There was evidence that the employer had put pressure on the workers not to join the Brotherhood of Railway Trainmen (the outside union) but to form a company union instead. Further evidence of general hostility to the brotherhood was also advanced. The Board ordered the reinstatement of the two employees on the ground that their discharges were "intended to suppress union activity."⁴⁹

In the Tubize Chatillon case,⁵⁰ the Board found merit in the complaints of ten workers that they had been subjected to discrimination by inclusion in the lay-off of some 400 employees during a seasonal decline. The evidence which led the Board to rule in favor of the workers, and to order their reinstatement, was to the effect

⁴⁸ *Decisions*, Vol. II, pp. 48-50.

⁴⁹ In the Illinois Power and Light Co. case, the company's expressions of hostility toward unions were taken as tending, in the light of other evidence, to prove that the dismissal of twelve employees was discriminatory (*Decisions*, Vol. II, pp. 60-61). In the Fifth Avenue Coach case, the active campaign of the company to prevent the formation of a union was held to be evidence of discrimination against a number of discharged workers (*Decisions*, Vol. II, pp. 8-10). See also Chicago Motor Coach case and Gordon Baking case (*Decisions*, Vol. II, pp. 74-77 and 53-54).

⁵⁰ *Rayon Workers' Union Local 2170 v. Tubize Chatillon Corp.*, *Decisions*, Vol. II, pp. 64-66.

that their lay-offs "followed soon after intimidation and/or threats of dismissal or lay-off" by department foremen.⁵¹

In the Birtman Electric Company case⁵² nine employees were discharged in October 1933 soon after representatives of the two unions concerned called upon the management to demand recognition and a wage increase. Both requests were refused and the following day nine union members were dismissed (two were subsequently reinstated). The National Board, in ordering reinstatement, held that:

The sudden discharge of employees of long standing, who are members of an organization which attempted on the previous day to bargain collectively with their employer, is certain to have a discouraging effect on the self-organization, both present and future, of the employees who remain with the company. The Birtman Electric Company . . . can best nullify the continued effect of its action by reinstating the complaining employees.

The guarded language here is to be explained by uncertainties in the evidence:

The evidence is not conclusive on the question of whether there was solicitation of workers on company time, but the date of the discharges and the severity of the penalty lead the National Labor Board to believe that, if such solicitation occurred, the discharges were not solely actuated thereby.⁵³

Discrimination, the Board also found, could result from indirect as well as direct actions by the employer. It might conceivably result where an employer removed

⁵¹ The same canons were applied in ordering the reinstatement of discharged workers in the Hatch Hosiery and Great Lakes Steel cases, among others. See *Decisions*, Vol. II, pp. 54-52, and Vol. I, p. 91.

⁵² *International Brotherhood of Electrical Workers and Metal Polishers' International Union v. Birtman Electric Co.*, *Decisions*, Vol. II, pp. 43-44.

⁵³ See also the Berliner-Joyce and General Aviation case, *Decisions*, Vol. I, pp. 55-57.

his plant in order to "reorganize" the working force;⁵⁴ where an employer, in order to hire non-union workers, broke his collective agreement;⁵⁵ or where an employer contracted out work to another plant.⁵⁶ In one highly complex case, discrimination was found in a series of actions by which a breach of collective agreement accompanied a removal of plant and also a corporate reorganization.⁵⁷

The National Labor Board sustained charges of discrimination more often than not in the cases brought before it.⁵⁸ Nevertheless, in a good number of cases the Board upheld the employer, where it was able to find that the behavior of the employees justified the employer's action. Thus in the Real Silk Hosiery case⁵⁹ the Board held that the discharge of two workers was justified on the ground that they violated a company rule "by circulating union literature during working hours." In the Great Lakes Steel case⁶⁰ the lay-off of two workers was upheld, because the Board found no reason to suppose that in cutting down the particular work gang, the company followed any other principle than that of retaining the "most efficient workers." It was recommended, however, that the two workers in question should be placed on a preferential re-employment list. In the Bassett Furniture case⁶¹ the Board could not find

⁵⁴ See Bear Brand Hosiery case, *Decisions*, Vol. II, pp. 67-68.

⁵⁵ See Kirchick-Beckerman case, *Decisions*, Vol. II, p. 4.

⁵⁶ See Consolidated Film case, *Decisions*, Vol. II, pp. 82-83.

⁵⁷ See Maujer Parlor Furniture case, *Decisions*, Vol. II, pp. 78-80.

⁵⁸ Examination of the published *Decisions* reveals 37 definite discrimination rulings. The NLB found in favor of complaining workers or groups of workers in 23 instances and against them in 14 instances.

⁵⁹ *American Federation of Hosiery Workers (on behalf of Estel Taylor and Nellie Savage) v. Real Silk Hosiery Mills*, *Decisions*, Vol. I, p. 23.

⁶⁰ *George Hynes et al v. Great Lakes Steel Corporation*, *Decisions*, Vol. I, p. 91.

⁶¹ *United Brotherhood of Carpenters and Joiners v. W. M. Bassett Furniture Co. et al*, *Decisions*, Vol. I, p. 93.

a discriminatory intent in the lay-off of eleven carpenters, members of union locals, who were let out shortly after the formation of the locals. The Board found that the workers were laid off concurrently with many other employees not members of the union, at a time when most of the plants were restricting operations, and when some of them were closing down for several weeks. It was not demonstrated that the union workers had been singled out for lay-off while non-union workers were retained on the job. Finally, the Board found that "in putting men back to work, the company appears to have treated union and non-union men alike."

The Lion Match case⁶² presented the Board with the problem of discrimination in an unusual form: the hiring by the employer of new employees to replace union workers who went on strike. The strike, somewhat precipitate, was called after the union had rejected, although the employer had accepted, a mediatory settlement proposed by the regional labor board. The NLRB found that there was evidence suggesting "hostility" by the employer to the union, but that "satisfactory proof is lacking that the company in its employment policies discriminated against members of the union." The Board was of the belief that the strike could have been avoided had the employer "in taking on new workers followed the usual industrial practice of affording preference to those previously laid off for lack of work." Nevertheless, the Board found that the employer had "no alternative but to recruit a new staff" because (1) "the union did not exhaust the processes of collective bargaining before calling the strike," and (2) the union rejected "the original proposals of settlement approved by the re-

⁶² *Match Workers Union Local 18922 v. Lion Match Co., Decisions*, Vol. II, pp. 62-63.

gional board." At the same time, the Board held that the rejection by the employer of later mediation proposals put forth by the regional labor board did "not constitute a violation of the statute." In any event, the Board failed to uphold the contention that the discharges were discriminatory, and merely recommended "in its mediational capacity," that the strike be called off, and the strikers be placed on a preferential list for re-employment, seniority governing.

It is likely, had the issue come up, that the Board would have ruled that refusal to rehire workers on strike because the employer violated Section 7(a) was a form of discrimination. Quite a number of the Board's decisions, which order the reinstatement of strikers and/or their participation in elections, presuppose that the striking worker enjoys the status of an employee.⁶⁸ What distinguished the Lion Match case was that the employer had *not* violated the statute before the workers went on strike; or more properly, that the strike was *not* caused by a violation of the statute.

⁶⁸ See the National Lock, Brockton Shoe, Dresner, Budd, Philadelphia Rapid Transit, Bee Line Bus, Motor Truck Association, Corcoran, and Eagle Rubber decisions, all elsewhere noted.

CHAPTER VII

WHAT IS "COLLECTIVE BARGAINING"?

The freedom of employees to have "representatives of their own choosing" was but a preliminary, although essential, step toward collective bargaining. The right and opportunity to bargain collectively was the real objective of organized labor and presumably the major concession conveyed to it by the Recovery Act. In most disputes which came before the Board the issues of collective bargaining and free choice were merged.

The questions which arose before the Board were: What are the essential elements of collective bargaining? What procedures does it necessitate? What obligations does it impose upon employers and employees? The act had nothing specific to say on the subject. Neither the PRA nor the various codes elucidated the issue. Administrative interpretations by the NRA had resulted in more confusion than enlightenment.¹ The National Labor Board was thus confronted with a major problem of statutory interpretation.

BASIC PRINCIPLES

The Board's general doctrine of collective bargaining rested upon several basic principles: (1) a presumed duality of obligation upon employers and employees; (2) manifestation by both parties of a will to agree; (3) the exertion of every reasonable effort to conclude bilateral agreements; and (4) formal agreements (preferably written) as the end result of the process.²

¹ See Chap. III.

² The Board took the desirability of collective bargaining for granted.

DUALITY OF OBLIGATION

Collective bargaining implied a duality of obligation on the part of employers and employees alike. The employer had the duty of meeting and dealing with the freely elected representatives of his employees, in good faith, for the consummation of a collective bargain. The employees on their part were to make all possible efforts for a peaceable adjustment before having recourse to strikes.³ This general idea was most clearly stated by the Board in the National Lock case decided on February 21, 1934.⁴ It is not necessary to enter here into the details of this case, which involved the discharge of union employees, a strike, the formation of a company union, the issuance of injunctions against the Chicago regional labor board, and in the sequel, the removal of the company's Blue Eagle. The NLB's decision, which alone concerns us here, said:

The collective bargaining envisaged by the statute involves a duality of obligation—an obligation on the part of employees to present grievances and demands to the employer before strik-

Only on one occasion did it engage in a theoretical justification of the process. This was in the Whatcom County Dairymen's case, decided Feb. 16, 1934. The Board pursued the usual line of argument—that collective bargaining is necessary to diminish existing inequalities in bargaining power between organized employers and their individual employees. "The disinclination of a co-operative association of 2,300 dairy farmers to bargain collectively with a union of 180 employees is difficult to understand," the Board observed, and further: "It is unseemly for the association to resent the exercise by its employees of a right of self-organization which the association itself enjoys under the sanction of the law. Individual bargaining is fair only where equality of bargaining power prevails. Where there is disparity in bargaining power, there must be pooling of resources of those suffering from the inequality in order to place them upon a parity in their bargaining relationships. This has been the objective of co-operative marketing associations in the agricultural field. It is also the objective of unions of employees in the field of employer-employee relationships." (See *Decisions*, Vol. I, pp. 73-74.)

³ For a discussion of the "right to strike" see pp. 204-07.

⁴ *Decisions*, Vol. I, pp. 15-20.

ing, and an obligation on the part of the employer to discuss differences with the representatives of the employees and to exert every reasonable effort to reach an agreement on all matters in dispute.

The concept of duality of obligation runs through practically all the strike cases decided by the Board. It was closely related to the right to strike and the role of arbitration, and so will be discussed at greater length under these two headings.

THE WILL TO AGREE

The Board repeatedly emphasized that the "objective sought by the law was the making of collective agreements."⁸ The purpose of Section 7(a) was to secure freedom of self-organization in order to facilitate the execution of collective agreements concerned with wages, hours, and other working conditions. It was the obligation of both employees and employers to try to reach such agreements, and for this purpose it was essential that they should be animated by a genuine "will to agree." "In times such as these," the Board observed in the Western Massachusetts Motor Truck Case, decided December 28, 1933, "the public must demand that both parties manifest a will to agree and adopt the co-operative attitude without which the recovery program cannot succeed."⁹

The Board did not argue that the parties to collective bargaining had to continue negotiating until an agreement containing specific terms was consummated. But it insisted that the parties to collective bargaining were obliged to show a "will to agree" by exerting "every

⁸ Hall Baking case, *Decisions*, Vol. I, p. 83.

⁹ *International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers, Local No. 404 v. Motor Truck Association of Western Massachusetts*, *Decisions*, Vol. I, pp. 62-63.

reasonable effort" to come to an agreement. In the language of the Hall Baking Company case, "the obligation of the statute is satisfied if both parties approach the negotiations with a sincere intention to agree, and if every reasonable effort is made to reach an agreement. The nature and contents of the collective bargain are matters for negotiation. . . ."

But how could it be determined whether or not both parties were possessed of "sincere intentions," and how could the "reasonableness" of their efforts be appraised? The Board proceeded on the assumption that in most cases an agreement could be effectuated if the employer entered the negotiations "in good faith" and manifested a "will to agree," and if the employees refrained from striking except as a "last resort." Obviously the determination depended on the particular circumstances of each case. In general, the rulings of the Board ran to the effect that an employer met the test if he did not impede the free election of representatives by his employees; if he met with representatives of employees, whoever they might be, if properly elected; if he heard their grievances and demands; if he put forward his own counter-proposals, and allowed for the higgling and haggling usual in labor bargaining. The employees in their turn showed reasonableness if they acted without undue haste or heat in calling a strike.

It is impossible here to examine the various specific conditions which were construed by the Board as evidencing a lack of the "will to agree." But a few cases may be cited for the sake of greater concreteness. In the Dresner case, decided January 31, 1934, the Board said:

The record reveals a deplorable misconception by the company of the nature and meaning of collective bargaining. Peace-

* *Decisions*, Vol. I, p. 83.

ful relations between management and labor can result only from a display of mutual trust and confidence. Agreement is possible wherever the will to agree is present. The peremptory rejection of the employees' proposal and the refusal to enter into negotiations with the representatives of the employees are repugnant to the very concept of collective bargaining.⁸

The Board went on to point out that if the employer questioned the representative character of the union officers, the question could have been settled by an election, which the company "has consistently refused to permit." Also, the Board observed, the union's closed-shop proposal—to which the employer most strenuously objected—"was merely a proposal of the employees and was properly the subject of patient negotiation and discussion. The refusal to enter into negotiations left the employees no alternative but to strike." In short, the employer failed to bargain collectively, not so much because he refused to recognize the authority of the representatives or because he refused to assent to a specific proposal, the closed shop, as because all his actions manifested the lack of a will to agree, an unwillingness to enter into negotiations and discussions.

In the Budd case, to continue, the Board ruled that:

The summary rejection by an employer of the demands of a committee of workers and the immediate cessation of work by employees do not constitute collective bargaining. Whether the committee was entitled to recognition depended on whether it was truly representative of the employees. Patient discussion and a display of mutual trust and confidence could have dispelled the doubts of the employer. Had these been unavailing, the good offices of the Philadelphia regional labor board might have been invoked and doubts put to rest by an election under its supervision. The hasty resort to a strike before the processes of collective bargaining had been exploited and before the Philadelphia board had been afforded an opportunity to mediate the

⁸ *United Leather Workers' International Union v. Drasner and Son, Decisions*, Vol. I, pp. 26-27.

dispute, on the one hand, and the employer's peremptory refusal to discuss the plans of the committee, on the other, reveal a mutual lack of understanding of the meaning of collective bargaining and of the requirements of the statute.⁹

Similar doctrines were stated succinctly and forcibly in the Eagle Rubber Company case, decided May 16, 1934:

The statute requires the employer to meet with the duly chosen representatives of its employees, whether an employee or outside union, and to negotiate actively in good faith to reach an agreement. Disclosure of those represented is not required. Summary rejections of employees' demands and restriction of communication to letters do not constitute compliance with the statute. The employees, on their part, did not strike without having previously taken reasonable measures to avoid drastic action.¹⁰

BILATERAL AGREEMENTS

Two concepts were inherent in the doctrine of the "will to agree": (1) that Section 7(a) required the employer to show by his action and his attitude that he was ready to conclude an agreement, provided both parties could come to terms; and (2) that Section 7(a) required the employer to be ready to incorporate the specific terms agreed on into a bilateral contract. The making of the latter was the crowning act in the process of collective bargaining.

The Board restated these concepts time and again.¹¹ In the National Aniline case, decided May 25, 1934, the

⁹ *Decisions*, Vol. I, p. 60.

¹⁰ *Decisions*, Vol. II, p. 33. In transmitting the Harriman case to the NRA Compliance Division and the Department of Justice, the Board stated in its "conclusion" that the employer had violated Sec. 7(a) "by entering into negotiations in bad faith with the definite intention not to make any agreement with the representatives of [the] employees." (*NRA Release No. 3812*, Mar. 13, 1934.)

¹¹ See *Hall Baking case*, *Decisions*, Vol. I, pp. 83-84; *Harriman Hosiery case*, Vol. I, p. 68; *General Cigar Company case*, Vol. I, pp. 71-72.

Board held that the right of collective bargaining meant more than merely receiving the workers' representatives to "discuss working conditions and grievances with them." What was called for by the law was the making of a collective agreement. The Board pointed out that the substance of these agreements was wholly a matter of negotiation and was not prescribed in any respect. "But an attitude of unwillingness to enter into any obligation with respect to future relations thwarts the statute," and "the company's refusal by word or by contract to enter into a bilateral agreement," the Board concluded, "prevents that joint regulation of conditions of employment which is the essence of the collective bargain." The employer, the Board noted, did not object to meeting with the union; did not deny the representative character of the union; "nor was there so inevitable and fixed a divergence between the parties complaining of the working conditions that should exist in the plant that it could be maintained that the possibilities of collective bargaining had been exhausted." In sum, as the Board observed, "the company neither challenged the authority of the negotiators for the employees nor found it definitely impossible to agree with them as to the content of a settlement." Accordingly, the Board found that:

The evidence is clear that even if these proper persons had presented or might present acceptable demands, the company would not record, nor engage itself with them to observe, the employment code that they might jointly agree upon. If this is not a denial by the company of its employees' right to bargain collectively, the promise of Section 7(a) is tinsel. Congress did not write vain words, and we must not empty the "right to bargain collectively" of serious meaning.¹⁹

¹⁹ *Aniline Chemical Workers' Local No. 18705 v. National Aniline and Chemical Co., Decisions*, Vol. II, pp. 38-42. Mr. du Pont dissented at

In accordance with these doctrines, the Board directed that, to conform to the statute, the company resume at once negotiations with the committee designated by the union, and that both parties make earnest efforts to conclude a bilateral contract concerning conditions of employment in the plant.

In the Connecticut Coke case, decided June 20, 1934, the employer took the position that he was "obligated merely to meet and confer with the representatives of [his] employees." He not only refused to make any agreement, written or oral, but also refused to submit to binding arbitration by an impartial tribunal. The Board took occasion to restate its doctrines of collective bargaining more succinctly and more comprehensively than ever before:

True collective bargaining involves more than the holding of conferences and the exchange of pleasantries. It is not limited to the settlement of specific grievances. Wages, hours, and conditions of employment may properly be the subject of negotiation and collective bargaining. While the law does not compel the parties to reach agreement, it does contemplate that both parties will approach the negotiations with an open mind and will make a reasonable effort to reach a common ground of agreement. The definite announcement by the company that it will not make any oral or written agreement deprives collective bargaining of any content or objective.¹⁸

The Board was of the opinion, to conclude, "that negotiations should be continued by the parties looking toward the making of a written collective agreement,

length, stressing that "the law does not require written contracts between employer and employee" and recommending that "the company shall not be required to enter into a written agreement with the union unless it shall appear that there is a misunderstanding as to terms or a disposition of either party to refuse to carry out the terms verbally agreed upon." Mr. du Pont's dissent is discussed on p. 185.

¹⁸ *United Coke and Gas Workers' Union No. 18829 v. Connecticut Coke Co., Decisions*, Vol. II, pp. 88-89.

establishing if possible machinery for the settlement of grievances and differences."

Because bilateral agreements are the main purpose of collective bargaining, the representatives of both parties to a dispute must be vested with authority to carry the negotiations to a conclusion. In the Corcoran case, decided February 15, 1934, the Board said: "Collective bargaining can only be effectively carried on where the representatives of each side are clothed with sufficient authority to negotiate a binding agreement settling a strike." The Board used general language but referred specifically to the refusal by the union rank and file to ratify certain proposals to which their representatives had assented. "Where the workers are seeking recognition of a union with which the employer has had no previous relationships," the Board warned, "their repudiation of their representatives can only be productive of suspicion and friction."¹⁴

VERBAL OR WRITTEN AGREEMENTS

Assume that the parties to collective bargaining, being possessed of a will to agree, have exerted all reasonable efforts, have succeeded in coming to terms, and that a bilateral contract is about to be consummated. Does the statute require that the agreement be reduced to writing? The Board never gave a direct answer to this question. From time to time, as the case required, the Board urged the practical convenience of reducing collective agreements to writing. But on no occasion did it expressly hold that an employer who refused to make a written agreement violated the statute.

The question of written agreements as a statutory is-

¹⁴ *Brotherhood of Shoes and Allied Craftsmen v. Joseph F. Corcoran Shoe Co., Decisions*, Vol. I, pp. 78-80.

sue was put squarely before the Board for the first time in the Pierson case, decided December 28, 1933.¹⁵ Some 450 employees had gone on strike on October 16, 1933 because of the management's refusal to deal with the union and also to protest against unsatisfactory piece rates. At a hearing before the St. Louis regional labor board, the union demanded a written agreement. The Board handed down a recommendation in favor of the union. This recommendation the management rejected. The National Board took jurisdiction, and held a hearing on December 6, 1933. At this hearing the vice-president of the company declared that the management was willing to negotiate with the union, but "cannot and will not sign a written agreement with our employees." The company also objected to any agreement to submit future disputes to arbitration. The Board held that:

The disadvantages of basing a business relationship upon verbal understandings are too obvious to require comment by this Board. The Pierson Company must realize that only a written agreement can give both parties the sense of certainty and security which is essential to lasting industrial peace. Impartial arbitration of future controversies will have the same desirable effect.¹⁶

Accordingly, the Board ruled that: "The company and the representatives of the employees shall proceed at once to negotiate an agreement covering the labor conditions in this plant, and any agreement which may be reached shall be reduced to writing. . . ." The Board further ruled that if differences still remained after all

¹⁵ *United Garment Workers of America Local No. 247 v. Pierson Manufacturing Co., Decisions*, Vol. I, pp. 53-54.

¹⁶ *Decisions*, Vol. I, p. 53. In an earlier unofficial draft of the decision, the last sentence read: "The employer who protests his willingness to deal with the representatives of his employees but who categorically refuses from the outset to make any written agreement with them is paying lip service, at most, to Sec. 7(a)." (*NRA Release No. 2502, Dec. 29, 1933.*)

reasonable efforts at negotiation had failed, these differences should be submitted to arbitration.

In the Connecticut Coke case, decided June 30, 1934, the Board affirmed for the last time that "the reduction to writing of the agreement reached by negotiation accords with sound business policy."¹⁷ But the Board did not hold that the statute required, as a technical legal obligation, that the agreement be reduced to writing.¹⁸

UNION RECOGNITION

Closely bound up with the question of collective bargaining was the issue of "union recognition." By union recognition we mean here a willingness on the part of an employer to accept the union as the spokesman of his workers; and, more important, a readiness on the part of the employer to accept the union as a party vested with authority to negotiate a collective agreement. Many unions take recognition to mean also the closed shop, limitation of apprenticeship, participation by the union

¹⁷ *United Coke and Gas Workers' Union No. 18829 v. Connecticut Coke Co., Decisions*, Vol. II, pp. 88-89.

¹⁸ In the National Aniline and Chemical Company case, *Decisions*, Vol. II, pp. 38-42, the question of written agreements was also involved. Mr. du Pont used the occasion to state clearly a dissenting opinion on the subject which reads in part as follows:

"The law does not require a written contract between employer and employee. The conferences of November 1933 resulted in terms tentatively agreed upon, many of which were embodied in plant notices posted on November 25. It is not in evidence that any of these terms have been violated by the company nor that the possibilities of collective bargaining had been exhausted. Had there been misunderstanding between the parties the Board might well be called upon to demand a definite contract but this condition of misunderstanding does not exist."

It is somewhat difficult to follow the logic of Mr. du Pont's dissent. On the one hand, he states that the law does not call for written contracts. On the other hand, he suggests that there are certain circumstances such as "misunderstanding as to terms" as well as "a disposition to refuse to carry out terms verbally agreed upon" under which written contracts might be in order. See also p. 182.

in formulating and enforcing shop rules, seniority, and other rights. These aspects of recognition, however, we shall omit in our present analysis, because they were not vital to the issues which the Board had to consider.

Organized workers and anti-union employers have attached a large symbolic importance to the issue of "union recognition." To the union, "recognition" is a principle involving both its status in industry and its capacity to consolidate the support of its members. From the anti-union employer's point of view, "recognition" threatens his position as master of his own business and implies various practices obnoxious to him, especially the "closed shop."¹⁹ It took the Board a long time to develop a clear stand on union recognition, and its progress was slow and halting. Several logical steps may be distinguished in this development: (1) the concept that union officers or members of a union committee may claim recognition as individual representatives; (2) the concept that a union committee, in its collective character, may claim recognition; and (3) the concept that a union as such may claim recognition.

The right of union officers to demand recognition as individual representatives of workers was already implied by the decision in the Berkeley Woolens Mills case. It was more definitely stated in the Dresner, National Lock, and several other decisions.

A decision calling upon an employer to recognize a union committee was rendered by the Board in the Finck Cigar case.²⁰ The company was directed by the Board to bargain collectively with three workers who had been elected by the employees as a union committee. At the

¹⁹ For the Board's rulings on the "closed shop," see pp. 197-201.

²⁰ *Cigar Makers' International Union of America v. Finck Cigar Co., Decisions*, Vol. II, pp. 26-27.

same time, the Board ruled that the "employees shall, within a reasonable time, elect and present to the management an Industrial Relations Committee of their own choosing" for purposes of negotiations. Similarly, in the Bear Brand Hosiery case,²¹ the Board found that Section 7(a) was violated by the employer's refusal to bargain collectively with a union committee which was entitled to recognition as the representative of the workers.

The question of union recognition in its most critical form was forced upon the Board by the dispute in the captive mines. As related elsewhere,²² the strike in the captive mines of western Pennsylvania was settled towards the end of October 1933, thanks to intervention by the President. The coal operators and the United Mine Workers entered into verbal agreements with the President. In accordance with these agreements elections were held in the captive mines on November 22-23, 1933 under NLB auspices. In two-thirds of the mines the workers elected officers of the United Mine Workers as their representatives. In further accordance with the agreements, the operators and the union officers came together to negotiate written contracts. But the negotiations reached an impasse when the parties found themselves opposed on the question of the proper form of the contract. The United Mine Workers of America proposed the standard form of contract, granting union recognition, which read as follows:

Agreement made and entered into this _____ day of _____ 1933, between H. C. Frick Coke Co., coal operators, operating coal properties within the territory embraced in District No. 4 of

²¹ *Branch No. 66, American Federation of Hosiery Workers v. Bear Brand Hosiery Co.* (Beaver Dam plant), *Decisions*, Vol. II, pp. 67-68.

²² See Chap. III, p. 73, and Chap. IV, p. 101. For the NLB rulings, see *Decisions*, Vol. I, pp. 44-50.

the United Mine Workers of America, party of the first part, and District No. 4, United Mine Workers of America, on behalf of itself and each of its members, party of the second part.

The operators rejected the proposal. They proposed, instead, a form of contract which recognized the individual representatives at each mine, in their strictly individual capacities alone, and which recognized them, further, only as representatives of the majority of the workers. This form of contract read as follows:

An election having been held on the 23rd day of November, 1933, at the Maxwell Mine of the H. C. Frick Coke Co., and a majority of those voting thereat having chosen John L. Lewis, international president, United Mine Workers of America—[and other union officers similarly designated]—as their representatives for the purpose of collective bargaining:

Now, therefore, this agreement entered into this—day of—1933, between the said H. C. Frick Coke Co. and John L. Lewis, Philip Murray, Thomas Kennedy, William Hynes, C. C. Boner, and John Kurtz, as their representatives of the majority voting as aforesaid.

Instead of facing the question of union recognition, the Board evaded it by a compromise. It ruled that the contracts should read as follows:

An election having been held on the 23rd day of November 1933, at the Maxwell Mine of the H. C. Frick Coke Co., and a majority of those voting thereat having chosen John L. Lewis, international president, United Mine Workers of America—[and other union officers similarly designated]—as their representatives for the purpose of collective bargaining:

Now, therefore, this agreement entered this—day of—1933, between the said H. C. Frick Coke Co. and John L. Lewis, international president, United Mine Workers of America—[and other union officers similarly designated]—representing the employees of the aforesaid coal company, who elected them as their representatives, and such other employees as may authorize them to represent them in negotiations with their employers.

The compromise granted much more to the operators than to the union. The union as such was not recognized. The representatives were recognized in their individual capacities, but were described in their representative capacities as international or district officers of the union. A separate agreement was to be executed for each mine. It was not made clear whether the representatives were to represent all the workers eligible to participate in the election, or whether they were to represent only the majority who elected them.

The Board was thoroughly aware that its ruling did not touch upon the basic question. "Whether a contract made and executed in this form," the Board observed, "does or does not, as matter of law, amount to a recognition of the union is a question not before us and one which we need not here decide." Clearly, the decision accommodated itself to the balance of forces in what had been a major industrial disturbance, and was designed as far as possible to "save face" for both of two powerful antagonists. But it should be noted that the Board's ruling in this case did not purport to be an interpretation of Section 7(a). Instead, the Board's jurisdiction in the case was limited to interpreting the specific terms of a particular agreement made through the good offices of the President.

It was in the Hall Baking case,²⁸ decided March 8, 1934, that the Board for the first time clearly and expressly advanced the doctrine that a labor organization as such might claim recognition as a representative for the purposes of the statute. But the Board went further. "Much weight," it said, "is attached by the disputants to the question whether the parties to the final agree-

²⁸ *Bakery Drivers' Union Local No. 264 v. Hall Baking Co., Decisions*, Vol. I, pp. 83-84. Mr. du Pont did not concur in this decision.

ment should be the principals, viz., the employers and the employees, or their agents, viz., the union or the officials or the union identified as such." On this question, the Board ruled as follows:

The statute neither forbids nor requires the making of contracts naming a union or union officials as parties to the agreement. As the statute confers complete freedom upon the employees in their choice of representatives, we see no valid reason why the employer should object to a contract with the representatives of the employees in their capacity as representatives. Where the union represents the employees, the agreement may well be made with the union as the representative of the employees.

The precise language used by the Board—"the statute neither forbids nor requires" and "we see no valid reason" and "the agreement may well be made"—was hardly decisive. Nevertheless, the Board's intent was unmistakable. Where it could be shown that a union represented the employees, the union was entitled to recognition of the same character and extent as the employer was required to extend to any individual representative or representatives. This supposition is confirmed by the Board's recommendation that "a collective agreement be made between the Hall Baking Company and Bakery Drivers' Local Union No. 264, representing the Hall Baking Company employees."

A more positive and direct statement of the underlying doctrine of the Hall case was made by the Board in the Eagle Rubber case.²⁴ The Board's ruling read: "The statute requires the employer to meet with the duly chosen representatives of its employees, whether an em-

²⁴ *United Rubber Workers' Federal Labor Union No. 18683 v. Eagle Rubber Co.*, *Decisions*, Vol. II, pp. 31-33. Mr. du Pont dissented from the decision.

ployee or an outside union, and to negotiate actively in good faith to reach an agreement."²⁵

MAJORITY RULE

Aside from "union recognition" and free elections to determine the identity of employees' representatives, there was the question: What was the authority of such representatives in relation not only to those who voted for them, but to all the workers of a collective bargaining unit?

The question arose as a result of the attitude taken by employers who opposed elections on the ground that they were willing to bargain collectively with *each and every* organized group among their employees. Therefore, the employers argued, it was useless to hold elections. For even if the majority of the employees should designate representatives, the employers would still feel free, indeed would regard it their duty under the law, to recognize and deal with representatives of the minority groups as well. The representatives of the majority would be entitled to negotiate for the minority or minorities. These employers were arguing for what may be termed "collective bargaining pluralism." The statute, in their interpretation, was not meant to establish exclusive agencies of collective bargaining in all units, but to assure the co-existence of as many collective bargaining groups as could find adherents among the workers. Furthermore, if any individual worker did not desire to participate in collective bargaining, the statute did not impair his right to bargain individually. It made col-

²⁵ This clear-cut doctrine of union recognition was followed by the Board in the National Aniline and Chemical Company, Connecticut Coke, Union Overall, Gordon Baking, and several other cases. These cases are all noted in Chaps. VI and VII.

lective bargaining permissible for but not mandatory upon the individual employee.

The main reason for this attitude on the part of certain employers was their fear, (1) that the Board's electoral procedure would throw elections to trade unions, and (2) that the winning of an election by a union was but a first step towards the demand for "union recognition" and the "closed shop." This fear was justified to some extent. The election returns of the National Labor Board show that where the choice was offered them, the workers favored trade unions rather than company unions in a ratio of about two to one.²⁶ In view of the interpretation of collective bargaining by the Board, this meant that elections were an entering wedge for trade unionism.

The Board did not make a definite ruling on the majority rule issue until March 1, 1934, when it handed down the decision in the Denver Tramway case.²⁷ The Board here ruled that the representatives elected by the

²⁶ In all, the NLB and its regional boards held 183 elections, comprising 546 industrial units, distributed among 36 states and 50 industries. Trade unions polled 69.4 per cent of the valid votes and won by a majority in 74.7 per cent of the units. Employee representation plans polled 28.4 per cent of the valid votes and won by a majority in 28.5 per cent of the units. No representation, voted for by 2.2 per cent of the workers casting valid ballots, prevailed in 2.1 per cent of the plants. In 28 of the unit elections, which we need not consider further, the choice was between two or more rival trade unions. In 69 of the unit elections, no alternative to trade union representation was started. Here trade union representation was chosen by 77.8 per cent of the voters in 82.6 per cent of the units. In 449 of the unit elections, the workers had a straightforward choice between trade or company union. Trade union representation was here chosen by 67.0 per cent of the workers in 71.9 per cent of the units. See Emily Clark Brown, "Selection of Employees' Representatives," *Monthly Labor Review*, January 1935, Vol. 40, No. 1, pp. 1-18 (particularly Tables 2 and 3, p. 5).

²⁷ *Amalgamated Association of Street and Electric Railway Employees, Division 1001 v. Denver Tramway Corp., Decisions*, Vol. I, pp. 64-65. Certain language in the Budd case, decided Dec. 14, 1933, apparently took majority rule for granted. See note 28, p. 193.

majority of employees casting votes were empowered to bargain collectively on behalf of all the employees eligible to participate in the election. The case was one of the rare instances in which an employer already maintaining a company union was willing to permit an election. On November 10, 1933 the National Labor Board conducted a referendum. Of the 714 qualified voters, 36 did not vote, 353 voted for representation by the Amalgamated Association of Street and Electric Railway Employees, affiliated with the A. F. of L., and 325 voted for representation by the Employees' Representative Committee, a company union. The Amalgamated construed this result to mean that it had been designated as the exclusive agency through which the employees would henceforth negotiate collective agreements with the company. The management refused to place such a construction on the election. On the direct question, the majority of the Board held that:

... the Amalgamated . . . was selected by a majority of those voting, both as the agency through which the employees of the Denver Tramway Corporation would collectively bargain with the management in negotiating an agreement and in the settlement of any disputes which may arise between it and its employees. Any agreement reached in conformity with this decision must apply alike to all employees of the company.²⁸

Mr. du Pont, however, dissented, basing his dissent, it would seem, on the Johnson-Richberg announcement of February 3, 1934.²⁹

²⁸ *Decisions*, Vol. I, p. 65. Compare what is said in the Budd decision, more or less as *obiter dicta*: "once the employees determine the nature and extent of the organization which they are forming, it is incumbent upon the employer to meet for the purpose of collective bargaining those who represent a majority of the class of employees which their organization covers." *Decisions*, Vol. I, p. 61. (Italics ours.)

²⁹ See Chaps. IV and X. Mr. du Pont's dissenting opinion read: "1. A selection of representatives, for the purpose of collective bargaining with

Majority rule, in this decision, was interpreted by the Board in yet another sense from that given above. The Amalgamated proposed a contract with the company which read: ". . . [the said agreement shall govern] the relations to exist during the term of this agreement between the company and the members of the said association."

The implication was that in its capacity as exclusive agent, the Amalgamated would bargain collectively for its members alone. The Board rejected this implication, and ruled that the Amalgamated was to bargain on behalf of all the employees of the company. Accordingly, it was held that the compact should be modified, to make it clear that "any agreement reached in conformity with this decision must apply alike to all employees of the company,"³⁰ whether union members or not.

The Board's position on majority rule sometimes worked against a trade union. In the Real Silk case the Board by administrative action applied the doctrine of majority rule to deny a trade union's request that it be

the employer, by the employees of the Denver Tramway Corporation has been conducted by the National Labor Board. 2. The ballots cast show that 353 of said employees favor, as their agency for collective bargaining, the Amalgamated Association of Street and Electric Railway Employees of America; 325 of said employees favor, as their agency for collective bargaining, the Employees' Representative Committee, the plan now in use on the property of the Denver Tramway Corporation. 3. The agencies above mentioned shall represent respectively the members of said employees favoring them. 4. With respect to the 36 employees who cast no ballot the Denver Tramway Corporation shall bargain with them individually until such time as all or part of them shall choose representatives for collective bargaining."

³⁰ *Decisions*, Vol. I, p. 64. William Green and John L. Lewis dissented from the last sentence of the Board's opinion, which read: "The limitation to its membership in the form of contract submitted by the Amalgamated does not meet [the requirement of majority rule] and must be modified accordingly." (The same, pp. 64-65.)

recognized as a minority representative.³¹ In this case a majority of the workers, at an election conducted by the NLB in October 1933, had chosen to be represented in collective bargaining by an employee representation scheme.

THE UNIT FOR BARGAINING

The Board's election formula and its doctrine of majority rule gave rise to the question: Which is the proper unit for collective bargaining—the plant, a department thereof, or each separate craft? Only in a few cases, however, did the Board attempt to pass on the question.

In the Budd case³² the Board observed that "the members of the workers' [union] committee state that they demanded recognition, but it is not clear whether they claimed to represent all the employees or only those in the automobile production department." On this aspect of the case, the Board ruled:

We cannot say whether the committee was supported by a majority of the workers in the Budd plant. The plant apparently consists of several departments which are engaged in different activities. Whether representation should be by plant or department is a matter which concerns primarily the workers themselves. In a plant of the size of this company, the workers may feel that they can best be represented when they organize on the basis of departments. It is not for the employer to dictate the type of organization which should be established. Once the employees determine the nature and extent of the organization they are forming, it is incumbent upon the employer to meet for

³¹ *American Federation of Full Fashioned Hosiery Workers v. Real Silk Company (Indianapolis plant)*. The case is not included among the edited *Decisions*, although the release speaks expressly of a "decision." The Board did not act unanimously; the release says that the Board "by majority vote has rejected the appeal" without, however, identifying the members who voted pro and con on the question. *NRA Release No. 4647*, Apr. 27, 1934.

³² *United Automobile Workers Federal Labor Union No. 18763 v. Edward G. Budd Manufacturing Co., Decisions*, Vol. I, pp. 58-61.

the purposes of collective bargaining, those who represent a majority of the class of employees which their organization is designed to cover.

In the National Lock case the employer tried to assert the doctrine that labor organizations under the statute must be confined to separate departments of the establishment.³³ The employer set up an employee representation plan under which separate meetings were held, and separate representatives elected, department by department. This doctrine the Board rejected, holding that "there is no requirement [under the statute] that the organization which is set up shall follow the departmental lines of any plant. Organization and representation are matters which concern the employees exclusively."

In the Gordon Baking case there were two plants, East Side and West Side, but the union apparently was representative of the West Side plant alone.³⁴ The employer sought to justify his rejection of the union's proposal to negotiate a contract on the ground that it did not represent the entire body of employees. The Board upheld this contention on the ground that:

[The union] committee purported to represent the West Side employees. If the West Side plant constitutes an appropriate unit for collective bargaining, the obligation of the company to bargain collectively with the committee could not be successfully challenged. However, the company's Detroit business is such that the two plants should not be treated as separate units for the purpose of collective bargaining. The same rules of operation obtained in both, and the managerial force, the

³³ *Federal Labor Union No. 18830 v. National Lock Co., Decisions*, Vol. I, pp. 16-20.

³⁴ *Bakery Wagon Drivers' Union Local No. 51 and Bakery and Confectionery Workers, Locals No. 20 and 77 v. Gordon Baking Co., Decisions*, Vol. II, pp. 53-54.

employees, and the delivery routes were shifted from time to time, from one to the other. Since there is no indication that the union had authority to speak for the whole group of Detroit drivers or attempted to do so, the alleged refusal of the company to negotiate with the committee on the basis of the demand for an agreement contained a closed-shop provision and covering wages, hours, and other terms of employment, was not of itself wrongful.⁸⁵

THE "CLOSED SHOP"

Majority rule together with union recognition bear on the issue of the "closed shop."⁸⁶ Section 7 of the NIRA was silent on this critical issue. True, it may be argued that some of the language in Section 7(a) definitely precludes the employer from requiring the employee, as a condition of employment, to belong to any labor organization whatever, be it an outside trade union or an inside company union.⁸⁷ But there is no evidence that in enacting Section 7(a) it was the intent of Congress to invalidate closed-shop contracts between an employer and a bona fide trade union⁸⁸ in so far as such contracts were previously valid at law. On the contrary, there is clear evidence that Congress intended to outlaw the yellow dog contract, that is, the system whereby the employer requires the employee to pledge himself not to join a trade union and/or to promise to become a

⁸⁵ The National Labor Relations Board later ruled that the West Side plant was an appropriate unit for collective bargaining. Case No. 248, decided Oct. 3, 1934.

⁸⁶ For a discussion of the meaning and forms of the closed shop see the article by W. M. Leiserson in *The Encyclopedia of the Social Sciences*, Vol. III, pp. 568-70. For the attitude of the courts towards the closed shop prior to the enactment of the NIRA, see E. E. Witte, *The Government in Labor Disputes*, 1932 (particularly Chap. 3).

⁸⁷ "That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing."

⁸⁸ For a discussion of the intent of Congress, see Chap. II.

member of a company union. The language of Section 7(a)—“refrain from joining, organizing, or assisting”—must be read in the context of this intent. It may reasonably be argued that the statute first restrains the employer from requiring that his workers join an inside union dominated by himself, and then restrains the employer from requiring his workers not to join an independent outside union.⁹⁹

On the whole, the Board avoided taking a clear stand on the validity of a closed-shop agreement, as such, between an employer and a bona fide trade union. On two occasions it ruled rather clearly on the point; but one of the rulings was a “declaratory judgment” rather than

⁹⁹ Such at least was the opinion of the counsel of the Board, Mr. Milton Handler, which he expressed in an address to the Legal Division of the NRA apparently delivered some time in April 1934, which we quote from an undated mimeographed copy.

“Does the statute outlaw the closed shop? Is the worker denied the right to choose his representatives if he is required to join a trade union? Clause two prevents the imposition of the condition that a worker join a company union. It does not expressly invalidate the requirement that he join a bona fide union. He may not, however, be required to refrain from joining a labor organization of his own choice. The wording of the clause therefore permits the construction that a worker can be required as a condition of employment to join a bona fide union. If the union by-laws do not prevent his joining any other organization, there is no impairment of his right to belong to a labor organization of his own choice.

“It must not be forgotten that this statute was intended to increase rather than limit the rights of labor. There is nothing in the legislative history of the statute disclosing any intention to forbid the closed shop. It would require fairly definite proof that Congress intended to invalidate collective bargaining agreements of long standing. Under all the circumstances, I believe it can be maintained that a closed-shop arrangement is in harmony with the requirements of the federal law. The issue has arisen collaterally in recent state court cases determining whether a strike for a closed shop is legal justification for picketing etc. and has been resolved both for and against the position taken here.

“As a matter of policy, it seems to me that closed-shop arrangements should be sanctioned only where: (a) the union is a legitimate as distinguished from a company dominated union; (b) the union imposes no inequitable restrictions upon its members or upon admission to membership; (c) the union is operated on democratic principles; and (d) the union itself has been designated by the employees as their representative.”

a decision; the other was an arbitrational award. In all of its true decisions which touched upon the closed shop, directly or indirectly, the Board was cautious and obscure; and it is easy to draw conflicting conclusions from the results.

The Board expressly sanctioned the closed-shop provision of a collective agreement in the arbitration award in the Peoples Pharmacies case.⁴⁰ Two sections of the agreement, the Board ruled, should read as follows:

Employ members in good standing—The employer agrees not to hire any registered pharmacist or assistant, not in good standing with the association or not a member of the association, except that the association is unable to supply the employer with the character of help he desires, whether white or negro, male or female, Gentile or Jewish within 24 hours after he has requested such help, then the said employer may employ such persons as are eligible.

No discharge—No employee shall be discharged, furloughed, or "vacationed" except upon due and sufficient cause or with the consent of the association, except as hereinbefore otherwise provided, but, in the event that the financial condition of the business is or becomes such as to demand a reduction in employment, such reduction may be made either by a discharge or a reduction of the hours of employment; provided the same is done in good faith and without benefiting one employee at the expense of another.⁴¹

This was not a decision which involved the interpretation of Section 7(a). It was a specific award applying to a particular arbitration. But it seems reasonable to suppose that the Board would not have upheld provisions which so patently established a closed shop, unless it was convinced that the provisions in question were

⁴⁰ *Maryland Association of Employees Pharmacists, Inc. v. Peoples Pharmacies, Inc., Decisions*, Vol. II, pp. 36-37.

⁴¹ Mr. du Pont dissented from the two sections quoted.

consistent with the meaning and intent of the statute.

Not a decision, but what might be called a "declaratory judgment," was handed down by the Board in the Quinlan Pretzel case.⁴² There was no existing dispute, and no complaint had yet materialized. Instead the Board was merely asked to give its opinion on the obligation of the employer to dismiss workers for non-payment of union dues in accordance with the provisions of a collective agreement. To include such a clause in a collective agreement is tantamount, of course, to establishing the closed shop. On April 11, 1934 the employer and the union, in accordance with recommendations of the regional labor board, concluded an agreement reading in part: "All of the original members of the union who were on the payroll July 19, 1933, as well as employees hired since that date must pay up their dues in the next two weeks or be dismissed." The question—whether the company's obligation included "dues which may become delinquent in the future"—was then referred to the National Labor Board. The Board responded to the request in the following language:

The National Labor Board has decided that the provision in the contract entered into by you April 1, 1934 is not a violation of Section 7(a) of the National Industrial Recovery Act and that the Quinlan Pretzel Company obliging itself to dismiss employees for non-payment of union dues which may become delinquent in the future is not a violation of Section 7(a) of the National Industrial Recovery Act.

The release accompanying this "declaratory judgment" is discreetly quiet on its possible theoretical import. Nothing is said about its bearing on the closed shop. Yet it is clear that the Board held Section 7(a)—in

⁴² *Pretzel Workers Union v. Quinlan Pretzel Co.*, *NRA Release No. 4863*, May 5, 1934. The case is not listed among the Board's published decisions, although the release is headed as a "decision."

this case at least—to mean that an employee might be required, as a condition of employment, to pay dues to a bona fide labor organization which is in contractual relationship with the employer. In brief, the Board upheld the validity of the compulsory check-off, which is one element in the closed shop.⁴³

Less favorable to the closed-shop arrangement was the decision of the National Labor Board in the Denver Tramway case.⁴⁴ The form of agreement proposed by the union would have limited eligibility to enjoy the benefits of its terms, so the Board believed, to workers who were members of the union. Reasoning, as we have seen, from the principle of majority rule, the Board concluded that "any agreement reached in conformity with this decision must apply alike to all employees of the company. The limitation to its membership in the form of the contract submitted by the Amalgamated does not meet this requirement and must be modified accordingly." This decision struck indirectly at one of the principal arguments used by unions to justify the closed shop: that only workers who accept the burdens of union membership should be entitled to enjoy the benefits of the collective bargain. The Board's ruling implied that the union must negotiate on behalf of members and non-members alike. Practically speaking, any union which did so would be abandoning a powerful weapon by which it could persuade non-members into membership, and help to establish a closed shop *de facto*.

THE ROLE OF ARBITRATION

Granted that in collective bargaining both parties exert every reasonable effort to conclude a formal agree-

⁴³ The Board compromised on the check-off question in the Captive Mines ruling, *Decisions*, Vol. I, pp. 44-50.

⁴⁴ *Decisions*, Vol. I, pp. 64-65.

ment, but cannot agree on the terms to be contained in the agreement, does Section 7(a) call for the joint submission of the differences to arbitration?

The National Labor Board at no time maintained that the right of collective bargaining, as guaranteed by the statute, was circumscribed by the duty to submit to compulsory arbitration. It handed down eleven arbitral awards but only upon the voluntary joint submission of both parties in interest.⁴⁵ In at least seven decisions, however, it recommended⁴⁶ that the parties to a dispute should submit the points at issue to arbitration in the event that they could be adjusted by voluntary agreement.⁴⁷ On several occasions, moreover, the Board did use language suggesting that the parties to a controversy were morally bound, if not legally obliged, to put their differences to arbitration rather than stake the issues on the outcome of a strike or a lockout.

In the Connecticut Coke case,⁴⁸ the decision wherein the Board stated its theory of collective agreements most fully and lucidly, the chief point at issue was the union's

⁴⁵ Arbitral awards of the National Labor Board: New Orleans Belt Bridge, *Decisions*, Vol. I, pp. 3-4; Full Fashioned Hosiery industry, Vol. I, pp. 9-13; Mason Builders of New York, Vol. I, p. 22; Philadelphia Bakeries, Vol. I, pp. 29-31; Allied Kid Co., Vol. I, pp. 33-34; Ward Baking Co., Vol. I, pp. 37-39; Oklahoma City Street Railways, Vol. I, p. 43; Richmond *Times Dispatch*, Vol. II, pp. 11-12; Wilkes Barre Lacc, Vol. II, pp. 13-14; Air Line Pilots Wage Dispute, Vol. II, pp. 20-21; Peoples Pharmacies, Vol. II, pp. 36-37.

⁴⁶ We use the term "recommended" rather than "decided" advisedly. What the Board recommended it could not, in the event of non-compliance, seek to enforce by reference to the NRA and/or the Department of Justice. What it decided could be so enforced, or at least the attempt could be made. True "decisions," it must be stressed, were those rulings alone which found a violation of Sec. 7(a) by the employer.

⁴⁷ The Pierson, Philadelphia Rapid Transit, Whatcom County Dairymen, Kibler Trucking, Haverhill Shoe, Consolidated Aircraft, and Connecticut Coke cases, all noted elsewhere in this or the preceding chapter.

⁴⁸ *United Coke and Gas Workers Union No. 18829 v. Connecticut Coke Co.*, *Decisions*, Vol. II, pp. 88-89.

demand that the 1929 weekly wage scale be restored. This demand the union was willing to submit to arbitration in accordance with the provisions of a proposed agreement. The Board's decision, although explicit on the subject of the collective agreement, was somewhat evasive on the question of arbitration. Referring to arbitration in general, the Board observed: "The establishment of peaceful machinery for the settlement of differences is the only effective way to insure stable relations, and avoid the economic losses resulting from conflict and strife." The Board was of the opinion that both parties should continue negotiations looking toward a written contract "establishing if possible machinery for the settlement of grievances and differences." Furthermore, "in the event of a wage arbitration, the arbitration board created by agreement of the parties should be guided by the scale of wages prevailing in the industry at large and in related industries in the New England states."

Evidently, the Board was recommending the creation of arbitration machinery in general as well as the specific arbitration of the wage controversy. But these recommendations were not put down as legal necessities arising out of Section 7(a). Indeed the decision implicitly ruled out compulsory arbitration, for it states: "the law does not compel the parties to reach agreement." This granted, the obligation to arbitrate is moral, not legal.

In the Pierson Manufacturing case,⁴⁰ arbitration was conceived of in a twofold role. On the one hand, it was the logical sequel to the failure of both parties, despite the exertion of every reasonable effort to negotiate, to conclude a written agreement dealing with wages, hours,

⁴⁰ *United Garment Workers of America Local No. 247 v. Pierson Manufacturing Co., Decisions*, Vol. I, pp. 53-54.

and other working conditions. On the other hand, arrangements to arbitrate grievances were in a sense the alternative to a formal bilateral contract between the employer and the organized employees. For after touching upon the merits of written agreements, as a means of preserving industrial peace, the Board observed: "Impartial arbitration of future controversies will have the same desirable effect.

In general, the Board tried to impress upon disputants that "where negotiations fail and mediation is unsuccessful there must be either arbitration or industrial warfare," and that "he who refuses to invoke the machinery of peace must assume the responsibility for the conflict which follows."⁶⁰ But the Board was careful to emphasize that the recourse to arbitration inherent in the concept of collective bargaining is a moral imperative and not a legal duty. Only when arbitration was made an express provision of a collective contract and machinery was established for the purpose did it become a definite obligation as part of the general contractual relationship.

THE RIGHT TO STRIKE

Closely allied to arbitration was the question whether or not Section 7(a) limited the right to strike.⁶¹ The Board approached this question in the same way as it did that of arbitration. It never interpreted the statute to mean that, by guaranteeing collective bargaining, Sec-

⁶⁰ Language used in the *Whatcom Dairymen's case*, *Decisions*, Vol. I, p. 74.

⁶¹ Of peculiar significance was the *Haverhill Shoe case*, *Decisions*, Vol. II, pp. 1-3. The strike was called by the union in protest against renewing the arbitration clause in a collective contract which had just expired. The Board scolded the union for striking; recommended the inclusion of an arbitration clause in the new contract, and further recommended arbitration of all other points at issue.

tion 7(a) impaired the right to strike so far as recognized by pre-existing law. The Board did, however, in all strike cases on which it had to rule, recommend that the strike be called off as a preliminary to setting the machinery of collective bargaining into motion. On many occasions, the Board also expressed the idea that collective bargaining presupposed certain moral, if not legal, obligations to refrain from making use of the strike (or lockout) except as a means of last resort.⁶²

It was a fundamental premise of the Board that collective bargaining could not proceed in an atmosphere of industrial conflict. The Board also believed that precipitate resort to force—whether the strike or the lockout—was incompatible with the processes of collective bargaining.⁶³ It never accepted what trade unionists ordinarily maintain: that the strike itself is one of the most important and powerful instruments of collective bargaining, an instrument which brings negotiations to an end when persuasion and argument fail.

Thus, whatever the causes or issues of a strike, the Board always urged that it be called off. In all such cases the Board also recommended the reinstatement of the strikers "without prejudice or discrimination" and/or by means of a "preferential list." The purpose of the latter recommendations is evident. By calling off their strike, the workers relinquish their principal pres-

⁶² Thus, in the Haverhill Shoe decision, the Board declared: "It is difficult to condone the sudden calling of a strike in an industry in which there has been a long history of successful collective bargaining, immediately upon the expiration of the old agreement at the very inception of negotiations for a new one, and long before an impasse is reached." (*Decisions*, Vol. II, p. 2.)

⁶³ Thus in the Budd case the Board held in part: "The hasty resort to a strike before the processes of collective bargaining had been exploited . . . [reveals a] lack of understanding of the meaning of collective bargaining." (*Decisions*, Vol. I, p. 60.)

sure weapon, and abandon the chance of maintaining their statutory rights by extra-legal force. The strikers, therefore, must be protected by assurance that their jobs will be returned to them.

Where no practical considerations stood in the way, the Board recommended the immediate reinstatement to their former positions of all the strikers. Where practical considerations did stand in the way, for example, in case of seasonal lay-off, temporary shutdown, or replacement by other workers in strikes not involving a violation of Section 7(a) by the employer, the Board recommended gradual reinstatement, usually in order of seniority, by means of a preference list from which the employer should recruit his staff before turning to outside sources of labor supply. There was, however, one important qualification. Workers guilty of violence in connection with a strike were disqualified for reinstatement.⁶⁴

In some cases the workers asked to be reinstated when reinstatement would have meant displacing workers then in the hire of the employer. In strike cases, such a demand would arise where the employer had recruited a new staff after the walkout was called. The demand also arose in lockout cases, where the employer discharged union members and hired a new force of non-union workers. The Board assented to the union demand on this point only in cases where it could be shown that the employer had violated Section 7(a); that is, had been animated by discriminatory intent in replacing the union workers. If no violation of Section 7(a) could be shown, the Board confined itself to recommending "in its media-

⁶⁴ The cases in which these principles were applied are too numerous to cite here. The reader is referred to the *Decisions* of the Board, in both volumes of which he will easily find illustrations of the principles stated in the text.

tional capacity" the creation of a preference list for re-employment. The mere fact of displacing union workers was not to be regarded as discrimination within the meaning of the statute. To sustain the charge of discrimination, it had to be shown that the displacement was motivated by hostility to the workers' self-organization.⁵⁵

Although bent on maintaining industrial peace, the Board did not regard all strikes as unjustified. It generally deprecated strikes which were called hastily, before every possible means of peaceful adjustment had been tried. The Board's idea was that, before striking, workers should seek to negotiate with the employer; and that failing in this, they should take recourse to existing means of mediation, conciliation, and voluntary arbitration. This principle, if it is a true statement of the law of Section 7(a), means that workers have a moral duty not to strike save as a last resort,⁵⁶ but that a strike is justifiable when an employer has violated Section 7(a) and refuses to enter negotiations.⁵⁷ In a number of other cases the Board found that employers and workers shared the responsibility for a strike, the former by neglecting the requirements of the laws, the latter by overhasty action.⁵⁸

⁵⁵ See International Narrow Fabrics case, *Decisions*, Vol. II, pp. 86-87; Lion Match case, Vol. II, pp. 62-63; Parlor Furniture case, Vol. II, pp. 78-80.

⁵⁶ See the National Lock case in which the Board said that the statute obliges the workers "to present grievances and demands to the employer before striking" and that "negotiations should precede rather than follow the calling of a strike" (*Decisions*, Vol. I, pp. 15-20). See also the Board's ruling in the Whatcom County Dairymen's case, *Decisions*, Vol. I, pp. 73-74; and the American Stores case, *Decisions*, Vol. II, pp. 69-70.

⁵⁷ In the Dresner case, the Board held that "the employer's refusal to enter into negotiations left the employees with no alternative but to strike" (*Decisions*, Vol. I, p. 27). See also Eagle Rubber case, *Decisions*, Vol. II, pp. 31-33; and Harriman Hosiery case, Vol. I, p. 68.

⁵⁸ See Cleveland Worsted Mill case, *Decisions*, Vol. II, pp. 17-19.

SUMMARY

Summing up, it may be said that through its rulings on the specific issues arising under Section 7(a) the National Labor Board laid the foundations for a "common law" of labor relations in American industry. This common law it transmitted to its successor, the National Labor Relations Board. The basic principles of this common law were present in Senator Wagner's Labor Disputes bill of 1934 and Labor Relations bill of 1935. We postpone discussion of the National Labor Relations Board and of the Labor Disputes bill to later chapters. In the final chapter of our study, we shall recur to the "common law" as finally elaborated and summarize its most important principles and implications.

CHAPTER VIII

SUCCESSSES AND FAILURES

We have reviewed the NLB's attempt to formulate and put into effect a "common law" of Section 7(a). It is now time to put the questions: How far can it be said that the Board succeeded or failed? What were the factors which determined the nature of its performance?

Because the Board exercised diverse functions, its work must be judged by more than one criterion. To the exercise of each separate function, distinct canons of appraisal must be applied. It will be found further that the board performed some functions better than others, largely because of the varying nature of conditioning factors.

The work of the Board aroused much comment, both favorable and critical. The Board itself was the center of friendly support and of vigorous attack. Its performance was evaluated one way or another according to the critic's bias. There thus came into being a considerable body of interested opinion. The method to be followed in the present chapter will be (1) to present a statement of the main partisan arguments and (2) to examine the Board's record of performance on the basis of what seem to us objective tests and standards.

THE CASE FOR THE NLB

This section will present the sort of *ex parte* case which the NLB might have made itself—a case which would be concurred in, with reservations, by many individuals and groups who feel that the Board performed useful work.

Proper allowance must be made for the extraordinary circumstances with which the Board had to contend. There was thrust upon it the most controversial and vexing issue of the national recovery program—the struggle between labor and management for the right to shape industrial relations—a struggle loaded with traditional biases, fears, and hatreds. Ostensibly the contest was waged on the legalistic plane: the meaning of Section 7(a). In fact, however, the divergences in interpretation of the statute gave formal expression to a more realistic underlying question: Which form of labor organization, the trade or the company union, should henceforth prevail under the régime of “industrial self-government”?

The Labor Board had to work out a policy to meet this problem unaided, if not indeed hindered by the NRA. Only a handful of codes made specific provision for the establishment of joint industrial relations boards which could take upon themselves some of the burdens of the task.¹ The administrators of the NRA in their search for “perfect neutrality” usually made confusion worse confounded when they attempted to take a hand in the matter.² Moreover, the Board had to hammer out its policies in the heat and turmoil of strikes, and under the pressure of the government’s re-employment program. Both of these factors were more favorable to the shaping of compromises than to the formulation of principles. In view of these circumstances, it can be claimed that the performance of the Board was more than satisfactory. It was successful in ending many strikes and in averting more—and that after all was the main purpose for which it was created.

¹ See Chap. X.

² See Chaps. III and X.

But the Board did much more. It evolved a theory of collective bargaining, which if acted upon by workers and employers would probably serve to diminish strikes and lockouts. Though slowly and by piecemeal, the Board developed a body of principles which constituted a doctrinal foundation for a rational system of labor relations. These principles were in accord with democratic ideas and traditions. Contrary to popular misconceptions, the Board's policy was not partisan; it neither sanctioned the trade union as the exclusive agency to bargain collectively, nor ruled out the company union as a lawful instrumentality of self-organization. The Board proceeded on the fundamental premise that it was for the workers themselves, through the exercise of free choice, to say what form of labor organization they preferred. Elections and majority rule were intended only to enable the workers to function as "free men."

Further, the Board by clarifying the obligations of employers under Section 7(a) put real meaning into the term "the right to bargain collectively." The Board did so, notwithstanding that such clarification was distasteful to many employers and at times unacceptable to trade unionists. The Board hewed to its basic democratic concepts, whether the chips flew in the face of employers or workers. Free elections and majority rule were intended to promote neither the "closed shop" nor the "open shop"; neither the A. F. of L. union nor the company union; nor yet any one of various contending "dual" unions. They were intended to establish the identity and authority of the employee representatives, whether individual persons, officers of a union, or unions in their corporate capacity. The elections brought over an American political concept into the field of industrial relations.

True, the Board hesitated and delayed, but finally did come to grips with the vexatious problem of company versus trade unions. To solve this problem, it affirmed and tried to put into effect rules of fair labor practices to run parallel, as it were, to the fair trade practices of the codes. These rules, if legally recognized and enforced, would have put an end to the many industrial disputes caused by discrimination of employers against union workers and by "interference, coercion and restraint" in matters of labor representation.

The Board admittedly sought to bring about settlements by agreement. It did not issue decisions until every means of amicable adjustment was exhausted. This procedure helped to promote a spirit of reasonableness in industrial relations. It did much to soften the die-hard attitude among employers toward dealing collectively with their employees and to remove the deep-rooted suspicion of trade union workers concerning their employers' good faith. True, such procedure slowed up the settlement of industrial disputes. But much, if not most, of the dilatoriness blamed on the Board was due, in fact, to the defective functioning of the NRA's compliance machinery, and to the passive, questioning attitude of the Department of Justice. Last, but not least, the Board brought the issue of industrial relations into public prominence. It should thus be credited with most of whatever progress was made during the first year of the NRA toward public realization of the need for formulating a national labor relations policy.

Such is the line of argument by which the NLB might have attempted to justify its record of performance.

THE CASE AGAINST THE BOARD

The most severe critics of the National Labor Board fell into two groups, anti-union employers and radical

trade unionists; that is, the representatives of the extreme "right" and the extreme "left" point of view. Their arguments ran counter to one another in fundamental premises, but had much in common in the selection of factors stressed.

THE "RIGHT" POINT OF VIEW

The employer opposed to trade unions approved the efforts of the Board to end and prevent strikes. In fact, in his opinion, this should have been its one and only function. The other activities of the Board he regarded as arbitrary assumptions of power. The Board, he argued, had no business to interpret Section 7(a). The section formed part of a statute enacted by Congress, and if it needed interpretation, the courts were the proper interpreters. It was also *ultra vires* for the Board to contrive a Reading Formula with its paraphernalia of elections and agreements, and to interfere in contests between "inside" and "outside" labor unions.

Even more vigorously did the anti-union employer object to the substance of the Labor Board's interpretations of Section 7(a). The tendency of the Board's doctrines, he maintained, was to force the trade union and its policy of the "closed shop" upon American industry. This, he claimed, was neither the intention of the Recovery Act nor the purport of American political and constitutional principles. Moreover, the NLB's interpretation of Section 7(a) was at variance with that developed by General Johnson and Mr. Richberg. Thus the question arose: What right did the Board have to enunciate doctrines contrary to those enunciated by the NRA?³

The anti-union employer further condemned the ac-

³ For the Johnson-Richberg interpretation of Sec. 7(a), See Chaps. III and X.

tivities of the Labor Board because, in his opinion, they conveyed to American workers a false vision of what Section 7(a) promised and implied. The workers were thus made an easy prey to professional trade union organizers and agitators. The trade union organizers, the anti-union employer argued, must stir up trouble in order to hold their members. Thus the result of the Board's intervention was to disturb the industrial peace, not to maintain it. This was especially true of such of the Board's decisions and interpretations as implied that the company union might constitute an attempt on the part of employers to interfere with the workers' right to organize, and therefore might be condemned as unlawful.

It was no part of the Board's duty, in this view, to pass even inferentially upon the validity of company unions. All that the Board should have done was to see to it that employees were not coerced into joining either company or trade unions. The company union had a perfectly valid right to exist, so long as employees wished to belong to it. Moreover, it was entitled to function as an agency for collective bargaining even if only a minority of the workers in a plant belonged to it. Therefore, in so far as the Board forced upon workers the alternative of choosing between a company union or trade union, it was perverting the meaning and purpose of Section 7(a).

THE "LEFT" POINT OF VIEW

If anti-union employers criticised the Board for not confining its activities to strike prevention, militant trade unionists attacked the Board for being a "strike-breaking agency." From the point of view of militant labor, the strike is the only effective weapon which workers possess

for forcing concessions from their employers. True, this weapon should be used with due regard to tactical and strategic requirements. But labor should always be ready to resort to it in order that employers should not be allowed to forget their employees' potential power of direct mass action. Because the NLB sought to eliminate strikes and to substitute in their stead mediation and arbitration, its activities were detrimental to the interests of organized labor.

The Board pursued methods which were all the more questionable and harmful, militant labor leaders argued, since it constantly persuaded workers to end strikes by promising them "settlements" which it lacked the power to bring about. The Board could not compel employers to "recognize" a trade union; could not reinstate workers found to be victims of discrimination, and could neither bring about elections if management objected to them, nor collective agreements if management did not wish to agree. Despite its pretensions at being a "Supreme Court of Industrial Relations," the Board served merely to retard an aggressive labor movement which began to develop under the stimulus of the NIRA. From the "left" point of view, the NLB deprived the workers of their best chance of winning their rights under Section 7(a)—that is, through militant strikes under a new and vigorous leadership which was springing up from the "rank and file."

The Board was perpetrating fraud, the left-wing laborites maintained, when it asked the workers to put their case in the hands of the government. The government, especially the NRA and the Department of Justice, it was charged, showed no real desire to enforce the rights guaranteed to workers by the statute. All that the government aimed at was giving employers mo-

nopolistic power in the guise of codes of fair competition. Because it lacked power, because it made vain promises, because it delayed swift action by aroused workers, because it spent its time in futile legalistic dilly-dallying, the NLB played into the hands of anti-union employers and set back labor self-organization. So the radical labor leaders maintained.

THE RECORD OF THE NLB

In the preceding sections, we summarized what were frankly partisan viewpoints. We pass now to what seems to us an objective appraisal of the Board's record. We shall consider separately the performances of the Board (1) as an adjustment agency, (2) as a quasi-judicial tribunal, and (3) as a body interested in enforcing its decisions. We pass over its performance as an arbitrator because this was an incidental and minor function.

ADJUSTING DISPUTES

From time to time, the NLB released statistical summaries purporting to demonstrate the efficiency of its entire system, including regional boards, in settling labor disputes. These statistics indicate a high ratio of settlements to disputes; and suggest that the Board was a highly effective adjustment agency. Up to July 1, 1934, the National Labor Board system handled 4,277 cases involving more than 2 million workers. Some 83 per cent of the cases were recorded as "settled," two-thirds by "agreement." The Board had mediated in 1,496 strikes involving over a million workers. "Settlements" were recorded in three-fourths of the cases. The Board claimed that 1,800,000 workers had been "returned to work, or kept at work, or had their other dis-

putes adjusted." More than half of the cases, 2,741, involved alleged violations of Section 7(a).⁴

The official figures, however were not of a high statistical order. They were gathered hastily and offhand in the rush of more urgent work. There was a considerable amount of double counting, in the sense that the same cases were sometimes included in the separate totals of the regional and the national boards. In contrast, many cases settled quietly were not counted at all. Nobody on the staff of the NLR was charged with specific responsibility for doing this statistical work; and no real effort was made to perform it in a craftsmanlike manner.

There was reason also to suspect that the published figures were presented for propagandistic rather than informative purposes. As compiled from time to time, the statistics took the form of press releases, designed, in part, to further the Board's claim that it was successful in maintaining industrial peace. To illustrate, no genuine effort was made to draw a line between what were truly "settlements" and what were merely "dispositions," or cases formally removed from the docket. Also a case would be counted as "settled" because of an "agreement" reached, although there was no certainty that the agreement was being kept. Again, the National Board exerted no serious efforts to check up on the reports from certain regional boards which might have been inclined, for purposes of prestige, to overstate the success of their activities.⁵

But even if complete and reliable statistics were available, it would still be an error to judge the success or

⁴ See *NRA Release No. 6295*, July 7, 1934, for complete tables.

⁵ Examination by one of the authors of the reports from the regional boards revealed a widespread tendency to treat cases "pending" as the alternative to cases "settled"; that is, once a case was disposed of in some way it was recorded as a "settlement."

failure of the Board by reference to the quantitative data alone. No doubt, many thousands of workers were persuaded to call off strikes and return to their jobs as a result of the intervention by the national and the regional boards. Many thousands of workers more were persuaded not to begin striking. If we assume that strikes as such were wrong, because they retarded the progress of the re-employment campaign, it follows that the Labor Board system, so far as it ended and averted strikes, performed its adjustment function well. But the Board was not created to end and avert strikes on any and all terms. It was presumably given the task of settling disputes on terms consistent with the provisions of Section 7(a) of the Recovery Act. The appropriate canons of appraisal to be applied to its performance are therefore not quantitative but qualitative. The questions to be asked are: What terms were typically included in settlements? How did the Board's settlements "take"? Were agreements made under Board auspices kept faithfully? Did employers and employees comply in general with the decisions it handed down?

As described elsewhere, the Board's settlements generally provided for calling off strikes, reinstating the strikers, holding an election, obliging the employer to recognize and deal with the elected representatives of his employees, and the submission of all future controversies to impartial determination. Most important were the provisions concerning elections of representatives and the employer's obligation to deal with them. These provisions gave substance to the Board's interpretation of the rights granted by Section 7(a).

The Board conceived of its settlement formulae as impartial and as in accord with the proper construction of the statute. Yet, in most disputes that came before the Board, the employers had little to gain and much

to lose from the holding of elections. As a rule, the employers had either already established "employee representation plans" or were in the process of so doing. Election à la Reading Formula under the auspices of the Board thus meant to most employers only a disturbance of the "peace," and the unpleasant task of proving that the company union was the genuine and free choice of the employees. In contrast, the trade unions generally had little to lose and everything to gain from the elections held by the Board. In fact, a major reason why trade unions were willing to abide by Board recommendations urging them to call off strikes was their belief that in a free election they were quite likely to win against the company unions.⁶

This explains why the impression became current that the Labor Board favored the trade unions. It also explains why many employers attacked the Board on the ground of partiality, and joined in a campaign to arouse public opinion against a system which, so they charged, was furthering "monopoly" control by the American Federation of Labor. The record, however, seems clear that the Board sought to be non-partisan in accord with Section 7(a). It attempted neither to "impose" the trade union nor to "outlaw" the company union. If its election procedure worked in favor of the trade unions, that was because of the temper of the workers and because in most disputes the unions were the weaker party whom public intervention would tend to help.

Setting forth a theory of collective bargaining was, however, but a beginning. From the standpoint of effectively adjusting labor disputes the more important ques-

⁶ According to the Brown study noted in Chap. VII, there were 449 unit elections wherein workers had the choice between trade unions and employee representation plans. Trade unions won in 323 units; employee representation plans in 126. Trade unions polled 61,231 votes; employee representation plans, 30,095.

tions are: To what extent was it possible to bring about voluntary agreements? To what extent was there compliance with decisions? The record of the National Board makes somewhat sad reading on this point. It was replete with instances of failure to achieve voluntary agreements and of refusal by employers to comply with decisions. The regional boards, even more than the National Board, ran into similar difficulties. After mid-December 1933, the Labor Board system began to be overwhelmed with instances of non-compliance, usually of employers. By early spring 1934, efforts to obtain compliance continually taxed and finally exhausted the energies of the national and the regional boards.⁷

In contrast to this, it must be emphasized that in a large number of cases handled by the Labor Board system, employers were thoroughly willing to accept its

⁷ Excluding arbitrational or quasi-arbitrational cases, we may consider 75 of the cases included among the edited *Decisions*. More than half of these, that is 43, involved earlier failure by the regional boards to achieve a settlement; 18 cases of refusal to comply with a regional board "decision" or ruling; 9 cases of refusal to comply with a regional board "recommendation" or proposal; 9 cases of refusal to submit to regional board jurisdiction. (Of this total of 36 cases, workers were the non-complying and/or resisting party only three times.) In 7 more cases, the regional board was unable to adjust the differences, completing the total of 43. In 6 additional cases there was an appeal from a regional board ruling; 5 times by employers and once by workers. It is to be noted also, that on at least three occasions, regional boards were made parties to injunction proceedings instituted by employers.

The National Board was able to bring the Department of Justice to act only once—in the Weirton case, and succeeded in having the NRA Compliance Division remove 4 Blue Eagles, two of which were later restored. In 11 cases, the Board issued "show cause" citations; in 5 cases it recommended the removal of the Blue Eagle. (These figures do not include cases later acted on by the National Labor Relations Board.)

Five cases were transmitted to the Attorney General: Weirton, *NRA Release No. 3556*, Mar. 1, 1934; Harriman, *NRA Release No. 3812*, Mar. 13, 1934; Roth, *NRA Release No. 3881*, Mar. 17, 1934; National Lock, *NRA Release No. 5094*, May 16, 1934; Great Lakes Steel, *NRA Release No. 5308*, May 24, 1934.

good offices so that no question of failure to agree or refusal to comply arose. The Board received most publicity in the press for those controversies in which its authority was "defied." It received little publicity in controversies in which its authority was accepted. Moreover, the National Board and its regional agencies performed their most effective work in a multitude of disputes which were settled informally and expeditiously, by a quickly convened conference, by the intervention of staff mediators, by telephone calls, and in other informal ways. Of many of these disputes, no formal records were kept in the files of either the National Labor Board or the regional affiliates.

Nevertheless, as instances of non-compliance multiplied and were broadcast publicly, it became increasingly difficult for the Labor Board system to secure compliance with its decisions. It was not so much that the Board's authority was defied by certain employers, but defiance, it became evident, did not result in quick penalties. By the end of June 1934 only four employers had been deprived of the Blue Eagle.⁸ Moreover, the government's suit to restrain the Weirton Steel Company from interfering with the Board's conduct of an election had come to grief for the time being in the United States District Court of Wilmington, Delaware, on May 29, 1934.

As employers increasingly challenged the Board's authority and went unscathed, the workers also began to lose faith in it. The existence of the Labor Board system notwithstanding, the spring months of 1934 were not-

⁸ A. Roth and Co. of Chicago, Apr. 3, 1934; the Harriman Hosiery Mills of Harriman, Tenn., Apr. 20, 1934; the National Lock Co. of Rockford, Ill., May 23, 1934; and the Milwaukee Electric Railway and Light Co., June 6, 1934. The Harriman and Milwaukee Blue Eagles were later returned. The recommendation in the Great Lakes Steel case was not acted upon, an amicable adjustment having been obtained. (Data obtained from the NLB and from the NRA Compliance Division.)

able for a nation-wide outburst of strikes, characterized in many instances by violence. In short, organized labor apparently did not pay heed to the Board's pleas that strikes should be used only as an instrument of final resort. What was more significant, in some instances trade unions proved reluctant to submit to Board mediation, and even opposed Board decisions.*

To summarize, the National Labor Board and its regional boards were an important factor in composing labor disputes and provided a mechanism—lacking in all but a few of the codes of fair competition—for regulating industrial relations. The fact that there existed an instrument for bringing employers and employees together to work out agreements; and the further fact that this instrument was highly publicized and had some prestige, brought about settlements in many controversies where agreement would not have been reached otherwise. As a rule, the Board's adjustment formulae were far more successful when expressed in a mutual "agreement" than when prescribed by a "decision." The Board's decisions, however, even in the absence of enforcement, helped to clarify the issues involved in the problem of collective bargaining. These decisions thus posited many of the questions that must be answered if a rational process of settling industrial disputes is to be set up in the United States.

INTERPRETING SECTION 7(a)

Forced thereto by circumstances, the NLB evolved into a sort of quasi-judicial body. Its primary intention, however, was not so much to act like a court of law as it was to evolve a set of principles and devices—a theory of labor relations—which would appeal to employers and workers alike because of rationality and justice.

* Notably the Haverhill shoe strike referred to on pp. 204 and 205.

The Board was practically forced to evolve such a theory. Section 7(a) was vague and ambiguous. Trade unionists read into it the idea that the trade union was to be the exclusive instrumentality for collective bargaining; employers interpreted it to mean that company unions were adequate for the purpose. Many of the disputes which came before the Board thus centered around the issue of what practices in the formation of company unions to counteract trade unions should be regarded as violations of Section 7(a). But although the Board eventually came to realize the need for principles of interpretation, it was slow in formulating them. It evolved them piecemeal, under the pressure of circumstances, in connection with the particular issues raised by specific cases. As a result it proceeded much of the time without a clear idea as to the doctrinal basis on which it was operating. Thus majority rule was not enunciated clearly until March 1, 1934; recognition of representative labor unions not until March 8, 1934.

But the Board was opposed on principle to handing down *obiter dicta*; to issuing gratuitous pronouncements on points not formally presented to it for adjudication. On many issues, therefore, the Board did not take an unequivocal stand all through its history. The question of the closed shop was the outstanding example. But the same was true of other basic issues: Must unsettled differences in collective bargaining go, finally, to arbitration? Did the duty to exert every reasonable effort to conclude agreements similarly imply eventual arbitration? Must contracts be written?—and similar questions.

ENFORCEMENT

By December 1933 it had become evident that the Board could not depend on moral suasion as a device for getting employers to comply with its recommenda-

tions. Those employers who were determined not to deal with trade unions questioned the Board's right to conduct elections and rejected its rulings on employee representation plans and collective bargaining with trade unions. The Board was thus forced to consider ways and means of enforcing its rulings within the limited powers it possessed.

As related elsewhere, between December 16, 1933 and February 23, 1934, the powers of the Board were extended and a definite procedure for enforcing its rulings was laid down.¹⁰ It was on the basis of the executive orders of February 1 and 23, 1934 that the Board started its first court prosecutions, made its first authorized recommendations to the Department of Justice for legal prosecutions, and started a series of "show cause" hearings preliminary to the removal of the Blue Eagle. But even under these executive orders, the powers of the Board were very narrow, being limited in substance to the right to refer cases to other disciplinary agencies in the executive branch of the government. The orders did not specify what action the NRA must take or how soon. Thus many loopholes were left for the NRA to nullify the disciplinary procedure of the Board, if the former body felt inclined to do so. Moreover, the Department of Justice was not obliged to initiate proceedings if its judgment on the merits of a case differed from that of the Labor Board.

In trying to understand why the enforcement record of the Board was so poor, we must lay heavy stress on these factors outside of the Board's control. A few small employers were persuaded into compliance by the threat of "show cause" hearings; but that was about all. The

¹⁰ President's Executive Order No. 6511 of Dec. 16, 1933; No. 6580 of Feb. 1, 1934; No. 6612-A of Feb. 23, 1934. See Chap. IV.

Budd case was settled by the NRA on a basis entirely different from the recommendations of the Labor Board in its decision of December 14, 1933.²¹ The Harriman Mills were deprived of their Blue Eagle only after a long interval of inaction.²² The Weirton case was still in the federal courts when the National Labor Board passed out of existence.

DETERMINING FACTORS

In analyzing the conditions which affected the Board's record of performance, we shall follow the procedure of considering separately its several functions. It should be kept in mind, however, that the special conditions bearing specifically on each separate function had also a general effect on the total work of the Board.

As an agency of conciliation and mediation, the Labor Board system was sometimes slow and dilatory. One reason for this was inadequate staffing in the face of a rush of work. Another was the lengthy and formal procedure necessitated by hearings in cases where settlement attempts had failed in the first instance. Much of the Board's time was taken up in formally hearing numerous cases of minor importance which the regional tribunals had failed to settle. It should be realized, however, that most of these were cases inherently difficult of settlement.

The system as a whole, particularly the National Board, was also hampered in its conciliation and mediation activities by the fact that hearings often tended to

²¹ After a series of misadventures, a settlement was obtained pursuant to the automobile settlement—the NLB's greatest defeat.

²² But the Blue Eagle was returned under circumstances which aroused considerable controversy. The Attorney General, it might be noted, did not believe there was sufficient evidence to warrant a prosecution, but nevertheless upheld the Administrator's right to remove the Blue Eagle. See *NRA Release No. 6207*, July 2, 1934.

take the outward appearance of court proceedings.¹⁸ This brought in the lawyer's brief, encouraged prolonged haggling over technical points, and stiffened the attitude of disputants anxious to "save face." As a matter of fact, when the Board was successful in its mediation, it was chiefly through informal conferences held prior to or after formal hearings.

The National Board's exercise of interpretative functions was another factor which operated against the success of its mediatory functions. The Board's interpretation of Section 7(a) offended and antagonized certain groups of disputants, particularly anti-union industrialists. So did the Board's efforts at enforcement, feeble as they were. It is obvious that as a mediatory body the Board was undermining its own strength; (1) by taking a definite attitude on highly controversial issues, and (2) by having recourse to compulsion.

The National Board was in a particularly bad situation for the performance of the interpretative functions which it assumed. Its bipartisan character¹⁹ made it impossible for it to reach quickly clear and definite principles on the issues that were vital. The sympathies, loyalties, and prejudices of both its employer and employee members were known in advance. They represented interest groups. Inevitably, the decisions handed down by the Board were bound to be viewed with suspicion. Employers distrusted them because it was known that high officials of the A. F. of L. had participated in rendering them. Employees distrusted them because of the known participation of big business men.

The Board undertook to interpret Section 7(a) without first securing a formal grant of authority to do so.

¹⁸ See Chap. V, pp. 126-28.

¹⁹ See Chap. V, pp. 118-19.

It thus exposed itself to challenge and defiance which undermined its prestige and made it increasingly difficult for it to develop its interpretations. Moreover, as the Board's theory of industrial relations evolved, it became apparent that the "common law" was in conflict with the ideas of the Administrator and General Counsel of the NRA. This not only caused confusion among employers and employees genuinely desirous of abiding by Section 7(a), but strengthened the opposition to the NLB. Thus the Board's interpretative activities were further hampered.

In view of these difficulties, it was not surprising that the Board proceeded haltingly in its interpretative functions, and that it remained vague on some of the most vital issues that came before it. Also, its legal advisers had no conclusive body of precedents interpreting Section 7(a) to fall back upon. In the absence of the United States Supreme Court decisions, they had to rely mainly on their own wits. Only slowly could these advisers break through the maze of legalistic concepts and become familiar with the concrete issues and realistic conditions which made the problems of industrial relations under the NRA so difficult and vexing.

The inability of the Labor Board to enforce its settlements and decisions was by no means its own fault. Not until February 1934 was the Board authorized to initiate enforcement proceedings of any kind. And even then, the powers of enforcement were meager and rested on executive order rather than on statute. The most that the Board could do was to refer cases of non-compliance to the Department of Justice and/or to the NRA. In the former event, any further move depended on the judgment of the Department of Justice. In the latter event, the Compliance Division was apparently animated by the

idea of a minimum of governmental compulsion. In either case vigorous pushing of the issues raised by the NLB might have precipitated the Recovery Act into the courts—a course the Administration was seemingly anxious to avoid.

Should the National Labor Board have tried to hand down theoretically enforceable decisions at all? Some would say that the NLB erred in trying to advance beyond achieving settlements, if possible, by voluntary agreement. At most, these critics will say, the Board should have issued recommendations where agreement was impossible. By attempting to do more, by laying down formal decisions, the Board was bound to raise embarrassing questions about its own powers and jurisdiction, and to stir up resentment and distrust detrimental to its mediatory activities. Other persons would say that the NLB was justified in trying to see that Section 7(a) was enforced. In the opinion of such persons, the Board was meant to be more than a mediation body; its true purpose was to function as a "Supreme Court of Industrial Relations" under the Recovery Act. Like any other court, the Board should interpret the law and take steps to enforce its decisions. To some degree the members of the Board themselves inclined to one or the other of these views.

In any event, the NLB was long delayed in securing the right to initiate enforcement proceedings. This tardiness meant an accumulation of instances of defiance and non-compliance, which was responsible for a loss of prestige. And in the interim, the effort to enforce decisions before authority to do so was granted was bound to result in failure. Such failure encouraged recalcitrants among employers and disappointed organized labor.

In spite of the factors which rendered the NLB in-

effective, much of the extreme criticism of the Board is hardly borne out by the facts. Consider a common charge, the accusation that the Board became a "strike-breaking agency." To be sure, the Board helped to end strikes. But it is doubtful that many strikes which would otherwise have been won by the workers were lost because of the intervention of the Board. Most of the strikes which were handled by the National Labor Board had little chance of success to begin with. They were of the "organizational" type, conducted for the purpose of "recognition" by a union attempting to penetrate into new territory, where a strong tradition against trade unions prevailed. Also, the continued unemployment throughout 1933-34 was not favorable to the success of many strikes. In fact, by ending and averting strikes, the Board often saved workers newly converted to trade unionism as well as "infant" unions from bad defeats. True, the Board was not of much help to the workers in gaining for them their demands; but it brought into the arena of public discussion the issues which were agitating the wage earners of the country.

Consider also the common charge that the Board was operating under false pretenses in that it sought to end and avert strikes without possessing the power to grant to workers not merely their reasonable demands, but even demands which the Board's interpretation of the statute implied were theirs as a matter of law. True, the Board was too hopeful during its earlier phases that anti-union employers would voluntarily submit to a radical reconstruction of industrial relations. But as soon as the Board realized that moral suasion was insufficient to accomplish this end, it sought to fortify itself with enforcement powers. Its chairman, moreover, sought to procure legislation which would define the Board's pow-

ers and jurisdiction on a firm statutory basis. Finally, the Board acted on the belief that the Administration would support firm, vigorous, and unrelenting enforcement of its doctrines of collective bargaining. These hopes were not fulfilled. Nevertheless, the Board was justified in hoping for their eventual realization; and what enforcement powers it did possess, it did not hesitate, finally, to use. By this time, however, it was too late.

In sum, the Board tried to settle the problems of collective bargaining under the NRA by relying upon the democratic procedure of elections. This policy was not acceptable to many anti-union employers. Their opposition frustrated the Board; the workers also began to have less faith in it. Thus the Board became on the one hand the object of an organized campaign of criticism and attack, and on the other a helpless body unable to enforce its opinions or rulings. The situation was an impossible one. By the spring of 1934 it became clear that the Board must be reorganized or it would collapse. Senator Wagner embarked valiantly on the course of reorganization and on March 1, 1934 he introduced his Labor Disputes bill. The fate of that bill and its effects on the course of collective bargaining are considered in the next chapter.

CHAPTER IX
ENACTMENT OF PUBLIC RESOLUTION NO. 44

By the end of February 1934 those most concerned with the work of the National Labor Board, particularly its chairman, had become convinced that it was necessary to reconstruct the Board on a permanent, statutory basis. The Board in its then status was practically impotent to enforce its decisions. Moreover, after a relatively quiet period during the winter months, strikes centering around Section 7(a) were beginning to break out once again. A legislative restatement of Section 7(a) which would remove ambiguities, it was believed, would diminish the possibility of further and continued industrial conflict.

Accordingly, Senator Wagner and his associates drafted a bill that became known as the Labor Disputes bill, which he introduced in the Senate on March 1, 1934.¹ This bill, referred to the Committee on Educa-

¹ 73 Cong. 2 sess., S. 2926, "A bill to equalize the bargaining power of employers and employees, to encourage the amicable settlement of disputes between employers and employees, to create a National Labor Board, and for other purposes." Representative William Connery (Mass.) introduced a similar bill in the House.

On Feb. 21, 1935 Senator Wagner introduced a similar measure under the title National Labor Relations bill (74 Cong. 1 sess., S. 1958, "A bill to promote equality of bargaining power between employers and employees, to diminish the causes of labor disputes, to create a National Labor Relations Board, and for other purposes"). This bill was reported out favorably with certain amendments by the Senate Committee on Education and Labor on May 2, 1935 (74 Cong. 1 sess., S. rep. 573 to accompany S. 1958). The measure, as reported out of committee, passed the Senate on May 16, 1935 after a cursory debate, by a vote of 63 to 12. (*Cong. Record*, daily ed., May 16, 1935, No. 102, p. 7980.) On May 21, 1935, S. 1958 was reported out favorably by the House Labor Committee, amended to the extent of placing the Board under the Department of Labor. See p. 243.

tion and Labor, immediately became the center of heated controversy and of a protracted legislative struggle which, culminating in the enactment of Public Resolution No. 44, had a decisive influence on the later course of collective bargaining under the "New Deal." In the present chapter we shall analyze the provisions of the Labor Disputes bill, summarize the arguments for and against it, and briefly relate its transformation, first into the National Industrial Adjustment bill and then into Public Resolution No. 44. We shall also give a point by point comparison between the Labor Disputes bill and the Labor Relations bill of 1935, its lineal successor.

THE LABOR DISPUTES BILL

The Labor Disputes bill professed to have three main purposes in view: (1) to equalize the bargaining power of employers and employees; (2) to encourage the amicable settlement of disputes between employers and employees; and (3) to create a National Labor Board.² We shall consider the main provisions of the bill in their bearing on these three principal objectives.

EQUALITY OF BARGAINING POWER

Title I, Sections 1 to 6 inclusive, contained various provisions intended to secure equality of bargaining power between employers and employees. Section 1 stated the title of the proposed act—the Labor Disputes Act. Section 2, the declaration of public policy, departed sharply from the individualistic tradition of industrial relations. It began by stating that tendencies in modern economic life toward "integration and centralized economic control" have long since destroyed "the balance

² Compare the virtually identical purposes of the 1935 measure.

of bargaining power between the individual employer and the individual employee." The individual unorganized worker, in the words of the bill, has been rendered "helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living." The inadequate recognition of the "right of employees to bargain collectively through representatives of their own choosing has caused strikes, lockouts, and similar manifestations of economic strife," and as a consequence, commerce has been obstructed and the general welfare imperiled.*

In view of all these considerations, the bill declared

* Compare the statement in the original draft of Senator Wagner's 1935 measure: "Equality of bargaining power between employers and employees is not attained when the organization of employers in the corporate and other forms of ownership association is not balanced by the free exercise by employees of the right to bargain collectively through representatives of their own choosing. Experience has proved that in the absence of such equality the resultant failure to maintain equilibrium between the rate of wages and the rate of industrial expansion impairs economic stability and aggravates recurrent depression, with consequent detriment to the general welfare and to the free flow of commerce." (Section 1.)

The Senate Labor Committee amended Sec. 1 to read as follows: "The inequality of bargaining power between employer and individual employee which arises out of the organization of employers in corporate forms of ownership and out of numerous other modern industrial conditions, impairs and affects commerce by creating variations and instability in wage rates and working conditions within and between industries and by depressing the purchasing power of wage earners in industry, thus increasing the disparity between production and consumption, reducing the amount of commerce, and tending to promote and aggravate business depression. The protection of the right of employees to organize and bargain collectively tends to restore equality of bargaining power and thereby fosters, protects, and promotes commerce among the several states.

"The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial unrest which burden and affect commerce. Protection by law of the right to organize and bargain collectively removes this source of industrial unrest and encourages practices fundamental to the friendly adjustment of industrial strife." (*Cong. Record*, daily ed., May 16, 1935, No. 102, p. 7948.) See also pp. 261-62.

it to be the policy of Congress to "remove obstructions to the free flow of commerce," to "encourage the establishment of uniform labor standards," and to "provide for the general welfare" by removing the obstacles which prevent the organization of labor for the purpose of cooperative action in maintaining its standards of living. These ends it was proposed to accomplish by encouraging the equalization of the bargaining power of employers and employees and by providing agencies for the peaceful settlement of disputes. The declaration of policy, it is obvious, was inspired by trade union ideology. But in the formal sense the measure was ostensibly based on the familiar powers of the legislature over "interstate commerce" and the "general welfare."⁴

Section 3 of the bill constituted a mere catalogue of definitions. Some of these definitions, however, were of extreme importance in view of the principles which they implied and the practices against which they were aimed. Provision one defined the term "person" to include "individuals, partnerships, corporations, legal representatives, trustees in bankruptcy, receivers, legal representatives of a deceased person."⁵ This precluded an employer from avoiding the burdens of the bill by having recourse to any one among the several legal forms of business enterprise. Provision two defined the term "employer" to include "a person who has one or more employees."

⁴ Compare the statement in Sec. 1 of the 1935 measure: "It is hereby declared to be the policy of the United States to remove obstructions to the free flow of commerce and to provide for the public welfare by encouraging the practice of collective bargaining, and by protecting the exercise by the worker of full freedom of association, self-organization, and designation of representatives of his own choosing, for the purposes of negotiating the terms and conditions of his employment or other mutual aid or protection." (See also pp. 261-62.)

⁵ In substantial accord is Sec. 2(1) of the 1935 measure.

Specifically excluded were the United States, any state or municipal corporation, other government instrumentalities, any "person subject to the Railway Labor Act as amended from time to time," and finally, "any labor organization, or anyone acting in the capacity of officer or agent of such labor organization."⁶ Provision two thus brought within the purview of the act the small as well as the large employer; the financial, commercial, agricultural, and household employer as well as the industrial employer.⁷ At the same time, by excluding labor organizations, provision two precluded the use of the bill against trade unions.

Provision three of Section 3 defined the term "employee" to include "any individual employed by any employer under any contract of hire, oral or written, expressed or implied." Also included thereunder were helpers and assistants, regardless of the immediate source of their compensation, if employed with the "knowledge, actual or constructive" of the employer. Provision three further extended the term "employee" to cover "any individual formerly so employed whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." In contrast, provision three excluded from the term "employee," "any individual who has replaced a striking employee." Thus, although the striking worker was to be regarded for the purposes of the bill as being vested with a tenure of employment, the worker who took the

⁶ In substantial accord is Sec. 2(2) of the 1935 measure. As amended by the Senate Committee, this section reads: ". . . any labor organization (other than when acting as an employer) . . ." (*Cong. Record*, daily ed., May 16, 1935, No. 102, p. 7948.)

⁷ Excluded as employees under the 1935 measure are agricultural, domestic, and family workers. Sec. 2(3).

place of a striking worker would not be entitled to similar consideration.⁸

Provision four defined the term "representative" to include "any individual or labor organization."⁹ This brief definition was highly significant because it ruled out the argument that, where the statute spoke of representatives, it meant nothing more than individual persons in their individual capacities.

The term "labor organization"—a crucial term—was defined in provision five as any "organization, labor union, association, corporation, or society of any kind in which employees participate to any degree whatsoever, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, or hours of employment."¹⁰ This definition was wide enough to cover both the trade union and the company union. But it was not wide enough to cover organizations existing for the *sole purpose* of administering pension schemes, unemployment and accident insurance plans, programs for the recreation, amusement, instruction, or cultural advancement of employees. An employer would thus be free to promote pure "welfare" organizations among his employees without becoming subject to the burdens of the bill. But any "welfare"

⁸ Striking workers and workers out of employment because of an "unfair labor practice" are defined as employees in the 1935 measure. Nothing is said, however, about workers who replace strikers. Important also is the express statement that "the term . . . shall not be limited to the employees of a particular employer. . . ." Sec. 2(3).

⁹ In accord is Sec. 2(4) of the 1935 measure.

¹⁰ In substantial accord is Sec. 2(5) of the 1935 measure. As amended by the Senate Committee, this section reads: ". . . any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." (*Cong. Record*, daily ed., May 16, 1935, No. 102, p. 7948.)

organization which transformed itself into an instrumentality of collective bargaining—which attempted to deal with wages, hours, and other working conditions—would become subject forthwith to the provisions of the bill.

UNFAIR LABOR PRACTICES

The heart of the Labor Disputes bill was contained in Sections 4 and 5. Section 4 stated the rights of employees in the following words:

Employees shall have the right to organize and join labor organizations, and to engage in concerted activities, either in labor organizations or otherwise, for the purpose of organizing and bargaining collectively through representatives of their own choosing or for other purposes of mutual aid or protection.¹¹

Evidently Section 4 was an attempt to restate the rights of Section 7(a) of the NIRA in more direct and specific form. Where Section 7(a) was vague on the question of whether or not employees could bargain collectively through trade unions as such, Section 4 of the Labor Disputes bill specified the right to join "labor organizations." Because "labor organizations" as provided in Section 3 might function as employee representatives, this was tantamount to requiring the "recognition" of representative trade unions.

The real significance of Section 4, however, derived from Section 5, wherein were enumerated six types of behavior forbidden to employers as "unfair labor practices." All six provisions sought to limit the activities of

¹¹ Compare Sec. 7 of the 1935 measure: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." The attempt by Senator Tydings to amend this by adding, "free from coercion or intimidation from any source" was voted down by the Senate, 50 to 21. *Cong. Record*, daily ed., May 16, 1935, No. 102, p. 7974.

the employer with respect to the self-organization of workers; none of them attempted to limit similarly directed activities on the part of labor organizations. Provision one stated that it was an unfair labor practice for an employer to impair the rights guaranteed in Section 4 "by interference, influence, restraint, favor, coercion, or lockout or by any other means."¹² Here was a much more detailed catalogue of disabilities than those set forth in Section 7(a) of the Recovery Act. The five remaining provisions of Section 5 elaborated and clarified the meaning of provision one. Provision two declared that it was an unfair labor practice for an employer "to refuse to recognize and/or deal with representatives of his employees, or to fail to exert every reasonable effort to make and maintain agreements with such representatives concerning wages, hours, and other conditions of employment." This formula, repeating similar language in the Railway Labor Act, gave voice to the National Labor Board's construction of Section 7(a).¹³ The value of the formula hinged on the meaning of the term "reasonable effort." The National Labor Board contemplated by the bill would have no power of compelling employers and trade unions to conclude collective agreements; it could only decide to its own satisfaction whether or not any employer in a given case was exerting every "reasonable effort." And this determination, naturally, would be subject to final adjudication by federal courts.¹⁴

¹² Compare Sec. 8(1) of the 1935 measure: ". . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

¹³ It also gave voice to the later construction of Sec. 7(a) by the National Labor Relations Board. See Chaps. VII and XI.

¹⁴ No similar unfair practice was stated in the original draft of the 1935 measure, although Sec. 9(a) authorized employee representatives to bargain collectively "in respect to rates of pay, wages, hours, or other basic conditions of employment." But the Senate committee added, as

Much more specific were provisions three and four. They imposed drastic limitations upon any activities by which an employer might seek to promote, establish, or maintain company unions. Thus provision three made it an unfair labor practice for any employer "to initiate, participate in, supervise, or influence the formation, constitution, by-laws, other governing rules, operations, policies, or elections of any labor organization."¹⁶ And provision four made it an unfair labor practice for an employer "to contribute financial aid or other material support to any labor organization, by compensating any one for services performed in behalf of any labor organization, or by any other means whatsoever."¹⁶ These provisions did not "outlaw" the company union, which remained just as valid as it was under Section 7(a) of the NIRA. But they laid restraints on practically every practice by means of which employers have been accustomed to encourage company unions.¹⁷

Sec. 8(5), a fifth unfair practice—" . . . to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a)." (*Cong. Record*, daily ed., May 16, 1935, No. 102, p. 7949.)

¹⁶Compare Sec. 8(2) of the 1935 measure: ". . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

¹⁷Compare the same. But Sec. 8(2) contains the proviso: "That subject to rules and regulations made and published by the Board . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

¹⁸These two provisions may be compared with (1) the Texas and New Orleans case under the Railway Labor Act of 1926, 281 U. S. 548 (1930); (2) the decisions of the NLB and of the NLRB bearing on company unions, Chaps. VI, VII, and XI; (3) certain language in the amendments to the Bankruptcy Act of 1933 and 1934, 47 Stat. L. 1481; U.S.C. title 11, Secs. 205 (p) and (q), and 48 Stat. L. 912, U.S.C. Title 11, Secs. 207 (l) and (m); (4) similar language in the Emergency Transportation Act of 1933, 48 Stat. L. 214; U.S.C. Title 49, Sec. 257 (e); (5) Mr. Eastman's interpretation thereof as co-ordinator of transportation, *New York Times*, Dec. 9, 1933; (6) above all, the Railway Labor Act as amended in 1934, 48 Stat. L. 1185.

According to provision five, it was an unfair labor practice for any employer "to fail to notify employees in accordance with the provisions of Section 304(b)." Section 304(b) was abrogative in character, with effects that might be construed to be retroactive. It read as follows:

Any term of a contract or agreement of any kind which conflicts with the provisions of this act is hereby abrogated, and every employer who is a party to such contract or agreement shall immediately so notify his employees by appropriate action.¹⁸

Evidently provision five was aimed at company unions which had been established prior to the enactment of the Labor Disputes bill by practices which the bill characterized as unfair. But the constitutionality of any such *ex post facto* provision was highly doubtful.

Provision six prohibited "discrimination" by an employer for or against any labor organization. It was declared an unfair labor practice for any employer "to engage in any discriminatory practice as to wage or hour differentials, advancement, demotion, hire, tenure of employment, reinstatement, or any other condition of employment, which encourages membership or non-membership in any organization."¹⁹ This formula was directly aimed at such tactics as discharging workers for refusing to join a company union; refusing to hire or advance workers because of membership in a trade union; paying members of a company union higher wages or giving them shorter hours than trade union workers

¹⁸ No similar provision is contained in the 1935 measure.

¹⁹ Compare Sec. 8(3) of the 1935 measure: "... by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"; to which is added 8(4)—"to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act."

performing identical tasks. Its purpose was to compel employers to treat all employees on an equal footing regardless of their union affiliations.

Provision six was subject, however, to two important provisos. The first read:

Provided, that where a contract or agreement of any kind is or shall be in force between an employer and a group of employees, the provisions of such contract or agreement regarding conditions of employment shall not, because of anything contained in this paragraph, compel an employer to observe similar conditions of employment in his relations with all his employees.²⁰

It was not clear what the language meant. Probably it was intended to mean that if an employer entered into an agreement with some particular craft organization, he was not obliged to enter into identical agreements with other organizations covering different crafts. Yet it might also be construed to mean that it was permissible for the employer to make different contracts with different organized groups pursuing the same crafts. This would assume a plurality of bargaining groups, each group bargaining for itself. Such a result would have been in conflict with the stand taken by the National Labor Board on majority-minority representation, and would have raised difficult questions bearing on "discrimination."

The second proviso read:

Provided further, that nothing in this act shall preclude an employer and a labor organization from agreeing that a person seeking employment shall be required, as a condition of employment, to join such labor organization, if no attempt is made to influence such labor organization by any unfair labor practice,

²⁰ Nothing akin to this is contained in the 1935 measure. But Sec. 9(b) thereof empowers the Board to define collective bargaining units.

if such labor organization is composed of at least a majority of such employers' employees, and if the said agreement does not cover a period in excess of one year.²¹

This proviso was obviously intended to validate closed-shop agreements executed under the conditions specified. The proviso was no doubt intended to safeguard trade unions in the execution of closed-shop contracts. Nevertheless, a closed-shop contract with a company union would also be valid, provided the company union had not been formed and was not being maintained by means of unfair labor practices.

Both provisos were susceptible of a construction which might be taken to evidence a trade union bias in the Labor Disputes bill. Under the first, an employer might grant to his organized workers a favorable contract, which need not necessarily apply to the unorganized workers. This, if done without "discrimination," would serve as an inducement on workers to enroll in the union enjoying the contract. Under the second proviso, it might be expected that only trade union closed-shop agreements would be valid. This followed from the numerous rigid and extreme restraints which the bill imposed on the activities of the employer with respect to initiating and promoting labor organizations.

Section 6 was the enforcing clause of Title I. It invested the several district courts of the United States with jurisdiction to prevent and restrain "any unfair labor practice that burdens or affects commerce or obstructs the free flow of commerce, or has led or tends to lead to a labor dispute that might affect or burden or obstruct

²¹ Compare a like proviso to Sec. 8(3) in the 1935 measure. As amended by the Senate committee, the proviso reads in part: "if such labor organization is the representative of the employees as provided in Section 9(a)" (*Cong. Rec.*, daily ed., May 16, 1935, No. 102, p. 7949.) Sec. 9(a) requires majority rule.

the free flow of commerce." It was the duty of the several district attorneys of the United States—under the direction of the Attorney General (but solely at the request of the National Labor Board)—to institute appropriate equity proceedings in their respective districts.²²

POWERS OF THE BOARD

Title II of the Labor Disputes bill was concerned primarily with the organization, procedure, and powers of the National Labor Board to be established thereunder. Sections 201-03 inclusive dealt with the personnel of the Board, their compensation, the *situs* of the Board's activities, and similar matters.²³

The principal powers of the Board as set forth in Sections 204 to 207 inclusive, were: first, to mediate and conciliate in labor disputes; second, to restrain unfair labor practices, by issuing "cease and desist" orders; third, to function as an arbitrator upon voluntary joint

²² In substantial accord was Sec. 11 of the original draft of the 1935 measure. But this provision was eliminated by the Senate committee, a change which, together with other amendments, would allow the Board direct access to the federal courts. *Cong. Rec.*, daily ed., May 16, 1935, No. 102, p. 7951.

²³ There were to be seven members, to be appointed by the President with the advice and consent of the Senate. Three members representing the public were to serve full time at a salary of \$10,000 a year each. Two of the members were to be designated as representatives of employers and two as representatives of employees. These partisan members were to serve one year each, at a per diem compensation of \$25. All members were to be eligible for reappointment. The President was to designate one of the public members as chairman. The Board was empowered to avail itself of the services of a salaried staff, and to establish regional boards from time to time whenever necessary. Under the 1935 bill three members, all presumably "impartial," were to be appointed. It should be stressed that under both the 1934 and 1935 measure, the National Labor Board in contemplation was to be independent of the Department of Labor. But in the form of the 1935 measure, reported out by the House Committee on Labor, the Board was to be created "in the Department of Labor." 74 Cong. 1 sess., H. rep. 1147 (by Mr. Connery to accompany S. 1958), p. 2 and pp. 11-14.

submission; fourth, to investigate and determine representation controversies. The cease and desist orders, it was provided, should be subject to judicial review in the federal courts, the "facts" as found by the Board being accepted as "conclusive."²⁴ In determining representation controversies, the Board might hold secret ballot elections; but nothing was said about majority rule or proportional representation.²⁵ In the exercise of its investigatory powers the Board could administer oaths and affirmations, take depositions and evidence, require the presence of witnesses and the production of books.²⁶ Also the Board could, from time to time, "make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of the act."²⁷

We need not develop those provisions of Title II which dealt with the intricate federal court procedures for reviewing and enforcing the orders, determinations, and awards of the Board.²⁸ Section 210 provided for a

²⁴ To the same effect, Secs. 10(e) and (f) of the 1935 measure.

²⁵ Sec. 9(a) of the 1935 measure as originally written affirms majority rule in the choice of representatives for "collective bargaining," but "any individual employee or group of employees shall have the right at any time to present grievances to their employer through representatives of their own choosing." But the Senate committee struck out the phrase, "through representatives of their own choosing." (*Cong. Rec.*, daily ed., May 16, 1935, No. 102, p. 7950.)

²⁶ Compare Sec. 13 of the 1935 measure.

²⁷ Compare Sec. 6(a) of the 1935 measure. Under the original draft of the 1935 measure, the Board would be empowered: to prevent unfair labor practices (Sec. 10); to define collective bargaining units (Sec. 9-b); to determine representation controversies (Sec. 9-c), presumably by majority rule (Sec. 9-a); and to act as a voluntary arbitrator (Sec. 12). Nothing is said about conciliation and mediation. But Sec. 12 was eliminated by the Senate committee, thereby removing the Board from arbitration as well as conciliation. (*Cong. Rec.*, daily ed., May 16, 1935, No. 102, p. 7951.) The Senate Committee also amended Sec. 4(a) to read "Nothing in this shall be construed to authorize the Board to appoint individuals for the purpose of mediation and conciliation (or for statistical work) where such service may be obtained from the Department of Labor." (The same, p. 7948.)

²⁸ The essential procedure—prevention of unfair labor practices—was

fine of not more than \$5,000 and imprisonment for not more than one year, or both, to apply to "any person who shall willfully assault, resist, impede, or interfere with any member of the Board or any of its agents in the performance of his duties." Resistance of the Board in the exercise of its statutory powers was thus made a criminal offense. But resistance to the orders, determinations, and awards of the Board, if punishable at all, could be punished only through contempt of court proceedings. For the federal courts, in the last analysis, had the power of reviewing all such instruments, and of confirming, modifying, suspending, or vacating them.²⁹

The most important part of Title III of the Labor Disputes bill was Section 303, which affirmed the right of employees to strike. The section read: "Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike."³⁰

THE ATTACK ON THE BILL

Few bills in recent year have evoked such determined, organized, and large-scale opposition as did the proposed Labor Disputes Act.³¹ Practically every important em-

based upon the procedures long followed by the Federal Trade Commission. Procedure under the 1935 measure is based still more closely upon that followed by the Federal Trade Commission.

²⁹ For court procedure contemplated under the 1935 measure as it passed the Senate, see Secs. 10 and 11.

³⁰ In accord, is Sec. 15 of the original 1935 measure, which became Sec. 13 as amended by the Senate committee.

³¹ An important factor in giving heart to the opposition against the bill was the automobile strike settlement of Mar. 25, 1934. This settlement (discussed in Chap. XIII) seemingly committed the Administration to principles of industrial relations in conflict with those worked out by the National Labor Board and reflected in the provisions of the bill. The opponents of the bill began their case on Mar. 26, 1934. (73 Cong. 2 sess., *To Create a National Labor Board*, Hearings before Senate Committee on Education and Labor on S. 2926, Pts. I-III.) For the arguments pro and con on the 1935 measure, see 74 Cong. 1 sess., *National*

ployer organization in the United States, as well as a great many individual employers, appeared to speak against it.³² Employee representatives from numerous company unions, particularly in the iron and steel industry, also appeared to speak in opposition to the proposed legislation. Finally, the bill was opposed by the "left wing" of the organized labor movement.³³

EMPLOYERS' ARGUMENTS

Many specific objections were raised against the bill, but in the main they were reducible to four points. The first and most frequent objection was that the bill was economically unsound in that it would promote rather than allay labor strife. This presumably would follow from the provisions which made continuance of employee representation impossible and thus gave the A. F. of L. unions a "monopoly" of organization with the concomitant results of "compulsory" unionization and a universal "closed shop."

The second objection was that the bill exemplified class legislation. It imposed restraints on employers but not on workers or trade unions. This was manifestly unjust. The third objection was on constitutional grounds. The bill, it was claimed, represented an unconstitutional

Labor Relations Board, Hearings before Senate Committee on Education and Labor on S. 1958, Pts. I-III.

³² Namely, National Association of Manufacturers, Hearings on S. 2596, pp. 340-41; Full Fashioned Hosiery Association Inc., pp. 427-28; National Publishers Association, pp. 459-60; American Cotton Manufacturers Association, pp. 622-23; American Transit Association, pp. 678-84; National Automobile Chamber of Commerce, pp. 709-17; U. S. Chamber of Commerce, pp. 495-502; representatives of individual companies, such as American Rolling Mill, Youngstown Sheet and Tube, Republic Steel, United States Steel, National and Weirton Steel, and so forth.

³³ A similar alignment of forces made itself manifest at the hearings on the 1935 measure.

extension of the powers of Congress over "interstate commerce" and the "general welfare," granted extraordinary and arbitrary administrative powers to the National Labor Board, and was in conflict with the "true" interpretation of Section 7(a) evolved by the National Recovery Administration.⁵⁴ Finally, it was said, the bill proposed hasty and immature measures of fundamental reform at a time when what was needed was emergency legislation to hasten recovery.

The arguments of James A. Emery, representing the National Association of Manufacturers, in his attack against the bill covered the ground rather fully. He said:

We will demonstrate that it is not an exercise of the commerce power of Congress, but a deliberate and indefensible invasion of the right [that is, of the states] to regulate . . . local employment conditions. . . . But assuming the bill were within the commerce power, the administrative body established, the authority proposed, the manner of its exercise, are arbitrary, destructive of the fundamental rights of the parties, and vest in an administrative body the determination of facts and law, without judicial review, that may be adjudicated only by a court.⁵⁵

Mr. Emery quoted with approval the President's statement of principle made the day before in settling the automobile strike,⁵⁶ to the effect that the government's only duty was to secure freedom of choice and not to favor a particular form of labor organization. But Senator Wagner's bill, said Mr. Emery,

. . . will stimulate complaints, promote the interruption of employment and deliberately undertake by its definitions and operation to force employees into one form of labor organization—the union. It will secure through the union, monopolistic

⁵⁴ The Johnson-Richberg interpretation is best set forth in *NRA Releases No. 463*, Aug. 23, 1933; *No. 625*, Sept. 4, 1933; *No. 3125*, Feb. 4, 1934. See also Chaps. III and X.

⁵⁵ Hearings on S. 2926, p. 341.

⁵⁶ See Chap. XIII, pp. 352-54.

control, assuring the unrestricted use of the strike, and thus confer the power to assess the public with the costs of sustaining a labor monopoly, established with federal aid, relieved of appropriate legal control, and without corresponding responsibilities for the acts of its agents.⁸⁷

Mr. Emery concluded: "The issue it presents is plain. It is no mere dispute over policy between employers and labor union. It is a deliberate step toward a nation unionized by the act of government."⁸⁸

Other representatives of employer organizations restated these arguments in different ways. A few quotations may be interesting as illustrative of the psychological factors animating employers. Thus, the Pittsburgh Chamber of Commerce opposed the bill, because "it is frankly subversive of the whole spirit of the original recovery legislation. Under the cover of the provisions for collective bargaining in Section 7(a) . . . a group of professional labor agitators are undertaking with the aid of Senator Wagner . . . to compel the great free majority of American workingmen to join a labor federation which they never have been willing to join of their own accord, and the professional leaders of which are endeavoring to make themselves masters of a labor monopoly with unprecedented powers tantamount to dictatorship over all American labor and industry."⁸⁹ E. M. Torrey, speaking for the Employers' Association of Northern New Jersey, was particularly outspoken in his objection to the bill:

We believe it to be inequitable, economically unsound, pregnant with class antagonism, and therefore contrary to sound public policy. From our experience, we believe this measure is aptly called the "Labor Disputes Act." We feel that its enact-

⁸⁷ Hearings on S. 2926, p. 345.

⁸⁸ The same, p. 394.

⁸⁹ The same, p. 412.

ment would assure an unprecedented volume of labor disturbances. . . . The explanation of this . . . is simple. With few exceptions, strikes do not happen. They are caused. The setting up of a governmental bi-partisan agency to mediate labor disputes . . . naturally [suggests] to those trained in promoting labor organizations the possibility of advantages to be gained. To secure action by such an agency, there must be a dispute. Therefore, a strike must be promoted.⁴⁰

Henry I. Harriman, president of the United States Chamber of Commerce, attacked the bill on constitutional grounds. The bill sought, as he saw it, "to broaden and make permanent the rights and privileges" which labor had gained under NIRA, "without similarly making permanent those features which affect business."⁴¹ Arthur H. Young, vice-president of the United States Steel Corporation in charge of industrial relations, objected to what he thought was the basic theory of the bill; that there exists a fundamental conflict of interest between capital and labor. "I find this bill" he said, ". . . both vicious and undesirable because of its fundamental philosophy." He continued:

All of its provisions assume a regimentation of each side into a warring camp, and intercourse between the two is referred to in terms and implications of perpetual strife. This is in utter disregard of progress toward complete co-operation and the abolition of small remaining areas of conflict . . . that has distinguished and uniquely characterized industrial relations in the U.S.A.⁴²

⁴⁰ The same, pp. 478-79.

⁴¹ The same, p. 497.

⁴² The same, p. 720. Compare Judge Nields' statement of Feb. 27, 1935 in denying an injunction against the Weirton Steel Co.: "The theory of a balance of power [between labor and management] is based upon the assumption of an inevitable and necessary diversity of interest. This is the traditional Old World theory. It is not the twentieth century American theory of that relation as dependent upon mutual interest, understanding and good-will. This modern theory is embodied in the Weirton plan of employee representation." (*New York Times*, Feb. 28, 1935.)

Mr. Young launched into a defense of work councils and employee representation plans as devices for the implementation of collective bargaining, and emphasized the futility of attempts to fit the square peg of the craft union structure of the A. F. of L. into the round hole of the industrial structure of modern business.⁴³

Thomas Girdler, president of the Republic Steel Corporation, opposed the bill because "it is designed to interfere with direct contact between management and employees and to destroy the friendly relations which now exist. . . . I think its purpose is to unionize all industry and to subject our plants to the domination of national labor unions. Senator Wagner may call this a bill to equalize the bargaining power of employers and employees, but I call it a bill to tie the hands of employers and turn industry over to the American Federation of Labor."⁴⁴

It is not necessary to state in detail the arguments put forward by representatives of company unions. Almost uniformly, these arguments followed the same line of attack: existing employee representation plans had come into being by the worker's free choice, and constituted genuine instrumentalities of collective bargaining. The bill was aimed against such plans; therefore it was bad and should not be passed by Congress.

OPPOSITION OF "LEFT WING" UNIONISTS

The "left wing" trade unions were opposed to the bill, because they believed that it aimed to suppress strikes and to introduce compulsory arbitration. They saw in it a purposeful check to the revolutionary activi-

⁴³ Hearings on S. 2926, pp. 721-27.

⁴⁴ The same, pp. 773-78.

ties of a militant labor movement. They pointed to the record of the existing National Labor Board, arguing that the Board had been successful only in strike breaking. Senate bill No. 2926, as they saw it, was only a device for giving statutory sanction to similar strike-breaking activities in the future. This point of view was expressed by William F. Dunne, who spoke on behalf of the Trade Union Unity League. He said:

It is true that the Wagner bill has a certain emergency character, but its main provisions are inherent in clause 7(a) of the National Recovery Act of which it is an extension. As such, the Wagner bill, under the guise of stimulating and increasing the so-called "bargaining power" of labor organizations, actually diminishes the power of workers to obtain better wages and working conditions by putting still more obstacles in the way of the effective use of the strike weapon.⁴⁵

What the government was aiming at, he declared, was a cessation of militant labor action. To quote:

Now the peace that the Wagner bill and the official program of the A. F. of L. proposes is the *pax Romana*—the peace of death—for the American working class. It is a program of preparation for a new drive against the working class and its living standards, preparation for imperialist war, and a step toward Fascism.⁴⁶

DEFENSE OF THE BILL

The supporters of the Labor Disputes bill who appeared before the Labor Committee comprised: (1) members of the National Labor Board system,⁴⁷ (2) officers of the American Federation of Labor and its

⁴⁵ Hearings on S. 2926, p. 973.

⁴⁶ The same, p. 992.

⁴⁷ For example, Senator Wagner, Hearings on S. 2926, pp. 7-18; Father Haas, pp. 113-20; Mr. Handler, pp. 27-38; Mrs. E. M. Herrick, pp. 176-88.

unions,⁴⁸ and (3) government officials and college professors concerned with labor problems.⁴⁹

The supporters of the bill uniformly described it as a measure to clarify the intent of and to "put teeth" into Section 7(a). The statute, they claimed, had fallen short of the mark principally because of the activities of employers in organizing company unions. Just so long as the employer was able to impose employee representative schemes on his workers, they argued, true collective bargaining was impossible. Something had to be done, therefore, to free the worker from the interference of his employer; to make the worker a "free man." The general refrain of proponents of the bill was that the company union was a menace not only to the NIRA but to the "very freedom of the American people."⁵⁰

The supporters of the bill all argued, further, that some means must be found to compel employers to abide by the implicit obligations of Section 7(a). This point was most elaborately stated by William Green:

The bill we are discussing today must be looked upon as a frank recognition of several facts. First, that collective bargaining is not wanted by all employers; second, that some employers . . . have shown themselves entirely unwilling to support the recovery program; third, that if unobstructed organization of workers is to proceed, it must do so in the face of bitter and often unscrupulous opposition from these employers; fourth, that if collective bargaining is to be carried out, it must be forced upon some employers; and fifth, that . . . [the National Labor Board] . . . has not the requisite power and authority to enforce Section 7(a).

⁴⁸ For example, Mr. Green, the same, pp. 67-113; Mr. Lewis, pp. 138-57; Mr. Hillman, pp. 120-24.

⁴⁹ For example, Secretary of Labor Perkins, the same, pp. 18-27; William M. Leiserson, pp. 231-40; Sumner H. Slichter, pp. 58-65; Paul F. Brissenden, pp. 211-20.

⁵⁰ Hearings on S. 2926, p. 191.

Mr. Green then proceeded to develop the theme of enforcement:

Certainly no one can deny that the National Labor Board has done a real work. But no one can deny that it has not done what it was hoped it would do. This failure to fulfill all our hopes can in no way be considered as the fault of the Board itself. Rather, it is due entirely to the position in which the Board has been placed by the ambiguous nature of Section 7(a). The National Labor Board has been given a heavy burden of responsibility—that of preserving industrial peace—without the accompanying authority which is essential if its responsibility is to be fulfilled. The Board has been consistently forced to straddle the real issue in many of the cases . . . union recognition for collective bargaining. . . . Unless Congress is prepared to establish the National Labor Board as an authoritative body, with power to enforce its ruling, it must be prepared to see the entire national recovery program held in increasing disrespect and disregard. There is no middle course. For seven months we have tried the method of persuasion. It has not worked. We are now forced to recognize that a deliberate and planned campaign is under way on the part of certain employers, not to comply with Section 7(a). We must recognize this fact and meet it.⁵¹

The third major argument of the supporters of the bill was that where employers are unwilling to recognize truly representative trade unions, collective bargaining becomes but a sterile right. It was not enough merely to prevent the employer from foisting upon his workers labor organizations dominated by himself. It was necessary that the employer be obliged to meet and confer with the workers' representatives in negotiations looking toward the execution of collective agreements. In Senator Wagner's words, the first defect of Section 7(a) was "that it restated the right of employees to bargain collectively, but did not impose upon employers the duty

⁵¹ The same, pp. 70-71.

to recognize such representatives." Failure to acknowledge this correlative duty "caused more than 70 per cent of the disputes coming before the National Labor Board. The new bill, therefore, provides that employers shall recognize those chosen by their workers and shall make efforts to arrive at satisfactory agreements. . . ."⁵²

THE NATIONAL INDUSTRIAL ADJUSTMENT BILL

The Senate Committee on Labor and Education concluded its hearings on the Labor Disputes bill on April 9, 1934. For more than a month thereafter the press was filled with gossip and rumors bearing on the ultimate fate of the bill, its acceptability to the President, and its relation to the general legislative program of the Administration.

While the bill rested with the committee a new upsurge of strikes began. These strikes of the late spring of 1934 were characterized by extreme and widespread violence. Three strikes in particular were featured by the newspapers; those of truck drivers in Minneapolis, employees of the Electric Auto-Lite Company of Toledo, Ohio, and longshoremen in the Pacific Coast ports, particularly San Francisco. "Union recognition" was the main issue in all three, as well as in many others that occurred during the spring months. Stirred into action by the crescendo of labor unrest, the Senate Labor Committee on May 26, 1934 reported out the Labor Disputes bill favorably, not in the original form, but in totally revised draft that came to be known as the National Industrial Adjustment bill.⁵³

⁵² The same, p. 8.

⁵³ 73 Cong. 2 sess., S. 2926 (rep. 1184). "A bill to equalize the bargaining power of employers and employees, to promote the amicable settlement of labor disputes, to create a National Labor Board, and for other purposes."

The National Industrial Adjustment bill differed from the Labor Disputes bill radically. The declaration of public policy in the new bill was toned down,⁵⁴ all references to equality of bargaining power being eliminated. The term "employer" was amended to exclude any person employing less than ten employees.⁵⁵ The term "employee" was amended to exclude agricultural workers, domestic servants, and workers in family enterprises.⁵⁶ The prohibition against regarding as employees, new workers who replace strikers, was removed. Section 4 of the original bill, stating the general rights of employees with regard to collective bargaining, was taken out. Above all, the unfair labor practices were reduced in number from six to four, and the content of these practices was substantially modified.⁵⁷ Under the new bill it would be unfair: (1) for employers to interfere with the self-organization of employees; (2) for employees to interfere with the self-organization of employers;⁵⁸ (3) for employers to dominate any labor organization or contribute financial support to it;⁵⁹ (4) for

⁵⁴ The new declaration read: "It is hereby declared to be the policy of the United States to remove unnecessary obstructions to the free flow of commerce, to encourage the establishment of uniform labor standards, and to provide for the general welfare, by establishing agencies for the peaceful settlement of labor disputes, and by protecting the exercise by the worker of complete freedom of association, self-organization, and designation of representatives of his own choosing, for the purpose of negotiating the terms and conditions of his employment or other mutual aid or protection." (Sec. 1.)

⁵⁵ Sec. 2(2).

⁵⁶ Sec. 2(3).

⁵⁷ Sec. 3(1-4).

⁵⁸ In passing the Labor Relations bill on May 16, 1935, the Senate voted down—50 to 21—an amendment proposed by Senator Millard E. Tydings of Maryland to prohibit coercion and intimidation by labor unions as well as by employers. *Cong. Record*, daily ed., May 16, 1935, No. 102, p. 7974.

⁵⁹ This was subject to a proviso enabling employers to compensate employee representatives for time taken from work and devoted to the business of a labor organization.

employers to encourage or discourage membership in any labor organization by discriminating in hire or tenure, in terms or conditions of employment.⁶⁰ It would no longer be an unfair labor practice, however, for the employer to refuse to recognize or deal with the representatives of his employees; or for the employer to fail to exert all reasonable efforts to make and maintain collective agreements. Also, instead of being forbidden to take any part whatever in the formation and maintenance of labor organizations, the employer was merely forbidden from "dominating" or "financing" them. Thus, from the trade union point of view, most of the teeth of the original bill were extracted in the revised draft. Both the employer's duties to recognize representative unions, and his disabilities in forming and maintaining company unions, were weakened.

Instead of a National Labor Board enjoying autonomous powers similar to those of the Federal Trade or Interstate Commerce Commission, the new bill provided for a National Industrial Adjustment Board "in the Department of Labor."⁶¹ The National Industrial Adjustment Board was empowered to engage in four types of activities: (1) prevention of unfair labor practices;⁶² (2) voluntary arbitration upon joint submission; (3) deter-

⁶⁰ This was subject to a proviso validating, under specified circumstances, contracts requiring membership in a labor organization on the part of persons seeking employment. Sec. 3(4).

⁶¹ Section 4(a). The NIAB was to be composed of five members. Three of these were to be representatives of the public. The remaining two, one representing employers, the other employees, were to be drawn from appropriate panels. (Secs. 4-b and 4-c.) Under the 1935 measure as passed by the Senate (but not as recommended by the House Labor Committee), the NLRB would be independent of the Department of Labor.

⁶² But the initiative, in bringing cases to the attention of the Board, had to come from the Secretary of Labor. Under the Labor Disputes bill, the National Labor Board was empowered to act on its own initiative.

mination of the identity of employee representatives, by secret ballot or other suitable method; and (4) investigations necessary to prevent unfair labor practices and to determine the identity of employee representatives. The bill, it should be noted, failed to empower the Board to engage in the mediation and conciliation of labor disputes. Presumably, these functions were to revert to the Conciliation Service of the Department of Labor.

In place of Section 303 of the original draft, which expressly affirmed the right to strike, the new draft engaged in circumlocution by a provision which read as follows:

Nothing in this act shall be construed to require any employee to render labor or service without his consent, or to authorize the issuance of any order or injunction requiring such service, or to make illegal the failure or refusal of any employee individually, or any number of employees collectively, to render labor or service.⁶⁸

Despite the favorable report of the Senate Labor Committee, the National Industrial Adjustment bill never came to a vote. Anti-union employers opposed it with the same vigor with which they had opposed the Labor Disputes bill, because in their opinion the new bill still offered an opening wedge to the A. F. of L. to unionize all industry under closed-shop conditions. Organized labor maintained a discreet silence on the new bill. It was evident, however, that the trade unions were disappointed with it in general, and suspicious of it on those particular points where it amended the original bill.

⁶⁸ Sec. 140. This provision, taken in the context of the bill's principal objective—"peaceful settlement of labor disputes"—might reasonably be taken to limit the right to strike. In its positive content it merely reaffirmed the usual prohibition against involuntary servitude.

PUBLIC RESOLUTION NO. 44

It seemed for a while that Congress would adjourn without enacting any legislation to supplement Section 7(a). However, at the last moment before the adjournment of Congress, the President, motivated no doubt by the threatening imminence of a nation-wide strike in the steel industry,⁶⁴ informally transmitted to congressional leaders in both the Senate and the House a draft of a proposed resolution. On June 15, 1934 this resolution was introduced as Senate Joint Resolution No. 143 by Senator Robinson of Arkansas and as House Joint Resolution No. 375 by Representative Byrns. With certain amendments,⁶⁵ it was enacted on June 16 as Public Resolution No. 44 and signed by the President on June 19.⁶⁶

Public Resolution No. 44 professed to "effectuate the policy of the National Industrial Recovery Act" and contained six sections.⁶⁷ The President was empowered to establish a board or boards "authorized and directed to investigate issues, facts, practices, or activities of employers or employees in any controversies arising under Section 7(a) . . . or which are burdening or obstructing, or threatening to burden or obstruct, the free flow of interstate commerce." Each such board was empowered "when it shall appear in the public interest" to conduct elections to determine by what "person, persons, or labor organization" the workers wished to be represented in collective bargaining. To expedite and facilitate the holding of such elections, the boards were authorized to

⁶⁴ The Amalgamated Association of Iron, Steel and Tin Workers called the strike for June 16, 1934 but rescinded the call at the last moment. See Chap. XII, p. 335.

⁶⁵ Notably Sec. 6 guaranteeing the right to strike introduced by Senator LaFollette.

⁶⁶ No record vote was taken except in the Senate on the LaFollette amendment, which passed unanimously.

⁶⁷ 48 Stat. L. 1183; U.S.C., Title 15, Secs. 702(a)-(f).

call for the production of records and to take testimony under oath. All orders issued by the boards under authority of this section were to be enforced or reviewed "in the same manner, so far as is practicable," as provided for in the cases of orders issued by the Federal Trade Commission under the Federal Trade Commission Act.

The boards were given administrative power of prescribing, with presidential approval, such rules and regulations as were necessary; (1) with reference to the investigation of labor disputes, and (2) "to assure freedom from coercion in respect to all elections." Persons knowingly violating such rules and regulations, and/or who interfered with or impeded any member or agent of the board in the performance of his duties, were punishable by a fine of not more than \$1,000 or imprisonment for not more than one year, or both. The resolution and the boards established thereunder, were not to continue beyond June 16, 1935, to the expiration date of the Recovery Act. Finally, the right to strike was safeguarded in Section 6 of the resolution as follows: "Nothing in this resolution shall prevent or impede or diminish in any way the right of employees to strike or to engage in other concerted activities."

Not much remained in the joint resolution of either the Labor Disputes bill or of the Industrial Adjustment bill. The boards established under the joint resolution might: (1) conduct elections of employee representatives; and (2) investigate labor disputes. But that was the practical limit of their authority. With reference to election procedure alone, the boards might issue orders patterned after the orders of the Federal Trade Commission. No new powers of enforcement were given these boards; compliance was to be obtained in the old way, through reference to the NRA for the removal of the

offender's Blue Eagle, or to the Department of Justice for court proceedings. Furthermore, no unfair labor practices were specified.⁶⁸

⁶⁸ "The text of the joint resolution reads:

"To effectuate further the policy of the NIRA. *Resolved by the Senate and the House of Representatives of the U.S.A. in Congress assembled,* That in order to further effectuate the policy of Title I of the NIRA, and in the exercise of the powers therein and herein conferred, the President is authorized to establish a board or boards authorized and directed to investigate issues, facts, practices or activities of employers or employees in any controversies arising under Section 7(a) of said act or which are burdening or obstructing, or threatening to burden or obstruct, the free flow of interstate commerce, the salaries, compensation and expense of the board or boards and necessary employees being paid as provided in Section 2 of the NIRA.

"Sec. 2. Any board so established is hereby empowered, when it shall appear in the public interest, to order and conduct an election by a secret ballot of any of the employees of any employer, to determine by what person or persons or organization they desire to be represented in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in Section 7(a) of said act and now incorporated herein.

"For the purpose of such election such a board shall have the authority to order the production of such pertinent documents or the appearance of such witnesses to give testimony under oath, as it may deem necessary to carry out the provisions of this resolution. Any order issued by such a board under the authority of this section may, upon application of the board or upon petition of the person or persons to whom such order is directed, be enforced or reviewed, as the case may be, in the same manner, so far as applicable, as is provided in the case of an order of the Federal Trade Commission under the FTC Act.

"Sec. 3. Any such board, with the approval of the President, may prescribe such rules and regulations as it deems necessary to carry out the provisions of this resolution with reference to the investigations authorized in Section 1, and to assure freedom from coercion in respect to all elections.

"Sec. 4. Any person who shall knowingly violate any rule or regulation authorized under Section 3 of this resolution or impede or interfere with any member or agent of any board established under this resolution in the performance of his duties, shall be punishable by a fine of not more than \$1,000 or by imprisonment for not more than one year, or both.

"Sec. 5. This resolution shall cease to be in effect, and any board or boards established thereunder shall cease to exist, on June 16, 1935, or sooner, if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by Section 1 of the NIRA has ended.

"Sec. 6. Nothing in this resolution shall prevent or impede or diminish

Public Resolution No. 44 was at bottom a compromise which avoided the basic issues raised by the NLB's efforts to interpret and apply Section 7(a). It served as a basis for establishing the National Labor Relations Board and a number of other boards which are considered in subsequent chapters. And the experiences of these joint resolution boards served to prepare the path for the introduction, in 1935, of the National Labor Relations bill.⁶⁰

in any way the right of employees to strike or engage in other concerted activities."

⁶⁰The Labor Relations bill had already been passed by the Senate (May 16) and favorably reported out by the House Labor Committee (May 21) when the Recovery Act codes were held to be unconstitutional by the Supreme Court (May 27, 1935). Until June 16, 1935, however, Public Resolution No. 44 still remained theoretically in effect, although the powers of the boards established thereunder to adjudicate on Sec. 7(a) disputes were terminated forthwith. On June 19, 1935 the House passed the Labor Relations bill without a record vote. It accepted an amendment, proposed by the House committee, to rewrite the declaration of public policy in an attempt to accommodate the intent of the measure to the concepts formulated by the Supreme Court in the Schechter case decision (*Cong. Rec.*, daily ed., June 19, 1935, no. 126, p. 10099). The new declaration of policy read in part as follows:

"The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening or obstructing interstate and foreign commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the process of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of . . . commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes . . . as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

[Footnote 69, *continued*]

To the same end, the House also accepted a re-definition of the term "affecting commerce" to read: ". . . in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (the same, p. 10100). The House voted down the committee amendment put the National Labor Relations Board "in the Department of Labor" (the same, p. 10106). It also voted down several other amendments: to include agricultural workers within the scope of the act; to limit the right to strike; to relax the restraint against company unions; and to prevent "coercion by trade unions." The House passed an amendment providing that "units of collective bargaining," when defined by the Board, should not include the employees of more than one employer. This amendment and another referring to freedom of speech were, however, removed in conference. The conference report was accepted by both houses of Congress on June 27, and the bill was signed by the President on July 5, 1935.

CHAPTER X

THE ROLE OF THE NRA

We have described the predominant part which the National Labor Board played for many months in the interpretation and application of Section 7(a). In subsequent chapters, we shall deal with the National Labor Relations Board, the various special boards established after June 1934 under Public Resolution No. 44, and the more important NRA industrial relations boards—all of which served as determining factors in shaping labor relations policy under the Recovery Act. But the full story of labor relations under the Recovery Act cannot be understood without allowing for the influence exerted by the NRA. The NRA impinged upon and hampered the work of the National Labor Board; it tried to impose its own interpretation of Section 7(a); it set up some machinery of its own for the adjustment of labor controversies; it was at all times responsible for the enforcement of code labor provisions. The present chapter briefly summarizes NRA's various activities along these lines and their final effects.

THE NRA VERSUS THE NLB

The paths of the NRA and the NLB crossed from the very beginning. Three administrative issues were raised: (1) What were the jurisdictional lines between the NLB and the compliance boards of the NRA? (2) What were the relations of industrial boards set up under NRA codes to the NLB? (3) What part was the NRA to play in the enforcement of decisions made by the National Labor Board? In addition to and underlying these ad-

ministrative issues was the basic question: Which of the two organizations was to speak authoritatively as the interpreter of Section 7(a)?

THE LINES OF JURISDICTION

Soon after its establishment the NLB was confronted with the fact that local compliance boards organized by the NRA¹ were assuming jurisdiction over local labor disputes. Numerous complaints came to the National Labor Board that such boards, largely composed of employers, were unfriendly to organized labor and were causing industrial friction instead of promoting industrial peace. It was partly to deal with this situation that the National Labor Board began forming its own system of regional agencies.

The question at once arose, What was the dividing line between the functions of the NRA compliance boards and of the NLB regional boards? This issue, after some negotiations in Washington, was settled to the satisfaction of the NLB. All strikes and lockouts as well as all cases of alleged violation of collective bargaining requirements were to be handled exclusively by the NLB regional agencies. The local compliance boards were to consider only cases involving violation of code provisions which related to wages, hours, and other working conditions.

The settlement of this issue, however, did not establish a definite *modus vivendi* between the NRA and the NLB. On the one hand the NRA pursued a policy of establishing, where expedient, code boards with functions similar to those of the NLB. On the other hand the NLB, confronted with employers' defiance, found it

¹ For the nature of these boards, See Charles L. Dearing and Others, *The ABC of the NRA*, 1934, Chaps. IV and V.

necessary to turn to the NRA for aid in enforcement proceedings. The questions raised by these developments called for further adjustments.

NRA's first approved code, the cotton textile code, was also the first to be equipped with an industrial relations board—the Cotton Textile National Industrial Relations Board.² After the National Labor Board was created in August 1933, it was still believed that the NRA might continue to form industrial relations boards under the codes for the separate industries. In fact, however, few such boards were formed. Nevertheless, the question arose: What powers, if any, did the National Labor Board possess over such boards?

This question was seemingly settled in favor of the National Labor Board by the executive order of December 16, 1933. Section 2(a) of the order read:

To settle by mediation, conciliation, or arbitration, all controversies between employers and employees which tend to impede the purposes of the National Industrial Recovery Act; provided, however, that the Board may decline to take cognizance of controversies between employers and employees in any field of trade or industry where a means of settlement, provided for by agreement, industrial code, or federal law, has not been invoked.

The proviso in the order was important. It took for granted that the NRA might establish industrial relations boards under codes, and allowed for such boards already in existence. But the NLB might "decline to take cognizance" of a dispute if the good offices of a board under a code had not been invoked. By inference, the NLB might proceed to exercise jurisdiction over a dispute even if the good offices of such a board had been invoked. Whether or not to accept the jurisdiction of a

² For organization and work of this board, see Chap. XV.

code board as conclusive was left to the discretion of the National Labor Board. The latter was thus by implication transformed into a superior board, although the extent of its powers over the inferior boards was left undefined.

NRA AS AN ENFORCEMENT AGENCY FOR THE NLB

On December 14, 1933 the National Labor Board handed down its decision in the Budd case. The employer refused to comply, with the result that on January 11, 1934 the Board turned the case over to the National Compliance Board of the NRA.⁸ This was the first time that the NLB had turned to the NRA for aid in enforcement. Instead of treating the case as one of non-compliance, however, the National Compliance Board insisted on treating it as a labor dispute *de novo*, to be adjudicated on the merits of the dispute. The Compliance Board held a hearing on January 24, 1934 and listened to all the evidence that had earlier been presented to the National Labor Board. It seemed clear that the Compliance Board intended to act, not as an enforcement agency for the Labor Board, but as an independent agency of administrative adjudication in labor disputes.

As non-compliance with its rulings multiplied, the NLB obtained from the President the executive order of February 1, 1934. This order empowered the Board to "report its determination promptly to the Administrator for Industrial Recovery for appropriate action" whenever the Board had determined that an employer declined to recognize or to deal with the authorized employee representatives, or was in any other way refus-

⁸ For the organization and functions of this Board, see Dearing and Others, *The ABC of the NRA*, Chaps. IV and V.

ing to comply with the requirements of Section 7(a). This provision, however, left the Administrator entirely free to decide: (1) whether there was cause for action; (2) what constituted appropriate action; and (3) what specific steps to take.

This was unsatisfactory to the National Labor Board. But the dissatisfaction was allayed when the President issued the executive order of February 23, 1934. It was therein provided that the Board "in its discretion" might report violations of Section 7(a) and make appropriate recommendations to the Attorney General or to the Compliance Division of the NRA. "The Compliance Division," it was expressly laid down, "shall not review the findings of the Board but it shall have power to take appropriate action based thereon." This order enlarged the powers of the NLB, but it did not transform the NRA into an enforcement agency of the NLB. Although the Compliance Division could not "review the findings" of the NLB, it was not obliged to act upon the Board's recommendations. The Compliance Division was merely to "have power" to take appropriate action—whatever that meant—based on the findings of the NLB.

The distinction between inability to review findings and the right to use discretion in the exercise of compliance powers had important practical effects. On March 13, 1934 the NLB recommended the removal of the Blue Eagle from the Harriman (Tennessee) Hosiery Mill.⁴ It was generally assumed, and taken for granted by the NLB, that the Compliance Division would act at once on this recommendation. But it was not until over a month later, on April 20, 1934 following a bitter in-

⁴ Because, it was charged, the employer "infringed the rights . . . recognized by Section 7(a) . . . by entering negotiations in bad faith with the definite intention not to make any agreement with the representatives of its employees." (*NRA Release No. 1812.*)

ternal controversy between the NRA and the NLB, that General Johnson ordered the employer's Blue Eagle removed. The removal notwithstanding, the NRA persisted in trying to reach an adjustment on its own account. These efforts culminated in the negotiation of an agreement between the NRA and the Harriman management, with the result that the Blue Eagle was restored on July 20, 1934.⁵ By this time the relations between the NLB and the NRA were no longer an issue, as the Labor Board had ceased to exist.

In all, the National Labor Board, acting on the executive order of February 23, 1934, transmitted five cases to the NRA for action: Harriman, Roth, National Lock, Milwaukee Electric Light, and Great Lakes Steel. In the first four of these cases the Blue Eagles were removed. In the fifth case a satisfactory adjustment was obtained. The Harriman and Milwaukee Electric Blue Eagles were later restored; the former by agreement between the employer and the NRA, and the latter upon the recommendation of the NLB following a settlement of the strike. This would seem a fair record of response on the part of the NRA. But the reluctant spirit in which the NRA, under General Johnson's leadership, behaved in some of these cases went far to impair the efficacy of the Labor Board.

PLURALISM IN COLLECTIVE BARGAINING

From their original position on Section 7(a)—that of "perfect neutrality"⁶—General Johnson and Mr. Rich-

⁵The terms of this agreement were utterly different from the formula recommended by the NLB in its decision of Jan. 10, 1934. Moreover, the NLB was not consulted in the agreement, the only parties to which were the NRA, as such, and the mill management. For the terms of agreement, see *NRA Release No. 6618*, July 20, 1934.

⁶See Chap. III, pp. 73-83.

berg eventually passed to the affirmation of the doctrine of "pluralism" in collective bargaining.

As related in Chapter IV, the executive order of February 1, 1934 provided that the NLB might hold elections to determine employee representatives. The Board was empowered to publish promptly the names of those representatives "who are selected by the vote of at least a majority of the employees voting, and have been thereby designated to represent all the employees eligible to participate in such an election for the purpose of collective bargaining." This seemingly implied commitment to the principle of majority rule. Besides, in making the order public, a subordinate official in the NRA's publicity department added his own comments, which apparently committed the government to a definite stand against company unions:

The President's order is a direct result of the growing tendency on the part of industrial managements to build up "company unions" in their plants. These unions are operated by employees' representatives chosen by the employer rather than by the employees themselves. Frequent charges that such company unions are not representative of the workers but are dominated by the management, have been made. Typical among such cases are those of the Weirton Steel Company and the Budd Company of Philadelphia.⁷

Anti-union employers, displeased with the implication of majority rule in the order, were outraged by the accompanying comments. The Iron and Steel Institute issued a statement attacking both the order and the NLB and defending the validity of employee representation plans. Mr. Emery of the National Association of Manufacturers hastened to obtain an interview with the Administrator. On February 3, 1934 General John-

⁷ *NRA Release No. 3078, Feb. 1, 1934.*

son and Mr. Richberg, to soothe the aroused employers, issued a joint public statement on behalf of the NRA, in which they made the following points:

(1) The executive order provides a method whereby any specific group of employees may select, by majority vote, representatives empowered to act for the majority of that group.

(2) This does not restrict or qualify the right of minority groups or of individual employees to deal with their employer separately.

(3) Section 7(a) permits minority as well as majority groups to organize, select representatives, and bargain collectively.

(4) The Richberg-Johnson joint statement of August 24, 1933—that the terms open and closed shop are excluded from the vocabulary of NRA—still holds and is not modified by the executive order.

(5) The order's purpose is to provide a definite workable method whereby the majority of any group of employees may select their representatives, who will thereupon be entitled to recognition as representatives of the majority of the employees eligible to vote.

(6) Because it is impossible for employers to conduct unlimited negotiations with employee representatives, and for the NLB to hold unlimited elections for the benefit of a multitude of minority groups, it is practically important to provide some method of ascertaining the majority will; which the executive order does.

(7) But this, a matter of practical convenience, does not exclude the exercise of their rights by minorities and/or by individual workers.

(8) The order does not require the employer to sign a contract with the representatives of his employees, for "the right of collective bargaining is not the right to obtain a specific contract."

(9) The order is not intended to favor the trade union at the expense of the company union, but to "insure that the choice be free; not to influence the choice between any particular forms of employee organization."⁸

⁸ For full text, see *NRA Release No. 3125*, Feb. 4, 1934.

Most significant in the Johnson-Richberg statement was the attitude it took on majority and minority representation. In their interpretation, Section 7(a) permitted the co-existence of a multiplicity of labor organizations each engaged separately in collective bargaining on behalf of various groups of workers employed in the same industrial units. Each such organization, in its representative capacity, was entitled to the same rights as any other. Each such organization might negotiate a separate agreement covering its own members, which might differ from agreements made by other groups as to wages, hours, and other working conditions.

The Johnson-Richberg interpretation of Section 7(a) made all elections under the Reading Formula more or less purposeless. That the Johnson-Richberg statement ran counter to the trend of its own formulae on collective bargaining, the National Labor Board took the first opportunity to make clear. Issued on March 1, 1934, the Denver Tramway decision clarified the doctrine of majority rule. Issued on March 8, 1934, the Hall Baking decision specified the right of representative labor organizations to make collective agreements. These decisions, particularly the former, put the NLB squarely in opposition to the NRA.

The automobile settlement made by the President on March 25, 1934⁹ provided for proportional representation by separate groups of workers and for collective bargaining by works councils. It was thus interpreted by many as a triumph for the NRA and for its version of the meaning of Section 7(a). Taken in connection with the loss of influence by the NLB, it seemed that the NRA was going to assume a new and leading part in the administration of Section 7(a). As a matter of fact, the

⁹ For details see Chap. XIII, pp. 355-58.

automobile settlement of March 25 was not wholly in accord with the Johnson-Richberg statement of February 3, 1934. Moreover, the pressure of events which led to the passing of Public Resolution No. 44 had as its consequence a diminution in the role of the NRA in the adjustment of labor relations and a return to the doctrines of the NLB.

JURISDICTION OVER LABOR DISPUTES

As already noted, the first code approved by the NRA (the cotton textile code) established an industrial relations board.¹⁰ Although this board was at first supposed to deal with "stretch-out" problems alone, it soon extended its functions to the consideration and settlement of all labor disputes in the industry. With this board as an example, it was thought by some that the NRA might well establish similar boards under each and every code.¹¹

A second industrial relations board was established under the bituminous coal code, approved on September 18, 1933.¹² The main reason for its creation was the desire of the United Mine Workers to supplement the union machinery for the adjustment of industrial disputes in the territory newly organized under the code.

For several months afterward the NLB continued to build up its system of regional boards, and was clearly aiming to centralize under its jurisdiction the adjustment of all collective bargaining disputes. Nevertheless, a few staff members of NRA's Labor Advisory Board became

¹⁰ For an analysis of this Board, see the discussion in Chap. XV.

¹¹ The President intimated this possibility in his statement of Aug. 5, 1933. See Chap. IV, p. 91.

¹² For organization and functions of this board, see the discussion in Chap. XV.

propagandists for the idea of industrial relations boards under codes. They pressed the idea at the informal conferences held during November and December 1933 by various NRA staff members, at which provisions for a so-called model code were discussed. The proponents of such boards argued that they were necessary to realize the objectives of Section 7(a); that in unionized industries they would give governmental sanction to the existing machinery of co-operative action; that in non-unionized industries they would promote the growth of self-organization, and make for an orderly settlement of disputes.

For the time being, however, these ideas fell upon barren ground. Those in the NRA who represented the point of view of employers distrusted such boards as an entering wedge of trade unionism. At the same time many of the A. F. of L. members of the Labor Advisory Board feared that to set up such boards in non-unionized industries would check the growth of trade unions and promote company unions.

Thanks in part to these conferences, however, the NRA formulated a provisional general policy on handling labor disputes and complaints. On January 22, 1934 the NRA issued *Bulletin No. 7*, a "Manual for the Adjustment of Complaints by State Directors and Code Authorities," intended to guide those entrusted with compliance and to demarcate labor dispute functions between the NRA and the NLB. The administrative scheme outlined in the manual rested on a distinction between labor complaints and labor disputes. A complaint was defined as involving "a violation of the labor provisions of a code"; a labor dispute as "a situation where a strike or lockout exists or is threatened—or a

complaint which because it primarily involves Section 7(a) of NIRA may lead to a labor dispute."¹³

Labor complaints with regard to wages, hours, and other working conditions, according to the manual, fell entirely within the province of the NRA Compliance System and were to be handled in the ordinary way: investigation, adjustment if possible, and eventual reference to the national headquarters in Washington. For labor disputes, two procedures were recommended. In codified industries where machinery for administering industrial relations was in force, labor disputes were to be handled through such machinery rather than by the National Labor Board system. State directors of compliance were instructed to refer labor disputes to "the appropriate industrial adjustment agency," and only if none "is authorized to handle labor disputes, to the appropriate regional labor board of the National Labor Board."¹⁴

In accordance with this distinction, the manual recommended the setting up by code authorities of separate agencies for labor complaints and labor disputes. "If an industry desires to adjust its own labor complaints," it read, "it must provide adequate adjustment machinery.

¹³ *NRA Bulletin No. 7*, p. 5. This distinction was not entirely logical. Any complaint of the violation of a code labor provision must necessarily involve Sec. 7(a). Provisions (1) and (2) of the section provide for collective bargaining while provision (3) requires the employer to comply with the wages, hours, and other working conditions set forth in his code. Hence the unsatisfactory character of the distinction. Ordinarily, however, Sec. 7(a) is taken to mean provisions (1) and (2) thereof. The wage and hour requirements of provision (3) are not ordinarily considered a part of Section 7(a).

¹⁴ The same, p. 12. The manual cautioned that "very few industries are organized at this time along lines suitable to adjustment and fact finding in this type of case. Complaints of violations of labor provisions should not be referred to industrial adjustment agencies unless the interests of the employee are adequately protected [that is by bi-partisan representation]." (The same, p. 5.)

... A labor complaints committee should be organized." Such a committee, to be acceptable, was to have an equal number of representatives of employers and employees, who would choose an additional member as chairman. The employer representatives might be appointed by the code authority subject to approval by the NRA. The employee members must be chosen "in such manner that all employees in the industry may be represented as fairly as possible." Appointment by the President or by the Administrator "upon the recommendation of the Labor Advisory Board" was one method specifically suggested.¹⁵ An industry which desired to adjust its own labor disputes (subject to any regulations which may be issued by the National Labor Board or by the Administrator), the manual further instructed, "should set up a labor disputes committee" of a bi-partisan character similar to that of a labor complaints committee.¹⁶ The manual abstained from suggesting any specific procedure to be pursued in the adjustment by such committees of labor disputes, but went into considerable detail in setting forth the proper procedure for handling complaints. The following instruction was significant:

If at any time in the adjustment of a complaint, a situation develops where there is a threatened or actual strike or lockout the complaint, together with a report of all action taken thereon to date and of all other pertinent facts, will be referred direct to the appropriate industrial adjustment agency if one has been authorized to handle labor disputes, or if not, to the appropriate regional labor board of the National Labor Board.¹⁷

Despite the issuance of the manual, no active steps were taken for widespread setting up of labor tribunals

¹⁵ The same, p. 24.

¹⁶ The same, p. 24.

¹⁷ The same, p. 31.

under NRA auspices until late in March 1934. On March 30, the Administrator issued Administrative Order X-12, the evident intent of which was to implement each NRA code with its own machinery for adjusting labor disputes (collective bargaining) as well as labor complaints (wages and hours).¹⁸ Two important developments preceded the promulgation of the order: (1) Early in March the NRA had staged a Code Authority Conference. The first fruits of this conference were considerable activity along the lines of organizing code authorities for effective performance of their functions. (2) On March 25, 1934 the President concluded the automobile strike settlement, resulting in the establishment of the Automobile Labor Board—a staggering blow to the authority and prestige of the NLB. General Johnson's active participation in negotiating the settlement seemed to indicate that the NRA would henceforth play a dominant part in adjusting collective bargaining disputes over and against the NLB and the Department of Labor.

Administrative Order X-12 called for the immediate establishment of both labor complaints and labor disputes committees in each and every codified industry. Industries operating under approved codes which contained express provisions for establishing an agency or agencies to deal with both types of labor matters were instructed to put these provisions into effect at once. Some codes, the order recognized, provided for agencies with jurisdiction over labor complaints alone; some for agencies with jurisdiction over labor disputes exclusively. In either case, the industry was instructed to establish both types of agencies, regardless of the express provisions of the code. If the approved code con-

¹⁸ For text of the order, see *NRA Release No. 4152, Mar. 31, 1934*.

tained no provisions on the subject, then the industry was "requested immediately to proceed to create an industrial relations committee to handle both labor complaints and labor disputes." Finally, after establishing these committees, industries were to be governed by the suggested procedure and standards set forth in *Bulletin No. 7*.

If Administrative Order X-12 had taken effect, it would have meant a proliferation of industrial relations boards which would have smothered the NLB and its regional agencies. But the order proved to be little more than a scrap of paper. This was due in part to the attitude of the Labor Advisory Board of the NRA, which Board saw no merit in an indiscriminate multiplication of boards. Above all, the Labor Advisory Board was skeptical about the establishment of any such apparatus in non-unionized industries. It wanted to be certain that the boards would be bi-partisan in character, that the labor members would be chosen only with its approval, and that the boards would not be granted any powers of compulsory arbitration.¹⁹ In the course of time, the Labor Advisory Board received satisfactory reassurances and withdrew its open opposition. It continued, nevertheless, to manifest a cautious and reserved attitude. Despite the fact that employers' opposition to labor boards diminished somewhat after the automobile settlement, Order X-12 remained practically without effect.

The passage of Public Resolution No. 44 changed the situation out of which Order X-12 arose. This resolution transferred the function of adjudicating labor disputes

¹⁹ The Labor Advisory Board at one time circulated an office order instructing its advisers to oppose, for the time being, all proposals looking toward the establishment of industrial relations boards under codes.

under Section 7(a) to a series of special boards which were soon established, above all to the National Labor Relations Board. Clearly and definitely, the NRA was being relegated to a secondary place in the field of labor relations and in the settlement of labor disputes.

The NRA recognized the new situation in Administrative Order X-69 of July 29, 1934, which attempted to adapt some of the ideas contained in Order X-12 to the new state of affairs. Administrative Order X-69 distinguished more clearly than before between labor complaints and labor disputes. Labor complaints were said to involve alleged violation of the maximum hour and minimum wage provisions of the codes; and disputes to be based on alleged violations of Section 7(a) of the NIRA involving actual or threatened strikes or lock-outs.²⁰ On the basis of this distinction, Order X-69 outlined separate methods of procedure for handling complaints and disputes. Code authorities were not authorized to deal with any labor complaints other than those voluntarily registered with it. To enjoy the right to handle labor complaints, a code authority must first submit a plan of procedure to be approved by the NRA. All code authorities which had not already done so were requested to submit plans of this character. Labor complaints, it was suggested, might be handled either by bi-partisan employer-employee committees or by a committee of neutral members. The Administrator reserved the powers of approval and disapproval over the organization and personnel of these committees. Code authorities were also requested to give serious consideration to the possibility of forming labor complaints committees to enjoy jurisdiction over related but separate

²⁰ The distinction is set forth, not in the order itself, but in the accompanying release.

code industries. The order further promised that if any industry preferred to route labor complaints through the NRA Compliance Division, such request would be considered on its merits.

The most significant departure was contained in the provisions bearing on the adjustment of labor disputes. (1) All existing NRA code boards theretofore authorized to handle labor disputes were exempted from the force of the order. (2) It was stressed that the NRA did not require any industry to establish a labor disputes board if the industry itself did not desire to do so. Any code authority which did desire to establish such a board for its industry was instructed to study Public Resolution No. 44 and Executive Order No. 6763, providing for the establishment of the National Labor Relations Board. Before any board could be set up under a code, the industry must consult with both the Administrator of the NRA and the NLRB. (3) It was emphasized that the NLRB had potential power of review over the decisions of all code boards established to settle labor disputes. It was noted in this connection that all code boards, those already in existence as well as those which might be created in the future, might be designated as special boards pursuant to Public Resolution No. 44.²¹

With the adoption of Order X-69, the NRA practically dissociated itself from control over labor disputes. Its various labor disputes boards in existence at the time the order was issued—the cotton textile, automobile, and bituminous coal tribunals—might continue to function for the time being. But they were potentially subject to the NLRB, which might decide at any time to bring any or all of them within the orbit of its own system. No new boards of this character could be brought into being un-

²¹ For text of Order X-69, see *NRA Release No. 6849*, July 29, 1934.

less the NLRB was first consulted. Practically, this meant that the NRA had been relieved from concerning itself with questions of collective bargaining.²²

FACTORS OF NRA POLICY

Any explanations of the NRA's efforts to build up a labor relations program must begin by emphasizing the dominant part played in the NRA by the Administrator during the entire period here considered. In his eagerness to extend the jurisdiction of the NRA to all labor controversies, he disregarded the claims of the NLB and the traditional influence of the Department of Labor.²³ Had he won the support of organized labor and of his own Labor Advisory Board, his idea of giving the NRA complete jurisdiction over collective bargaining issues might have had some chance. But, according to the expressed view of trade union leaders and sympathizers, the Administrator was moved by a bias against organized labor. Union leaders and sympathizers resented his pronouncements on Section 7(a), on the closed shop, and on trade unions; his actions in all the cases in which Section 7(a) violations were involved, particularly the Budd and Harriman cases; his behavior in the automobile strike, the cotton textile strike, and in the steel controversy. By friends of organized labor these actions were taken to indicate a temperamental incapacity to pursue that neutrality which he declared to be the right policy of the

²² Later developments are discussed in Chap. XI.

²³ Until his retirement, General Johnson was in the habit of projecting himself into all strike situations. He intervened, by acts or words, in the threatened automobile strike (March 1934), the threatened steel strike (June 1934), the San Francisco general strike (summer 1934), the Chicago Stockyards' strike (summer 1934), and the nation-wide textile strike (September 1934). Each such intervention was melodramatic and as a rule embroiled the Administrator with trade union leaders.

government. As time went on, feeling against him became more and more intense, until the A. F. of L. unions became insistent on his resignation.²⁴

It is doubtful whether the NRA could ever have become an efficient agency for the handling of disputes under Section 7(a). It was animated by the purpose of turning out codes of fair competition as rapidly as possible. The President's Re-Employment Agreement was but an expedient. The true objective was the complete codification of trades and industries. In the process of formulating codes the NRA found it necessary to enter into compromises. Bargains had to be driven with employer associations and with labor organizations. This involved the NRA in entanglements and commitments which disqualified it from functioning as an impartial instrumentality in the field of collective bargaining disputes. Moreover, had the NRA wished to exercise jurisdiction over Section 7(a), it would have had to assume a definite attitude on the statute. Whatever its stand, it was bound to have offended either employers or employees. The result would have been a weakening of the bargaining tactics and procedures which were fundamental to NRA's success as a speedy maker of codes. Even as it was, the efforts of General Johnson and Mr. Richberg to interpret Section 7(a) resulted, principally, in antagonizing the trade unions; and in awakening among the unions a suspicion of the NRA, not only as a tribunal of collective bargaining, but also as an agency for the formulating of code labor provisions.

Had the NRA truly succeeded in establishing its jurisdiction over labor disputes, it would have been even more rent by internal dissension than was the NLB;

²⁴ Such demands were expressed publicly following his intervention in the national textile strike.

and for the same reasons. The Labor Advisory Board, composed of trade union leaders and of persons selected for their sympathies toward ideals of organized labor, did not see eye to eye with the Industrial Advisory Board, composed almost entirely of "big business" leaders, most of them representatives of open-shop industry. Within the NRA as a code-making mechanism, this divergence expressed itself in disagreements concerning the content of the labor provisions of codes. Had the NRA been successful in claiming the field of labor disputes for its own province, the Labor Advisory Board and the Industrial Advisory Board would have pulled in two opposite directions, in the same manner as the labor and industry members of the NLB.

The constant antagonism between the Administrator and the Labor Advisory Board was perhaps the chief reason why the Board obstructed the Administrator's efforts to transform the NRA into an agency for applying Section 7(a) to labor disputes. The trade unions, whose interests the Labor Advisory Board represented, were satisfied with the doctrines evolved by the NLB, but dissatisfied with the doctrines evolved by Messrs. Johnson and Richberg. The trade unions saw no reason, therefore, to disturb the NLB in its labor dispute activities, and to push the NRA's jurisdictional claims.

Backed up in this attitude by the Labor Advisory Board, the trade unions were distrustful of the system of code administration which was springing up under the NRA. As code was added to code, it became apparent that the NRA's concept of "industrial self-government" was limited; membership on code authorities, with rare exceptions, was restricted to employers. In short, from the trade union point of view there developed a system of industrial self-government which was synonymous

with self-government of and by, if not also for, employers. The NRA would not recognize the validity of the trade union argument that industrial self-government should mean a complete partnership between labor and industry, that organized labor should enjoy an equal role in code administration with organized industry.²⁸

Accordingly, the trade unions believed it would be dangerous to set up labor boards and committees in conjunction with the administrative agencies established by the NRA. Trade union leaders scented a danger that code authorities would exercise jurisdiction, via committees and boards, over collective bargaining issues. So far as such committees and boards could be regarded as agents of the code authorities, the trade unions felt it would be a case of empowering employers to sit in judgment on themselves. One party would be at the same time defendant, advocate, and judge. From organized labor's point of view, industrial relations boards under code machinery were not a promising arrangement.

Another factor in blocking the claims of the NRA over labor disputes was the attitude of the Department of Labor. From the beginnings of the Recovery Act, the Department was forced into the background by the newer and more vigorous emergency agencies. The formulation of labor standards, as a field of code-making activity, was controlled by the NRA; the adjustment of labor disputes, under Section 7(a), by the NLB. But the NLB early worked out a *modus vivendi* in which proper allowance was made for the Labor Department's traditional jurisdiction over conciliation and mediation. Moreover, on the subject of the rights and duties of

²⁸ The furthest NRA was willing to go on general principles was to name "labor" as well as "consumer" advisers to assist the Administration members of code authorities. *NRA Release No. 4152*, Mar. 31, 1934.

collective bargaining, there is reason to suppose that the Secretary of Labor was more of one mind with the chairman of the NLB than with the Administrator of the NRA. In any event, the NLB and the Department of Labor entered into close working arrangements, forming as it were separate parts of one mechanism for adjusting labor disputes. No such relationships were established between the Department of Labor and the NRA, although both agencies co-operated in the handling of many specific problems. The Department's weight, when it came to the jurisdictional struggle between the NRA and the NLB, was therefore thrown behind the latter body. Secretary Perkins spoke in behalf of the principles underlying the Labor Disputes bill submitted by Senator Wagner, and played an important part in drafting Public Resolution No. 44. When the new National Labor Relations Board came into being, it was created "in connection" with the Department of Labor. Thus, the Department of Labor reasserted some of its traditional authority in the field of labor relations policy over against the NRA.

THE FINAL SCHEME

By late May 1935 the Recovery Act machinery for handling labor complaints and labor disputes had assumed extensive proportions, and was intricate and quite confusing to the observer. In a broad sense, after mid-summer 1934 labor complaints fell within the jurisdiction of the NRA; disputes within that of the National Labor Relations Board. But in actual detail, affairs were hardly as simple as this generalization might suggest.

So far as complaints were independent of strike complications, they were matters to be handled by the apparatus of the NRA Compliance Division. Where the

complaints arose under codes not equipped with apparatus to deal with labor violations, the Compliance Division instrumentalities exercised jurisdiction all the way through—in the field, in the district agencies, and in Washington headquarters—and by investigation, adjustment if necessary and possible, and Blue Eagle discipline as the last resort. When complaints arose under those few codes where adjustment apparatus was functioning, the Compliance Division machinery swung into action only after the labor complaints committee or industrial relations board had failed to work out a satisfactory settlement.

But many complaints were in fact complicated by strike situations, thus verging into disputes. At the same time, many labor disputes centered around the collective bargaining requirements of Section 7(a) and had nothing whatever to do with the wages and hours prescribed by the codes. Controversies of this character were handled by a number of industrial relations boards, some of them attached to NRA codes, others based on Public Resolution No. 44, including the National Labor Relations Board and its regional affiliates. How far, if at all, the NLRB could be regarded as a "supreme court" was exceedingly doubtful. One point only was certain. To secure Blue Eagle discipline on their rulings relating to collective bargaining requirements, *all* the industrial relations boards had to turn to the NRA Compliance Division.³⁰

There were four joint resolution boards: the National Labor Relations Board itself; the National Steel Labor Relations Board; the Textile Labor Relations Board;

³⁰ We here leave out of account, because it would complicate the story further, the Petroleum Labor Policy Board. Attached to the Petroleum Administration, this board had nothing to do either with the NRA or the joint resolution. It handled both labor complaints and labor disputes.

and the National Longshoremen's Board (whose continuing existence was somewhat theoretical). All four were agencies orientated toward collective bargaining. Only with respect to the textile board was it clear that the NLRB enjoyed powers of review. None of the boards, except the textile tribunal, handled complaints in the strict sense.

Attached to codes, there were three NRA industrial relations boards expressly authorized to deal with collective bargaining, that is, in the strict sense, 7(a) controversies. These were the bituminous coal, automobile manufacturing, and daily newspaper tribunals.²⁷ At one time it might have been argued that each of these boards was subordinate to the NLRB. This could no longer be maintained, however, for the President had instructed the NLRB not to interfere, either originally or on review, in the work of such tribunals.²⁸ At least two of the boards—the coal and automobile tribunals—handled complaints as well as disputes.

Some NRA codes were equipped with joint conference apparatus within whose jurisdiction apparently fell labor complaints pure and simple. Such were the arrangements under the coat and suit, dress manufacturing, men's clothing, cotton garment, men's neckwear, infants' and children's wear, burlesque theatrical, brewing labor, cigar manufacturing, commercial relief printing Zone 16, and advertising typography codes. Occupying a shadowy and amorphous zone between committees (complaints) and boards (disputes) were the arrangements for dealing with labor problems under the codes for the electrotyping and stereotyping, photo-engraving, shipbuilding and ship-repairing, textile print-roller en-

²⁷ We count the several bituminous coal boards as one.

²⁸ See Chap. XI, pp. 326-27.

graving, importing, and printing ink industries—six in all. The construction code was implemented, mostly “on paper,” with special and elaborate joint conference arrangements which were independent of complaints and disputes alike in the sense that these terms were understood by the NRA. Two other proposed boards or committees—for trucking and household goods storage and moving—were not yet established, from all that could be learned. At least three boards or committees—for lumber, rubber, cleaning and dyeing—had expired, if indeed they ever had been active.

In sum, less than 25 of almost 800 basic and supplementary approved codes were equipped with machinery attached directly to the NRA for dealing with labor complaints, labor disputes, or both. And much of this machinery, from all that could be learned, was virtually inoperative. We shall consider these boards (and complaints committees to a lesser degree) in the remaining chapters of our study.²⁰

²⁰ The data summarized above were gathered from a variety of sources, principally from materials compiled by staff members of the Labor Advisory Board, the National Labor Relations Board, and the Post-Code Analysis Unit of the NRA Research and Planning Division. The structure and operations of the various boards are dealt with in the subsequent chapters. For a summary treatment, see Leverett S. Lyon and Others, *The National Recovery Administration*, 1935, Chap. XVII.

PART III
THE LABOR BOARD SYSTEM COMPLETE

CHAPTER XI

THE NATIONAL LABOR RELATIONS BOARD

In the general scheme of new agencies for dealing with industrial relations under Section 7(a), the National Labor Relations Board held a key position, even more important than that held by its predecessor, the National Labor Board. The NLRB was the potential source of a new "common law" on collective bargaining by which the legal foundations of industrial relations in the United States may some day be recast. It was also the potential supreme arbiter over the activities of all other Recovery Act boards in the field. We must therefore first consider the NLRB before passing to an analysis of the other labor relations boards which concerned themselves with Section 7(a). We shall examine in turn the Board's powers and jurisdiction; its organization and functions; its contributions to the theory of Section 7(a); and some of its principal operational problems. The story is carried no further than May 27, 1935, when the United States Supreme Court ruled unanimously that the NRA codes were unconstitutional.

POWERS AND JURISDICTION

On June 29, 1934 the President issued an executive order providing for the establishment "in connection with the Department of Labor" of the NLRB as the successor of the NLB.¹ The creation of the one and the abolition of the other board became effective on July 9, 1934. This executive order was issued in reliance upon Public Resolution No. 44, the story of which was related

¹ Executive Order No. 6763.

in Chapter IX. The powers and jurisdiction of the NLRB were thus based, in general outlines, upon this resolution, and in specific details upon the executive order.³ These powers and jurisdiction may be summed up as follows:

(1) The Board could investigate any and all labor disputes which arose under Section 7(a) of the Recovery Act or which affected interstate commerce; (2) it could order elections among any groups of employees—whenever such elections appeared to be “in the public interest”—to determine through secret ballot by what persons or organization the employees wished to be represented for purposes of collective bargaining; (3) it could hold hearings and issue findings of fact in all cases involving alleged violations of Section 7(a); (4) it could, subject to presidential approval, lay down rules and regulations necessary to carry on its investigatory activities and to assure freedom from coercion with regard to elections; (5) it could recommend to the President rules and regulations relating to collective bargaining, labor relations, and labor representation, to be prescribed by the President in reliance on the powers granted to him by Section 10(a) of the Recovery Act; (6) it could act as a tribunal of arbitration upon voluntary joint submission.

With regard to labor elections, but to no other subject matter of its activities, the Board had the power to subpoena witnesses, take testimony under oath, and issue orders which were reviewable or enforceable by the federal courts in the same manner as an order of the Federal Trade Commission. Any person who knowingly violated Board rules (approved by the President) bearing upon the investigation of labor disputes or coercion in elections

³ Both the resolution and the order are quoted in full in *Decisions of the NLRB* (July-December 1934), pp. v-vi, vii-ix.

was liable to a fine of not more than \$1,000, or imprisonment for not more than one year, or both. In all other matters the Board had to rely for enforcement discipline on the NRA and the Department of Justice.

The executive order specified the relations of the NLRB to other boards growing out of the Recovery Act. In view of the importance of this relationship and of the controversies which it aroused, it may be best to quote Sections 3(a) and 4(c), which are directly pertinent. Section 3(a) authorized the Board as follows:

1. To study the activities of such boards as have been or may hereafter be created to deal with industrial or labor relations, in order to report through the Secretary of Labor to the President whether such boards should be designated as special boards and given the powers that the President is authorized to confer by Public Resolution 44.

2. To recommend, through the Secretary of Labor, to the President, the establishment, whenever necessary of "regional labor relations boards" and special labor boards for particular industries vested with the powers that the President is authorized to confer by Public Resolution 44.

3. To receive from such regional, industrial and special boards as may be designated or established (in accordance with 1 and 2) reports of their activities and to review or hear appeals from such boards in cases in which (1) the board recommends review, or (2) there is a division of opinion in the board, or (3) the National Labor Relations Board deems review will serve the public interest.

Section 3(a), it would seem, constituted the NLRB as a "Supreme Court" over all other joint resolution boards subsequently established.³ At the same time, Section 3(a) defined a procedure whereby the NLRB might disestablish any co-existent labor board in order to reconstitute it

³ The National Steel Labor Relations Board (see Chap. XII) and the Longshoremen's Board (see Chap. XV) were established prior to the NLRB. Whether the NLRB could review decisions of either of these boards was at all times an open and doubtful question.

as a joint resolution tribunal. These two features of Section 3(a), taken together, formed a possible basis from which a single and uniform system of labor boards under the Recovery Act might have been projected. The possibility was destroyed, however, through informal action taken by the President late in January 1935, by which the newspaper, automobile, and certain other NRA code boards were taken out of the NLRB's scope of power.⁴

Section 4(c) was also highly significant in connection with problems which arose out of the existence of "joint resolution" boards and NRA code labor boards. This section read as follows:

The National Labor Relations Board may decline to take cognizance of any labor dispute where there is another means of settlement, provided for by agreement, industrial code, or law which has not been utilized.

The phrase "may decline to take cognizance" was permissive, not mandatory. It apparently conferred upon the NLRB discretionary power to intervene or not to intervene in any labor dispute which might otherwise have been routed through an NRA code labor board or a joint resolution board. But this was disputed by NRA authorities and the newspaper publishers in the so-called Jennings case.⁵ Finally, as we shall see, the President ruled against the NLRB and it was forbidden to inter-

⁴ See pp. 326-27.

⁵ For a full discussion of this problem, see the Board's decision in the Jennings case (No. 195, decided Dec. 3, 1934, affirmed, Dec. 12, 1934). Relying on Sec. 4(c), the Board decided that it had authority to adjudicate in a discrimination case, notwithstanding that the case had not been submitted, as it might have been, to the Newspaper Industrial Board. The NRA, in the persons of Mr. Richberg and Mr. Blackwell Smith, argued that the NLRB had no jurisdiction over the case; further, that the intervention of the Board was contrary to the terms of the newspaper publishing code. After the NLRB had turned the matter over to the NRA Compliance Division with the recommendation that the employer be deprived of his Blue Eagle, the President interfered and the matter was dropped.

vene, originally or on review, in cases arising under codes equipped with a board empowered to make "final adjudication."

Whatever right of intervention the NLRB may or may not have had, it had autonomous power over such cases as properly fell within its jurisdiction. Whenever the Board took jurisdiction over a case, no other agency in the executive branch of the government could intervene; and all findings of facts or orders issued by the Board in any case or controversy were final and not subject to review by any person or agency in the executive branch of the government. This meant that the NLRB was free from the Department of Labor. It also meant that the NRA Compliance Division was disqualified from initiating independent investigations into controversies on which the NLRB had already passed.

ORGANIZATION AND FUNCTIONS

The National Labor Relations Board, to quote from the executive order, was established "in connection with the Department of Labor." It was nevertheless independent of the Secretary of Labor, who, besides making the facilities of the Department available to the Board, acted as the medium by which its recommendations were transmitted to the President.

The NLRB, with offices in Washington, consisted of three impartial members, each appointed by the President at a compensation of \$10,000 per year. No member of the Board might engage in any other business, vocation, or employment.⁶ The NLRB might use the services

⁶ The three original members of the Board were: Lloyd Garrison, dean of the Law School at the University of Wisconsin; Harry A. Millis, chairman of the Department of Economics at the University of Chicago; and Edwin S. Smith, former commissioner of labor and industries of Massachusetts. Mr. Garrison resigned on Nov. 16, 1934. He was replaced by

of the staff of the Department of Labor, but it also had a staff of its own. This staff was composed of a legal division at the head of which stood the general counsel to the Board (Mr. Calvert Magruder); a number of examiners who acted as mediators and conciliators; a few research and statistical experts, and clerical employees. There was also an executive secretary (Mr. Benedict Wolf).

Heading up into the National Board, and subject to its authority, was a nation-wide system of 17 regional labor boards, each functioning within its proper district. This regional set-up was substantially the same as that which prevailed under the National Labor Board, save for a few territorial readjustments. Some regional boards for reasons of administrative convenience had more than one office.⁷ Each regional board was in charge of a regional director. In some districts, one or more associate directors were named. The functions of the director and his associates were to engage actively in mediation; to see that cases were promptly and efficiently heard and disposed of and that full and complete records of every hearing were made, so that in case of review by the Board the case might be finally disposed of without additional testimony in Washington.⁸ Attached to the regional boards were examiners, who exercised the functions described

Francis Biddle of Philadelphia, an attorney, who was still chairman when this book went to press.

⁷ In all, 24 offices were distributed among the 17 regional labor board districts, as follows: First District, Boston; Second, New York City; Third, Buffalo; Fourth, Philadelphia and Pittsburgh; Fifth, Baltimore; Sixth, Atlanta; Seventh, New Orleans; Eighth, Cleveland, Toledo, and Detroit; Ninth, Cincinnati; Tenth, Chicago, Indianapolis, and Milwaukee; Eleventh, Minneapolis; Twelfth, St. Louis and Kansas City; Thirteenth, Fort Worth; Fourteenth, Denver; Fifteenth, Los Angeles; Sixteenth, San Francisco; Seventeenth, Seattle and Portland.

⁸ *Functions of the NLRB and the Regional Labor Boards*, distributed by the NLRB, Oct. 31, 1934, 11(c). This publication will be referred to hereafter as *Functions*.

above under the supervision of the directors. Each regional board had the services of one or more panels, appointed by the NLRB and consisting of representatives from labor, industry, and the public.⁹ Each case was heard before such a panel. One of the important duties of the regional director was to assign cases in which formal hearings were necessary to the proper panels. The director was also expected to participate at the hearings in the questioning of witnesses, and to see that an adequate record of the case was built up. Generally, however, the regional director did not sit as a member of the panel which heard the case.¹⁰

The NLRB and its regional boards engaged in four activities: (1) the settlement of labor disputes so far as they involved issues relating to Section 7(a); (2) the quasi-judicial interpretation of the statute; (3) the enforcement of the statute's collective bargaining requirements; and (4) the conduct of elections. We shall consider each of these activities in the order indicated.

SETTLEMENT OF DISPUTES

Settlement of labor disputes so far as they related to statutory issues bulked large in the activities of the regional boards.¹¹ Each board was instructed to strive to

⁹ There were 544 panel members in all.

¹⁰ The following exceptions should be noted: (1) If a public representative was not available, the director might act as chairman; (2) if a former impartial chairman was appointed director, he might continue to preside at hearings if so instructed by the NLRB; (3) if a panel was not available for a particular hearing, the director might sit alone, take the testimony, and refer it to a panel as soon as possible if a written opinion became necessary; or (4) if some other method of procedure was directed by the NLRB. See *Functions*, II (d).

¹¹ Regional boards were instructed to "confine their jurisdiction to the handling of complaints, controversies, or strikes involving violation of Section 7(a)." (That is, the collective bargaining requirements thereof.) Complaints involving violation of code provisions on wages, hours, and the like, were to be referred forthwith to the NRA Compliance Division unless there was a "strike in progress because of the code violation." In

bring about amicable adjustments of controversies, even where there were apparent or clear violations of Section 7(a).¹² The task of mediation and conciliation was one of the primary duties of the director, who might ask for assistance from the Conciliation Service of the Department of Labor.¹³ There were three successive steps in the process: (1) the director intervened in a dispute and strove to bring about a settlement without recourse to a hearing, if possible; (2) at the hearing itself, if one was necessary, the director and the panel continued the quest for a compromise; and (3) after the hearing but before the regional board expressed its opinion, mediational efforts, if still practicable, were continued. The regional board handed down a formal opinion only after further negotiations toward a settlement became impossible or seemed fruitless.

The boards were instructed to make settlements on terms which were "in harmony with the provisions of 7(a) as interpreted by the NLRB."¹⁴ In disputes involving Section 7(a), they were not to sacrifice "principles" to "expediency"; at the same time, however, they were

the latter event, the regional boards had to report the case to the NLRB for transfer to the Department of Labor Conciliation Service. The Conciliation Service also enjoyed "exclusive jurisdiction" over "all labor disputes which involve neither code violations nor violations of Section 7(a)." The regional boards might handle complaints which involved both Sec. 7(a) violations and minor wage and hour violations; but first they had to request the NLRB to "secure an authoritative ruling from the NRA regarding the code violation." Where a complaint involved violation of Sec. 7(a) and where code violations were important features of the case, the regional board could handle the 7(a) violations but had to refer the code violations to the NRA Compliance Division. See *Instructions* (mimeographed) issued to regional labor boards by the NLRB, Mar. 19, 1935, p. 1.

¹² *Functions*, IV (a).

¹³ The same, IV (d).

¹⁴ The same, IV (b).

not to insist on "legalistic interpretations of 7(a)" where "genuinely harmonious relationships" could best be brought about by agreement.²⁵

The regional boards were not to commence mediation where, upon inquiry, it appeared that "there is a substantial Section 7(a) question" and that prompt settlement would be unlikely.²⁶ In issuing this instruction, the NLRB sought to avoid one of the most serious mistakes committed by the National Labor Board, and was guided by the belief that "nothing is more fatal to the enforcement of 7(a) than delay."²⁷ For the same reason, if upon a hearing of the case a prompt settlement still appeared unlikely, the regional boards were instructed to proceed at once to make their findings and opinions; and if the latter were not observed, to transmit the case to the NLRB.²⁸

The theory of the NLRB was that it should refrain from engaging directly in mediation and should function, so far as possible, as a court of administrative adjudication on Section 7(a) cases. But the Board did not hold strictly to this theory. It helped to settle strikes in the aluminum industry, and among employees of the Atlantic and Pacific stores and marine workers in the Atlantic and Gulf ports. It also tried to mediate in the national textile strike, though without success. Taking the NLRB system as a whole, we may say that its adjustment activities were essentially intertwined with its judicial functions, though

²⁵ The same. The instructions of the NLRB read further: "Perhaps the only rule that can safely be laid down is that no board should suggest or participate in settlements unless they are fair and reasonable under the circumstances and do not countenance or perpetuate conditions which could be remedied by enforcement of Section 7(a)."

²⁶ *Functions*, IV (c).

²⁷ The same.

²⁸ The same.

to a much less extent than was true of the former National Labor Board.¹⁹

The NLRB and its regional boards stood ready to act as arbitration tribunals and invariably encouraged resort to voluntary arbitration. The willingness of the boards notwithstanding, employers and employees submitted only a few disputes to arbitration.²⁰

QUASI-JUDICIAL ACTIVITIES

The quasi-judicial process within the NLRB system began with a hearing of a dispute before a panel of some regional labor board. If a settlement was clearly impossible or would involve too much delay, the regional board proceeded to hand down an "opinion."²¹ The procedure was for the director to draft an "opinion," which he submitted to the members of the panel for correction and approval. The opinion included the "findings" which indicated in what particulars, if any, the employer had violated the statute, and the "enforcement clause" giving the employer a "fixed and reasonable period within which to bring about a condition in harmony with the law." This clause also stated that if the employer failed

¹⁹ From July 1, 1934 to Dec. 31, 1934, the regional boards handled 3,437 cases involving 1,195,247 workers. Of this total, 3,075 cases were reported as "closed"—1,315 by "agreement," 566 by "decision," and the rest by some other disposition. On Dec. 31, 1934, 528 cases were pending before these boards. Of the cases handled up to that date, 691 had to do with actual or threatened strikes, affecting 495,371 workers directly. Strikes "settled" numbered 514, involving 196,910 workers; strikes "averted" numbered 469, involving 411,469 workers. Of all cases handled, 2,937 involved charges of Sec. 7(a) violations; 376, wage demands; and 14, reduced earnings. *Sixth Monthly Report of the NLRB to the President*, Jan. 9, 1935, p. 2.

²⁰ On arbitration procedure, see *Functions*, V (a-h). Up to Dec. 31, 1934, a total of 82 cases had been jointly submitted to the regional boards for arbitration. *Sixth Monthly Report*, p. 2.

²¹ On "opinion" procedure, see *Functions*, VIII (a-d).

to adopt the corrective measure set forth within the specified period, the case would be referred to the NLRB for "appropriate action." If the regional board found that the law had not been violated, it issued "recommendations" for the adjustment of the dispute.²² The parties to the dispute were free to accept or reject such recommendations. Non-compliance did not result in the transmission of the case to the NLRB.

With regard to the regional boards, the NLRB acted as a superior court. It obtained jurisdiction in one of two ways: (1) Either party to a proceeding before a regional board might request a review by the NLRB; or (2) in the event of non-compliance with an enforcement clause, a regional board had to refer the matter to the National Board immediately.²³ In either event, the NLRB promptly scheduled a hearing in Washington, and invited the parties concerned to appear and argue upon the record previously developed at the regional board proceedings. For the purposes of such a hearing, the regional board transmitted to the NLRB a complete file of the case. Having heard the argument upon the record, the NLRB proceeded to hand down its "decision." Generally, a decision reviewed the facts of the case in terms of the Board's interpretation of Section 7(a); gave the findings, and stated either an "enforcement" or "recommendation" clause, or both, as the case might require. The enforcement clause of a decision ordered the employer to comply with the law within a specified period of time, and warned him of the steps the Board would take if he failed to comply.

The NLRB reserved to itself the power of laying down the general principles of Section 7(a). As these principles

²² Recommendations such as these were issued but rarely.

²³ *Functions*, IX (a-b).

emerged in one decision after another, it became the duty of the regional boards to apply them in particular cases. Procedure at the NLRB hearings, although informal and flexible, conformed to the spirit of the judicial process.

ENFORCEMENT OF DECISIONS

The NLRB inherited its enforcement technique from the National Labor Board. It could avail itself of one or both of two methods of discipline against non-complying employers: It could recommend removal of the Blue Eagle to the NRA Compliance Division, or it could refer the case to the Department of Justice for appropriate action.

After some difficulties culminating in the Chicago Motor Coach case, the NLRB worked out a *modus operandi* with the NRA Compliance Division. Under this arrangement, the Compliance Division agreed to remove Blue Eagles without delay upon the receipt of an NLRB recommendation—but only in so-called “normal” cases. In exceptional cases the Compliance Division reserved the power of “ultimate discretion.”²⁴

²⁴ As set forth in the *Second Monthly Report of the NLRB to the President*, Sept. 9, 1934, pp. 2-3, the arrangement was as follows:

1. In the normal case where the Board has found a violation of Sec. 7(a) and the company within the time allotted to it by the Board has not made such restitution, if any, as the Board has recommended, the Compliance Division of the NRA, upon submission of the decision and of the file, will without delay remove the employer's right to fly the Blue Eagle and will notify the Board accordingly.

2. In the normal case if, after the employer's Blue Eagle has been removed because of violation of Sec. 7(a), the employer petitions for restoration of the Blue Eagle, the petition will be referred to the Board for investigation and for a recommendation to the Compliance Division as to the terms upon which restoration should be granted. In the normal case this recommendation will be followed.

3. Whenever for any reason the Compliance Division believes that in a particular case there is reason not to follow the procedure outlined above, a joint conference will be arranged between the Compliance Division and the Board for a discussion of the matter, it being understood

For a while this arrangement worked well. During its first six months of existence the NLRB succeeded in having 24 Blue Eagles removed. At the end of this time, twelve cases were still pending with the compliance authorities, and a few recommended removals were held up by court actions initiated by employers.²⁵ But early in December 1934 difficulties arose as a result of the so-called Jennings case.²⁶ These difficulties were not smoothed over until the President stepped in to diminish the NLRB's power over and against code labor boards.

The NLRB tried to make use of the disciplinary powers of the Department of Justice. As matters stood in May 1935, it could not be argued that these efforts had been successful; for the Department of Justice was much more reluctant to prosecute than the NLRB was to recommend prosecutions. Where the NLRB was convinced that it had clear-cut cases of 7(a) violations, the Department of Justice was cautious and reserved, slow to move into action before every possible legal contingency had been fully evaluated. During the period from July 9,

that so long as responsibility for the removal of the Blue Eagle remains with the Compliance Division discretion with respect to its removal and restoration must remain with this division.

²⁵ See the *Sixth Monthly Report*, p. 1. Between July 9, 1934 and Mar. 2, 1935 the NLRB issued decisions in 111 cases. In 86 of these, a Sec. 7(a) violation was found to have occurred. In 52 cases, of which 33 were referred to the Department of Justice, the Board had to initiate compliance proceedings. See testimony by Chairman Biddle, 74 Cong. 1 sess., *National Labor Relations Board, Hearings before the Senate Committee on Education and Labor on S. 1958*, p. 93.

²⁶ Jennings, a rewrite man on the San Francisco *Call Bulletin*, complained that he had been forced to resign his position because of his activities in the American Newspaper Guild. The NLRB intervened in the case and handed down a decision in favor of Jennings. When the employer failed to comply, the NLRB transmitted the case to the NRA Compliance Division. Instead of removing the Blue Eagle at once the Compliance Division referred the matter to the Newspaper Industrial Board, established under the daily newspaper publishing code, asking for counsel and advice.

1934 to January 9, 1935 inclusive, the NLRB transmitted 21 cases to the Department of Justice. Eight of these were referred by the Department to United States district attorneys for the initiation of proper legal proceedings. In only one case was a bill of complaint filed. This was the famous Houde case, involving the refusal of an employer to assent to a decision wherein the Board laid down the principle of majority rule.²⁷

CONDUCT OF ELECTIONS

The conduct of employee elections in which workers chose representatives for collective bargaining was one of the major tasks of the NLRB system.²⁸

Regional labor boards could hold elections on their own initiative only in cases where they obtained the employer's consent to a referendum. If the employer refused to grant his consent, then the matter had to be referred to the NLRB, which decided how to proceed further, if at all. The power to *order* elections was specifically granted to the NLRB; but it could exercise this

²⁷ See the *Sixth Monthly Report*, p. 1. Our compilation includes one case inherited from the NLB and one case which never came before the Board for decision. In the Houde suit the government asked for the following relief: (1) A subpoena requiring the employer to answer charges of violating Sec. 7(a); (2) A decree requiring the company to recognize (that is, to bargain collectively with) the labor union concerned; (3) An order directing the employer to cease negotiations with other collective bargaining agencies, specifically the employee representation plan; (4) An injunction restraining the employer from interfering with his employees' exercise of the rights of self-organization and free choice. (See *New York Times*, Dec. 1, 1934; also *NLRB Press Memorandum in re Bill of Complaint in Houde Case*, Nov. 30, 1934.) Of the 33 cases sent to the Department of Justice up to Mar. 2, 1935 the Houde case was still the only one in which a bill of complaint had been filed. See the statement by Chairman Biddle noted above. Further proceedings in the Houde case were dropped on June 1, 1935, together with all other Recovery Act suits.

²⁸ See *Functions*, X (a-d); also XI as amended by further *Instructions* dated Mar. 19, 1935.

power only in the case of employers who were engaged in "interstate commerce." The procedure for handling election petitions which came to the regional labor boards was set forth as follows:

Immediately upon the presentation of a bona fide petition for an election to the director, he will satisfy himself by a cursory examination that the number of signatures on it bears a substantial ratio to all of the employees in the plant or the petitioning unit. Then he will promptly forward to this board a memorandum on the petition covering the following points:

1. The number of signatures on the petition.
2. The total number of people in the unit for which the election is petitioned.
3. A history of the attempts which the petitioning group has made to bargain collectively with the employer, and information as to the nature of the dispute resulting in the petition.
4. His comments as to the appropriateness of the request for election, in so far as the unit is concerned.
5. The official names and addresses of (a) the company; (b) the petitioning union; and (c) any other bargaining group which may be involved in the matter, such as an employees' representation plan.
6. Information as to the interstate or intrastate character of the company's business.
7. The proposed date for an election hearing to be conducted before the director. This date should be not more than ten days following the date of the memorandum and should state specifically hour and place of the hearing, as well as the date.

Upon receipt of this memorandum, this board will immediately decide whether to schedule the case for hearing before the director of the regional board as its agent. Such hearing, if called, will be scheduled for the date indicated by the director's memorandum, and the hearing notices will go out by wire from this board.

In the meantime, after the director has transmitted the memorandum to this board, he shall initiate the usual mediation procedure in an attempt to secure the employer's consent to the election. If he is successful in arranging the consent election, the hearing called by this board will be cancelled. If he does not

succeed, the issue will be adjudicated promptly. It is understood, of course, that when the record and the transcript are completed, they should be filed immediately with this board for decision as to whether an election order should be issued.

This procedure is instituted because the initiation of mediation efforts has in the past resulted in long delays in adjudicating the issues, and such delays have been extremely prejudicial to the rights of the petitioning employees. Furthermore, there is excellent reason for believing that the existence of a deadline such as the hearing date will eliminate many of the customary excuses and delays put forward by the employer.²⁰

In the handling of election petitions by regional boards, it was presupposed that an independent labor organization or a substantial number of employees acting on their own initiative would submit the request. If these conditions were not satisfied, the regional board had to refer the case to the NLRB for further instructions. "Requests by an employer for an election among his employees, or requests made by employees who have been prompted thereto by their employer, should not be entertained unless permission is secured from the NLRB. This is to prevent any abuse of the election device by using it to forestall, obstruct, or defeat legitimate self-organization of employees."²¹

If the employer consented to an election, the regional boards had to try to state the conditions of the election in the form of a written agreement between the parties concerned. "If there is no agreement, the conditions should be determined by the regional director or board, and the director should transmit to the parties a letter stating the conditions. Whenever possible the regional director should have the approval of a panel in ordering, arranging, and conducting an election."²¹ The conditions of

²⁰ *Memorandum* from Chairman Biddle to the regional labor boards, Mar. 6, 1935.

²¹ *Functions*, X (b).

²² *The same*, X (d).

the election were expected to include the following subject matter:

1. Date. "Usually a week or ten days should be allowed before election day. . . . The time or hours for polling will depend upon the number of votes to be cast, working conditions and transportation facilities. . . ."

2. Location of polling place. "Elections should never be held in the plant where the workers are employed. The most desirable polling place is a federal building. . . . If none is available, municipal buildings, churches, lodge rooms, or vacant stores are acceptable."

3. Eligibility to vote. "In the absence of some special agreement, the general rule is that only production employees are eligible—excluding all in supervisory capacities, all who can 'hire and fire,' foreman who can recommend employment or discharge, factory clerks, timekeepers, service planners, production and efficiency checkers, working foremen, straw bosses, gang leaders, research workers, chemists, draftsmen and office workers."

"The date as of which the eligible classes are to be determined must be fixed, and will depend upon the circumstances of each case. Sometimes a date prior to a strike or to lay-offs, if the strikers or men laid off are likely to, or should be reinstated, may appropriately be taken. In the absence of special facts, the date on which the election petition was filed should be taken."

4. Form of election notices. ". . . election notices should be prepared. These notices should state briefly and clearly (1) the purpose of the election, (2) the classes of employees eligible to vote (3) the date, time and location of the election, (4) the manner of voting, by secret ballot under governmental supervision, ensuring freedom of choice without coercion or intimidation, (5) the main contents of the ballot, (6) any agreement as to the effect of the election. These notices should be handed to the company, the union, and any rival groups. . . . A copy should be given to the newspapers. . . ."

5. Form of ballot. The recommended forms offered the worker a simple and clear choice between representation by two (or more) labor organizations, or between acceptance and rejection of representation by some given labor organization, etc. Ballots all included the name of the RLB and statements that

the poll was to be secret, that each voter should mark *x* in the proper space, should *not* sign his name, and should fold the ballot with printing inside before depositing it in the ballot box. "In most instances, where a particular organization is a candidate its names should not be followed by the name of any individual members or officers. This is to make clear that the worker is selecting the organization [instead of] individual members."

6. Supervision of elections. "The election should be held under the supervision of the regional director, or an examiner, or a staff member of the NLRB, if one has been assigned to the case. . . . An equal number of tellers should be selected to represent each of the employee groups concerned in the election. . . ."

7. Method of voting. Procedure similar to that ordinarily pursued in American political elections by secret ballot.

8. The agreement, if any, as to the effect of the election. "If possible the parties should agree in advance that they will be bound by the results of the election, and the employer should agree that the representative or representatives selected by a majority of the employees eligible to vote should be the exclusive agency for collective bargaining for all of the employees eligible to vote. If such an agreement cannot be obtained, the election may proceed without it."⁸²

As a rule, it was expected that a request for an election would be accompanied by an appropriate petition, subscribed to by a substantial number of the employees engaged in the unit for which the election was sought. The purpose of requiring such a petition was "to avoid agitation by small and non-representative groups."⁸³ But the regional director was given discretion, in "exceptional cases," to proceed without a petition. He could thus proceed "where an election may be used as the means of calling off or averting a strike, or where there is no real doubt that a particular organization represents a substantial group, or where the employer consents."⁸⁴ The

⁸² The same.

⁸³ The same, X(b).

⁸⁴ The same.

mere fact that one employee organization objected to an election requested by another employee organization was not to be deemed a sufficient reason for withholding the election, providing that the organization requesting the election was a bona fide "collective bargaining agency genuinely representing a substantial group of workers."⁸⁵

Finally, the regional boards had to keep constantly in mind the inherent purpose of an election. As stated by the NLRB:

The purpose of having an election among the employees of a given bargaining unit (plant, department, etc.) is to determine by what person, persons, or organization they desire to be represented for the purpose of collective bargaining.⁸⁶

It proved no easier for the NLRB than it had been for NLB to compel recalcitrant employers to submit to elections. Tied up as the election orders were with the principle of majority rule, they clearly pointed the way toward union recognition, at least in cases where the trade union could command a majority of the workers. On several occasions, employers went into the courts to restrain the Board from putting into effect decisions which called for elections.⁸⁷

From July 10, 1934 to January 9, 1935, the NLRB system conducted 103 elections comprising 528 industrial units. Trade unions won the election in 301 of the units (57.0 per cent) and polled 20,682 (59.0 per cent)

⁸⁵ The same.

⁸⁶ The same, X(a).

⁸⁷ On Nov. 2, 1934 the U. S. Circuit Court of Appeals in Richmond, Va. dismissed an injunction suit brought against the Board by the Ames Baldwin Wyoming Company. On Dec. 5, 1934 the Firestone and Goodrich companies brought suit against the Board in the United States Circuit Court of Appeals for the Fourth District. Other suits against the Board were also brought.

of the valid votes. Company unions won in 162 of the units (30.5 per cent) and polled 12,207 (34.9 per cent) of the valid votes.³⁸

THE THEORY OF SECTION 7(a)

Functioning first and foremost as a quasi-judicial tribunal, the NLRB outlined a theory of Section 7(a) as the basis for industrial relations. In developing this theory, it worked out from the foundations laid by the NLB, adding many specific details. To present the general outlines of the NLRB's theory of Section 7(a), we shall quote verbatim from the Board's summary of decisions submitted to the President on February 9, 1935,³⁹ and indicate where specific issues were adjudicated in specific cases by citing particular rulings.⁴⁰

GENERAL POLICIES

While the interpretation of Section 7(a) is not free from difficulty at some points,⁴¹ we have sought to develop a body of decisions in harmony with the language of the statute and the intent of Congress as manifested in the hearings and debates on the NIRA.⁴²

As the Board stated in its decision in the Houde Engineering Corporation case:

"Section 7(a) must be construed in the light of the tradi-

³⁸ George Shaw Wheeler, "Employee Elections Conducted by National Labor Relations Board," *Monthly Labor Review*, Vol. 40, No. 5, May 1935, pp. 1149-54. See particularly Tables 1 and 2.

³⁹ See *Sixth Monthly Report*, pp. 3-5.

⁴⁰ Almost exclusively, all cases cited are to be found in the edited volume of *Decisions* covering the period to December 1934. From December 1934 to the end of May 1935, the Board produced a voluminous body of additional decisions. But the decisions contained in the edited volume suffice to cover virtually all points of theoretical interest.

⁴¹ The Board had in mind such points as the closed shop, the proper unit for collective bargaining, the disestablishment of company unions, and so forth. These points are discussed below.

⁴² See Chap. II.

tional practices with which it deals, and the traditional meanings of the words which it uses. When it speaks of 'collective bargaining' it can only be taken to mean that long-observed process whereby negotiations are conducted for the purpose of arriving at collective agreements governing terms of employment for some specified period. And in prohibiting any interference with this process, it must have intended that the process should be encouraged, and that there was a definite good to be obtained by promoting the stabilization of employment relations through collective agreements."⁴⁸

In this the Board gave to Section 7 (a) a fundamental construction similar to that given the comparable provisions of the Railway Labor Act of 1926 by the U. S. Supreme Court in the *Texas and New Orleans Railroad v. Brotherhood of Railway and Steamship Clerks*, where Chief Justice Hughes wrote a unanimous opinion:

"The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries v. Tri-State Central Trades Council*, 257 U.S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional rights of either, was based on the recognition of the rights of both."

Acting on this fundamental policy and construction the Board has in its many decisions to date sought to give content to the legal rights and duties expressed by Congress in Section 7 (a) in

⁴⁸ *Houde Engineering Corp. v. United Automobile Workers Federal Labor Union No. 18839*, decided Aug. 30, 1934; *Decisions of the NLRB*, June 9, 1934-December 1934, pp. 35-44. This volume will be hereafter referred to as *Decisions*.

their application to the many factual situations in which they arise.

COLLECTIVE BARGAINING

The right of employees to bargain collectively carries with it a correlative duty on the part of the employer to bargain with their representatives. Without this duty to bargain, the right to bargain would be sterile and we do not believe that Congress intended the right to be sterile.⁴⁴ The employer is obligated by the statute to negotiate in good faith with his employees' freely chosen representatives, to match their proposals, if unacceptable, with counter-proposals and to make every reasonable effort to reach an agreement for a period of time. The empty declarations by the employer of willingness to confer with union representatives, offers to adjust individual differences as they arise, or mere assent to those terms or demands as are found satisfactory, without an understanding as to duration, do not constitute compliance with the statute.⁴⁵

While the failure to reduce an agreement to writing is not necessarily a violation of the law, the Board has frequently urged that this action be taken, as consistent with business expediency, common sense, and the general purpose of the statute to stabilize industrial relations upon a basis clearly expressed and mutually agreed upon. And the insistence by an employer that he will go no further than to enter into an oral agreement may be evidence in the light of other circumstances in the case, of a denial of the right of collective bargaining.⁴⁶ Again, while the breach of a collective agreement is not of itself a violation of the

⁴⁴ See the Houde case decision. See also the following cases given in the *Decisions*: Atlanta Hosiery Mills, pp. 144-46; Kohler Company, pp. 72-78; and National Aniline and Chemical, pp. 114-17.

⁴⁵ For an expression of this point of view, see the Houde, Atlanta Hosiery Mills, Kohler Company, and National Aniline and Chemical cases, cited above. See also the rulings in the following cases reported in the *Decisions*: Century Electric, pp. 78-81; Eagle Rubber, pp. 55-58; Ely and Walker Dry Goods, pp. 94-98; Glabman Bros., pp. 159-60; Gordon Baking, pp. 102-04; Hildinger-Bishop, pp. 129-30; Johnson Bronze, pp. 105-10; North Carolina Granite, pp. 89-93; Omaha and Council Bluffs Street Railway, pp. 190-91; and Whiting Milk, pp. 137-38.

⁴⁶ These ideas are illustrated with particular clarity in the decisions on the Ely and Walker and the National Aniline and Chemical cases.

statute,⁴⁷ the Board has held illegal the wholesale discharge of employees in violation of an implied term of such agreement or understanding without exhausting the processes of collective bargaining, since the employer is obligated to bargain collectively before modifying or terminating an agreement, arrangement, or understanding.⁴⁸ The Board has prescribed the activities of so-called "runaway employers" who sought by the transfer of their business to other localities to avoid their prior agreements or understandings and to defeat the right of their employees to bargain collectively.⁴⁹

MAJORITY RULE

Acting on the view that any interpretation of Section 7(a) which in practice would hamper self-organization and the making of collective agreements cannot be sound, the Board in the Houde Engineering Corporation case affirmed the principle of majority rule. It is there stated as follows:

"When a person, committee or organization has been designated by the majority of employees in a plant or other appropriate unit for collective bargaining, it is the right of the representatives so designated to be treated by the employer as the exclusive bargaining agency of all the employees in the unit, and the employer's duty to make every reasonable effort, when requested, to arrive with this representative at a collective agreement covering terms of employment of all such employees, without thereby denying to any employee or group of employees the right to

⁴⁷ See the rulings in the Glabman Bros. case cited above, and in the Chicago Defender case, *Decisions*, pp. 119-22.

⁴⁸ In the Chicago Defender case, the employer, publisher of a Negro periodical, broke his closed-shop contracts with the printing trades unions by summarily discharging 35 skilled workers, all but three of them whites. The Board held that the employer violated his duty under Sec. 7(a), not because he broke the contract or discharged the men, but because he did so peremptorily and without any attempt to confer with the men on certain wage questions.

⁴⁹ See in particular the Maujer Parlor Furniture case, *Decisions*, pp. 20-23. See also the Brooklyn Fur Dressing plant case, decided Dec. 22, 1934 (too late for inclusion in the *Decisions*). In all the "runaway" employer cases, the Board ordered the employer to offer re-employment to the workers discharged on account of his flight from the agreement with the union.

present grievances, to confer with their employer, or to associate themselves and to act for mutual aid or protection. This construction accords with American traditions of political democracy, with established customs in industrial relations, with the decisions of the National Labor Board, and with those of the National War Labor Board and the Railway Labor Board under statutes of pronouncements similar in purpose and frequently strikingly similar in language to Section 7(a). It has been expressly confirmed by the President in his executive orders, those of February 1, 1934 with reference to the National Labor Board, and of June 28 and September 26, 1934, establishing the Steel and Textile Labor Relations Boards. The rule was expressly written into the Railway Labor Act by Congress in the amendments of June 1934. We believe it to be the keystone of any sound, workable system of industrial relationship by collective bargaining."⁵⁰

Often the question of what industrial unit should be recognized as appropriate [for collective bargaining] presents difficulties which require careful consideration. Plant representation may be the proper unit, or an industrial as against a craft, union. The organization of the business, the community of interests, geographical convenience, prior bargaining relations, functional coherence—all these considerations should be taken into account. This is peculiarly an administrative matter which has been determined flexibly by the Board, having in mind the growth and nature of labor unions, without laying down too rigid general principles. The Board has sought wherever possible to avoid dictating labor union policies or being drawn into deciding union jurisdictional disputes.⁵¹

⁵⁰ Other cases in the *Decisions* where the NLRB affirmed majority rule are: Atlanta Hosiery Mills, pp. 144-46; Detroit Street Railway Commissioners, pp. 123-26; Columbian Steel Tank, pp. 99-101; Ely and Walker, pp. 94-98; Guide Lamp, pp. 47-48; North Carolina Granite, pp. 89-93; and Tubize-Chatillon, pp. 30-32. The Detroit Street Railway Commissioners case, in particular, bears upon the question of the representation rights of minority groups.

⁵¹ Cases in which the Board ruled upon the definition of a unit for collective bargaining: Detroit Street Railway Commissioners; Ely and Walker Dry Goods; Gordon Baking; Guide Lamp; Hildinger-Bishop; Houde Engineering; Tubize-Chatillon; United Dry Docks. All of these cases except the last (*Decisions*, pp. 150-51) are noted above. Each case

ELECTIONS

The Board believes that the device of elections in a democratic society has, among other virtues, that of allaying strife, not of provoking it. An election is merely a device for determining as a matter of fact who are the representatives of the employees in the particular unit. Therefore, where there are contending factions of employees, or a substantial number of employees in any particular unit call for an election, this should, in most cases, constitute grounds for holding that the public interest requires it.⁵²

COMPANY UNIONS

The statute does not render illegal a company union, if by that term is meant simply a self-organization of the employees in a particular plant into some form of association for collective

was decided on its own intrinsic merits rather than on any general principle of vertical versus horizontal unionism.

⁵² Cases reported in the *Decisions* where the Board developed the theory of "public interest" as the ground for calling elections: Davidson Transfer and Storage, pp. 55-58; Firestone Tire and Rubber, pp. 173-79; Goodrich, pp. 181-88; Kohler, pp. 72-78; North Carolina Granite, pp. 89-93; Omaha and Council Bluffs Street Railway, pp. 190-91; United Dry Docks, pp. 150-51. The Kohler, Firestone, and Goodrich cases are peculiarly significant because of their development of the idea that elections will serve to remedy the employer's coercion in establishing the company union.

Decisions in which the Board saw fit to order elections: Ames Baldwin Wyoming, pp. 68-71; Appalachian Marble, p. 132; Candora Marble, p. 133; Firestone Tire and Rubber, pp. 173-79; Goodrich, pp. 181-88; Gray Know Marble, p. 134; Knoxville Gray Eagle Marble, p. 135; Kohler, pp. 72-78; Tennessee Producers' Marble, p. 136. The predominance of the marble cases will be noted. They all formed a single group.

Decisions in which the Board refused to order elections: Omaha and Council Bluffs Railway, pp. 190-91; United Dry Docks, pp. 150-51. In the former case, a trade union's petition was denied on the ground that the employer was already dealing with it as a collective bargaining agency. (Affirmed Dec. 20, 1934.) In the latter case, involving the claims of welders to be treated as a separate bargaining group, the Board found against the welders. See also what appears to be an informal verbal ruling in the Milwaukee Electric Railway and Light case, where the Board denied a company's union election request on the ground that to hold an election would disturb a recent strike settlement whereby three trade unions were "recognized." *New York Times*, July 18, 1934.

bargaining or mutual aid or protection. What the statute prohibits is the interference, restraint or coercion of employers, or their agents, in connection with their employees "designation of representatives of their own choosing, self-organization, or other concerted activities for the purpose of collective action or other mutual aid or protection." Thus violations of the law may arise in respect of the initiation, sponsorship, financial support, elections, by-laws and other affairs of any labor organization, including a plant organization or company union.⁵³

Participation by employees in an election under a company union plan which has not been submitted to them for approval, has been taken to indicate no affirmative acceptance of that organization as the desired means of collective bargaining.⁵⁴ In certain extreme cases of coercion and interference or where the company union could not operate as a means of collective bargaining, the Board has disqualified the company [union] as agency for that purpose.⁵⁵

⁵³ This, in substance, was the point of view taken by the NLB. See Chaps. VI and VII.

⁵⁴ In other words, election of representatives *under* a company union plan is not equivalent to a vote *in favor* of that plan. See in particular the decisions in the Firestone and Goodrich cases, *Decisions*, pp. 173-79 and 181-88.

⁵⁵ By ordering the disqualification, if not the disestablishment of company unions in a number of cases, the NLRB ventured into a realm of interpretation of Sec. 7(a) unknown to the NLB. Disqualification rulings are given in the *Decisions* for the following cases: Danbury and Bethel Fur, pp. 195-200; Davidson Transfer and Storage, pp. 55-58; Ely and Walker, pp. 94-98; North Carolina Granite, pp. 89-93. In other cases, although the Board found that the company union had been established by "coercion" within the meaning of the statute, it nevertheless proceeded on the theory that "the wrong done by the company can be remedied by an election." In ordering the elections the Board therefore ruled that the company union, notwithstanding its unlawful origins, was entitled to a place on the ballot. This point of view was best expressed in the Kohler Company case, *Decisions*, pp. 72-78. Compare also the rulings in the Firestone and Goodrich cases. In the former the Board rejected the trade union's request that the company union be denied a place on the ballot. In the latter case, however, the union refrained from charging a violation of Sec. 7(a) as such. Whether or not the Board's attitude involved a paradox is a moot point. The NLB, it is true, had also ordered elections in many cases where the company union had been initiated or was being maintained by practices which supposedly contravened the statute. But the NLB never went so far as to rule that there might be circumstances justifying the utter disqualification of a com-

Our records show that in 30 per cent of the 86 cases heard by the Board, company unions were a primary or attendant cause of the dispute. All but two of the unions were formed or revived since the passage of the National Industrial Recovery Act; a great majority became active immediately before or after a contemporary labor union organizing movement, or in close relation to a strike.

DISCRIMINATION

This is by far the most frequent form of interference, restraint or coercion with choice of representatives or self-organization, being involved in approximately half of the cases heard by the Board. It has arisen in a variety of situations, including discharge, lay-off, demotion or transfer, forced resignations, or division of work, and in connection with reinstatement following a change in corporate structure, strike, temporary lay-off or transfer of plant. In numerous cases of this type the Board has ordered employees reinstated to their former positions.⁵⁸

pany union. In the sequel, the Kohler case projected the NLRB into hot water with the A. F. of L. unions. The election was held and the workers chose to be represented by the company union—the same company union whose lawful origins the Board had challenged.

⁵⁸ The Board "ordered" reinstatement only when a Sec. 7(a) violation could be proved; when the charge could not be sustained, the Board could at most "recommend" reinstatement. It was a basic principle that if the strike was caused by the employer's violation of the statute, he was required to offer reinstatement to the striking workers. But where it was not shown that a Sec. 7(a) violation was responsible for the strike, the striking employees could not claim reinstatement as their legal right. See the following cases in the *Decisions*: E. F. Caldwell, pp. 12-14; Century Electric, pp. 79-81; Eagle Rubber, pp. 155-58; Fischer Press, pp. 84-88; International Furniture, pp. 63-64; Kugler's Restaurant, p. 67; Pick Mfg., pp. 161-64; Whiting Milk, pp. 137-38; Winters and Crompton, pp. 165-66.

Like the NLB before it, the NLRB restricted the right of an employer to hire and fire only so far as it could be shown that, in exercising it, he was animated by an intent to punish workers for their union membership or activities. The animating principles were the same as those laid down by the NLB in the Lastowski case (see Chap. VI, p. 169). It would take us too far afield to treat the multiplicity and diversity of discrimination cases in detail. Something should be said, however, about the NLRB's arbitrational award in the so-called Donovan case. Here the Board found that General Johnson, administrator of the NRA, had discharged the president of the NRA Employees Union under circumstances which would have amounted to a violation of the statute if Sec. 7(a) had been ap-

SPECIAL ISSUES

A few points in the theory of Section 7(a), not touched upon in the NLRB's own summary, also call for consideration.

CLOSED SHOP

The NLRB took the same stand on the closed shop as did the NLB: a reserved and cautious approach, resting upon the assumption that the statute did not impair the validity of a closed-shop agreement between the employer and a bona fide labor organization. In the *Tamaqua Underwear case*,⁵⁷ the Board ruled that a closed-shop agreement between an employer and a company union was invalid, and that any discharges made in reliance on this agreement were unlawful. In the language of the Board:

The facts of this case do not require us to determine, in the light of Section 7(a) . . . the validity of a closed-shop agreement with a bona fide labor union resulting in the discharge of employees not joining the union. We need to decide only whether the *Tamaqua Employees' Union* is a company union within the intent of that part of Section 7(a) which provides that "no employee and no one seeking employment shall be required as a condition of employment to join any company union."

In the light of all the circumstances present in this case, we plicable. Donovan's reinstatement was ordered, the Administrator complying with the award. See *Arbitration in the Matter of American Federation of Government Employees ex. rel. John L. Donovan, and Hugh S. Johnson, administrator for National Recovery* (decided Aug. 21, 1934), *Decisions*, pp. 24-29.

The authors have examined the 32 discrimination cases listed under "discharge" or "lay-off" in the index to the published *Decisions* as well as 38 of such cases decided between Dec. 1, 1934 and Mar. 24, 1935. In 60 instances, the Board found in favor of complaining workers or groups of workers. In 20 instances it found against complaining workers or groups of workers. Some of the cases contained rulings "for" and "against."

⁵⁷*Tamaqua Underwear Co. v. Amalgamated Clothing Workers of America* (decided Aug. 6, 1934), *Decisions*, pp. 10-11.

are of the opinion that the Tamaqua Employees' Union is a company union within the meaning of Section 7(a). The result is that it was contrary to the terms of the statute to dismiss those who would not join.

In the Bennett Shoe case,⁸⁸ the NLRB sustained the discharge of four employees dismissed by the employer pursuant to the terms of his closed-shop agreement with the United Shoe and Leather Workers Union.⁸⁹ The discharge, it should be noted, followed the expulsion of the workers from the United after they had been tried by a union tribunal on charges of violating a fundamental union rule.⁹⁰ The four complaining workers were informed by the Board that if, as contended, they were wrongfully discharged from the union, courts were available to provide them with adequate relief. If, the complainants were further informed, the union's constitution was wrongfully adopted, the courts provided adequate remedies for setting it aside. Moreover,

. . . by joining the United, the complainants ratified in effect a closed-shop agreement and cannot be heard to question its validity. In fact, they are in complete accord with its terms. By requesting and accepting membership in the United at a time when that union had already adopted the constitution, they assented to it, and it must therefore, for the purpose of the present case, be assumed to have been legally adopted and binding upon them.

It is uncertain upon close analysis, whether in this decision the Board truly passed upon the validity of the closed-shop contract. It can be argued that the Board

⁸⁸ Decided Dec. 10, 1934, too late for inclusion in the published *Decisions*.

⁸⁹ A so-called "independent" trade union; independent, that is, of the A. F. of L.

⁹⁰ That no member of the United could belong, at the same time, to any other union in the trade.

merely ruled that the complaining workers were stopped from asking for relief from the burdens of such a contract voluntarily assumed by them. But there can be no doubt about the decision's practical effect. It ratified the closed shop.

In the Hildinger-Bishop cases⁶¹ the Board set aside the discharge of Edward and Dominick Cruciana in reliance upon a closed-shop contract⁶² but upheld the discharge of one Malkowski in reliance upon an identical contract.⁶³ Both rulings, however, were inconclusive and avoided the main point. The discharge of Malkowski was sustained because at the time of his dismissal "he was the sole employee of the Princess Theater in the categories of workers comprising the membership of the rival unions concerned. We do not believe that Congress provided in Section 7(a) for the situation presented by the discharge."⁶⁴ Reinstatement of the Crucianas was ordered because "applying the majority rule principle . . . it results that the company violated its obligations under Section 7(a) by negotiating a collective agreement with a union representing none of its employees, in the face of a request for collective bargaining previously made by a union representing all of the employees in the particular craft group concerned."⁶⁵

⁶¹ *Hildinger-Bishop Co., Cosmopolitan Amusement Co., Inc., Crescent Theater Co., Inc., v. Independent Projectionists and Stage Employees' Union* (decided Oct. 25, 1934), *Decisions*, pp. 127-30.

⁶² In force at the Victory Theater between the employer and Local 359 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators (affiliated with the A. F. of L.).

⁶³ In force at the Princess Theater between the employer and Local 359.

⁶⁴ In other words, this was a case of individual and not collective bargaining.

⁶⁵ Thus, not only the closed-shop provision but the entire collective agreement was invalid. The ruling, it might be argued, presupposed the validity of a closed-shop contract between the employer and a labor organization which spoke for at least a majority of the workers.

INDIVIDUAL BARGAINING

No more than the NLB before it did the NLRB ever argue that the statute required workers to bargain collectively and inhibited employees from engaging—if they so desired—in individual bargaining.⁶⁶ What the NLRB did argue, in contrast, was that the employer violated the law when he compelled his workers to bargain individually rather than collectively; when he sought by establishing individual bargaining relationships to frustrate them in the exercise of the right of self-organization.

This point of view was best expressed in the E. F. Caldwell case.⁶⁷ Here the union contended that “the action of the company in presenting individual contracts to its employees when it was well aware of their desire to bargain collectively, constitutes a violation of the statute.” The union also contended that “the company exercised coercion to induce the employees to sign the individual agreements.” Unimpressed by the evidence of coercion, the Board preferred to rule on the case as if no coercion had occurred. It held as follows:

An employer who, having been already informed by the representatives of his employees, that they desire to bargain collectively, deliberately sets out to bargain with them individually, interferes with the right guaranteed his employees by the law. The Caldwell Company's motive is revealed by the fact that the individual contracts were presented at the very time that the employees were attempting to negotiate collectively with a large number of men with whom the company had not previously had similar agreements. These contracts, which covered wages and hours, the prime subjects of collective negotiations, would, if

⁶⁶ But compare the ruling on Malkowski above, where it is supposed that he who engages in individual bargaining can expect no redress whatever from the application of the statute.

⁶⁷ *E. F. Caldwell and Co., Inc. v. Lighting Equipment Workers' Local Union No. 19427* (decided Aug. 9, 1934), *Decisions*, pp. 12-14.

valid, empty the employees' right of collective bargaining of all significance and purpose.

Finally, the Board found, "the circulation of individual contracts by the E. F. Caldwell Company constituted a violation of the rights of its employees to be free from the interference of the employer in their concerted activities for the purpose of collective bargaining."⁶⁸

ORDERS RESTRAINING "UNFAIR LABOR PRACTICES"

In those few cases wherein the NLRB disqualified company unions from the benefits of the statute, the Board concurrently issued instructions to the employer which amounted to the restraint of "unfair labor practices" as contemplated by the Wagner bills of 1934 and 1935. Thus in the North Carolina Granite case⁶⁹ the Board ordered the employer (under penalty of enforcement discipline) to offer reinstatement to four employees discharged because of union membership and to "recognize and deal with the Granite Cutters' International Association as the sole representative of its employees for the purpose of collective bargaining until its employees make an unfettered choice of another representative." In the Ely and Walker decision⁷⁰ the employer was ordered to take each of the following steps:

1. Withdraw all financial support from the Employee and Management League (the company union).
2. Cease from soliciting membership in the league, or from suggesting to employees that they should join the league and

⁶⁸ For other comments on bargaining with individual employees, see the decisions in the Columbian Iron Works, Glabman Bros., North Carolina Granite, and Whiting Milk cases, all cited elsewhere in this chapter.

⁶⁹ *North Carolina Granite Corp., J. D. Sargent Granite Co. v. Granite Cutters' International Association, Mt. Airy Branch* (decided Sept. 24, 1934), *Decisions*, pp. 89-93.

⁷⁰ *Ely and Walker Dry Goods Co. v. Wholesale House Workers' Union Local No. 18316* (decided Sept. 25, 1934), *Decisions*, pp. 94-98.

instruct all supervisors and foremen to cease from such solicitations or suggestions.

3. Recognize the Wholesale Workers' Union Local No. 18316 which represents a conceded majority of the employees in the four departments concerned as the exclusive collective bargaining agency for the employees in these departments.

4. Withdraw any recognition from the league as a collective bargaining agency.

5. Negotiate in good faith with the union, and make reasonable efforts when called upon to do so, to arrive at a collective agreement covering terms of employment of the employees in the four departments.

6. Notify all employees by the posting of bulletins or other suitable means that the foregoing steps are being taken, and that no employees who resign from the league will be discriminated against.⁷¹

In the Danbury and Bethel Fur case,⁷² to cite a last example, the employer was instructed to behave as follows:

1. Refrain from requiring or urging, either directly or indirectly, membership in the shop union.

2. Refrain from in any way aiding, encouraging or assisting the shop union, including permitting its meetings to be held during working hours.

3. Until such time as the employees shall have made a free and unfettered choice of another representative, recognize and deal with the United Hat Workers . . . and refrain from in any way recognizing or dealing with the shop union, as the accredited representative of its employees for the purpose of collective bargaining.

By ordering the disqualification of company unions, the NLRB at most disestablished them from any privileges of status under Section 7(a). But the Board, it

⁷¹ See somewhat similar instructions in the Johnson Bronze case, *Decisions*, pp. 105-10.

⁷² *Danbury and Bethel Fur Co. v. United Hat Fur Workers of Danbury and Bethel, Conn.* (decided Nov. 22, 1934), *Decisions*, pp. 195-200.

should be noted, did not order them to be dissolved. They were disestablished in that the employer was ordered to cease and desist from treating with them as accredited representatives for collective bargaining. They might continue in existence as purely fraternal or social organizations. For all practical purposes, however, if the employer complied with the orders of the Board, complete dissolution of the company union would ordinarily soon follow.

EFFICACY OF THE NLRB SYSTEM

Frankly and openly, the members of the NLRB confessed the breakdown of the system on the enforcement side. "The Board is powerless to enforce its decisions," they stated. "In the ultimate analysis its findings and orders are nothing more than recommendations." In a number of cases, the Board reported, Blue Eagle removals were being held up by injunction proceedings in the Supreme Court of the District of Columbia. More to the point, "in many industries the loss of the Blue Eagle has little practical effect."⁷⁸ The Board reported further:

Court enforcement under the present machinery is slow, uncertain and cumbersome. The proceeding may be [a] bill in equity to force the employer to bargain collectively, or indictment for violation of Section 7(a) as embodied in the particular code under which he may be operating. The record before the Board serves as nothing more than a basis for the Attorney General to proceed. It cannot be filed or used in court, and the case must be tried *de novo*. After a bill in equity is filed, the employer has 30 days to answer; or he may move to dismiss, or for a bill of particulars. The case cannot, necessarily, be tried at once. As it must be brought in the district in which the defendant resides, or where, if a corporation, it is incorporated,

⁷⁸ *Sixth Monthly Report*, p. 7.

there is often the burden and inconvenience of bringing witnesses from a distance. This inevitable delay has been increased by much litigation resulting from uncertainty as to the meaning of Section 7(a). There is perhaps ground for genuine disagreement as to its meaning. This should be clarified.⁷⁴

Nevertheless, the NLRB system proved to be administratively more efficient than the NLB system had been. Two reasons help to explain the improvement. First, the NLRB disengaged itself more fully than the NLB had from mediational activities. Second, by hearing arguments upon a pre-existing record rather than by seeking to build up a complete new record, the NLRB cut through much of the red-tape in which its predecessor was entangled, thus avoiding much delay and confusion. But the improvement did not eliminate all defects. The NLRB system, like that of its predecessor, worked all too slowly to grant relief. The fault was inherent in the use of the regional boards as adjustment agencies simultaneously with their use as tribunals for preparing the record of a case.

On the whole, the NLRB was unable to budge anti-union employers from their determination not to permit trade unions to profit by Section 7(a). The unwieldy machinery of code compliance and the slow action of the Department of Justice were important contributory factors. That the Department of Justice did not see fit to prosecute quickly and vigorously all cases where an employer refused to comply with an NLRB decision explains, in large part, why many employers did not consider it necessary to respect the Board's orders. True, the

⁷⁴ The same. These comments, it should be noted, were delivered some weeks prior to Feb. 27, 1935, when Judge Niels held unconstitutional the application of Sec. 7(a) to the Weirton Steel Co. The decision applied to a case inherited from the days of the NLB. Its immediate effect, however, was to obscure still further the already obscure status of NLRB findings and orders.

Board had recourse from time to time to Blue Eagle discipline. But the procedure was uncertain; it worked in "normal" cases, but failed in "extraordinary" cases such as the Jennings *cause célèbre*. Furthermore, there is reason to believe that removal of the Blue Eagle had lost much if not most of its punitive force by the time the NLRB entered upon the scene. Public enthusiasm for the NRA had waned, and the public was no longer ready (if it ever had been) to boycott an employer who was deprived of the Blue Eagle because of non-compliance with Section 7(a). As for possible legal disabilities due to the loss of the Blue Eagle—for example the matter of bidding on government contracts—that was a matter of relatively minor influence.⁷⁵

The Board also failed to achieve its hoped for position of a "supreme court" on the "common law" of Section 7(a). Although it was generally supposed that the NLRB could review the determinations of all joint resolution boards, its technical authority over the steel and longshoremen boards was open to question.⁷⁶ That the NLRB possessed any authority whatever to intervene in disputes arising under industries equipped with NRA code labor boards became doubtful after the Jennings case. On January 22, 1935, while the NLRB and the NRA were still locked in their jurisdictional struggle over the case, the President addressed a letter to Chairman Biddle which rather materially curtailed the powers which the Board had claimed for itself.⁷⁷ Henceforth

⁷⁵ In the Colt case, the NRA refrained for quite a while from informing the governmental agencies concerned that the employer's Blue Eagle had been removed. The case aroused considerable public controversy.

⁷⁶ See above, p. 290 n.

⁷⁷ The letter read as follows: "It has come to my attention that out of a total number of approximately 550 different codes . . . a very small number, probably less than 5, contain a provision for the consideration and final adjudication of complaints of violation of labor provisions. The

the NLRB could no longer claim original or review jurisdiction over disputes arising under codes equipped with labor relations tribunals empowered to issue "final adjudication." The practical effect of the President's request was not extremely important—at most it shut out the NLRB from the bituminous coal and daily newspaper codes—but the request was rather harmful to the Board's authority and prestige.

On January 31, 1935 the President administered still another blow to the authority and prestige of the NLRB when he incorporated the Automobile Labor Board by executive order into the renewed code of fair competition

existence of this provision in this handful of codes was due to the evolutionary procedure of code making during the first year of NRA. . . .

"It is, of course, clear to me that it is reasonable that some provision for appeal should be a part of governmental policy. Nevertheless, the fact that government has approved this provision in these very few codes, makes it imperative that government should live up to the letter of the agreement as long as those codes remain in effect.

"I therefore request that the NLRB conform to the following principles in cases arising under these few codes until such time as the codes themselves may be altered. . . .

"1. Whenever, in an approved code of fair competition, provision is made for the consideration and adjudication of complaints of violation of the labor provisions of the code, and where a committee, board, or other tribunal has been established under the code to which an appeal can be taken, and which is empowered to make a final and enforceable decision of such complaints, the NLRB will refuse to entertain any such complaint, or to review the record of a hearing thereon, or to take any other action thereon.

"2. Whenever a complaint shall be made to the NLRB that the tribunal of appeal established under an approved code of fair competition for the final adjudication of labor controversies has not been constituted or is not qualified in accordance with the requirements of such code, the NLRB may investigate the merits of such a complaint and submit its recommendations thereon to the President.

"3. Whenever, in the case of the type of code referred to in No. 1, a complaint shall be made to the NLRB by either party to a case before the tribunal of appeal that the decision of the tribunal of appeal is contrary to the existing interpretations of the law and specifically of Section 7(a) . . . the NLRB may, in its discretion report to the President as to whether in its judgment the interpretations referred to are contrary to law." (See *New York Times*, Jan. 23, 1935.)

for the automobile manufacturing industry.⁷⁸ This action removed one of the principal fields of industrial relations under the Recovery Act from the scope of the NLRB's potential authority. The Automobile Labor Board, by the terms of the presidential settlement, enjoyed so-called "final adjudication." By virtue of incorporation into the code—in contrast to its prior existence pursuant to a tripartite agreement—the Automobile Labor Board thus became one of the tribunals to which the President's letter of a week earlier was applicable.⁷⁹

Hopes for the future success of NLRB revived when on February 21, 1935 Senator Wagner introduced his proposed National Labor Relations Act, modelled in essential outlines after the Labor Disputes bill of 1934. But the Wagner bill was not then regarded by most qualified observers as an "Administration measure." Although the President said nothing for or against it for the time being, it was generally supposed at the time that he might refrain from giving it the weight of his support. The chances that the bill would be enacted were regarded as faint. What is more, the Weirton decision of February 27, 1935 had opened up the whole question of the constitutionality of Section 7(a).

By March 1935, therefore, the NLRB had run into a blank wall. It was shut off from applying its doctrines of collective bargaining to all codes then or thereafter to

⁷⁸ Sec. 4 of the executive order read as follows: "The members of the industry will comply with the provisions and requirements for the settlement of labor controversies which were established by the government and have been in operation since March 1934, and which are hereby confirmed and continued."

⁷⁹ This question will be discussed further in Chap. XIII, which deals with the Automobile Labor Board. It would appear that "final adjudication"—that is, administratively but of course not judicially final—was enjoyed by only three NRA code boards, the automobile, bituminous coal, and daily newspaper publishing tribunals.

be equipped with qualified industrial relations machinery. Thanks to non-compliance and deficient enforcement, it was like a voice crying in the wilderness. And to cap it all, the future of the NLRB as an interpreter of Section 7(a) was shrouded in the mists of constitutional doubt.

From March to May 27, 1935 the NLRB continued to produce a large quantity of decisions, most of which dealt with complaints of discriminatory discharge. But as soon as the Schechter case ruling was announced by the United States Supreme Court, the NLRB ceased to issue decisions, and suspended all proceedings in Section 7(a) controversies. The regional boards also manifested considerable activity up to May 27. A good part of the NLRB's energies, however, were taken up by an increasing number of court cases, in most of which employers sought to review election orders, findings of Section 7(a) violations, and Blue Eagle removals.⁸⁰

Late in May there occurred two dramatic develop-

⁸⁰ As of April 2 the following cases were in the federal courts: Petitions by employers to review election orders—Acme Machine Products; American Oak Leather; Bendix Products; Firestone Tire and Rubber; B. F. Goodrich Tire. Petitions by employers to review findings of Sec. 7(a) violations—Guide Lamp; Hildinger-Bishop. Petitions by employers to restrain removal of Blue Eagle—Ely and Walker Dry Goods; Hazel Atlas Glass; Chas. Pürzer Co. Preliminary injunctions secured by employers against regional boards—Aronson-Rose Co.; Vyn Storage. Information filed by NLRB—Carl Pick Mfg. Suit by NLRB to compel employer to bargain collectively with majority representatives—Houde Engineering. (Data procured from the legal staff of the NLRB.)

On June 1, 1935, Attorney General Cummings announced that the government would forthwith terminate all court proceedings related to the Recovery Act. The following cases in which the NLRB was directly or indirectly involved were accordingly dropped:

Suits against the government: *Acme Machine Co. v. NLRB*; *American Oak Leather Co. v. NLRB*; *Aronson-Rose Mfg. Co. v. Elliot* (regional director, RLB); *Bendix Products Corp. v. NLRB*; *Employees' Association, Kelsey-Wheel Co. v. NLRB*; *Employees' Conference Plan, Firestone Tire and Rubber Co. v. NLRB*; *Firestone Tire and Rubber Co. v.*

ments, each of critical importance for the future (if any) of the NLRB. On May 16, the Labor Relations bill was passed by the Senate with surprising ease, thanks to the virtual collapse of all anticipated opposition.⁸¹ On May 21 the House unanimously reported out S. 1598 with a recommendation that it be enacted.⁸² For the moment, it appeared that the Labor Relations bill was on the verge of enactment; that the NLRB "common law" of Section 7(a) would at length be projected into the law of the land, and the Board itself continued as a permanent tribunal vested with adequate powers of enforcement.⁸³

On May 27, however, the United States Supreme Court—in the *Schechter* case decision—ruled unanimously against the constitutionality of the National Industrial Recovery Act. The effect of this ruling upon

NLRB; Goodrich Rubber Co. v. NLRB; L. Greif and Bro. v. NLRB; Hazel Atlas Co. v. Clay Williams et al (NRA); Hildinger-Bishop Co. v. NLRB; Hoosier Mfg. Co. v. NLRB; International Nickel Co. v. NLRB; Kelsey-Hayes Wheel Co. v. NLRB; National Color Printing Co. v. D. R. Richberg; Pennsylvania-Dixie Cement Co. v. NLRB; Pfizer and Co. v. Clay Williams et al; Schoenfeld Bros. v. Hope (regional director, RLB); Simon Schwab et al v. F. Biddle; Square D. Co. v. NLRB; United Color and Pigment Co. v. D. R. Richberg; Vyn Co. v. U.S.; Washburn Crosby Co. v. NLRB; Morris Weinman Co. v. D. R. Richberg.

Suits by the government: *U.S. v. Houde Engineering Corp.*; *U.S. v. Oil County Special Ties Mfg Co.*; *U.S. v. Carl Pick Mfg Co.*; *U.S. v. Weirton Steel Co.*

⁸¹ Senator Wagner spoke at length in favor of the bill on May 15. The debate on May 16 was scanty and brief. What opposition there was to the underlying objectives of the bill was expressed by Senator Tydings' proposed amendment, which was voted down 50 to 21. The bill passed, in the form recommended by the Committee on Education and Labor, 63 to 12. See Chap. IX, pp. 231-32 n, and p. 237 n.

⁸² The House committee proposed one major amendment; to establish the Board, not as an independent establishment, but as a part of the U. S. Department of Labor. Representative Marcantonio dissented.

⁸³ According to newspaper reports of the period, the President had finally thrown the weight of his support behind S. 1958 and was ready to push it as an "Administration measure."

the NLRB, was twofold. First, the Board, although it nominally continued in existence until June 16, ceased to function. It entered, so to speak, into a state of suspended animation. True, the Supreme Court had nothing to say about the constitutionality of Section 7(a) as such. But by ruling that all codes were null and void, the court destroyed the subject matter of the NLRB's quasi-judicial activities. Recognizing this fact, the Board halted the issuance of any further decisions, ceased to hold hearings, and terminated all other essential activities.

Second, what the court had to say about the powers of Congress over "interstate commerce" raised serious doubts concerning the constitutionality of the Labor Relations bill. The bill proposed to restrain such "unfair labor practices" as might be engaged in by employers in general; but the Schechter decision suggested quite strongly that the court might hold that manufacturing, mining, construction, and the like were not "interstate commerce." In any event, immediate action by the House of Representatives on S. 1958 was suspended for the time being in the legislative and executive confusion which ensued upon the judicial scrapping of the Recovery Act.⁸⁴

⁸⁴ Two further developments may be noted: (1) On June 15, 1935 the President issued Executive Order No. 7074, temporarily extending the life of the NLRB to July 1, 1935 (later extended to August 1). The Board was empowered to "exercise the powers and the functions and be charged with the duties prescribed in Executive Order No. 6763 . . . in so far as such powers, functions, and duties are authorized under the NIRA as amended and continued by . . . Senate Joint Resolution 113." (*New York Times*, June 16, 1935.) (2) On July 5 the Labor Relations bill became law. Rewritten in an attempt to get around the supposed obstacle of "interstate commerce," the bill kept the new statutory board in contemplation independent of the Department of Labor. See Chap. IX, p. 262.

CHAPTER XII

THE NATIONAL STEEL LABOR RELATIONS BOARD

Of the four special boards established under Public Resolution No. 44, the National Steel Labor Relations Board¹ was peculiarly significant. This Board sought to handle the basic problems of Section 7(a) in a major industry wherein the issue of trade versus company unions was particularly acute throughout the code-active life of the Recovery Act. Thus, before reviewing the work of the Steel Board, it is desirable to relate briefly the events which led to its establishment.

THE CREATION OF THE STEEL BOARD

Feeble since the defeat of the 1919 strike, the Amalgamated Association of Iron, Steel, and Tin Workers began to revive in 1933 under the stimulus of the Recovery Act. At the same time, employee representation plans were introduced in the vast majority of the plants in the industry.² The scene was thus set for conflict. The Amalgamated's rapid growth brought into its ranks a number of new local leaders, militant in spirit, who organized themselves into a "Rank and File Committee," demanding an aggressive campaign for union recognition, to be backed up, if necessary, by a general strike in the industry. At the Pittsburgh convention of the union in April 1934, the Rank and File leaders prevailed over the older leadership and strike plans were ratified.

¹ The other three—the Textile Labor Relations Board, the Winant Board of Inquiry and Mediation, and the Longshoremen's Labor Board—are considered briefly in Chap. XV.

² See Chap. III, particularly the part which deals with the employers' effort to write employee representation plans into the code, pp. 60-65.

Late in May 1934, in accordance with the decision of the convention, over 200 locals of the Amalgamated presented to their respective managements a demand for union recognition. The demand was either rejected or ignored by all employers. A general steel strike to begin in mid-June seemed imminent. The situation was intensified by Judge Niels' first ruling on May 29, 1934 on the Weirton case, in which he refused the government's application for a temporary injunction without going into the merits of the case. This decision weakened organized labor's faith in the ability of the government to enforce Section 7(a). It antagonized, particularly, the Rank and File elements in the Amalgamated.*

On May 30, 1934, the President hastened to relieve the tense situation. In approving on this date the extension of a revised code for the iron and steel industry, he promised the workers an opportunity to participate in elections. In the executive order granting approval of the revised code the President said:

In order to assure the free exercise of the rights of employees under the provisions of Section 7 of this act and Article 4 of this code, I will undertake promptly to provide, as the occasion may demand, for the election by employees in each industrial unit of representatives of their own choosing for the purpose of collective bargaining and for mutual aid and protection, under the supervision of an appropriate governmental agency and in accordance with suitable rules and regulations.

The Rank and File leaders were not at all satisfied with the President's somewhat vague pledge. They is-

* Judge Niels based his reasoning on the Anti-Injunction Act of 1932. At that time, it should be noted, the government was seeking to compel the Weirton Co. to submit to an NLB election. The election issue was later severed from the bill of complaint following the establishment of the Steel Board, and was not touched upon in the court's final adjudication of Feb. 27, 1935.

sued an extraordinarily militant statement which was repudiated by the officers of the Amalgamated. The latter, however, also criticized the government, in more moderate language, for "having failed in its trust to organized labor" by not enforcing Section 7(a) with sufficient vigor and speed. Two days later, the Iron and Steel Institute issued a counter statement asserting that the Amalgamated spoke for a very small fraction of the employees in the industry, and that the vast majority of the 430,000 workers were satisfied to bargain collectively through the employee representation plans. The statement said also:

There is only one point at issue, the "closed shop." . . . The employers in the steel industry will make no agreement that denies to their employees, whether or not they are members of the union, equal opportunity for work and advancement.

Senator Wagner began negotiations with the Amalgamated, but General Johnson soon intervened. On June 1, the Administration suggested the establishment of a Steel Labor Board similar in composition and functions to the Automobile Labor Board. This proposal enraged the Rank and File leaders, who ridiculed the NRA as "the National Run-Around." General Johnson and Donald Richberg nevertheless continued to confer with leaders of the Iron and Steel Institute, and on June 8, 1934 the Administrator announced a plan for a "Steel Industrial Relations Board" to which the Iron and Steel Institute had agreed. The proposed board would have been confined in effect to the regulation and supervision of company union schemes already in existence.⁴ The Amalgamated refused to have anything to do with this proposal; for once the international officers and the Rank

⁴ For details of this plan, see *New York Times*, June 9, 1934.

and File committee were in agreement. After an acrimonious dispute with the Administrator,⁵ the union leaders left Washington to prepare for a convention beginning June 14 which was expected to call the general strike.

It was the threat of this strike, more than any other single factor, which led to the enactment of Public Resolution No. 44. Meanwhile, a day after the Amalgamated opened its convention in Pittsburgh, William Green, president of the A. F. of L., addressed the delegates in a forceful plea for peace. Mr. Green asked the union to call off the strike, and to rely instead on the program proposed by him. This program, it was tacitly understood, had Administration support. It called for the appointment by the President of an impartial "Board of three" with authority to investigate and adjust complaints of Section 7(a) violations, to function as a voluntary arbitrator, and to hold elections of representatives who would be authorized to execute collective agreements.⁶

Mr. Green's speech had the desired effect, and the convention voted to suspend the strike call for the time being. After some delay and further negotiations, the President, by executive order and in reliance on Public Resolutions No. 44, established the National Steel Labor Relations Board of three "impartial" members.⁷

⁵ Including a radio address in which the Administrator spoke of the union leaders in most uncomplimentary terms, and a response, in equally heated language, by the Rank and File group. It was generally believed that the repercussions of this dispute were a factor in leading the President into "easing out" General Johnson from further jurisdiction over labor disputes.

⁶ For details of the program, see *New York Times*, June 16, 1934.

⁷ Chief Justice Walter P. Stacy of North Carolina, chairman; Rear Admiral (retired) Henry A. Wiley, U. S. Navy; Dr. James Mullenbach, (deceased Apr. 2, 1935) member of the Petroleum Labor Policy Board.

POWERS AND JURISDICTION

The general source for the authority and jurisdiction of the National Steel Labor Relations Board was in Public Resolution No. 44. The specific powers and jurisdiction of the Board were set forth in Executive Order No. 6751 of June 28, 1934.

Section 1 of the order created the National Steel Labor Relations Board in connection with the Department of Labor; named the three members; provided for their compensation; authorized the Board to appoint employees, to incur necessary financial obligations in the performance of its duties; and allocated to its use certain of the funds appropriated for the purposes of the Recovery Act.

Section 2 gave the Board the following powers and duties in connection with labor problems relating to the iron and steel industry:

(a) Promptly to investigate, hear and determine any charges of interference, restraint, or coercion of employees in the exercise of their rights [of collective bargaining, as defined in Section 7(a) of the NIRA and in Article 4, Section 1 of the Iron and Steel code]; and any complaint of discrimination against or discharge of any employee in violation of [such] rights.

(b) To mediate in any dispute arising between employers and employees in the iron and steel industry; to arrange, when the Board shall deem it necessary, for conferences for collective bargaining or adjustment of grievances between employers and representatives of employees chosen in accordance with the requirements [of the Recovery Act, the code, and the joint resolution]; and, by mediating and conciliating, to promote the settlement of controversies between employers and employees in the industry.

(c) To serve as a board of voluntary arbitration, or to create boards of voluntary arbitration [in any labor dispute between employers and employees in the industry, but only upon joint submission by the parties concerned].

(d) To exercise all the powers provided in said Public

Resolution 44, 73d Congress, for a board established under said resolution.

Section 3 defined a fourth function—the conduct of elections:

Whenever, after its services are invoked by employers or employees the Board, upon investigation, shall find that an election is necessary to determine by what person, persons or organization employees desire to be represented, the Board is authorized to order and conduct an election by a secret ballot (including primary elections when deemed advisable) in order to determine by what person, persons, or organization the employees desire to be represented. After each such election the Board shall certify the results to all concerned, and the person, persons or organization certified as the choice of the majority shall be accepted as the representative or representatives of said employees for the purpose of collective bargaining, without thereby denying to any individual employee or group of employees the right to present grievances, to confer with their employers, or otherwise to associate themselves and act for mutual aid or protection.⁸

Section 4 was related to Section 3. It provided that the Board should have access to such payroll and other documents as would enable it to prepare and certify lists of employees eligible to vote in elections. No specific procedure whereby the Board could compel the production of the necessary documents was defined. It could be supposed, nevertheless, that this was a matter to which the appropriate provisions of the joint resolution would apply.

Section 5(a) empowered the Board, with the approval of the President, to make and prescribe such rules and regulations as it deemed "necessary for the exercise of

⁸ Sec. 3 was particularly noteworthy. It expressly required the majority rule principle in collective bargaining elections. At the same time, individual and minority group safeguards were provided. A similar provision appeared in Executive Order No. 6858 of Sept. 26, 1934, which established the Textile Labor Relations Board.

the powers conferred in this order." Section 5(b) instructed the Board to report to the President, through the Secretary of Labor, on "its activities, findings, investigations and recommendations."

Section 6 stated that the Board should cease to exist when, in the opinion of the President, it had completed the duties it was authorized to perform.

To sum up, the National Steel Labor Relations Board was authorized to engage in the mediation and conciliation of labor disputes in the iron and steel industry; to arbitrate upon a voluntary basis; to adjudicate controversies involving the meaning and application of Section 7(a); and to determine, by secret ballot elections, under majority rule, disputes concerning representation.⁹

ACTIVITIES OF THE BOARD

The National Steel Labor Relations Board did not use all of its assigned powers in the same degree. We shall consider its main activities separately.

MEDIATION AND CONCILIATION

From July to the end of 1934, the Steel Labor Board functioned almost entirely as an agency for mediation, not so much in the sense of settling strike situations, which were few and trivial, as in the sense of trying to bring the employers and the Amalgamated together for purposes of joint conference.¹⁰ The Board held a series of hearings on collective complaints, moving its scene of

⁹ The effect upon the Steel Board of the Supreme Court decision, May 27, 1935, which held the Recovery Act unconstitutional, was the same as the effect of the decision upon the other joint resolution boards. See Chap. XI, pp. 330-31.

¹⁰ By Oct. 1, 1934, the Steel Board reported the "settlement" of "disputes" involving 15,000 workers directly. (*Department of Labor Press Memorandum*, same date.) But these were not all disputes, which if unsettled, would have eventuated in strikes.

operations for that purpose from Washington to the iron and steel districts. But it refrained from handing down decisions, and bent its energies instead toward bringing about the adjustment of collective grievances by agreement.¹¹

The Board held its first and only election of collective bargaining representatives among the production employees of the West Virginia Rail Company at Huntington, West Virginia on September 6, 1934. In the technical sense, the Board "ordered" this election. The order was issued, however, after the employer expressed his readiness to submit and willingness to abide by the results. Given the choice between representation by a lodge of the Amalgamated Association or by a company union—the Huntington Steel Workers Association—237 employees voted for the trade union; 134 for the company union. Applying the principle of majority rule, the Board certified the Amalgamated lodge "as the representative of the employees of the West Virginia Rail Company for the purpose of collective bargaining with all the rights and privileges vouchsafed by law to such choice and certification."¹²

In three other important cases, Apollo Steel Company (Apollo, Pennsylvania), Clayton Mark and Company (Chicago), and Bethlehem Steel Corporation (Sparrows Point, Maryland plant), the Board was able to adjust

¹¹ As an illustration, we may cite the dispute between various lodges of the Amalgamated Association of Iron and Steel Workers and the Republic Steel Company. It arose out of the employer's refusal to renew wage contracts covering groups of skilled workers in the plants at Warren and Niles, Ohio, and Moline, Ill. Failure to settle this controversy might have precipitated a strike. The settlement, reached by agreement, consisted in the employer's notice to the union that he would adhere to the union scale of wages as incorporated in a general agreement covering small Mid-Western mills. The union was content to regard this as a renewal of the bilateral contract.

¹² *NSLRB Certification*, Sept. 10, 1934.

representation controversies without recourse to elections.¹³ In all three cases, it appears, the employers gave the Board assurances that they were willing to meet and deal with the committees of the Amalgamated. How far, if at all, these assurances constituted union recognition it is hard to say. What mattered, from the Board's point of view, was its ability to bring the parties to the disputes into agreement.

To simplify the procedure of dealing with complaints coming from the Amalgamated Association of Steel Workers, the Board at an early date entered into working arrangements with the Mr. Charlton Ogburn, counsel to the union. All complaints received by the Board involving the Amalgamated were transmitted to him, and he prepared them for presentation, if necessary, at a formal hearing. To centralize responsibility still further, individual members of the union and lodges of the Amalgamated were instructed by the Board to present their grievances in the first instance to the union's counsel for investigation and presentation.¹⁴

All this activity in connection with hearings and adjustments however, was of secondary importance. The Board's greater task was to bring about, if possible, a lasting truce between the Amalgamated and the iron and steel employers. This task necessitated a series of informal and confidential conferences with representatives of both parties. While engaged in this work, the Board refrained from committing itself, officially at least, to a stand on Section 7(a) which might have spoiled its chances of achieving mutual accommodations.

This part of the Board's work reached a climax and

¹³ *Department of Labor Press Memorandum*, Oct. 1, 1934.

¹⁴ *NSLRB Memorandum*, July 20, 1934.

came to an end late in December 1934. By that time, steel production had begun to move upward once again, labor unrest was stirring anew, and the possibilities of a steel strike were more vivid than at any time since May or June 1934. On November 18, 1934 it was reported that as a concession to the President's recent plea for industrial peace, the iron and steel employers were ready to grant provisional and limited recognition to the Amalgamated. Seemingly, the employers offered a scheme of proportional representation similar to that adopted in the President's automobile settlement. The Amalgamated insisted on "majority rule." The negotiations, in which the Steel Labor Board served as chief intermediary, broke down.¹⁵ The next step was intervention by the President and the Secretary of Labor, and on December 18, 1934 a conference was held at the White House.¹⁶ The union representatives were urged to agree to a settlement by which (1) the employers promised to bargain with all groups of employees; (2) both labor and employers promised to recognize the Steel Board as an arbitration agency; and (3) both sides promised to observe a six-month truce, during which no elections of representatives for collective bargaining would be held.

In the light of the June truce, which resulted in the establishment of the Steel Labor Board, these were somewhat extraordinary proposals. On the assurance that elections would be held under majority rule, the

¹⁵ See *Washington Post*, Nov. 18, 1934.

¹⁶ Those in attendance were: Miss Frances Perkins, secretary of labor; Edward F. McGrady, assistant secretary of labor; Messrs. Stacy and Wiley of the Steel Board; Eugene G. Grace, president of the Bethlehem Steel Corporation; William Green, president of the A. F. of L.; Michael F. Tighe, president of the Amalgamated. *New York Herald Tribune*, Dec. 19, 1934.

Amalgamated had called off its proposed strike. Now that the strike fever was reviving once again, the union was asked to enter into a new truce involving the denial both of elections and of majority rule. The Administration, it appeared, was ready to scrap the terms of the first truce if by doing so it could help to promote the progress of re-employment.

Confronted with these proposals, the A. F. of L. stood firm. The White House conference led nowhere. Having failed to bring about agreement by conference, the Steel Labor Board turned toward the exercise of its election powers.

ELECTION ORDERS

Long before it began to issue any election orders in January 1935, the Steel Board had been functioning as a tribunal for administrative adjudication of Section 7(a) cases. Charges that employers were practicing discrimination were frequent. So also were complaints by various Amalgamated lodges, alleging refusals by employers to bargain collectively, or accusing employers of having imposed company unions on the workers against their will, and asking that the representation issue be settled by means of a secret referendum.

On December 31, 1934 the Board issued two orders for elections in properties owned by the Carnegie Steel Company, one in the Duquesne (Pennsylvania) plant, the other in the McDonald (Ohio) mill.¹⁷ In both plants, the Amalgamated claimed a majority of the production employees; in both plants an employee representation scheme was in force. After considering the facts, in both cases, the Board concluded "it to be in the public interest that an election of the productive em-

¹⁷ *NSLRB Press Memorandum*, Jan. 2, 1935.

ployees . . . be held to determine by what person, persons or organization they desire to be represented for the purpose of collective bargaining."

The Board ordered further in each case that the Carnegie Steel Company should produce, within seven days, "its last payroll prior to the date of the making of this order of all its productive employees" at each plant for the purpose of making it "possible for this Board to ascertain those employees of said company eligible to vote in the election ordered herein." Finally, in the event that application should be made to "an appropriate court of the United States for enforcement or review of this order," the payrolls were to be produced within five days following the decision by the court, on the assumption, to be sure, that the court would uphold the Board.

Seven days passed, and the Carnegie Steel Company failed to produce the payrolls as ordered. Moreover, the Board was taken into the federal courts by the action of the General Body Committees of Employee Representatives (the company union). These court actions, asking that the election orders be set aside, were commenced on January 7, 1935 in the United States Circuit Court of Appeals in Philadelphia and Cincinnati. The lawyers for the company unions did not challenge the constitutionality of the Recovery Act. Contending, merely, that no election was justified, they argued that the Board was in error by failing to find that "the employee representation plan is a proper vehicle for the exercise of the right of collective bargaining under Section 7(a)," and in not finding that "the employee representatives were freely and voluntarily chosen by a majority of the employees." To these contentions, the counsel for the Amalgamated, who announced that he would seek to intervene in the case, retorted as follows:

The employee representation plan is not an organization of employees. Testimony in this case showed that the company union has no dues and no treasury and that the fees of the attorney representing it were paid by the Carnegie Steel Corporation.¹⁸

Court proceedings having been initiated, both election orders were necessarily held in suspense. On March 8, 1935 the Board cancelled the Duquesne order in response to the Amalgamated's petition to withdraw. Three days earlier the United States Circuit Court of Appeals for the Third Circuit, acting in reliance upon the joint agreement of all parties concerned, had dismissed the company union's appeal against the order of December 31, 1934.¹⁹ The reasons for the dismissal by the Circuit Court and the cancellation by the Board were identical: factional strife within the Amalgamated between the Tighe leadership and the Rank and File group had resulted in the suspension of many local charters, among them the charter of Fort Dukane Lodge No. 187.

By its action in the Carnegie Steel cases, the Steel Labor Board committed itself to the issuance of election orders. On January 8, 1935 it issued three more orders; two of them addressed to the Youngstown Sheet and Tube Company (East Chicago, Indiana, and South Chicago, Illinois plants); the third to the Illinois Steel Company (Gary, Indiana works).²⁰ The Board went further in these orders than in the Carnegie Steel order. In all three cases, it found that the employee representation plans were "clearly sponsored by the company and that the elections held for said employee representatives were not such elections as it contemplated by Public Resolution No. 44." Refuting the contention that in

¹⁸ *New York Times*, Jan. 8, 1935.

¹⁹ *NSLRB Press Memorandum*, Mar. 8, 1935.

²⁰ The same, Jan. 8, 1935.

electing representatives under the company union schemes the workers had expressed their choice, the Board observed:

At no time was the question of approval of this plan submitted to the workers in these plants for a clear-cut vote to determine whether the workers would select this as their means of collective bargaining or some other agency.

The Board ruled further (Youngstown cases) that

. . . the interest of certain supervisory officials in the numbers voting at the election vitiated this as to the free choice of representatives as contemplated under Section 7 (a) of the NIRA.²¹

On that same date, January 8, 1935, the Board refused to grant the Amalgamated lodge's petition for an election among the employees of the Acme Steel Company (Riverdale, a Chicago suburb).²² The Board found that the employees had been offered the choice by secret ballot of approving or rejecting the company union plan; that a majority had voted in favor of adopting the plan; and that a member of the Chicago regional labor board had been present at the election as an observer. As for the trade union's attitude, the Board said: "It does not appear that the Amalgamated Association offered any alternate plan or objected to the vote being taken." The findings continued to the effect that, although the company had participated in the formation of the plan by having its representatives act in an advisory capacity, no coercion had been used.

²¹ All three of these orders were shortly thrown into the federal courts, the employers refusing to produce the payrolls and the company union plans taking the legal initiative. Later election orders (Jan. 16, 1935) addressed to the Pittsburgh Steel Co. were also taken into the courts, this time by the employer. On June 1, 1935, Attorney General Cummings announced the termination of all the court cases in which the Steel Board was involved, together with all other Recovery Act cases.

²² *NSLRB Press Memorandum*, Jan. 8, 1935.

On January 11, 1935 the Board refused to sustain the complaints made by an Amalgamated lodge against the Jones and Laughlin Steel Corporation (Aliquippa, Pennsylvania plant) to the effect that the company had violated Section 7(a) by interference in the self-organization of employees. The dispute ran back to certain acts of espionage, intimidation, and discharge supposedly committed during the late summer and early fall of 1933, while the Amalgamated local was first getting started. All these matters had been settled, however, by the time the Board came to rule on the case. The Amalgamated's earlier election petition was not at issue, the matter having been deferred by stipulation between the union and the employer.²³

On January 16, 1935 the Board ordered that elections be held in the Monessen and Allenport, Pennsylvania plants of the Pittsburgh Steel Company. In each case, notwithstanding the Amalgamated's claim to speak for a majority of the workers, the employer had conducted an election of representatives under the company union scheme. In each case, the Board found that "such elections for employee representatives were not such elections as is contemplated by Public Resolution No. 44."²⁴

On February 28, 1935 the Board addressed an election order to the Clearing, Illinois plant of the Continental Can Company. It was found in this case that "such elections as were held under the employee representation plan did not permit that freedom of choice and did not guarantee the non-interference of the company with the self-organization of its employees contemplated by Section 7(a) . . . and Public Resolution No. 44."²⁵

²³ The same, Jan. 12, 1935.

²⁴ The same, Jan. 17, 1935.

²⁵ The same, Mar. 4, 1935.

On March 11, 1935 the Board dismissed charges of Section 7(a) violations brought against the Wheeling Steel Corporation (Portsmouth, Ohio plant), but nevertheless granted the Amalgamated's election request. In ordering the referendum, the Board advanced the following explanation of Public Resolution No. 44:

... [Its purpose is] to provide a method by which employees may choose their representatives for collective bargaining with their employer without restraint or interference by means of a secret ballot election impartially supervised. The right to hold such an election should not be denied to petitioning employees where a *prima facie* showing is made by petitioners, and not rebutted, that such an election will tend to put at rest existing controversies among employees as to the bargaining agency they desire to have represent them.²⁶

DECISIONS ON DISCRIMINATION

Almost immediately after issuing its first batch of election orders the Steel Labor Board began to hand down its first decisions in discrimination cases. Among the various cases handled by the Board, special interest attached to complaints by the Amalgamated against the Republic Steel Company (Warren, Ohio and Niles, Ohio plants), which were decided on January 10, 1935.²⁷ With reference to the Niles plant, the Board found that "a violation of Section 7(a) of the NIRA by the Republic Steel Company has not been proven and the company is not guilty of such violation." The Board recommended, nevertheless, that the employer "as an act of

²⁶ The same, Mar. 11, 1935.

²⁷ These cases had been before the Board since the early autumn of 1934. The Board went to the trouble, in each decision, of explaining why the decision had been so long delayed: "The delay in the decision in this matter has been for the purpose of enabling the company and the union to negotiate their differences. Reports of counsel to the Board, made from time to time since the hearing, have indicated that these negotiations were still in progress." (The same, Jan. 11, 1935.)

good faith" take certain steps which might lead to the reinstatement of the four complaining workers.

With reference to the Warren plant, the Board was unable to find that the company had discriminated against eight of the workers involved. It did, however, sustain the discrimination complaints in the case of two other workers, and held that the Republic Steel Company had "interfered with, restrained and coerced these employees in the exercise of their rights of concerted activities for mutual aid and protection. . . ." Reinstatement of both employees was ordered. There was then appended to the decision an enforcement clause as follows:

Should the Republic Steel Company fail to notify the Board within ten days from the date of this decision that it has reinstated the said [two employees] in their former respective positions, provided that within said period the two said employees, or either of them, shall make application to the company for reinstatement, the case will be referred to the Compliance Division of the NRA and other agencies of the federal government for appropriate action.

The Republic Steel decision set an important precedent in the application of Section 7(a) to the iron and steel industry. It was the first time that an employer had been officially warned that refusal to comply with a decision of a labor board might lead to the loss of the Blue Eagle. It was the second time that an employer had been found guilty by a labor board of "discriminatory discharge."²⁸

²⁸ The Weirton suit initiated by the National Labor Board arose, not out of the employer's refusal to comply with a decision, but out of his failure to carry out the terms of an agreement as the agreement was understood by the Board. It is not apparent that the NLB ever recommended to NRA that the Weirton Company be deprived of the Blue Eagle. The NLB in the Great Lakes Steel case found a violation in the discharge of two workers. (See *Decisions*, Vol. 1, p. 91.) Refusal by the employer to comply led the NLB to refer the case to the NRA Compliance

On March 14, 1935 the NSLRB handed down what appears to be an arbitrational award on a group of discrimination complaints entertained by Tuscarawas Lodge No. 173 of the Amalgamated against the Greer Steel Company of Dover, Ohio. These cases were heard by virtue of an agreement, settling a strike, which provided *inter alia* that "discharge cases that cannot be adjusted by direct negotiation shall be referred to the Steel Labor Board for arbitration." With reference to a number of ore workers, the Board found that they "were merely given work that was somewhat different from what they did previously, but that the change was occasioned by the economic requirements of the mill and not because of their union affiliation and union activities." With reference to one Prosser, the Board again found no evidence of discrimination, but recommended his reinstatement to his former job.²⁸

Sixteen workers, the Board found in the Gulf Lakes Steel decision of May 1, 1935, had been discriminated against by their employer in violation of Section 7(a). The employer, it was also found, had been guilty of "interference" with the self-organization of the employees. The Board ordered the employer to reinstate the 16 workers in question within the next fortnight on penalty of having the matter referred to the NRA Compliance Division and other federal enforcement agencies. The case, which involved 27 individual complainants in all, was the outgrowth of a plant shutdown during July and

Division and to the Attorney General; but thanks to an adjustment, the matter was not further pursued. By April 1935 the Steel Labor Board had not yet referred the Republic Steel case to the Compliance Division because, there is reason to believe, of certain legal technicalities. One of the workers had been reinstated.

²⁸ NSLRB Press Memorandum, Mar. 14, 1935.

August 1934, following the threatened general strike which failed to materialize. Despite the findings of "discrimination" and "interference," the Board held that "no case has been made in support of the allegation that the employer has refused to engage in collective bargaining."²⁰

SUMMARY

It could hardly be said, as of May 1935, that the National Steel Labor Relations Board had accomplished much in attempting to apply Section 7(a) to the industrial relations problems of the iron and steel industry. The Board had smoothed over a number of difficulties, and averted a number of plant strikes. But it had not been able to solve the basic issue of trade union versus company union. It had not been able to introduce majority rule and collective agreements as living realities.

The Board refrained for many months from forcing the issue of elections.²¹ It may be excused for refraining from forcing the issue earlier, in an attempt to carry out the specific terms of the June truce. The reason for the Board's delay was not of its own making. The cause lay in the Administration's reluctance, because of the desire to push along re-employment, to precipitate a struggle with one of the country's major industries. The attitude of the steel industry was clear; it would stand by its company unions and fight any attempt to force trade unions upon it. In evading the issue for many months,

²⁰ *Matter of Gulf States Steel Co. (Gadsden, Ala.) and Lodges No. 18, 21, and 22 Amalgamated Association of I.S.T.W.*, NSLRB Press Memorandum, Apr. 30, 1935.

²¹ Judge Nields' Weirton case ruling had nothing to do with the Steel Labor Board's election powers. In fact, the Steel Board was not at all involved in the suit. The court held (in fact) that the employer did not unlawfully impose the employee representation plan on his workers; and (in law) that Sec. 7(a) was unconstitutional in application to a manufacturing enterprise, because manufacturing is not "interstate commerce."

the Steel Labor Board merely accommodated itself to the Administration's objectives.

Another factor was the lack of a real basis in the ranks of the A. F. of L. for direct and effective action. Torn by internal dissension, after June 1934 the Amalgamated lapsed into a state of lethargy. In view of the continued low rate of production and widespread unemployment, moreover, it would probably have been suicidal if the union had called a strike at any time thereafter. Organized labor, though still in ferment, gave no signs of being able to take the offensive. What is more, the Tighe leadership of the Amalgamated, instead of pushing ahead on a vigorous organizational campaign, was engaged, during the spring of 1935, in carrying out a "purge" of the Rank and File leaders.²² True, at the convention of 1934, the A. F. of L. Executive Council had been instructed to initiate a drive for union recognition in iron and steel. But what specific steps, if any, had been taken were not readily apparent. Finally, the whole psychological situation was profoundly affected by Judge Niels' Weirton case decision. It was not so much that he found Section 7(a) unconstitutional. What counted most was the praise he lavished on employee representation plans (company unions) as a means for supervising industrial relations, particularly in the iron and steel industry. All in all, by May 1935 company unionism had become more firmly entrenched in the iron and steel industry than ever before.

Such was the sum and substance of affairs when on May 27, 1935 the United States Supreme Court handed down its decision in the Schechter case—the decision which gave the death-blow to NRA codes. The effect of this decision upon the Board was to block it from con-

²² The charters of many of the more aggressive locals were suspended.

tinuing its efforts to apply Section 7(a) to the labor relations problems of the iron and steel industry. The future of the Board (if any) depended on what action Congress would finally take on the Labor Relations bill, for as a "joint resolution" tribunal the Steel Labor Board was due to expire on June 16, 1935. But although the Board became at once quiescent in its quasi-judicial and election activities, it continued for the time being to engage in the mediatory function.²²

²² Agents of the Board sought to settle a bitter and violent strike in Canton, Ohio, which began coincidentally with the ruling in the Schechter case. The strike was not, however, precipitated by the ruling, but began for independent reasons.

By executive order on July 1, 1935, the Steel Board's existence was extended indefinitely, pending the creation of a labor board system under the Labor Relations Act.

CHAPTER XIII

THE AUTOMOBILE LABOR BOARD

The Automobile Labor Board—the full title was the President's Automobile Labor Board of the National Recovery Administration—owed its origins to the labor unrest in the industry in the early spring of 1934. No other Recovery Act labor board was the center of more controversy concerning the theory and application of Section 7(a). Before considering the work of the Board, however, it will be well to summarize the events which led to its creation.

THE CREATION OF THE BOARD

In the summer of 1933 the American Federation of Labor began a campaign for organizing the workers in the automobile manufacturing industry. Federal labor unions, constituting units of what was then called the United Automobile Workers Union, were formed in most of the important plants.¹ The employers, however, succeeded in putting the "individual merit" clause into the automobile code,² and began setting up employee representation schemes.

Labor troubles broke out at once. Early in March 1934, while the industry was experiencing a brief seasonal expansion, they came to a head. The A. F. of L. unions began preparations for a general strike.³ The

¹ At the same time, the Mechanics Educational Society of America, independent of the A. F. of L., began to organize tool and die craftsmen. Some months later, the federal locals were fused into a "national" council preliminary to the establishment of an A. F. of L. "international" organization (not set up by June 1935).

² See Chap. III, pp. 65-68.

³ At that time, it was believed there were from 75 to 100 such federal unions. Estimated membership was from 50,000 to 60,000. One year

National Labor Board intervened to avert the threatened walkout and arranged a hearing in Washington. On March 14, 1934, representatives from the various federal labor unions constituting the United Automobile Workers' Union, presented a series of demands which may be summarized as follows:

1. The National Labor Board should conduct plant referendums [on the model of the Reading hosiery and captive mines referendums] at which the employees could choose between representation by outside and inside unions.

2. The employers should agree to recognize the United Automobile Workers' Union in any plant where the majority of the workers chose it as their representative for collective bargaining.

3. The employers should reinstate all employees who, it could be shown, had been laid off or discharged because of their union activities.

4. A joint industrial relations board of the bi-partisan type should be set up for the automobile industry.

5. Collective agreements fixing wages, hours, and other working conditions should be concluded in all plants where the workers elected the union as their representative.

6. Seniority rights should be given conclusive weight in questions of seasonal lay-offs and rehiring.

7. A commission should be established with authority to inquire into the speed-up system, the method of paying wages by crews of workers, the adjustment of super-minimum to minimum wage rates, seasonal employment swings, and so on.

Unless these demands were granted, the A. F. of L. spokesman said they would have no alternative but to call a strike.⁴

On March 15 the hearings before the NLB reached a deadlock. Mr. William S. Knudsen, executive vice-

later membership had declined considerably; just how far, it is hard to say. Membership totals were still lower by June 1935.

⁴*NRA Release No. 3817; Memoranda Nos. 1-7, Mar. 14, 1934. See particularly the statement by Mr. William Collins, principal A. F. of L. organizer, Memorandum No. 2.*

president of the General Motors Corporation, read a statement in which he asserted that General Motors would neither recognize any A. F. of L. union nor commit itself to holding elections. The corporation was willing to meet with representatives of any and all groups of the employees to talk things over with these representatives and to adjust particular complaints. But these representatives must first establish their identity and authority; which meant, presumably, that the union would be expected to disclose its membership lists. Having delivered his pronouncement, Mr. Knudsen walked out of the hearing room.⁵

At this point, General Hugh S. Johnson assumed the part of chief negotiator on behalf of the government. He brought the dispute before the President, who, after several conferences with committees representing the National Automobile Chamber of Commerce and the A. F. of L., on March 25 finally succeeded in obtaining a settlement which was accepted by both parties.⁶

The Automobile Settlement of March 25, 1934 was a departure from both the Reading Formula developed by the National Labor Board and the Johnson-Richberg interpretation of Section 7(a) of February 3, 1934.⁷ To begin with, the President prefaced the settlement with the following restatement of the significance of Section 7(a):

- Reduced to plain language, Section 7(a) of NIRA means:
- (a) employees have the right to organize into a group or groups;
 - (b) when such group or groups are organized, they can choose

⁵ *NRA Release No. 3827 (3817)*; *Memorandum No. 2*, Mar. 15, 1934 summarizes Mr. Knudsen's statement.

⁶ General Johnson during these negotiations showed himself to be out of sympathy with the demands of the unions and expressed views at variance with those held by the NLB.

⁷ See Chap. IV, pp. 97-98 and Chap. X, pp. 270-71.

representatives by free choice, and such representatives must be received collectively and thereby seek to straighten out disputes and improve conditions of employment; (c) discrimination against employees because of their labor affiliations or for any other unfair or unjust reason is barred.

This restatement of the statute was more in line with the Johnson-Richberg doctrine of pluralism in collective bargaining than with the National Labor Board's theory of majority rule. But the specific terms of the settlement made it clear that the President did not intend to establish the Johnson-Richberg theories to the exclusion of those developed by the NLB. Instead, he advanced several new ideas and devices in terms which read as follows:

1. The employers agree to bargain collectively with the freely chosen representatives of groups and not to discriminate in any way against any employee on the ground of his union labor affiliation.

2. If there is more than one group, each bargaining committee shall have a total membership pro rata to the number of men each group represents.

3. NRA is to set up within 24 hours a board, responsible to the President of the United States, to sit in Detroit to pass on all questions of representation, discharge, and discrimination. Decisions of the board shall be final and binding on employer and employees. Such a board to have access to all payrolls and to all lists of claimed employee representation, and such board will be composed of: (a) a labor representative, (b) an industry representative, and (c) a neutral. In cases where no lists of employees claiming to be represented have been disclosed to the employer, there shall be no basis for a claim of discrimination. No such disclosure in a particular case shall be made without specific direction of the President.

4. The government makes it clear that it favors no particular union or particular form of employee organization or representation. The government's only duty is to secure absolute and uninfluenced freedom of choice without coercion, restraint, or intimidation from any source.

5. The industry understands that in reduction or increase of force, such human relationships as married men with families shall come first, and then seniority, individual skill and efficient service. After these factors have been considered, no greater proportion of outside union employees similarly situated shall be laid off than of other employees. By outside union employees is understood a paid-up member in good standing, or any one legally obligated to pay up. Any appeal shall lie in case of disputes on principles of paragraph 5 to the board of three.

To interpret the settlement to the public, the President made the following statement:

In the settlement just accomplished two outstanding advances have been achieved. In the first place, we have set forth a basis on which, for the first time in any large industry, a more comprehensive, a more adequate, and a more equitable system of industrial relations may be built than ever before. It is my hope that this system may develop into a kind of works council in industry in which all groups of employees, whatever may be their choice of organization or form of representation, may participate in joint conferences with their employers; and I am assured by the industry that such is also their goal and wish. In the second place, we have for the first time written into an industrial settlement a definite rule for the equitable handling of reductions and increases in force.³

In brief, the settlement interpreted "representatives of their own choosing" to mean "proportional representation." There was apparently contemplated the establishment, within each unit of the industry, a works council as the agency for collective bargaining. In so far as this assumed a single instrumentality of collective bargaining, the doctrines of the NLB were observed. But each works council was to consist of representatives on a pro rata basis, chosen from among the several labor organizations claiming to speak for various groups of employees. This assumed the recognition of collective

³ *New York Times*, Mar. 26, 1934.

bargaining rights of minority groups, and was in accordance with Johnson-Richberg theories. For the rest, the settlement outlined a general formula for handling the seasonal lay-offs and seasonal rehiring so characteristic of the automobile industry. To put the settlement into effect an Automobile Labor Board attached to the NRA and independent of the NLB was established.

STRUCTURE AND POWERS

The Automobile Labor Board was established on March 26, 1934 by order of the Administrator, who acted in reliance upon the settlement of March 25.⁹ Three members were named: Leo Wolman, impartial chairman;¹⁰ Nicholas Kelley, representing employers;¹¹ and Richard F. Byrd, employee member representing the workers.¹² The Board set up headquarters in Detroit, extemporized a staff, and began to function.

The Board's powers, as stated in the administrative order, were to "pass on all questions of representation, discharge, and discrimination." All of its decisions were to "be final and binding on employer and employees." In the exercise of its powers, however, it must be emphasized that the Board was limited by the terms of the agreement of March 25. At first its jurisdiction was limited by this settlement to the field covered by the code for the automobile manufacturing industry. Later, however, it was extended to cover questions of representation, discharge, and discrimination arising under the automotive parts and equipment code; but only to

⁹ Administrative Order X-11. See *NRA Release No. 4072*, Mar. 27, 1934.

¹⁰ Dr. Wolman was at the time chairman of NRA's Labor Advisory Board and one of the "labor" members of the National Labor Board.

¹¹ Mr. Kelley was counsel to the Chrysler Company.

¹² Mr. Byrd was a leading spirit in the United Automobile Workers' unions, with which he later broke.

such questions as were voluntarily submitted to it by the parties to a dispute.¹⁸

The Automobile Labor Board was the constant subject of criticism by the A. F. of L. unions. In January 1935 the A. F. of L. finally broke with the Board and repudiated the settlement of March 1934. The Board was charged by the A. F. of L. unions with partiality to the employers; with complacency in the face of employer dominated company unions; with unwillingness to interpret Section 7(a) along the doctrinal lines of the NLB and the NLRB; and with bias against union workers in discharge and lay-off cases. The analysis which follows will indicate how far, if at all, these criticisms were justified. But in passing judgment one must keep in mind that the Board was created to implement the provisions of a specific agreement, and that the unions had accepted the settlement voluntarily. In brief, the virtues and defects of the Board were in large measure the result of the settlement of March 25.

WORK OF THE BOARD

The Automobile Labor Board, largely because of the beliefs of its chairman, stressed the idea of settling complaints and disputes by compromise, adjustment, and voluntary agreement. Its technique was to seek adjustments informally and to arrange in a facilitative capacity conferences by which the parties were brought together in the hope that they might reach an understanding. This was simplified by the relative absence of strikes in the industry after the creation of the Board. There were a few flurries, about a dozen in all, but these were local-

¹⁸ Administrative Order X-26, supplemental to Administrative Order X-11.

ized and of brief duration. The Board helped to bring almost all of them to a rapid conclusion.¹⁴

The refusal of the Board to develop, through formal "decisions," a theory of Section 7(a) akin to the NLB-NLRB theory was a major cause of dissatisfaction on the part of the A. F. of L. The unions realized that the settlement of March 25 was a defeat for them and a victory for their employers. Hoping to use the Board to turn defeat into victory, they were disappointed by the ALB's unwillingness to act the necessary part.

From time to time, the ALB issued a series of general instructions to employers and employees, bearing upon collective bargaining and representation questions and upon procedure to be followed in lay-off and re-hiring. It also conducted elections preliminary to the establishment of works councils. Only with respect to complaints that individual workers had been improperly discharged or discriminated against in lay-offs, did the Board function as a quasi-judicial tribunal. If it could not bring about adjustment of such complaints informally, it held formal hearings and handed down decisions.¹⁵ Complaints of discriminatory discharge and lay-off bulked larger in the work of the Automobile Labor Board than in that of any other labor board. This

¹⁴ For information on strike situations which the ALB helped to settle, see *Report of the Activities of the ALB from Mar. 29, 1934 to Feb. 5, 1935*, p. 8. The ALB had little to do, however, with settling the strike in the General Motors' transmission plant at Toledo, Ohio. This strike, which occurred late in the spring of 1935 and threw some 30,000 workers in assembly plants out of work for a few days, was called by one of the United Automobile Workers' units in an effort to secure union recognition and pay increases. It ended in a compromise more favorable to the employer than to the workers.

¹⁵ Up to February 5 the Board had handled 2,035 such cases. Of this total, 1,061 complainants returned to work without a hearing and 550 complaints were dropped. The Board issued 199 "decisions." The remaining cases were still at issue. *Report of the ALB*, p. 4.

was because of the highly seasonal character of production occasioned by the introduction of new models at stated periods during the year. This phase of the Board's work is considered first because of its primary importance.

RULES ON LAY-OFFS AND REHIRING

Two months after its establishment, the Automobile Labor Board formulated the following general principles to govern lay-offs and rehiring:

1. When there is a decrease of force, the following procedure shall be observed:

(a) Employees hired after September 1, 1933, shall be the first to be laid off, irrespective of marriage or dependency unless they fall within class (d).

(b) Employees next to be laid off shall be those hired before September 1, 1933, who are unmarried and without dependents, except in the case of employees of long service and of employees in class (d).

(c) Employees next to be laid off shall be those hired before September 1, 1933, who are married and those who have dependents.

In each of classes (b) and (c), employees of less service shall be laid off before employees of longer service; service to be determined on a yearly basis.

(d) Employees whose work, in the judgment of the management, is essential to the operation of the plant and production, or who have received special training or have exceptional ability, may be hired, retained, or returned to work notwithstanding the provisions of clauses (a), (b), and (c), and of paragraph 2 below.

2. Where there is an increase of force, members of class (c) shall be returned to work before members of class (b), except in cases of members of class (b) of long service, and members of class (b) shall be returned to work before new people are hired. In each class, employees of longer service shall be returned before employees of less service. The terms of clause (d) above

are intended, among other things, to provide for the establishment of the line as operations begin.

3. Length of service shall be determined from the date of employment in the plant, or similar plants of the same employer, rather than by length of employment in the group, department, or on any job.

4. Where other things above set out are equal, the skill and efficiency of the individual employee, as determined in the judgment of the management, shall determine preference both in being kept at work and in being returned to work.

5. The principles above set out shall be applied with due consideration of the differences in classification of work in various groups of operations performed in a plant.

6. All cases of discharge or quitting, as distinguished from lay-off, shall be indicated clearly as such and the reason given.

7. The task of applying this procedure in carrying out the principles of the President's settlement, involves the use of considerable data. Each of the employers in this industry will therefore prepare, previous to lay-off, schedules of lay-off, by department, group or job affected, indicating in detail the employees retained, together with lists of cases falling within class (d) and those to be laid off, and the pertinent records of both groups of employees. Any schedule shall be made available to the Board promptly upon its request for use in the work of the Board.¹⁶

In formulating these principles, the Board presumably sought to put the ideas underlying the President's settlement into the form of a practical formula. In brief, it laid down the following order of priority to govern seasonal lay-offs and rehiring: Last to be laid off and first to be rehired, should be workers who in the judgment of the management were "essential" to production—who had "special training" or "special ability." Third to be laid off and second to be rehired, should be employees hired before September 1, 1933 who were "married" and/or who had "dependents." Second to be laid off and third to be rehired, should be employees hired

¹⁶ *Statement of the Automobile Labor Board, May 18, 1934.*

before September 1, 1933 who were "unmarried" and/or "without dependents." First to be laid off and last to be retired, should be employees hired after September 1, 1933, regardless of marital status or number of dependents, unless, of course, they possessed exceptional skill and ability or were otherwise essential. The basic factor in determining preference was individual efficiency, in the evaluation of which the employer's judgment prevailed. The second factor in importance was seniority, as determined by hiring before or after a fixed date. Within the class of employees who enjoyed prior seniority and who, presumably, were of equal efficiency, the basic factor was marital status, number of dependents being taken into account.

The order thus prescribed completely reversed the one laid down in the President's settlement.⁷ Moreover, the Board's formula was apparently based on a complete acceptance of the automobile code's "individual merit" clause. Both seniority and marital status gave way before employees whose work was deemed "essential by the management," or who had "special training," or "exceptional ability." Where seniority and marital status were equal, preference was determined by the "skill and efficiency of the individual employee," again "as determined in the judgment of the management." It is easy to understand, therefore, why these regulations of May 18, 1934 aroused vigorous resentment against and lively distrust of the Board among the trade union workers.

The Board in its formula did not allow expressly for the proviso in the President's settlement that "no greater proportion of outside union employees similarly situated

⁷ "The industry understands that in reduction or increase of force, such human relationships as married men with families shall come first, and then seniority, individual skill, and efficient service." (See pp. 356-57.)

shall be laid off than of other employees." Instead, it called upon the employers to prepare and submit elaborate data bearing on lay-off and rehiring. The purpose, it would seem, was to enable the Board to consider individual complaints in the light of the mass record. By considering these data, it might presumably detect any abuses which occurred in the application of the individual efficiency proviso, and might also judge how far, if at all, the employer gave due weight to seniority and marital status.¹⁸

Both the theoretical nature and the operational results of the Board's formula may be judged from the analysis here presented. This analysis is based on an examination of 114 cases in which the Board, up to the early fall of 1934, was called upon to decide upon individual complaints of "improper discharge" and "erroneous" lay-off.¹⁹ The words "improper" and "erroneous" (the Board's own terms) are used in the sense of contravening the President's settlement as modified by the regulations issued on May 18. Almost all of the cases involved complaints by the worker that he was the victim of "discrimination" within the meaning of Section 7(a). Almost without exception, these cases were brought before the Board by some outside trade union, usually a unit of the A. F. of L.'s National Council of Automobile Workers' Unions.²⁰

There were 50 individual complaints of "improper

¹⁸ On Jan. 23, 1935 the Board issued certain modifications to the lay-off and rehiring rules of May 18, 1934. These modifications were of a minor character, their effect being to strike out Sept. 1, 1933 as the fixed date from which seniority claims should be calculated. Paragraph 1(a) as amended read as follows: "Employees who were first hired less than one year prior to a decrease in force shall be the first to be laid off. . . ."

¹⁹ There are no *a priori* reasons to believe that an analysis of all the 199 cases decided up to Feb. 6, 1935 would yield significantly different results.

²⁰ These unions are also referred to in the text as United Automobile Workers.

discharge." In 12 cases the Board decided in favor of the worker, recommending immediate reinstatement in 11 cases and eventual rehiring with seniority rights in one case. In none of the 12 cases did the Board expressly say that the employer was guilty of discrimination. It made no comment whatever in four instances and in the other 8 it declared that the worker's dismissal should be regarded as "a disciplinary lay-off." In 38 cases the decision was against the worker and the discharge was justified. The following reasons for the adverse decision were given in the number of cases indicated below:

Worker was "unsatisfactory," his work was "poor," etc. . . .	10
Worker was guilty of "insubordination" or "misconduct"	7
"Sufficient ground" and/or no evidence of "discrimination"	6
Worker was not dismissed but "quit" of his own accord. . .	5
Worker "deliberately limited production"	2
Worker was "officious, troublesome"	1
"Interference" with other workers by worker released. . .	1
"Carelessness" and "violation of company rules"	1
Worker was guilty of "damaging material"	1
Worker "falsified records" (production records)	1
Worker "killed time" when on the job.	1
"Solicitation of union dues" during working hours.	1
Worker dismissed was guilty of "scrapping crankshafts" . .	1
Total number of cases	38

There were 60 complaints of "erroneous" lay-off. The Board decided in favor of the worker in 15 cases, ordering immediate or eventual preferential reinstatement in 8 instances and the granting of seniority rights to apply in the next increase of force in the remaining 7. It decided against the worker in 45 cases. The issues involved in these lay-off cases were as follows:²¹

²¹ A number of these cases involved more than one issue, which accounts for the disparity between the total number of cases and the total number of issues involved.

Question of seniority rights	41
Marital status, with or without dependents	7
Individual efficiency or skill	7
Discipline based on work record	5
Other factors	10
	<hr/>
Total number of issues	70

We must consider 4 more cases not elsewhere classified. Three of these required the exact calculation of seniority rights (all decided in favor of the worker); one involved a charge of "discrimination" arising out of the worker's transfer from a skilled high-pay category to an unskilled low-pay category (decided against the worker on the ground that he was not dismissed but "quit").

In summary, the Board decided 114 cases which may be distributed as follows according to the problem presented:

Type of Case	Total number	Decision for Worker	Decision against Worker
Discharge	50	12	38
Lay-off	60	15	45
Other	4	3	1
	<hr/>	<hr/>	<hr/>
Total	114	30	84

About 25 per cent of the Board's findings were favorable to the workers complaining; and about 75 per cent favorable to the employers complained against.²² In the absence of other relevant criteria, these facts cannot be taken to indicate a bias on the part of the Board against the trade unions and in favor of the manufacturers. It is probable that the very existence of the Board stimulated the unions to initiate an unusual number of complaints, a substantial proportion of which may have been

²² Mr. Byrd, the employee member, did not dissent from a single decision of the Board. In one case, however, he withheld his concurrence, and in a few early cases he did not participate.

without intrinsic merit. It is also probable that the complaints in which the workers had the best cases were those which the Board disposed of informally by agreement. It is noteworthy, however, that in not one of the 30 decisions favorable to the workers did the Board expressly declare that the employer had engaged in "discrimination." In contrast, in 29 of the 84 decisions unfavorable to the workers, the Board did expressly declare that the employer was not animated by discriminatory intent. Moreover, in 7 cases it took particular pains to explain that the worker's union affiliations were no issue in his lay-off or discharge.²³

SCHMES FOR COLLECTIVE BARGAINING

Committed as it was to voluntary adjustments, the Automobile Labor Board was not over-eager to launch a frontal attack against the problems of labor representation and collective bargaining which had threatened a strike in the industry.²⁴ But the Board found that it had to take immediate steps to relieve the tension. A few

²³ "It is the Board's judgment after ten months of experience in the industry that discrimination caused by union activity or union membership is not a problem of any magnitude at the present time and has not been for some time in the past." (*Report of the ALB*, p. 6.) A somewhat different picture is conveyed by the finding on p. 5 of the summary to *Preliminary Report on Study of Regularization of Employment and Improvement of Labor Conditions in the Automobile Industry*, NRA Research and Planning Division, Jan. 23, 1935: "Labor unrest exists to a higher degree than is warranted by the depression. The unrest flows from insecurity, low annual earnings, inequitable hiring and firing methods, espionage, speed-up and displacement of workers at an extremely early age." (Italics ours.) The *Preliminary Report* also speaks of the arbitrary powers of foremen with reference to lay-offs and discharges (pp. 48-49). A condensed version of the report (popularly known as the Henderson-Lubin report) will be found in *NRA Release No. 9980*, Feb. 8, 1935.

²⁴ "The Board regards collective bargaining as a peaceful process which can only be successfully worked out with patience and with understanding. It is perfectly clear from our experience that long former habits cannot be changed overnight by fiat, and that the experience and skill required to successful negotiations cannot be suddenly supplied by mandate." (*Report of the ALB*, p. 9.)

days after it began to function, the ALB issued a statement in which it ordered that solicitation for trade and company union membership during working hours should cease.²⁵

Two months later, it was necessary to issue a clarification of this statement. Three questions had apparently arisen: (1) whether or not solicitation for membership outside of working hours but on company property was permissible; (2) whether or not solicitation for membership during lunch hours rather than working hours should be allowed; and (3) whether or not solicitation for membership by persons not employees was legitimate. To avoid further confusion and misunderstanding, the Board enunciated the following rules:

1. It is not the Board's intent to attempt infringement of the individual's right to discuss any topic during non-working hours, including his lunch hours, regardless of where such discussion may take place. Any ruling by employers as to the place of solicitation during employees' non-working hours goes beyond the intent of the Board's ruling. This does not mean that the property of the companies is to be used as a place for agitation or mass meetings.

2. It was clearly meant that no one should solicit membership in any group during working hours, whether such solicitor were a member of such group or not.

Membership in any organized group is not at this time a necessary qualification for continued employment. The Board is desirous that further irritation should cease.²⁶

In mid-April 1934 the Board issued a statement outlining the form of collective bargaining which it thought applicable to the industry, within the limitations of the

²⁵ "It is incumbent upon all concerned to be patient and to await the results of the deliberations of the Board," the statement read. "In order to avoid friction and because of practices that have come to the Board's attention, the Board holds that there should not be any solicitation for membership in either unions or company representation plans during working hours." (*Statement of the ALB, Mar. 29, 1934.*)

²⁶ The same, May 26, 1934.

settlement of March 25. This statement is of interest, not only because it sketched the outlines of a theory of collective bargaining, but also because it suggested a procedure by which the Board then hoped to put this theory into effect. The statement read as follows:

In accordance with Section 7(a) . . . the code of fair competition of the automobile manufacturing industry provides, among other things, that employees shall have the right to organize and bargain collectively through representatives of their own choosing. The statement of the President of the United States of March 25, 1934, under which this Board came into existence, says that "if there be more than one group, each bargaining committee shall have total membership pro rata to the number of men each member represents" and in the statement the government makes it clear that it favors no particular union or particular form of employee organization or representation.

This Board has already received from ten unions affiliated with the American Federation of Labor, for comparison and verification, lists of their members, apparently including in all many thousands of names, and other unions have informed it that they will present their lists shortly. The work of verifying and comparing the lists has begun and the Board plans to press this work as rapidly as possible. In the meantime, the Board deems it desirable that conferences for collective bargaining between the employers and representatives of the employees should not be delayed. The Board believes that in the cases in which it has received the lists, organized groups of varying sizes, some of them large, now exist. These groups have in many instances already selected representatives of their own choosing for the purpose of collective bargaining. In several instances the employers have already met with these representatives, with the understanding that the list of employees for whom they are acting will be later determined.

In order that the purposes of the President's statement of March 25, 1934 may be fulfilled as rapidly as possible, and that collective bargaining may not suffer delay through the time that dealing with the lists will necessarily take, the Board believes that employers should grant conferences without awaiting the result of the lists. It will be understood by employers, by employees, and by the Board that participation in such conferences

by the employer is not to be taken as recognition of any union as such. Nor are the employees' representatives participating in such conferences to be taken as representing any other employees than those determined to be represented by them on the basis of the lists as dealt with by the Board. Where the representatives of a group of employees voluntarily submit a list of names of their group to the employer, it is the Board's opinion that the employer should accept the list for verification, and in the meantime should confer with the representatives.²⁷

In other words, collective bargaining, according to the ALB, consisted in conferences between the employer and the representatives of different groups among his employees. The representatives were entitled to speak only for such workers as expressly desired to be represented by them. In dealing with the representatives, the employer did not extend recognition to any union as such; he presumably recognized the representatives in their individual capacities as spokesmen for a given group of employees. Evidently, this statement took for granted the co-existence of a multiplicity of bargaining organizations; but it said nothing about works councils except to mention at the outset that pro rata representation should apply where there was more than one bargaining group.

So far as the trade unions were concerned, their conferences with employers, arranged by the ALB, brought them no further toward recognition than they had been in the summer of 1933. Nor did the ALB issue certifications to the unions as collective bargaining representatives. More to the point, the A. F. of L. unions lost considerably in membership and strength for many months following the establishment of the ALB. Internal dissension, complicated by dissatisfaction with the March settlement and with the ALB, resulted in the

²⁷ The same, Apr. 16, 1934.

breaking away of a number of local unions which formed themselves into the "independent" Associated Automobile Workers of America. Other membership losses were also heavy. But the A. F. of L. tried to meet the situation in several ways. The first step was the creation on June 24, 1934 of a National Council under the supervision of the A. F. of L.'s Executive Council. The second step was the decision of the A. F. of L. convention, in October 1934, to organize along "industrial" lines in the automobile as well as in other mass production industries. Neither step, however, had much appreciable effect on increasing membership or raising morale.

The issue of labor representation was kept alive by the A. F. of L., however, and in mid-July 1934 the Automobile Labor Board issued an order suspending "the nominating and electing, in plants having [employee] representation plans, of representatives under these plans until this Board shall have promulgated rules and regulations."²⁸ The Board requested that a notice to this effect be posted on the bulletin boards of all plants concerned.²⁸ It would seem that the order was ignored in a number of plants, for two months later the Board found it necessary to issue the following new statement:

On July 17, 1934, the Board made an order suspending nominating and electing representatives under representation plans. Through misunderstandings certain elections have taken place, the effect of which is not clear. In order to remove all misunderstandings, the Board rules that these elections are not valid. The Board rules further that, as a temporary expedient, and in order to avoid confusion until the Board shall issue rules and regulations, and until elections under these rules and regulations shall take place under the supervision of the Board, the managements may meet with the existing representatives as un-

²⁸ The same, July 17, 1934.

official interim representatives of such employees as wish to have these representatives act for them. In order to inform all interested parties of this ruling, and to avoid further possible misunderstandings, the Board directs that the order of July 17, 1934 and this order be posted on all bulletin boards in all plants.²⁹

On December 7, 1934 the Automobile Labor Board at last announced the details of an election plan whereby it was hoped to set up, in each unit of the industry, a works council on the basis of proportional representation. The details of the plan were reported as follows:

Plants first will be divided into "districts" or departments. Then a primary election will be held, with each employee voting for any man he wants to represent him. The voter may place a designation opposite his candidate's name, such as "American Federation of Labor" or "Associated Automobile Workers' Union," to show with which organization the candidate is affiliated.

The two candidates receiving the highest number of votes in the district will enter the final election, and the one receiving the highest number of ballots will become a member of the "bargaining agency" to meet and bargain with employers under rules to be announced later by the Automobile Labor Board.

All men working in the plant may vote, and those employees listed on payrolls but not working at the time also will be allowed to vote and will be so notified by the Board. This rule was made [said the Board] to forestall any charge that elections would be held when production is not at a peak and comparatively few men would be working in the plant.

The Board's election staff, after the final election, will total the votes to determine whether the representatives chosen for the bargaining body are truly representative of the plant employees. If it is found that a majority of the men are in sympathy with American Federation of Labor principles, but that the election has not given to the Federation a proportionate share of seats on the bargaining agency, the Automobile Labor Board may add members to the bargaining group, selecting men who received the next highest number of votes in the election.

²⁹ The same, Sept. 18, 1934.

[The Board said] the new plan would replace any other which has been used in any plant; that it would be absolutely secret and under a staff which would see that no undue influence was exerted on employees, and would be a guarantee that no employee would be discriminated against because he voted for a candidate in sympathy with a labor organization.²⁰

At the same time the Board let it be known that it was about to hold, among the employees of the Cadillac plant in Detroit, the first of a series of works council elections. The order for this election read as follows:

The nominating and final elections will be held in the plant under the sole and direct supervision of agents of the Board, to insure freedom and secrecy. The employees, according to the ballots being prepared by the Board, will nominate and vote for their representatives and will, if they so desire, specify the group with which their candidate is affiliated. The total of such specifications throughout the plant for each group will determine the proportion which each of such groups will have on the bargaining agency. Those who do not specify a group will be treated as a group. Representatives will not be restricted to employees. Arrangements will include opportunity for employees not working at the time to participate.²¹

Under the scheme of the ALB, the workers were thus not to choose between a trade union and a company union. Instead, they were to elect, first at primary and then at final elections, individual representatives whom they might designate as company or trade union spokesmen, or as unaffiliated. All the representatives taken together would constitute the works council, on which each group of employees, whether organized or not, would have proportional representation.²²

²⁰ *New York Times*, Dec. 2, 1934.

²¹ *Statement of the ALB*, Dec. 7, 1934. It should be noted that by holding elections in the plant, the ALB repudiated one of the basic principles followed in NLB-NLRB elections. By excluding a choice between labor organizations as such, the ALB repudiated still another basic principle of the NLB and NLRB.

²² On Apr. 12, 1935 the ALB issued a formal set of *Rules and Instructions on Bargaining Agencies*. By this time, no less than 48 bargaining

Within a week after the announcement of this scheme, the United Automobile Workers decided to withdraw from the agreement of March 25, 1934. Their Detroit Council on December 13 petitioned the President to establish a joint resolution board similar to the Steel Labor Board and, pending its establishment, to authorize the NLRB to hold elections in the automobile plants.⁸³ On January 24, 1935 the entire group of A. F. of L. unions involved in the President's settlement formally withdrew from co-operation with the Board, a move which was tantamount to the A. F. of L.'s express repudiation of the President's settlement.⁸⁴ It was announced at the same time that the A. F. of L. would "intensify its organizing campaign in automobile centers, with a view to calling strikes in important plants in the spring . . . it will seek to have the National Labor Relations Board take jurisdiction over labor cases in the automobile industry, superseding the Automobile Labor Board. . . ."⁸⁵

The ALB went ahead, however, with its elections. By February 5, 1935 the Board had conducted ten primary and seven final elections in ten separate plants in the Detroit area. Participating in these elections were 53,771 workers or 90 per cent of those eligible to vote.⁸⁶

agencies in the form of works councils had been chosen and arrangements were under way to set up 20 more.

⁸³ *New York Times*, Dec. 14, 1934.

⁸⁴ It would also seem, although the legal technicalities are obscure, that the A. F. of L. sought to break away from the Board and withdraw from the settlement as early as Sept. 11, 1934, pursuant to resolutions adopted Aug. 31 by the National Council. (See the correspondence between the President and Mr. Charlton Ogburn, counsel to the A. F. of L. federal labor unions, made public in the *New York Times* of Feb. 6, 1935.)

⁸⁵ *New York Times*, Jan. 25, 1935. Press reports for the next month indicate the progress of the A. F. of L.'s plans, notably Mr. Green's request of Mar. 1, 1935 for a conference with the employers. The request was later denied. No general strike was called.

⁸⁶ The ten plants were as follows: Cadillac; Chevrolet (forge, spring, and bumper); Dodge (forge); Lynch (road truck); Amplex; Plymouth; Chrysler (Highland Park); Dodge (main); Chevrolet (gear and axle); Hudson (Gratiot, axle, and main).

It was significant that such a large proportion of the workers should have participated although the A. F. of L. had instructed its members not to vote. The detailed results of the primary vote were as follows:

	Ballots
Affiliations of Representatives	Cast
Unaffiliated individual representatives.....	40,953
Representatives designated as spokesmen of plant employee associations (company unions)	5,440
Representatives designated as spokesmen of the Associated Automobile Workers of America (independent trade union, result of schism within U.A.W.)	3,124
Representatives designated as spokesmen of the A. F. of L. unions (U.A.W.).....	2,286
Representatives designated as spokesmen of Mechanics Educational Society of America (independent trade union, tool and die craftsmen).....	314
Representatives designated as spokesmen of Auto Workers' Union (Trade Union Unity League "left wing" union)	22
Representatives designated as spokesmen of Auto Service Mechanics Association (independent union)	16
Representatives designated as spokesmen of Society of Designing Engineers (independent union)....	9
Representatives designated as spokesmen of I.W.W. union ("syndicalist" trade union).....	6
Representatives designated as spokesmen for International Association of Machinists (A. F. of L. "craft" union)	1
Total valid ballots cast	52,171
Blank ballots	624
Void ballots	976
Total ballots cast²⁷	53,771

²⁷ *Report of the ALB*, p. 11. According to *Statement of the ALB*, Mar. 20, 1935, by that date the Board had conducted 43 primary elections, with results as follows:

Unaffiliated individual representatives.....	100,651
Plant employee associations.....	18,591

Following the A. F. of L.'s repudiation of the 1934 agreement came the question: By what grant of authority did the ALB continue in existence? The Board had originally been established on the basis of that agreement; and it was argued that repudiation of it by the A. F. of L. destroyed the Board's legal foundation. The question was finally answered on January 31, 1935, when the President issued an executive order extending the automobile code to June 16, 1935. Section 4 of the order incorporated the Automobile Labor Board into the code in language as follows:

The members of the industry will comply with the provisions and the requirements for the settlement of labor controversies which were established by the government and have been in operation since March 1934, and which are hereby confirmed and continued.⁸⁸

This executive order was important. Contrary to the demands of the A. F. of L., it reconstituted the Automobile Labor Board, not under Joint Resolution No. 44, but as an NRA code board. This, in the light of the

United Automobile Workers.....	10,052
Associated Automobile Workers of America.....	6,077
Mechanics Educational Society of America.....	613
Pattern Makers League of North America.....	132
Auto Workers' Union.....	57
Association of Certified Welders.....	36
I. W. W.....	26
Society of Designing Engineers.....	24
Auto Service Mechanics Association.....	16
Dingmen's Welfare Club.....	7
Pontiac Chamber of Labor.....	4
Auto Makers of America.....	1
International Association of Machinists.....	1

Total valid ballots..... 136,288

In addition to the valid ballots, 3,988 were "blank" and 3,586 "void." Total ballots cast (143,862) represented 85 per cent of the total eligible voters, who numbered 168,789; and 90 per cent of total eligible voters working on the day of the nominating elections, who numbered 160,547.

⁸⁸ See *New York Times*, Feb. 1, 1935.

President's letter of January 22, 1935 to the National Labor Relations Board,²⁰ meant that the Automobile Labor Board was to be free from jurisdictional claims on the part of the NLRB. It therefore meant that the ALB could proceed with its program of establishing works councils on the basis of proportional representation, which was contrary to the NLRB's election formulas of choice between trade union and company union and of majority rule. The order also made it clear that the policies pursued by the ALB had the approval of the President.

APPRAISAL

A general appraisal of the Automobile Labor Board must allow for the following points:

1. The balance of power in the automobile industry lay with the employers. By pursuing policies offensive to the A. F. of L., the Automobile Labor Board ran no immediate danger of disturbing the industrial peace. But by pursuing policies offensive to the automobile employers, it might have provoked their withdrawal from the code.

2. On the side of labor relations, automobile manufacturing emerged under the NRA as a privileged industry. The President's settlement sanctioned the theory of works councils and proportional representation, not used in other codified industries. Section 7(a), as incorporated into the automobile code, was qualified by the "individual merit" clause.

3. The Board was instrumental in adjusting a number of strike situations, and on the whole in maintaining the industrial peace. These adjustments were made on the basis of expediency rather than in accordance with clearly defined principles.

²⁰ See Chap. XI, pp. 326-27.

4. The Board initiated a series of conferences between trade unions and employers in the hope that this might prove to be the first step toward establishing collective bargaining relations. Nothing resulted from these conferences in the way of union "recognition." The failure was largely due to the weakness of the A. F. of L. unions.

5. Relying on the terms of the President's settlement, the Board set up semi-official works council. In doing so, it did not consult the workers as to whether they approved or disapproved of the device. The Board took it for granted that the workers were bound by the agreement of March 25, 1934. The A. F. of L. repudiated the agreement, but the President, fully aware of the balance of power between organized labor and management in the industry, projected the terms of the settlement into the code itself.

The ALB sought, in essence, to introduce a new form of collective bargaining—the works council on the basis of proportional representation. It attempted to cut the Gordian knot of company union versus trade union by ignoring it. In some ways, the device was a reversion to the policy of the War Labor Board, which set up works councils in industries where no effective technique for collective negotiations had as yet been developed.⁴⁰

At the same time, it may be said that the ALB went much further than that. It established collective bargaining organizations under government sponsorship and regulation. It thus broke away from the general principles which guided other Recovery Act labor boards; namely, that the workers themselves should choose among alternative forms of labor organization.⁴¹

⁴⁰ See Chap. I, pp. 9-13.

⁴¹ This statement should be qualified by allowing for the original Cotton Textile National Industrial Relations Board, which encouraged the formation of mill committees pursuant to the code. The Bituminous Coal

The ALB thus tended to impose upon the workers a sort of semi-public unionism.

Had the NRA codes been continued, the success of the ALB would have been conditioned by two main factors. The first would have been the ability of the A. F. of L. to organize the industry. A forceful strike might have swept the ALB into the discard. The second would have been the attitude of the automobile manufacturers toward works councils as these bodies developed into "going concerns." If the works councils emerged as true agencies for negotiating collective agreements, if they pressed for higher wages and shorter hours with recourse to strikes if necessary, then the automobile manufacturers might possibly have changed their friendly attitude and reverted to the promotion of company unions.

It is held by many students of industrial relations that the works council has distinct merits as a device for composing and adjusting individual grievances between labor and management in a single establishment. It is also argued, however, that the works council is not suited to function as an instrumentality for executing collective agreements, and cannot therefore be regarded as an alternative to the trade union. If we start from the point of view that collective bargaining means the execution of collective agreements, then the ALB's policy was questionable and flew in the face of Section 7(a). If we regard the works council merely as a supplement to trade unions, then the ALB's policy was consonant with Section 7(a), although it might be argued that the ALB started from the wrong end.

Where the other labor boards ran into employer non-

Divisions Labor Boards have also hesitated to call for elections in "dual unionism" cases. See Chap. XV.

compliance, the ALB was free from enforcement problems.⁴² Its chief troubles were the loss of faith among trade union workers in the Board's impartiality. To a large extent, however, the A. F. of L.'s objections to the Board were beside the point. They were based on the premise that the ALB's task was to hew to the line of Section 7(a). In fact, however, its task was to carry out the terms of the President's settlement, regardless of how far, if at all, the provisions thereof were compatible with the doctrines supposedly underlying Section 7(a). Thus in objecting to the Board, the trade unions actually objected to an agreement into which they entered of their own free will.

It is significant to note that the "Henderson-Lubin" *Preliminary Report* found that "the automobile industry should develop a labor policy consistent with its own requirements and that of *national policy*," and that "many of the complaints against management—such as poor working conditions, terror and discrimination—will disappear when and if facilities are *fully extended* for the purpose of collective bargaining or other mutual aid or protection."⁴³ On the basis of the *Preliminary Report*, it is further significant to note that the National Industrial Recovery Board was "of the opinion that definite consideration should be given to the advisability of establishing, under the authority of the NIRA and Public Resolution 44, a comprehensive Automotive Industry

⁴² On enforcement the Board said: "The decisions, orders and rulings of the Board have been generally obeyed. The Board has by decision ordered many men back to work. . . . The employees so ordered to return to work were, to the best of the Board's knowledge, returned to jobs. . . . The jurisdiction of the Board has not been challenged and it has not been involved in any litigation." (*Report of the ALB*, p. 7.) No other Recovery Act labor board enjoyed anything like the ALB's freedom from enforcement problems.

⁴³ Summary, pp. 11-12. (Italics ours.)

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Labor Relations Board.”⁴⁴ Both the findings and the recommendations based thereon bore out some of the widespread criticism of the ALB and gave weight to the demand for a new approach to industrial relations in the automobile industry. Further developments along lines old and new were stopped abruptly, however, when the United States Supreme Court invalidated the Recovery Act codes on May 27, 1935.

⁴⁴ See “A Letter Submitted to the President . . .,” *NIRB Press Release*, Feb. 8, 1935, pp. 4-5.

CHAPTER XIV

THE PETROLEUM LABOR POLICY BOARD

The Petroleum Labor Policy Board was unique among the Recovery Act labor boards. An autonomous body within the Petroleum Administration, and responsible to Secretary of the Interior Harold L. Ickes in his capacity as Petroleum Administrator, the Board was independent of the NRA and of Public Resolution No. 44. Within the limits of the code of fair competition for the petroleum industry,¹ the PLPB engaged in a wider range of activities than any of its contemporaneous tribunals.

FORMATION OF THE BOARD

Under date of October 10, 1933 the Planning and Co-Ordination Committee² recommended to the Petroleum Administrator that he establish a bi-partisan labor policy board. On November 24, 1933 the Administrator announced the establishment of a Petroleum Labor Policy Board for the purpose of "studying and recommending to the Administrator differentials between wages for skilled and unskilled labor," and for "looking into any employer-employee difficulties that might arise."³ The first function was called for by Article 2, Section 4 of the petroleum code.⁴ The second was

¹ Under Art. 1, Sec. 1 of the code of fair competition for the petroleum industry (approved Aug. 19, 1933), this industry included "production, transportation, refining, and marketing of crude petroleum and its products." It was also inclusive of "natural gasoline and the production of natural gas in conjunction with petroleum."

² The PCC which represented the members of the industry, was the code authority, but functioned subject to the superior authority of the Petroleum Administrative Board, a governmental body.

³ *Department of the Interior Press Memorandum*, Nov. 24, 1933.

⁴ This section originally provided that differentials between skilled

made expedient by the threat of a strike movement in the industry.

A bi-partisan board with an impartial chairman was set up, but could not get started. The trade union representative appointed to the Board, the president of the International Association of Oil Field, Gas Well and Refinery Workers of America (affiliated with the A. F. of L.), refused to sit with a spokesman for employee representation plans. A bi-partisan board from which company union spokesmen would be excluded was out of the question, in view of the long history of employee representation plans in the refinery branch of the industry. The Board was therefore reorganized on December 19, 1933 on an "impartial" basis, three experts in the field of labor problems being named as members.⁵

POWERS OF THE BOARD

The original powers of the PLPB were specified as follows:

rates and code minima "will not be less than those existing in the industry on July 1, 1929; but in no case will such differentials for first-grade refinery stillmen be less than 45 c.p.h. or for rotary drillers less than 75 c.p.h." The section was modified on Sept. 13, 1933 to read: "There shall be an equitable adjustment of the differentials between the rates for skilled jobs and minimum established in this code for common labor, as determined by the regional committees from time to time in each area, subject to the approval and revision of the PCC, and subject to final determination of the President."

⁵ Dr. William M. Leiserson, professor of economics at Antioch College and at one time executive secretary of the National Labor Board; Dr. George W. Stocking, professor of economics at the University of Texas; and Dr. James Mullenbach, labor arbitrator in the Chicago clothing trades since 1912. In July 1934 Dr. Leiserson resigned to become chairman of the Railway Mediation Board. On Sept. 22, 1934 the Administrator announced a reorganization of the Board. Dr. Stocking became the chairman; and Dr. John A. Lapp, at one time president of the National Conference on Social Work, was added as the third member. Dr. Mullenbach after a long period of inactivity, due to ill health, died in April 1935. His place was not filled.

The Board will consult with the [Petroleum] Administrator and the [Planning and Co-Ordination] Committee to aid in determining basic questions of policy affecting labor and in considering and dealing with any controversies that may arise under the petroleum code.

It will determine the most practicable method of investigation in connection with complaints of violations of labor provisions to insure successful enforcement of these provisions.⁶

These powers, although general, were vague. They were not, it will be noticed, based upon a formal administrative order. Not until March 8, 1935 did Administrator Ickes issue an express order in which the Board's powers were defined in exact detail, as follows: (1) To investigate and make findings of fact on alleged Section 7(a) violations; (2) to act as voluntary arbitrator; (3) to mediate and conciliate in labor disputes; (4) to conduct elections to determine agencies for collective bargaining, majority rule governing; and (5) to function as an adviser on all labor matters, including the code.⁷

Throughout the course of its existence, the PLPB exercised a large variety of specific functions. It gave advice and counsel to the Administrator on proposals to redraft the labor provisions of the code and on questions of applying existing provisions. It promulgated, with the Administrator's approval, doctrines of collective bargaining similar to those promulgated by the NLB and the NLRB. It mediated in strikes. It facilitated the making of collective agreements. It sought to devise a procedure for dealing with labor complaints. It conducted elections and certified labor organizations as agencies of collective bargaining. It adjudicated upon complaints of Section

⁶ *Department of the Interior Press Memorandum*, Dec. 22, 1933, p. 1. This memorandum, announcing the Board's reorganization, served for more than a year in lieu of an administrative order.

⁷ For text of the order, see *Order under the Code of Fair Competition for the Petroleum Industry*, Mar. 8, 1935 (press release dated Mar. 12).

7(a) violations. In general, we may say, the PLPB functioned: (1) as an adviser on labor policy; (2) as a tribunal to adjust and adjudicate labor disputes; and (3) as an instrumentality for dealing with labor complaints.

ADJUSTING COMPLAINTS AND DISPUTES

Complaints, for procedural purposes, were informally divided into two groups: those alleging violations of collective bargaining requirements or charging discrimination; and those alleging non-observance of code wages and hours. It was the PLPB itself which undertook to investigate and adjust all collective bargaining complaints and most discrimination complaints. The ordinary run of wage and hour complaints were transmitted to the Division of Investigation of the Department of the Interior. However, some cases, many of them involving retroactive wage payments, were transmitted to the Planning and Co-Ordination Committee, which had a set-up of regional labor sub-committees. In its final form, the procedure was the outgrowth of considerable experimentation.⁸

If no satisfactory adjustment seemed possible, in cases where the Board believed the employer guilty of violating the code, recommendations for prosecution were transmitted to the Department of Justice. The PLPB was no more successful than any of the other Recovery Act labor tribunals in getting the Department of Justice to act. And not until February 1935 were definite arrangements made whereby recalcitrant employers might be deprived of their Blue Eagles.

⁸ The original procedure—almost complete reliance on the PCC—failed to secure, from the Board's point of view, satisfactory results. Nor were the results of almost complete dependence on the Division of Investigation altogether satisfactory.

The PLPB engaged in the mediation of strikes. Thanks to its good offices, quite a number of strikes were called off or averted.⁹ When a strike occurred or threatened to occur, the Board often sent one of its own members or staff employees into the field, or called upon the Conciliation Service of the Department of Labor for aid. Only when a satisfactory settlement could not be achieved and investigation showed non-compliance with the code, did the Board hold formal hearings, and, if the circumstances warranted, promulgate a formal decision.

The Board aimed at settling disputes by voluntary agreements, preferably written. Its guiding idea was that such agreements should be reached through collective bargaining in the first instance and should provide for continued collective bargaining in the future. Thus settlements by the Board ordinarily fixed wages, hours, and other working conditions, and provided machinery for the adjustment of future disputes.¹⁰

The Board also adjudicated disputes concerning the rights and duties implied by the concept of collective bargaining. In disputes of this character, it conducted exhaustive investigations, held formal hearings if need be, and—subject to the approval of the Administrator—promulgated decisions which were based on its own interpretation of Section 7(a).¹¹

⁹ For example, the St. Louis strike (*Department of the Interior Press Memorandum*, Feb. 24, 1934); the East St. Louis threatened strike (the same, Mar. 16, 1934); the Enid, Oklahoma strike (the same, Apr. 23, 1934); the Cleveland strike (the same, May 14, 1934).

¹⁰ Agreements regarded as models by the Board were: St. Louis filling station strike settlements, (*Department of the Interior Press Memorandum*, Feb. 24, 1934); East St. Louis strike settlement (the same, Mar. 16, 1934); Champlin Refining Co. strike settlement (the same, Apr. 23, 1934).

¹¹ See pp. 391-405.

The Board also evolved a technique for certifying the identity and authority of representative labor organizations, a task which absorbed a good part of its time and energy. Two procedures were used: (1) an employee referendum along the lines followed by the National Labor Relations Board; or (2) a comparison of payroll records with trade union membership as revealed by petition signatures. Which procedure was followed in a particular case depended upon the specific circumstances. We may illustrate the two procedures by citing two cases chosen at random from the records of the Board. Case No. 45 is typical of the first—election procedure. To quote:

On June 14, 1934, the Board received a petition signed by 90 employees of the Texas Co. at Casper, Wyo., requesting that an election be held to determine duly accredited representation for the purpose of collective bargaining under Section 7(a). . . .

Mr. W. H. Rodgers, commissioner of conciliation of the U. S. Department of Labor, was assigned by the Board to conduct the election, and he submitted the following report:

"At an election held by the employees of the Texas Co. refinery at Casper on the above date under the auspices of the Petroleum Labor Policy Board to ascertain employees' representation, the following results were obtained from the operating force subject to petroleum code hours:

For the Oil Field, Gas Well and Refinery Workers of America	83
For the plan of joint representation between employees and management	7
Bad votes, that is, incomplected ballots	1
	<hr/>

91

"It is hereby certified by the undersigned members of the election board that this election was held in a fair and impartial manner and the results are correct as set forth above. Roy E.

Dineen(s) and C. W. Evan(s) for the Oil Field, Gas Well and Refinery Workers of America. W. D. Hill(s) and S. A. Reimers(s) for the plan of joint representation between employees and management. Attest: W. H. Rodgers(s) for the Petroleum Labor Policy Board. S. S. Bernfeld(s) special agent, oil enforcement, Department of the Interior."

On the basis of this report and in accordance with the decisions approved by the Petroleum Administrator, the Petroleum Labor Policy Board certifies that out of a total vote of 91, a majority of 91 per cent of the refinery employees have duly chosen the International Association of Oil Field, Gas Well and Refinery Workers as their agency for collective bargaining as authorized by Section 7(a) of the NIRA and Article 2, Section 4 of the code of fair competition for the petroleum industry.

Petroleum Labor Policy Board. W. M. Leiserson, chairman (s) George W. Stocking(s) James Mullenbach(s).²²

Case No. 38 illustrates the second procedure. To quote:

In pursuance of the following petition signed by 234 employees, the company and the representatives of the employees agreed to a check of the signatures on the petition against the payroll signatures:

"We the employees of the Louisiana Oil and Refinery Co. constituting a substantial majority of the total working force in the Refinery Department, have organized ourselves into Local Union No. 245 of the International Association of Oil Field, Gas Well and Refinery Workers of America, in pursuance of the right to self-organization as guaranteed in Section 7(a) of the NIRA. Through this organization and our duly designated and authorized representatives and officers, we desire to make a collective bargain with our employer, as authorized by the same section of the law covering terms of employment and the relations of management and labor; and we do not want to make individual bargains with respect to these matters.

"We therefore, respectfully request a conference with representatives of the management at your earliest convenience to begin negotiations, to work out a collective bargain, and to agree

²² Department of the Interior Press Memorandum, July 5, 1934.

on terms of employment and orderly methods of settling differences in the relations between management and labor."

Mr. Joseph S. Myers, commissioner of conciliation of the U. S. Department of Labor, was assigned by the Board to make the check.

Under date of May 26, Mr. Myers reported as follows:

"The company submitted the names of 384 employees coming under the above classification and the writer accepted same without question. In addition to this there are 27 monthly men who are foremen and bosses having the right to hire and discharge; 25 who are clerical employees, and not eligible and not asking for collective bargaining. Some question came up about 19 employees of what is known as the Grease Plant, but this is a separate unit located about two miles from the refinery, and should not be considered.

"Of the 384 employees submitted by the company, I was able to verify a total of 213 favoring collective bargaining through the union.

"The union list had 234 signatures. Of this number 21 were not counted, 10 of which could not be verified; 9 had been laid off, 3 of them since the petition was started in circulation on April 1 and 6 prior to that time; one had just been promoted to an official position, and one disqualified because he does not work in the refinery.

"The company, preferring not to know who had signed the union list, selected Mr. Fernandez of the First National Bank to represent it in the check, and the union had Mr. Geiger as its representative. All worked together harmoniously, and my check was only three more names than Mr. Fernandez' list had at the final count. That is to say, I verified three more names than he allowed."

On the basis of this report and in accordance with the decisions approved by the Petroleum Administrator, the Petroleum Labor Policy Board certifies that 213 employees out of a total of 384 involved, or a majority of 55, have duly chosen as their accredited representatives for collective bargaining Local Union No. 245 of the International Association of Oil Field, Gas Well and Refinery Workers of America and their duly designated and authorized representatives and officers as authorized by Section 7(a) of the NIRA and Article 2, Section 4 of the code of fair

competition for the petroleum industry. Petroleum Labor Policy Board, W. M. Leiserson(s) George W. Stocking(s) James Mullenbach(s).¹³

A partial analysis of various certifications up to the late autumn of 1934 showed that the workers chose the trade union in preference to either the employee representation plan or to individual bargaining in a large majority of the cases.¹⁴ There is no reason to suspect that the cases available for analysis were atypical. It would seem, therefore, that the process of certification by the Board generally led to vesting an outside trade union with rights of a representative for collective bargaining within the meaning of the statute.¹⁵

¹³ The same, June 7, 1934.

¹⁴ The Oil Field, Gas Well and Refinery Workers' Union was found to be the choice of a majority in the following cases: Magnolia Refining (Apr. 9, 1934; payroll comparison); Col-Tex Refining (Apr. 18, 1934; payroll comparison); Empire Oil and Refining (Apr. 19, 1934; payroll comparison); Texas Co., Lockport, Ill. (May 15, 1934; election); Empire Oil and Refining, Ponca City, Okla. (May 21, 1934; payroll comparison); Empire Oil and Refining Co., Okmulgee, Okla. (May 21, 1934; payroll comparison); Indian Territory Illuminating Oil Co. (June 2, 1934; payroll comparison); Louisiana Oil and Refinery Co. (June 7, 1934; payroll comparison); Texas Co., West Tulsa, Okla. (June 11, 1934; election); Texas Co., Casper, Wyo. (July 5, 1934; election); Pasotex Petroleum (Aug. 14, 1934; election); Merrick Bristow Oil (Aug. 24, 1934; payroll comparison); Lion Oil Refining (Aug. 27, 1934; election); Crown Central Petroleum (Sept. 8, 1934; election); Republic Oil Refining (Sept. 8, 1934; election); Marathon Oil (Sept. 26, 1934; election); Reagan County Purchasing (Sept. 30, 1934; election); Group No. 1 Oil (Sept. 30, 1934; election); Employees of G. W. James (Oct. 5, 1934; election); Wisner Oil (Nov. 1, 1934; election).

In the following cases, in contrast, the process of certification revealed that a majority of the workers preferred to be represented by company union plans: White Eagle Refining (July 5, 1934; election); Stanolind Oil and Gas (July 25, 1934; election); Lion Oil Refinery (Oct. 6, 1934; election). In at least one case—Continental Oil Co., Baltimore, Md. (July 10, 1934; election)—a majority of the workers chose an independent inside union in preference to the Oil Field Workers' Union, on the one hand, and an employee representation plan, on the other. Later certifications showed similar proportions in choice.

¹⁵ Up to Mar. 5, 1935 the PLPB conducted 35 elections in which a total of 5,887 valid ballots were cast. The number of workers voting

INTERPRETING AND APPLYING
SECTION 7(a)

Like most of the other industrial relations boards, the Petroleum Labor Policy Board was a tribunal of administrative adjudication in that it interpreted the meaning of Section 7(a) as applied to specific cases. In its exercise of this function, the Board laid down a body of general principles applying to representation and collective bargaining on the one hand and to discrimination in discharge and lay-off on the other.

REPRESENTATION AND COLLECTIVE BARGAINING

The PLPB's principles of representation and collective bargaining were in the main identical with those evolved by the NLB and the NLRB. We may summarize them as follows: (1) employees had to be assured complete freedom of choice in selecting their representatives; (2) although company unions were not *per se* unlawful, the employer must refrain from imposing a company union on his workers; (3) in the event that a trade and a company union each claimed to speak for the same body of workers, the proper method for settling the controversy was by certification—that is, either an election or else a comparison of payrolls with union members; (4) certification, regardless of the method employed, had to be governed by majority rule; (5) once certified as the representative of at least a majority of the workers, the labor organization was entitled to bargain collectively on behalf of all the employees, but minority groups retained the right of organizing for

for trade union representation was 3,568 (or 60.0 per cent); for employee representation plans 1,965 (or 33.4 per cent); for individual representatives or individual bargaining, 354 (or 6.0 per cent). (Twentieth Century Fund, Inc. *Labor and the Government*, 1935, pp. 92-93.) According to the authors of the same study: "The PLPB has checked at least 4,112 signatures against payrolls aggregating 5,833 persons. Of these 3,763 were those of trade unionists." (p. 89.)

mutual aid and protection; (6) the representative labor organization was entitled to expect that the employer would negotiate with it in good faith, with a view to executing a collective agreement. The application of these principles may best be shown by considering three precedent making decisions.

The Magnolia Case

The first decision handed down by the Board related to a controversy between the Magnolia Petroleum Co. (Fort Worth, Texas) and the International Association of Oil Field, Gas Well and Refinery Workers' Local Union No. 208.¹⁶ Two issues were raised by the case. One resulted from the fact that the employer had inaugurated an employee representation plan some time in August 1933. The question was: Did the employer, as the union contended, impose this plan upon his workers and thus violate their freedom of choice; or was the plan in fact approved, as the employer contended, by duly authorized representatives of the employees? The second issue derived from the fact that the Magnolia Petroleum Co. operated other properties than its Fort Worth refinery. The question was: Could the Fort Worth refinery workers claim to constitute a separate entity for collective bargaining?

The union petitioned for an election whereby the Fort Worth refinery workers might choose a "representation plan for collective bargaining without restriction or interference imposed by the employer." The employer rejected the charge that he had engaged in coercion of any

¹⁶ Case No. 2, decided Feb. 6, 1934. See *Decisions of the Petroleum Labor Policy Board*, Feb. 6, 1934 to Mar. 13, 1935, pp. 1-5. (This publication will be referred to hereafter as *Decisions*.)

kind, saw no need for a new election, but requested that if an election be held, it should include the 11,000 workers in all the plant units, at least all the refinery units, and not the Fort Worth refinery alone.

Guided in this case by the concept that the Fort Worth refinery was an appropriate unit for collective bargaining, the Board perceived "two simple issues":

1. May the employees be induced by an active campaign on the part of their employer to contract away their right to collective bargaining through representatives of their own choosing—and to substitute therefor a restricted right of representation that is preferred by the employer? Is this interference within the meaning of Section 7(a)?

2. Was there in fact such a contract made which now prevents a majority of the employees at the Fort Worth refinery from bargaining collectively with their employers through representatives not restricted to employees of the company?

On the first issue the Board found that:

The activities of the management—in inducing the representatives to give up their right to collective bargaining as provided in Section 7(a) and to substitute therefor the restricted form of representation preferred by the company, were improper activities intended to prevent the employees from fairly considering and voting for the unrestricted right of collective bargaining and representation as authorized by Congress, if indeed these activities did not constitute interference—which the law specifically prohibits.

On the second issue, the Board found that:

The *vote* taken jointly by the management and employee representations at the meeting in Dallas on August 18 cannot reasonably be held to be a contract binding on all the employees in view of the unanimous testimony of witnesses from the Fort Worth refinery that they understood, and the employees in Fort Worth generally understood, that the plan worked out at the Dallas meeting would be brought back to be considered and accepted by the employees. This was not done,

although the plan was submitted to the directors of the Magnolia Company for acceptance after the Dallas meeting. No collective bargaining contract was signed or attested to, no wages, hours, or other terms of employment were fixed.

On the basis of these findings, the Board ruled that the petition presented by a majority of the Fort Worth employees "is a reasonable request. They are within their rights in asking for an election to determine for themselves the method of collective bargaining they prefer to use and the kind of representatives they want to select; and it is not for the company to deny them these rights." Further, the Board specifically ruled against the employer's contention that any election should comprise all its employees, not merely the Fort Worth refinery workers.

. . . the ordering of a company wide election when no such request has been made by the employees or their representatives would be going beyond the limits of the question submitted—and it would permit the employees in a large plant in another city to overcome and defeat the wishes of the majority of employees in Fort Worth as to their exercise of the right of collective bargaining and their free choice of representatives. The refinery at Fort Worth is a separate and homogeneous unit and was so recognized by the company when it permitted the employees of the Fort Worth refinery to vote separately to choose two representatives under the company's plan. There is no good reason for denying the employees at Fort Worth the opportunity to vote separately for the form of collective bargaining they prefer, as well as for the representatives they want.

Finally, the Board took pains to specify the exact form of ballot to be used. The workers were to be asked to indicate their preferences among the following alternatives: (1) those who wanted to bargain collectively through the Oil Field, Gas Well and Refinery Workers' Union; (2) those who wanted to bargain collectively

through the plan of joint representation of employees and management as proposed by the company; (3) those who wanted to bargain collectively through any other agency; (4) those who wanted no collective bargaining but preferred to bargain individually with the company. The choosing of representatives, the Board stressed, was only a preliminary step toward true collective bargaining, which meant, essentially, plans for "negotiating and arriving at a collective bargain." To quote:

By way of explanation of this form of ballot, it is important to understand that Section 7(a) guarantees to the employees the "right to bargain collectively" and not merely the right to choose representatives. The election of representatives is merely incidental to the exercise of the right to bargain collectively, because it is through representatives that a collective bargain is arrived at. If an election is held merely to choose representatives, and no plan or provision is made for negotiating and arriving at a collective bargain, then the "right to bargain collectively" as guaranteed by Section 7(a) is denied to the employees.

No election was ever held, because the company agreed to recognize an officer of the international union, or the union itself, upon certification by the Board that the union was representative of the workers. Upon this understanding, the Administrator on Feb. 28, 1934 ruled that it would be advisable to dispense with a referendum.¹⁷ The Board proceeded to a comparison of payroll records with signatures signed to a petition asking that the international union be certified as the representative. The check revealed that a majority of the eligible employees at the Fort Worth refinery wished to be represented by the union. Accordingly, the Board certified the International Union as the employees' representative for

¹⁷ Appeal from the decision, Case No. 2, *Decisions*, pp. 6-8. The ruling was drafted and signed by Mr. Nathan R. Margold, as chairman of the PAB, and approved by Mr. Ickes, in his capacity as Administrator.

collective bargaining "regarding terms and conditions of employment and relations of employer and employees." The Board also made it clear that the International was henceforth the sole instrumentality authorized to bargain collectively on behalf of the refinery workers:

In order that there may be no misunderstanding, the Board certifies further that the company's joint representation plan is not authorized to bargain collectively for the employees at Fort Worth, not having been freely chosen or authorized by the employees so to do in accordance with the NIRA and the petroleum code.¹⁸

In making the certification public, it was announced on behalf of the Administrator that the Labor Policy Board had decided "that company unions could not represent employees in collective bargaining when employees had signified they desired to be represented by another agency."¹⁹ In effect, the Board's ruling was equivalent to disestablishing and disqualifying the company union from functioning further as a collective bargaining agency. More generally, the decision laid down the doctrine that one and only one labor organization is entitled to bargain collectively on behalf of the workers employed in a given unit—the labor organization chosen by at least a majority of the workers. As for minority labor organizations,

The position of the PLPB is that when any such minority complains that its rights are adversely affected, the Board will hear and decide the matters in dispute in the same manner that it hears and decides complaints of individuals and majorities. In this position I concur.²⁰

¹⁸ PLPB "Certification of Organization for Collective Bargaining," Mar. 8, 1934, attached to *Department of the Interior Press Memorandum*, Mar. 16, 1934.

¹⁹ The same, p. 1.

²⁰ Language used by Mr. Margold in the appeal from the decision, Case No. 2. Majority rule as set forth in the Administrative Order of

The Phillips Case

The Board advanced further along the lines marked out in the Magnolia case in its decision relating to the dispute between the Phillips Petroleum Co. (Borger, Texas) and the International Association of Oil Field, Gas Well and Refinery Workers' Local Union No. 236.²¹ The decision was based on complaints by the union, charging that the employer "was holding meetings for the purpose of organizing a company union; that the employer was compelling workers to attend these meetings and to sign applications for membership in the company union; that the employer was discriminating against workers who belonged to the International, by discharging and threatening with discharge those who joined this union"; and that, in sum, the employer was interfering with the "self-organization of his employees." The Board found these complaints to be well grounded; held that the employer was in fact guilty of "interference"; and ordered the employer to cease and desist in the future from all activities intended to bring about the establishment of a company union against the will of the employees. The Board used the occasion to develop the doctrine of interference and free choice as follows:

... the action of the Phillips Petroleum Company in actively promoting its "company employees' union" through meetings

Mar. 8, 1935 was qualified by the proviso: "Without thereby denying to any individual employee or groups of employees the right to present grievances, to confer with their employer, or otherwise to associate themselves or act for mutual aid or protection." On freedom of choice, Mr. Margold stated: "It is for the employees themselves to determine the agency or person, through whom they wish to bargain collectively. The government is not interested in what selection the employees make, so long as it represents their own free choice."

²¹ Case No. 25, decided July 2, 1934. *Decisions*, pp. 11-16.

managed by the employer, and through elections conducted under restricted rules stipulated by the employer, is in violation of the . . . petroleum code . . . and Section 7(a). And the company is asked to cease from these activities and to refrain from any further efforts to secure the establishment of its own "company employees' union."

It is for employees freely to choose such an organization if they prefer it, and any election that purports to give employees an opportunity to express their choice must provide an opportunity for the employees to vote on as many organizations or representatives as the employees may want to choose from and must not be confined or restricted to a vote on the employer's proposal alone. The election should be by secret ballot, and must not be conducted by an agent of the company. It should be supervised by an election committee chosen by the employees and representatives of different organizations among them or by a neutral party agreed upon by all parties. If this cannot be arranged, the Petroleum Labor Policy Board will conduct the election. Only in this manner can a fair and free choice of the employees be secured as to the organization or the individuals they desire to represent them in collective bargaining.²²

²² Two later representation decisions are also significant. In the Lion Oil Refining case (No. 74, decided Dec. 12, 1934), the PLPB held that the employer violated Sec. 7(a) by persisting in the organization of a company union after the International had been chosen by 61.2 per cent of the workers at an election. The employer was ordered to "recognize the International and to withdraw recognition from the company union." (*Decisions*, pp. 34-38.) In The Texas Co. case (No. 21, decided Dec. 11, 1934), the PLPB ordered the employer "to dissolve" the company union at the West Tulsa, Okla. refinery. The Board found that the employer was violating the statute by "imposing" a company union in open disregard of the fact that a majority of the workers had chosen to be represented by the International (*Decisions*, pp. 29-34). This was perhaps the only case in the history of Sec. 7(a) wherein a Recovery Act labor board ordered the *dissolution*, rather than the disestablishment or the disqualification of a company union. The employer failed to comply; and on Apr. 30, 1935 Administrator Ickes requested the Secretary of the Navy and the Procurement Division of the Treasury to refuse to entertain bids for government petroleum business submitted by The Texas Co. (*Department of the Interior Press Memorandum*, May 11, 1935.) On May 26, Administrator Ickes wrote to the Secretary of the Navy to inform him that the request of April 30 did not apply to a subsidiary—The Texas Co. (Calif.)—"unless it were established that a part or a whole of the petro-

The Yount Lee Case

The PLPB had to decide on the merits of a blanket charge of coercion in the dispute between the Yount Lee Oil Company (Beaumont, Texas) and the International Association of Oil Field, Gas Well and Refinery Workers' Local Union No. 251.²⁸ The union submitted a complaint, charging the management with "threatening dismissal of employees at High Island, Texas, because of membership in that organization." On the basis of the findings made after a hearing in the field by one of its members, the Board ruled that the "management of the Yount Lee Oil Company has been interfering with the right of its employees to organize and bargain collectively in violation of Section 7(a) . . . and of the code . . ." In order to clarify the obligations of employer and management in cases of this kind, the Board stated that:

It is unlawful: (1) To deny or in any way question the right of employees to join the labor organization of their choice.

(2) To interfere in any way with the organization of employees.

(3) To restrain or coerce employees in any way, through agents of any kind, in self-organization, or in other concerted activities for collective bargaining, mutual aid, or protection.

"There must be no intimation," the Board finally ruled, "that the men will lose their jobs or in any other way be subject to discrimination directly or indirectly for exercising their rights under the law."

DISCRIMINATION

Discrimination rulings did not bulk as large in the work of the PLPB as they did in that of the National

leum products furnished the government were supplied indirectly by [the parent company] through [the subsidiary]." (*Department of the Interior Press Memorandum*, May 25, 1935.)

²⁸ Case No. 12, decided Apr. 4, 1934. *Decisions*, pp. 8-10.

Labor Board, the National Labor Relations Board, and the Automobile Labor Board. Excluding one arbitral award presently to be considered, the authors examined eight such rulings up to March 13, 1935. In two instances, the Board found in favor of complaining workers or groups of workers, and in six instances it found against them.²⁴ Eight rulings, although enough to be suggestive, were not quantitatively sufficient to warrant coming to any conclusion on a well-defined, long-run trend. A study of each of these particular adjudications will illuminate the specific character of the complaints and the exact nature of the PLPB's reasoning thereon.²⁵

The PLPB established its fundamental canons for determining charges of discrimination in the dispute between the American Oil Company (Baltimore, Md.) and the International Association of Oil Field, Gas Well and Refinery Workers' Union.²⁶ It was held that Section 7(a) did not prohibit an employer from reducing his work force; further, that the employer did not violate the law merely because union men happened to be

²⁴ The favorable decisions were in the cases of Harmon and Whitehill, Tulsa, Okla., (*Decisions*, pp. 42-45), and Continental Oil Co., Hominy, Okla., (the same, pp. 21-26). The failure of the Continental Oil Co. to comply led Administrator Ickes, on May 2, 1935, to request the Secretary of the Navy and the Procurement Division of the Treasury to refuse to entertain any bids submitted by the company for government petroleum business. (*Department of the Interior Press Memorandum*, May 11, 1935.)

The unfavorable decisions were in the cases of Continental Oil, Glenrock, Wyo. (*Decisions*, pp. 46-50); Kanotex Refining, Arkansas City, Ark. (the same, pp. 51-53); Girard Corp., Dallas, Tex. (the same, pp. 41-42); Sunray Oil, Tulsa, Okla. (the same, pp. 39-40); American Oil, Baltimore, Md. (the same, pp. 17-18); and Latonia Refining, Latonia, Ky. (the same, pp. 16-17).

²⁵ In the Phillips Petroleum, Bartlesville, Okla. case (decided Apr. 9, 1935) the Board expressly rejected discrimination complaints; in the Sterling Oil, Pittsburgh, case (decided May 4, 1935) the Board by implication sustained discrimination complaints.

²⁶ Case No. 46, decided July 30, 1934. *Decisions*, pp. 17-18.

included among the workers released. Not the fact of discharge or lay-off, but the circumstances surrounding the release of union workers, were to be taken into account. In choosing workers to be released, the employer was to refrain from using his lawful right—work force reduction—in an unlawful manner; that is, as a pretext to discipline workers because of their union membership or activities. To quote:

The fact that a man belongs to a union and is laid off is not sufficient in itself for a finding that [he] was discriminated against in violation of the law in question. The charge is a serious one and must be supported by affidavits which are clear and specific, or by circumstantial evidence sufficiently strong to lead to such a conclusion.

“The underlying policy that even the heat of anger and the stress and excitement of a strike do not justify acts of violence by employees,” to quote from the text of the official release, was laid down by the counsel to the Board, who acted as the arbitrator on discrimination charges arising out of the failure of the Champlin Refining Company (Enid, Oklahoma) to reinstate 15 strikers following the settlement of a strike.²⁷ Reinstatement was denied to eight employees and granted to six. The decision ran against four of the eight workers because “they left their jobs at machinery boilers without making sure that the mechanical equipment was left in a safe condition.” The reason given in the other four cases varied. In the fifth case, it was found, the worker laid violent hands on the president of the company and removed him from the premises; in the sixth, the discharged worker left his post of duty, leaving a running still in a dangerous condition; in the seventh, the worker struck the foreman after the foreman accused him of be-

²⁷ Decided Sept. 13, 1934. *Decisions*, pp. 69-77.

ing a liar; and in the eighth, the worker's actions since the strike tended to "harass and humiliate his employer," and were of "such nature and spirit as to prohibit his reinstatement." In the six cases where decisions were favorable to the worker, the arbitrator was unable to find evidence sustaining charges of sabotage, violence, use of vile language, or the like.

On August 17, 1934, the Administrator announced his approval of recommendations, transmitted to him by the Labor Policy Board, asking that the Gulf Refining Company be prosecuted on charges of violating the labor provisions of the code.²⁸ The facts, in essence, were as follows: On June 27, 1934, the Independent Oil Workers' Union called a strike because of the employer's refusal to enter into negotiations looking toward the execution of a collective bargain. The plant was closed down for a while; but on July 17 it was reopened after the company had recruited a sufficiently large force of new workers. On the same date, the union proposed to the Board a settlement formula, characterized by the Board as "reasonable," which the employer rejected.²⁹ On July 29, 1934 the Board received a complaint from the union charging that the employees newly engaged were being worked hours in excess of the code maximum. Upon investigation, the Board ascertained that these complaints were well founded.

The company took the position that "the refusal of its striking employees to return to work on the terms which

²⁸ See *Department of the Interior Press Memorandum*, Aug. 17, 1934.

²⁹ The settlement provided that: (1) all striking employees were to return to work without discrimination and with the same status held before the strike. (2) Negotiations of collective agreements were to start immediately upon the return to work. (3) All day men were to be returned to work simultaneously, all shift men in accordance with their shifts. (4) Rates of pay as announced by the company July 1 were to prevail until final settlement by collective agreement.

the company stipulated created an emergency which warranted working the new employees in excess of the maximum established in the code." The Board took the position that "after a fair and reasonable proposal had been made for settling the strike, the Gulf Refining Company, in preference to a settlement of the controversy in a law-abiding and peaceful manner, chose to resort to a continuation of industrial warfare, even at the expense of a violation of the law."

In reporting to the Administrator, the Board stated that the strike was lost; and that in the process of breaking it, the employer had resorted to unlawful means. The Board did not hold that the employer was guilty of discrimination in hiring strike-breakers to replace strikers who walked out because the employer refused to consider negotiating a collective agreement. What the Board did hold was that by working the new employees hours substantially in excess of the code maxima from July 19 to July 31, a period of two weeks, the employer broke the strike by breaking the law. He should be prosecuted, therefore, for violating the labor provisions of the code—not the collective bargaining guarantees, but the maximum work day and/or work week standards. The Board reported:

The issue in this case is simple and clear. Is an employer—in this case a powerful oil company—to be permitted to resort to a violation of the law in endeavoring to break a strike, occasioned by the failure of the company to enter into negotiations with its employees in the exercise of their right to collective bargaining as guaranteed under the National Industrial Recovery Act? The Board recommends prompt submission of this case to the Department of Justice with a request for immediate prosecution.⁸⁰

⁸⁰ The Gulf Refining Co. was later indicted but up to May 1935 the case had not come to trial. It was dropped, together with all other Recovery Act cases, on June 1, 1935.

It would have clarified the interpretation of the statute had the Board, in this case, grasped the opportunity of developing the doctrine of discrimination within the meaning of Section 7(a): First of all, does an employer engage in discrimination when he rejects a "reasonable" settlement proposal, the effect of which if accepted would be to let out the strike-breakers and reinstate the strikers in their stead? Second, does the employer engage in discrimination when he recruits a new labor force in the place of strikers whose walkout, to begin with, was caused by the failure of the employer to comply with the statute?

That striking employees enjoy a tenure of employment when walkouts are occasioned by anti-union activity was affirmed by the Board in the dispute, decided May 4, 1935, between the Gasoline Station Employees' Union No. 19204 and the Sterling Oil Company of Pittsburgh.²¹ To begin with, the Board scolded the workers for striking precipitately, in language as follows:

The Board deprecates the manner in which the strike was called—looking with disfavor upon a labor organization's going out on strike without notice to its employers, or without first taking advantage of the machinery which has been established for the peaceful settlement of labor disputes. Such action, however, under existing law would not mitigate prior damage done by a company in its anti-union activity or erase a violation of the law.

The Board was convinced, however, that the strike began because the workers had good and sufficient reasons to believe that their jobs were immediately endangered by the employer's anti-union activities. It therefore ordered the employer to reinstate each of the ten employees in question, or at least to place them on a prefer-

²¹ *Department of the Interior Press Memorandum, May 8, 1935.*

ential list for re-employment. It further ordered the employer to reinstate one Mrs. O'Connor, not a union member, but apparently discharged because her husband was one of the workers who walked out. Inasmuch as the company resumed operations with a new labor force not long after the strike began, compliance with the PLPB decision would have meant the displacement of workers subsequently engaged in favor of former employees. On the general theoretical issue involved, the Board held as follows:

The Board is of the opinion that where a strike is caused by the anti-union activity of a company, which places the workers in reasonable apprehension that unless they act quickly they will be deprived of their jobs, that the strikers are employees, and therefore entitled to the protection of Section 7(a) . . . and that the exertion against any one of them of such pressure as is here evidenced is interference within the meaning of the statute. Consideration of all the facts and circumstances in this case, leads the Board to find that the company violated Section 7(a) . . . by coercing the employees and interfering with their right of self-organization for the purpose of collective bargaining.

CODE LABOR POLICIES

Unlike any other industrial relations board under the Recovery Act, the Petroleum Labor Policy Board played a part in applying the wage and hour provisions of the code, over which it had jurisdiction, and in passing judgment on proposals to amend, expand, or redraft those labor provisions. When the Administrator required advice on such matters, he was likely to call in not only the PLPB, but the Petroleum Administrative Board and the Planning and Co-Ordination Committee. As a rule, where a choice was necessary, the Administrator was guided by the recommendations of the PLPB rather than those of the PCC. We shall illustrate these activi-

ties of the Labor Policy Board by reference to a few special problems. These references are intended to be suggestive, not exhaustive.⁸²

SPECIAL PRICES TO EMPLOYEES

On April 16, 1934 the Administrator issued an order⁸³ which temporarily exempted the employees of the Bayway Refinery (Linden, New Jersey) operated by the Standard Oil Company of New Jersey, from a code provision reading as follows:

Sales to employees of the products named in this paragraph must be made at the same price and upon the same terms as to other consumers.⁸⁴

In petitioning for exemption from this provision, the employees contended that it deprived them of a customary right to purchase petroleum products from the employer for their own use at a discount. This right, they further contended, was not only a matter of mere usage, but had been incorporated into the wage bargain and had contractual force. Before ruling on the petition, the Administrator turned it over to the Petroleum Administrative Board, to the Petroleum Labor Policy Board, and to the Planning and Co-Ordination Committee. Both the PAB and the PLPB found the petition meritorious and recommended accordingly; the PCC, in contrast, recommended that no exemption be allowed. In suspending the force of the code provision, the Administrator pre-

⁸² In addition to advising the Administrator on the various problems mentioned in the text, the PLPB advised him on the operation of code labor provisions in small towns; on derrick and rig-building wage rates; on matters connected with stripper wells, and so on.

⁸³ *Department of the Interior Press Memorandum*, Apr. 17, 1934.

⁸⁴ Art. 5, Rule 3, par. 4, as approved and promulgated Nov. 10, 1933.

ferred to rely on the advice of the two Boards rather than on that of the PCC.⁸⁵

WAGE DIFFERENTIALS

On May 21, 1934, the Administrator gave his approval to a plan of so adjusting the differential compensation of skilled workers "that they will, in effect, receive a real income approximately equal in purchasing power to that of 1929."⁸⁶ This order not only established differentials for the time being between "wages provided for common labor in the code and wages to be paid other employees," but also provided that after a trial period ending August 1, 1934, the Administrator would "on due application consider the advisability of eliminating Section 4, Article 2 of the code, so that thereafter the employers and employees may be free to adjust differentials by collective bargaining."

In issuing the order, the Administrator relied on the recommendations of the PLPB in opposition to those of the PCC. In accordance with Section 4, Article 2, the Administrator had asked the PCC to instruct its regional committees to prepare and transmit to him a proposed schedule of differentials. This the PCC caused to be done; whereupon the Administrator, in accordance with Section 7(c) of the Recovery Act, referred the proposal to the PLPB, which held hearings April 12 to April 14, inclusive, at which employers and employees stated their respective cases. The Board found that,

The proposed differentials failed to adjust equitably the wages paid skilled employees to those paid common labor under the

⁸⁵ On Feb. 5, 1935, the Administrator issued an order which "revoked and cancelled" the ruling of Apr. 16, 1934. Once again he was guided by the PLPB. *Department of the Interior Press Memorandum*, Feb. 13, 1935.

⁸⁶ The same, May 24, 1934.

code in that they would establish an arbitrary classification, elaborate and unworkable, of skilled jobs within the industry.

Having come to this conclusion, the PLPB recommended that the Administrator disapprove the proposed differentials, which he did. The PLPB studied cost of living indexes for 1929 and 1933, and worked out and recommended a graduated schedule on the basis of data submitted by representatives of the operators and of organized labor, in the belief that an equitable adjustment could be achieved if the wages paid to skilled employees were adjusted "in a proportion corresponding substantially to the adjustments made in the aforesaid wages paid common labor." This schedule was approved by the Administrator. Under the plan, it was stated, "the majority of skilled employees will get 80 per cent of their 1929 weekly earnings, although they worked 48 and 56 hours in 1929, as compared with 36 hours now."

Contemplating the likelihood, or at least the possibility, that employers and employees would in the future desire to set differential wage scales by collective bargaining, the Administrator, about four months later, modified the order of May 21 by adding the following proviso:

The provisions of the order shall not apply to those cases where other wage adjustments mutually satisfactory to employers and their employees may be arrived at through negotiations between employers and the duly chosen representatives of their employees; provided that such negotiations conform to the requirements of Section 8(a) of the NIRA and Section 7, Article 2 of the petroleum code; and provided, further, that such negotiations are completed by October 19, 1934.²⁷

On the same day, September 26, 1934, the Administrator promulgated a series of interpretations relating

²⁷ *Order under the Code of Fair Competition for the Petroleum Industry*, Sept. 26, 1934.

to his order of May 21, covering production, refinery, and pipe-line operations. The general interpretation read as follows:

This order does not apply to supervisory occupations paying \$35 per week, or more, and others whose hours are not restricted by the code; nor will it apply to any employees hired on or after August 19, 1933, to work under code hours; provided, however, that the rates of pay for such workers hired since August 19, 1933, shall not be so low as to affect the stability of rates established under the order. Similarly it does not apply to employees of any employer that signed the President's Re-Employment Agreement, who were hired after the date of signature to work under the hours therein provided. It is necessary, however, in such cases for employers to be prepared to make *bona fide* showings that the subject employees were hired at reduced hours to effect compliance with the code or the President's Re-Employment Agreement and not in connection with normal replacements.²⁸

Other questions raised by the order of May 21—for instance, how far the order should be retroactive—were subsequently answered by the Administrator in accord with the recommendation, not of the Planning and Coordination Committee, but of the PLPB. In fact, by the winter of 1934 the PLPB had come to play such an important part in its advisory capacity that it was engaged in a series of hearings preliminary to a complete revision of the labor provisions of the code.²⁹ A thoroughgoing revision, it should be noted, had been demanded by the

²⁸ *Interpretations of Order under the Code of Fair Competition for the Petroleum Industry*, Sept. 26, 1934.

²⁹ For a notice that such hearings would be held, see *Department of the Interior Press Memorandum*, Sept. 29, 1934. On June 7, 1935, the PLPB's "Report . . . to the . . . Administrator on the Proposals made by the International Association of Oil Field . . . Workers . . . for Modifying the Labor Provisions of the Petroleum Code" was finally made public. (*Department of the Interior Press Memorandum*, same date.) By this time, however, the report was of a purely academic interest, for the code had already expired.

Oil Workers' Union, upon whose request the hearings were held.

DEFINITION OF THE TERM "EMPLOYEE"

On February 16, 1935 Administrator Ickes promulgated a definition of the moot term "employee," holding in effect that "an operator of a filling station and his employees are the employees of the supplying company *if the supplying company controls the operators of the station.*"⁴⁰ In so defining the term, the Administrator disapproved of a formula put forward by the PCC. Had he accepted the PCC definition of the term, there would have been exempted "from the status of employee the operators of all filling stations operated under the lease and agency, lease and license, and lease and sales contract agreements, irrespective of the extent of control over station operations by the supplying companies."

As in many other instances, the Administrator here preferred to be guided on a critical issue by the advice of the PLPB and the PAB, which concurred in recommending the exact definition finally promulgated. Prior to making its recommendations, the PLPB "made an exhaustive study of the question, held several hearings, and received numerous briefs." Its final definition, it was announced, was based on accepted legal concepts: that an employee is "one whose work is done under direction and control of another."

The exact text of the definition read as follows:

The term "employee" includes all persons, working at a filling or service station or at any garage or other institution selling petroleum products to the public who work subject to the direc-

⁴⁰ See *Department of the Interior Press Memorandum*, Feb. 19, 1935. (Italics ours.)

tion and control of another regardless of the nature of their duties, their mode of compensation or the legal form of their contract if by its terms or under its operations such direction and control exists.

Specifically, and without limitation of the general definition, the operator of a service or filling station and his helpers are the employees of the supplying company when such company owns or holds such station under lease and such company leases or sub-leases such station to the operator on a lease and sales contract or any arrangement which insures the exclusive sale of the gasoline of such company at the station and which also insures the operation of the station in such manner as the company may direct, irrespective of whether these results are accomplished directly by the terms of the contract or by virtue of powers of cancellation or forfeiture or otherwise, provided, however, that when a filling or service station is operated by the party from whom the supplier leases the station under a lease and agency or lease and license agreement, the party operating such station and his helpers shall not be considered employees of the supplier.

When an operator has a substantial sum invested in the operation of a service or filling station, whether such operator and his helpers are employees of the supplying oil company, shall be determined in accordance with the provisions of the general definition.⁴¹

The definition aroused tremendous opposition on the part of supplying companies operating chains of filling stations. It was the contention of the PCC, to quote from a protest filed with the Administrator, that the definition "includes as employees persons who could not be so classified under existing court decisions and it attempts to create artificially the relationship of employer and employee where such relationship does not exist in law or fact." The PCC requested, specifically, that the order of February 16 be cancelled, leaving each case to be decided on its own particular facts.⁴² On May 6, 1935

⁴¹ *Order under the Code of Fair Competition for the Petroleum Industry*, Feb. 16, 1935.

⁴² *Department of the Interior Press Memorandum*, May 18, 1935.

the Administrator replied to the PCC in a letter which was not made public until May 18. The most essential paragraph of this letter read as follows:

I wish to make it clear that I subscribe to the same theory of administrative practice that each case must be decided on its facts, but I am of the opinion that the present definition in no way precludes but in fact contemplates hearing cases as they arise and deciding them on their particular facts. Further, I am confident that the definition is consistent with the court decisions and that it has support in law.⁴⁸

What the Administrator's attitude came to, in sum, was this: on the one hand, he refused to revoke the definition of February 16 or to modify its language. On the other hand, he rejected the idea that, according to the definition, the mere existence of "ownership, leasing, exclusive sales arrangement, and cancellation clause . . . makes the operator *ipso facto* an employee." To quote once again from the letter:

. . . there is no real difference of opinion between us. . . . To cancel the present definition would be unwarranted. The specifications set forth in the definition serve as guide-posts and were intended to place the industry on warning that the existence of certain factors in a leasing arrangement, in the absence of other factors, may be regarded as presumptive evidence of the employee status of an operator.

If the ordinary meaning is given to the language used in the definition, it will be seen that the conditions objected to are notice to the industry that such conditions will be given weight in the determination of a case but that, in any case, their mere existence cannot be said to establish *ipso facto* that the operator . . . is an employee, regardless of other evidence showing that, in fact, the conditions enumerated do not insure "the operation of the station in such manner as the company may direct."

INFLUENCE OF THE BOARD

Like all the other boards which took a stand on Section 7(a) favorable to organized labor, the PLPB

⁴⁸ The same.

aroused the opposition of anti-trade union employers. The Board, so far as concerns the promulgation of decisions which "lay down the law" of Section 7(a), ran into the same blank wall of non-compliance which characterized the labor board system as a whole.⁴⁴ In its work of certifying representative labor organizations, however, the PLPB enjoyed a substantial measure of success in prevailing upon employers to recognize the effect of such certifications. As for difficulties arising out of the attempt to put the wage and hour provisions of the code into effect, they were typical of the entire NRA set-up and by no means peculiar to the PLPB. From one point of view, it should be noted, the PLPB wielded more influence than any other labor board; for the Petroleum Administrator relied heavily on the Board's advice in determining the labor policies which should be officially pursued.

Undoubtedly, the activities of the Board were materially helpful to the International Association of Oil Field, Gas Well and Refinery Workers' Union, as well as to the A. F. of L. federal labor unions among gasoline service station employees. Exact data are not available, but the International increased its membership from a few thousand early in 1933 to more than 25,000

⁴⁴ Hardly any use of the Blue Eagle was made by the Petroleum Administration. Certain regulations were promulgated on June 25, 1934, but did not take effect. New regulations were issued by the Administrative Order of Feb. 8, 1935. These regulations provided that "Prior to the revocation of the right to display and use the Blue Eagle poster and insignia, the PAB and the PLPB jointly in the case of labor violations . . . shall hold a hearing . . . but such hearing shall not review the question of violation if the violation giving rise to the proceedings has been previously established after hearing by either of the said boards. The right to display and use the Blue Eagle shall be revoked . . . after such hearings and upon findings made by the PAB and the PLPB jointly in the case of labor violations . . . if such findings are approved by the Administrator." (*Department of the Interior Press Memorandum*, Feb. 13, 1935.)

late in 1934.⁴⁵ In addition to enjoying a phenomenal growth, the union succeeded in concluding on May 31, 1934 its first nation-wide collective agreement, an agreement with the Sinclair companies (Sinclair Refining Company; Sinclair Prairie Oil Company; Sinclair Prairie Oil Marketing Company; Sinclair Prairie Pipe Line Company; Rio Grande Oil Companies).⁴⁶ The PLPB did not play a direct part in the negotiation of the agreement but was largely responsible therefor in an indirect sense.

As was the case with all other Recovery Act labor boards, the activities of the PLPB came to an abrupt end on May 27, 1935. The invalidation of the petroleum code by the Schechter case decision of that date deprived the PLPB of any subject matter upon which to exercise its functions, although the Board nominally continued in existence until June 16, 1935.⁴⁷

⁴⁵ In 1933 the union's allotted voting strength at the A. F. of L. convention represented a membership of 3,000; in 1934, of 12,500. Voting strength is not, however, a reliable index; it is calculated on the basis of the per capita dues which the union sees fit to pay into the A. F. of L. treasury. The change from 3 to 125 votes is nevertheless highly significant. The union now claims anywhere from 50,000 to 100,000 members.

⁴⁶ See the *Articles of Agreement*, May 31, 1934. This compact was the first of its kind between the A. F. of L. union and a major oil producer.

⁴⁷ After the enactment of the joint resolution extending the Recovery Act in mid-June 1935, the Board was kept alive, for the time being, as a research agency. New functions would be found for it, it was believed, upon the enactment of the Labor Relations bill, or oil legislation then pending, or both.

CHAPTER XV

OTHER LABOR BOARDS

In addition to the four industrial relations boards examined in preceding chapters, there were in existence toward the end of May 1935 a number of other boards which fell into two groups. One group included boards functioning under NRA codes, while the other included boards established on the basis of Public Resolution No. 44. In view of space limitations, it is impossible to consider all of these boards in detail. But to make our picture of the system of industrial relations boards more complete, we shall touch briefly upon the boards in the textile and coal industries and comment even more briefly on the work of the rest.

LABOR BOARDS IN THE TEXTILE INDUSTRY

The textile industries, particularly cotton textile, were the scene during 1933-35 of turbulent developments in industrial relations. The developments were conditioned by several factors. The United Textile Workers of America, affiliated with the A. F. of L. but a small and weak organization before 1933, took advantage of Section 7(a) to launch a vigorous organizational drive, directed primarily against the textile mills in the South. Despite the determined resistance of employers, the union enrolled thousands of new members and sought every opportunity to make its new strength felt.¹

For many years prior to the NRA, textile employers had been pushing ahead with schemes variously termed "rationalization," "stretch-out," or "speed-up," de-

¹ Even more vigorous were the organizational drives of the American Federation of Hosiery Workers, an autonomous unit within the U.T.W.A.

signed to increase man-hour productivity by increasing the loom load per worker. These experiments did not cease with the adoption of the several textile codes. There is some reason to believe that experiments were accelerated—more so in the cotton textile than in the silk or wool industry—as a result of the increased unit labor costs attributable to the raising of wage rates and shortening of work hours.

No industry shared more fully than the cotton textile in the “boomlet” of the spring and summer of 1933, and it was one of the first to feel the effects of the recession in the fall. Despite some early experiments with the curtailment of machine-hour operations, inventories continued to accumulate. By May 1934 the code authority asked for a 25 per cent curtailment to be effective for three months. The NRA granted the request for the months of June, July, and August 1934. Wage rates, however, remained the same as before, thus restricting the power of workers to earn up to the full weekly minimum possible under the code: \$13 North and \$12 South.

By the early autumn of 1934 the pressure against weekly earnings, in combination with an accumulation of “stretch-out” grievances, brought labor discontent in the cotton textile industry to a head. Chiefly under the impulse of demands from Southern mill workers newly organized, the United Textile Workers launched a national strike. Although the union failed to win its demands, the strike was a surprisingly effective display of concerted action. For the purposes of our study, it forms the dividing line. Industrial relations in the textile industries had been under the guidance of two NRA code labor board systems—cotton textile and silk-wool textile—before the strike shattered both. Thereafter, industrial relations in the textile industries were under the

guidance of one joint resolution board. Although the workers struck primarily for economic reasons, the United Textile Workers used the strike to force the government into scrapping the old boards and establishing a new board set-up. The strike thus had as one principal result a reorganization of the machinery for handling industrial relations throughout the textile industries.

THE OLD COTTON TEXTILE LABOR BOARD

The cotton textile code was the first to be equipped, in August 1933, with an industrial relations board. The wool and silk board was not established until almost a year later—toward the end of June 1934. We may dispose of the latter board with this brief reference, for it had barely progressed beyond the first phases of organization when it was swept out of existence by the September strike.²

The Cotton Textile National Industrial Relations Board was based for the greater part of its life on Section 17 of the cotton textile code, as amended on August 8, 1933. Its task was "to make proper provision with respect to the 'stretch-out' (or specialization) system and any other problem of working conditions in the cotton textile industry." Section 17 in its original form, provided for: (1) the establishment of a board of three members;³ (2) the creation of a series of state boards;⁴

² This short-lived board was called the Textile National Industrial Relations Board. It had five members—Mr. Robert W. Bruere, impartial chairman; two labor representatives, Frank Gorman (wool) and Elizabeth Nord (silk); two management representatives, Arthur Besse (wool) and Lionel F. Straus (silk).

³ Until Aug. 10, 1934, the national board was composed of Robert W. Bruere, impartial chairman; George L. Berry (labor) and B. E. Greer (management). Two additional members, Mr. Fox (labor) and Mr. Dixon (management) were added on Aug. 10, 1934 pursuant to Sec. 17 as amended on July 10, 1934.

⁴ By mid-August 1934 state boards were in existence in nine states:

(3) the formation of mill committees created *ex post facto* in particular mills to deal with specific disputes;⁷
(4) a procedure of adjudicating disputes which ran from mill committee to state board to the national board.

The Cotton Textile Board finally came to deal with labor "disputes" and labor "complaints." With reference to disputes, the national board attempted to mediate in strikes, acted as an arbitrator upon voluntary joint submission, and above all, encouraged its state boards to form mill committees. With reference to complaints, the Board acted as a clearing house through which charges of code violations were transmitted to the code authority, in effect the Cotton Textile Institute, for investigation and adjustment. The Board also investigated and adjusted, on its own account, charges of "improper work loads."⁸

From its earliest days the Cotton Textile Board fell into the disfavor of the United Textile Workers. Their union was disappointed by the Board's failure to follow the NLB interpretation of Section 7(a) and resented the fact that its labor member was an official of the printing pressmen's union instead of theirs. The U.T.W.A. further claimed that, as a result of the Board's method of relying upon the code authority, labor complaints were not adequately considered or properly adjusted. It also accused the Board of failure to deal

Alabama, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina in the South; Massachusetts and Rhode Island in New England. Each of these boards was of the bi-partisan type, with an impartial chairman.

⁷ Each such committee had to consist of an equal number of management and employee representatives. The employee representatives had to be fellow employees. Each committee was supposed to be discontinued after adjusting the dispute which brought it into being.

⁸ The practice of stretch-out, *per se*, was not in violation of the cotton textile code as amended by Sec. 17, Aug. 8, 1933.

honestly with the stretch-out problem, and was distrustful of the mill committee system as a possible device to block the progress of independent labor organization.

The union's criticism of the Board's inadequacy in handling labor complaints and charges of excessive stretch-out was on the whole probably justified. But the union was unable to obtain action in the matter until June 1934, when the NRA authorized a 25 per cent reduction in machine-hour operations without a compensating increase in minimum wage rates. Without delay, the union threatened to call a national strike. Faced with this threat, the Administrator offered a compromise, which was accepted and embodied in an agreement on June 2, 1934, "without prejudice to the right of labor to strike." The union withdrew its threat to strike and received in return the following main concessions: (1) a representative of the union was to be appointed to the Board; (2) a representative of the union was to be named labor adviser to the governmental member of the code authority; (3) the powers of the Board were to be more clearly defined; (4) the Division of Research and Planning of the NRA was to undertake a series of investigations into hours, wages, differentials, work loads, and man-hour productivity in the industry.¹

On July 10, 1934, pursuant to the June agreement, Section 17 was amended in several important features. The powers of the Board were redefined as follows:

To make proper provisions with regard to any problem of working conditions in the cotton textile industry, including but without limitation, all claims and complaints of discrimination, representation, incorrect entries on pay envelopes, unwarranted reductions in classification, increased stretch-out, alleged viola-

¹ Summarized from the *New York Times*, June 3, 1934.

tions of Section 7(a) . . . and all other alleged violations of code provisions affecting relations between employers and employees. . . .

The Board was to be reconstituted to consist of five members: two nominated by the Cotton Textile Industry Committee to represent the employers; two representing labor, one chosen from among the employees of the industry and the other nominated by the Labor Advisory Board; and a fifth selected by the Administrator. Last, but not least, the rules on mill committees were to be changed so that it would be possible for the employees of a mill to be represented not only by their "fellow employees," but by any outsiders they wished to choose.

These changes, however, neither satisfied the union nor allayed the labor unrest in the industry. The reconstitution of the Board did not materially change its procedure. The Board floundered in its incapacity to attack the labor problems of the industry vigorously or efficiently. It also proved incapable of preventing the strike which began after Labor Day, 1934.

On September 5, 1934 the President exercised the powers conferred upon him by Public Resolution No. 44 to establish a board of inquiry and mediation.* On September 20, 1934, the Board made public its report. Its principal recommendations were as follows:

(1) The Cotton Textile National Industrial Relations Board should be replaced by a joint resolution board "for the more adequate protection of labor's rights under the collective bargaining and other provisions of the code. . . ."

(2) The Bureau of Labor Statistics and the Federal Trade Commission should undertake a series of investigations, the

* Composed of John G. Winant, governor of New Hampshire, chairman; Marion Smith, attorney, Atlanta, Ga.; Raymond V. Ingersoll, borough president, Brooklyn, New York. (Executive Order No. 6840.)

former into wages, hours, employment and payrolls, the latter into labor costs, profits and investments.

(3) To deal with the stretch-out problem, the President should establish work control assignment boards; pending the organization of which, no increases in work loads were to be permitted.⁹

The report made no provision for union recognition, which was one of the main issues in the strike. But aware of its inability to win on this point, the union accepted the "Winant Report" as a fulfillment of its demands, and called off the strike. The President then proceeded to put the recommendations into effect.

THE NEW BOARD

On September 26, 1934 the President created by executive order,¹⁰ and in reliance on Public Resolution No. 44, the Textile Labor Relations Board which continued to function until the Recovery Act was held unconstitutional. The Board consisted of three impartial "special commissioners."¹¹ Its powers were threefold: (1) to adjudicate charges of "discrimination" arising out of the failure of employers to re-engage workers *who participated in the textile strike*; (2) to exercise all the powers inherent in Public Resolution No. 44 with reference to *all the textile industries*; and (3) to deal with labor complaints arising out of the application of the three principal textile codes, that is, *cotton, wool, and silk*. Decisions of the Textile Labor Relations Board were reviewable, subject to the usual conditions, by the

⁹ Summarized from the *New York Times*, Sept. 21, 1934.

¹⁰ Executive Order No. 6858.

¹¹ The original personnel of the Textile Labor Relations Board was identical with that of the National Steel Labor Relations Board, that is, Judge Stacey, chairman, James Mullenbach, and Admiral Wiley. On Nov. 20, 1934, F. P. Douglass of Oklahoma took the place of Dr. Mullenbach.

National Labor Relations Board; its findings of fact and orders were final and conclusive with reference to other agencies in the executive branch of the government.

During its eight months of active existence most of the energies of the TLRB were absorbed by efforts to clear up the avalanche of discrimination complaints resulting from the settlement of the textile strike. The Board sent out field examiners; co-operated with the Labor Department's conciliation service and with the regional boards of the NLRB; held formal hearings; and issued a long series of decisions on discrimination complaints, most of them complaints of refusals to reinstate *en masse*.

In ruling on discrimination complaints, the TLRB allowed considerable latitude to "executive judgment" as exercised by the management of the plant.²² The burden of proving that the discharge or lay-off was animated by discriminatory intent, the Board reasoned, rested upon the employee. The general rule was stated in the Industrial Rayon of Virginia case as follows:

The employee who complains of discriminatory discharge must assume the burden of proving his allegations. He is charging that the employer terminated his employment because of his union affiliation or activity. When the charge is made and denied, there is presented a question of fact the essence of which is the motivating intention of the employer. Union affiliation or activity must have caused the discharge. It must have been an element of judgment in the mind of the supervisory official who made the decision. It goes without saying that the proof must show that the cause existed, as well as that the effect was produced. There must have been union affiliation or activity on the part of the employee; it must have existed before his discharge; and, if it was a factor in judgment, it must have been known to

²² For example, the Bemis case, decided Apr. 9, 1935; the Lockwood case, decided Apr. 13, 1935; and the Cleveland Worsted Mills case, decided Apr. 23, 1935.

the employer at the time of the discharge. These basic elements must be proved. They cannot be presumed. . . . The knowledge of the employer and the motivating intention are subjective. They are, however, essential elements of proof and cannot be presumed. They may be inferred from circumstances.¹³

Most notable among the Board's decisions on discrimination complaints arising out of the national strike were the Ninety-Six Cotton Mills and the Byrum Hosiery Mills cases. In the Ninety-Six case, the circumstances, briefly, were that the employer, to break a strike not occasioned by a violation of the statute, hired a new labor force, the members of which he continued in employment after the strike was called off. The Board ruled that the "complainants' strike was unsuccessful and for that reason it is not incumbent upon the employer to reinstate the strikers."¹⁴ In the Byrum Hosiery case the employer curtailed operations (instead of hiring a new labor force) when the strike was called. After the strikers sought to return to work, the employer hired ten new operatives, refusing reinstatement to eight of the employees who participated in the walkout. The Board held that the refusal to rehire was discriminatory.¹⁵ In affirming the original decision on the Ninety-Six case, the Board sought to distinguish it from the Byrum Hosiery case, and disavowed the concept that the "success or failure of a strike *per se* . . . is the test of discrimination within the meaning of Section 7(a)." But the Board was at pains to stress that although the right to strike is "freely conceded . . . in juxtaposition to this

¹³ *U.T.W.A. 2214 v. Industrial Rayon Corp. of [Covington] Virginia*, decided Apr. 30, 1935.

¹⁴ *U.T.W.A. 2161 v. Ninety-Six [S.C.] Cotton Mills*, decided Jan. 30, 1935; affirmed Mar. 27, 1935.

¹⁵ *A.F.H.W. 101 v. Byrum Hosiery Mills [Shelby, N.C.]*, decided Feb. 12, 1935.

right stand the rights of the miller to run his mill and of the other employees to work.”

Pertinent to the same problem was the Board’s ruling in the Alexander Manufacturing Co. case. In affirming its original ruling that the employer was not guilty of discrimination in failing to rehire workers after the strike was called off, the Board remarked:

The failure to reinstate the workers in their former positions was not due to their union activities, but to the fact that others had been employed in their stead, when they refused to return to their positions after being requested to do so, and no work was available for them after the strike was called off. The question of the right to strike is not involved in this case. This is conceded. It should be remembered, however, that co-equal with this right are the rights of the miller to run his mill and of other employees to work.¹⁶

Another important principle relating to the tenure of employment enjoyed by striking workers was developed by the TLRB in the Calloway Mills case. Here a strike was precipitated, so the union charged, by unlawful stretch-out and wage cuts, and by violation of the collective bargaining requirements. The Board cleared the employer on each charge and refrained from ordering the reinstatement of the striking workers. In effect, it based its refusal so to order on the theory that workers who strike in the absence of a Section 7(a) violation, without exerting every reasonable effort to adjust their grievances, disqualify themselves from the benefits of the statute.¹⁷

The authors have made an examination of 46 dis-

¹⁶ *U.T.W.A. 2062 v. Alexander Manufacturing Co.* [Forest City, N.C.], Mar. 27, 1935; original decision, Jan. 31, 1935.

¹⁷ *U.T.W.A. 1899, 2246, 2360 v. Calloway Mills* [La Grange, Ga.], decided May 10, 1935. Displeased with this ruling, the U.T.W.A. announced its intention to appeal to the NLRB. (*New York Times*, May 13, 1935.)

crimination cases decided by the TLRB up to May 20, 1935. In 26 cases, the Board found that the employer was guilty in whole or in part of various complaints brought against him because of refusal to reinstate striking employees following a walkout. In three cases the Board held that the discharge of employees temporarily reinstated following the cessation of a strike constituted discrimination, and in one case sustained a discrimination charge, no strike being directly pertinent thereto. The total of rulings favorable to complaining employees was thus 30. In 11 cases, the Board dismissed each and every charge of discrimination brought against the employer in consequence of refusal to rehire striking employees; in one case dismissed the charge that the employer engaged in discrimination by discharging employees temporarily reinstated following the cessation of a strike; and in 4 cases rejected complaints, no strike being directly pertinent thereto. The total of rulings favorable to employers was thus 16. While devoting most of its energies to discrimination cases, the Board also sought to work out a procedure for dealing with labor complaints on wages and hours arising under the cotton, wool, and silk textile codes. It also developed the theory of collective bargaining within the meaning of the statute, insisting upon the NLRB principle that the exertion of every reasonable effort to reach an agreement was a *sine qua non* of collective bargaining. The Board held at least two referendum elections for the choice of employee representatives, in both of which the trade unions were successful.²⁸ It ran into considerable em-

²⁸ In the two elections mentioned above a total of 1,352 valid votes was cast. Trade unions won both elections, polling 910 votes. An employee representation plan in one of the elections polled 303 votes to 399 for the trade union. Individual representation, in the other election, polled 139 votes to 511 for the trade union. The results of these two

ployer resistance and was engaged in three federal court proceedings—the Enterprise, Oregon Worsted, and Sibley cases—by the time the NRA codes were held unconstitutional.

The Textile Labor Relations Board was not required to deal directly with the stretch-out problem. On October 16, 1934 the President amended the cotton, wool, and silk textile codes to provide for the appointment by the Textile Labor Board of three work assignment boards to deal with the problem. On November 30, 1934, the President ratified the establishment of three such boards, one for each industry. Each of the three boards was an autonomous unit—composed of an impartial chairman, an employer member, and a labor member—which functioned in administrative conjunction with the TLRB.

The problems before the work assignment boards may be grasped from an examination of the provisions of Section 17 of the cotton textile code as amended on October 16, 1934. Here we find a statement of the problem in so far as it concerns the cotton textile industry. It reads in part as follows:

2. . . . no employer prior to February 1, 1935, shall make any change in work assignment of any class of employees which shall increase the effort required over that prevailing on September 21, 1934. During this period the number of looms,

elections are tabulated in Twentieth Century Fund, *Labor and the Government*, pp. 92-93.

Although TLRB elections were based on majority rule, it was stressed in the certificate of representation that "nothing . . . shall be construed as denying to any individual or employee or group of employees the right to present grievances, to confer with their employers, or otherwise to associate themselves and act for mutual aid or protection." This language was based on the executive order of Sept. 26, 1934, which stated majority rule subject to the qualification which the TLRB introduced into the certification.

frames, or other machines required to be tended by any class of employees shall not be increased where the character of the raw materials, yarn, construction of cloth, preparatory processes, type of equipment used, or character of finish or put-up, is not changed. Where such changes do occur the number of machines tended by such employees may be increased or decreased in such manner as will not increase the amount of effort required of the worker.

Where, during the period above referred to, a mill resumes the manufacture of any specific product which it has made within six months prior to September 21, 1934, and where the conditions of manufacture enumerated in the preceding paragraph are not changed, then the work load formerly used on such product shall be the guide in determining the proper work assignment.

Where, on September 21, 1934, a new style of yarn or cloth or any other new type of product was in course of introduction or is thereafter during the period above referred to introduced into a mill or finishing plant, a tentative work load may be established during the period of determining a proper work load in accordance with the foregoing principles.

3. Prior to February 1, 1935, on petition of any employee or employer affected, or his representative, or on its own motion, the Cotton Textile Work Assignment Board may investigate any work assignment which has been increased since July 1, 1933, at any mill, and the mill shall show the reasons for such increase. If after hearing the Board finds such assignment requires excessive effort it may require its reduction accordingly.

4. The Cotton Textile Work Assignment Board shall have authority to appoint district impartial chairmen and such other agents as it may select and to issue rules and regulations to carry out the foregoing provisions of this section.

5. The Cotton Textile Work Assignment Board shall, subject to instructions of the President, make a study of actual operations in representative plants and report to the President as to a permanent plan for regulation of work assignments in the industry.¹⁰

¹⁰ A report was made to the President on May 12, 1935. (See *New York Times*, May 13, 1935.) The Silk and Wool Boards also reported to the President soon thereafter.

LABOR BOARDS IN THE COAL INDUSTRY

The elaborate system of industrial relations boards in the bituminous coal industry represented a working arrangement between the United Mine Workers of America (the A. F. of L.'s largest and most powerful trade union) and the various groups of operators in different parts of the country who maintain contractual relationships with the U.M.W.A. To a large extent, the system of boards generalized, supplemented, and gave code status to pre-existing joint conference machinery. To a degree, however, the system served as a first step toward establishing such machinery in regions of the industry newly organized on the labor side.

We need not dwell in detail on the energy and skill with which the U.M.W.A. turned Section 7(a) to its own advantage. It is sufficient to say that the union regained its dominant position in the Central Competitive Field (Illinois and the neighboring states, its pre-code stronghold), established itself in territory previously barred to it, executed the Appalachian Agreement within this territory, and made progress toward organizing the captive mines operated by the iron and steel companies in western Pennsylvania. To understand why and how the bituminous coal boards operated as they did, one must bear in mind the union's tremendous organizational drive in the early summer of 1933 and the success which attended it. One must also bear in mind the high degree to which arbitrational devices, techniques, and procedures had been developed by the union many years before the Recovery Act went into effect.

STRUCTURES AND POWERS

The machinery for governing industrial relations in the bituminous coal industry was based on Article 7,

Section 5 of the code as approved on September 18, 1933. To begin with, it was assumed that employers and employees "are organized or associated for collective action." All labor controversies whether relating to wages and hours or to collective bargaining were to be dealt with through mine, district, or divisional conferences established by mutual agreement. It was the duty of employers and employees alike to "exert every reasonable" effort, not only to utilize such conference machinery, but also to establish it wherever it was lacking. Failing the adjustment of controversies by joint conference, the bituminous coal divisional boards, six in number, came into play. Appeal ran from the divisional boards to the National Bituminous Coal Labor Board.

The operation of the machinery limited the right of employees to engage in strikes and of employers to declare lockouts, provided that the controversies were of a character which affected or tended to affect interstate commerce. "During the consideration of any such controversy, either by the agreed machinery of adjustment or by the Bituminous Coal Labor Board," neither party to the controversy could change the conditions out of which the controversy arose, or utilize any coercive or retaliatory measures to compel the other party to accede to its demands. The coal labor boards, when passing upon controversies which affected interstate commerce, were thus in large measure agencies of compulsory arbitration. Their decisions were to be "accepted by the parties to the controversy as effective for a provisional period of not longer than six months, to be fixed by the Board."

Each of the six administrative divisions of the code was equipped with its own labor board.³⁹ Each board was

³⁹ The territory of each divisional board was: No. 1 (divided into North and South), Pennsylvania, Ohio, Michigan, Maryland, Virginia.

composed of three members, all appointed by the President, one selected from nominations submitted by organizations of employees within such division, one selected from nominations by the divisional code authority, and one who was a "wholly impartial and disinterested representative of the President."²¹ It was provided that the expenses of these boards should "be met by equal contributions from the employers and employees nominating members," the amount and method of collecting to be determined by regulations prescribed by the President. The National Bituminous Coal Labor Board was composed of the 18 members of the six divisional boards.²² But where the divisional boards functioned continuously, the national board could be convened only upon call of the Administrator of the NRA, and then only in the event that (1) a controversy involved employers and employees of more than one division; (2) the decision of a divisional labor board affected operating conditions of more than one division either directly or because of its effect on competitive marketing; or (3) in the opinion of the Administrator the decision of a divisional labor board involved the application of a policy affecting the general public, or the welfare of an industry as a whole.

Besides handling labor complaints and labor disputes

North Carolina, Kentucky, and Tennessee (certain counties); No. 2, Illinois, Indiana, and Iowa; No. 3, Alabama, Georgia, and Tennessee (counties not in territory of No. 1); No. 4, Arkansas, Kansas, Missouri, Oklahoma, and Texas; and No. 5, New Mexico, Colorado, Utah, Wyoming, North Dakota, South Dakota, Montana, Idaho, Washington, Oregon, California, Nevada, and Arizona.

²¹ In practice, the labor members were nominated by the U.M.W.A.

²² When the National Board adjudicated, all 18 members participated; but the power of casting votes was restricted to the six impartial chairmen. When a divisional board adjudicated, all three members participated and voted. Decisions went by majority rule.

the divisional labor boards were vested with power to determine representation controversies, for

If any such controversy shall involve or depend upon the determination of who are the representatives of the employees chosen as provided in Section 7(a) of the NIRA, the appropriate bituminous coal labor board, through any agent or agency it may select, shall have power to determine the questions by an investigation, and if necessary, by a secret ballot taken under its direction.

As for the National Board, it might, when convened by the Administrator subject to the conditions set forth above, "exercise all the powers conferred upon a divisional labor board." It might give "original consideration to a controversy," or review the decision of a divisional board, "which may be either affirmed, set aside and/or modified."

THE MACHINERY IN OPERATION

The National Bituminous Coal Labor Board was convened only once or twice during the entire life of the code. Its most important act was to ratify a precedent making decision of Divisional Board No. 2.²⁸ But if the National Board was inactive, the divisional boards were very much alive.

Five main types of controversy were dealt with by the divisional boards: (1) disputes over the claims of one or more labor organizations to be the representative of the employees; (2) charges that employers had refused to bargain collectively with the authorized employee representatives; (3) accusations that employers had discharged miners for membership or activity in a trade

²⁸ The so-called Peabody decision, which was upheld by the NBCLB on Jan. 28, 1934. For official announcement of the ruling, see *NRA Release No. 3425*, Feb. 21, 1934.

union; (4) complaints arising out of the interpretation, application, and enforcement of code provisions on wages, hours, and other working conditions; and (5) arbitration of differences and grievances arising under collective agreements between the U.M.W.A. and operators. All six boards, though in varying extent, handled all five types of controversy.²⁴

Arbitration of differences and grievances arising under collective agreements between the U.M.W.A. and operators bulked large in the work of Divisional Board No. 1 (North). Typical were questions of the following kind: Shall separate payment, outside of tonnage rates, be made for the timbering of cross bars?²⁵ What payments shall be made by the mine owners on account of burial funds?²⁶ What differential rates, as compared with hand loading, shall be paid for machine loading?²⁷ Is Saturday work permissible during weeks in which the mines do not run the full quota of machine hours under the contract?²⁸

Both Divisional Board No. 1 (South) and Divisional Board No. 3 were hard put to it to enforce Section 7(a) in various regions and isolated mines where the U.M.W.A. had not as yet established itself solidly; that is, chiefly in parts of the Appalachian area and in the South. Divisional Board No. 4 was faced—more so than any other board—with complaints that employers failed to comply with the wages, hours, and other working

²⁴ The discussion which follows is based upon the study of a large number of divisional board decisions made available to the authors by the NLRB and the U.M.W.A.

²⁵ *U.M.W.A. v. Jamison Coal and Coke Co.*, decided Mar. 19, 1934.

²⁶ *Fred Davis v. Consolidated Coal Co.*, decided Mar. 6, 1934.

²⁷ *U.M.W.A. v. Michigan Coal Operators' Association*, decided Mar. 6, 1934.

²⁸ The same.

conditions prescribed by the code. Board No. 5 dealt with a miscellaneous group of matters.

Divisional Board No. 2 had to contend with a peculiar problem—the dual union struggle between the United Mines Workers of America and the Progressive Miners of America. In most of the mines involved in the struggle, the U.M.W.A. held collective contracts which antedated Section 7(a). In a few mines, the contracts were held by the P.M.A. Case after case came up in which the union which did not hold the contract, usually the P.M.A., petitioned the board to conduct an election to determine which of the two labor organizations was entitled to negotiate on behalf of the miners. In case after case the board ruled that where the agreement antedated Section 7(a), contract rights took precedence over the right of free choice guaranteed by the statute. The precedent making decision along these lines was delivered in the so-called Peabody case, where the board refused to order an election as requested by the P.M.A., which claimed to represent a majority of the workers in the mines although the U.M.W.A. held the contract.²⁹ From

²⁹ *P.M.A. v. U.M.W.A. and Peabody Mines 43 and 47*, decided Jan. 9, 1934. Similar rulings on similar cases were handed down in the following decisions, among others: Union Colliery Co.; Dorthell Coal Mine; United Electric Coal Co., Freeburg, Cuba, and Du Quoin mines; St. David Mine. In the Rex Mine case (decided Apr. 13, 1934) the board rejected a request by the U.M.W.A. that a pre-code contract between the operator and the P.M.A. be set aside, and the operator ordered to revert to a still earlier contract with the U.M.W.A. In the Mark Mine case (decided Jan. 4, 1934), the board ordered an election, pursuant to the request of the P.M.A., where it appeared that the operator's contract with the P.M.A. was executed after Sec. 7(a) became effective in the bituminous coal industry. On May 22, 1934 the board issued a public statement which read in part as follows: "The BCLB, Division 2 . . . declared today that there is no authority under the NIRA or the bituminous coal code to hold a statewide referendum of miners in Illinois on the question of which union should represent the miners for the purposes of collective bargaining. Petitions have been received asking such a refer-

this precedent Division Board No. 2 did not deviate. This insistence upon the sanctity of contract rights, Section 7(a) notwithstanding, was more than mere legalistic reasoning. It illustrated the way in which the U.M.W.A. used the machinery of the code to strengthen its position at the expense of a contending bona fide labor organization.

Excepting in dual unionism cases, the bituminous coal labor boards did not hesitate to take recourse to the election device. Their stand was the same as that of the National Labor Relations Board: elections serve to determine the issue in all controversies where the employer challenges the representative character of some labor organization claiming to speak on behalf of the workers.

endum . . . the state legislature recently passed a resolution calling for such a referendum under national auspices. Demands have been made to apply Sec. 7(a) to Illinois mines by granting a state-wide referendum. These petitions, resolutions, and demands have been based on a misunderstanding of the Recovery Act and the code. . . . These provisions clearly apply to the relationships between an employer and his men in a given plant or mine. They do not authorize or require a state-wide referendum for all employees of all employers in a single industry. They do not authorize a referendum even for the combined plants of a single operator. They do not require that in any given plant or mine the question as to who represents the men of that plant or mine shall be determined by an investigation or by secret ballot."

The board went on to state the underlying principles upon which the Peabody, Rex, Mark, and other cases had been decided. It was then asserted that a state-wide referendum would be "futile in its results," because of the force of existing collective agreements which antedated the bituminous coal code. Such contracts (whether with the U.M.W.A. or the P.M.A.) must not be broken, the board declared, any possible referendum results notwithstanding. The only ground upon which the contracts could be voided was a showing that they were "against public policy."

The dual unionism decisions of Division Board No. 2 have something of a counterpart in a decision handed down by Division Board No. 5 (*Western Miners Union of America v. U.M.W.A.*, District 10, heard Apr. 18 to 20, 1934). Challenging the validity of the U.M.W.A. contracts, the W.M.U.A.—a "rump" organization—petitioned for an election in reliance on Sec. 7(a). The board turned down the request, holding that the U.M.W.A. contract was valid.

Majority rule governs. Once identified, the representative labor organization has authority to negotiate the collective agreement and to co-operate with the employer in setting up adjustment machinery under the agreement.

RESULTS

Owing to the control which it exercised over the bituminous coal labor boards, the U.M.W.A. took a long step toward capturing for itself a quasi-public, semi-official status. Considering the boards as a whole, they gave the sanction of a Recovery Act code to the joint conference arrangements by which, in the past, collective agreements were interpreted, applied, and enforced. So far as concerns Division No. 2, the U.M.W.A. profited by its control over the board to shut out a rival trade union from the benefits of Section 7(a). So far as concerns Division No. 1 (South) and Division No. 3, the U.M.W.A. sought to use the boards as a weapon in its drive against unorganized sections of the industry. At the same time, the U.M.W.A. sought through all the boards (particularly so in Division No. 4) to enforce compliance with the code wage and hour provisions.

Where the external pressure of the U.M.W.A. was sufficient for the purpose, the bituminous coal boards operated rather effectively. Where the U.M.W.A. lacked external power, the bituminous coal boards ran into the usual difficulties: widespread non-compliance with their rulings; ineffective enforcement on the part of governmental executive agencies. The U.M.W.A.'s quasi-public status under the board system exerted its most substantial weight, not against employers who refused to grant union recognition or who flouted the wage and hour standards of the code, but against "dual" labor

organizations. It was not yet possible—by May 27, 1935—to pass judgment upon those features of the board system which limited the right to strike.³⁰

THE LONGSHOREMEN'S BOARD

In addition to those already considered, there remains one other joint resolution board which calls for brief summary. The National Longshoremen's Board was the first board to be established by executive order under the authority of Public Resolution No. 44 on June 26, 1934.³¹ Three members were appointed: an impartial chairman, an employee representative, and an employer representative.³² The purpose of the Board was limited to adjusting the Pacific Coast dock strike.³³

The Board could make little headway at first. It was helpless in the face of the swift current of developments which culminated in the San Francisco "general strike" of July 1934. By the end of July, however, the strike situation had cleared up, and the marine workers began to return to work on the understanding that all issues would be submitted to the National Longshoremen's

³⁰ The Coal Control bill now pending in Congress provides for a Bituminous Coal Labor Board in the Department of Labor, composed of representatives of "producers" and "organized employees," with an impartial chairman, to administer rules along the line developed by the earlier boards.

³¹ Executive Order No. 6748.

³² The members were: Archbishop Edward J. Hanna of San Francisco, chairman; Edward F. McGrady, assistant secretary of labor (employees); O. K. Cushing, San Francisco attorney (employers).

³³ Called by the International Longshoremen's Association (A. F. of L.), the strike began early in May 1934. By mid-June, practically all Pacific Coast ports, with the exception of Los Angeles, traditional "open-shop" city, were closed tight. The longshoremen were striking for shorter hours, higher wages, and above all for control of the "hiring halls." Before long, they were joined in the walkout by other marine workers' labor organizations; that is, the International Seamen's Union (A. F. of L.) and the Marine Workers' Industrial Union (affiliated with the left-wing Trade Union Unity League).

Board for final determination. Not until mid-October 1934 did the Board finally hand down an arbitral award with reference to the longshoremen. The award provided for a basic 30-hour work week (six hours per day, five days per week); for pay increases (10 cents per hour straight time, and 15 cents per hour overtime) retroactive to July 31, 1934; for the establishment of labor relations committees; and what was most important perhaps, for joint control of "hiring halls" by the union and the employers. This award constituted in the main a victory for the International Longshoremen's Association.³⁴ During October 1934 the Longshoremen's Board conducted elections among seamen on tanker fleets on the Pacific Coast. Of a total of 977 votes, 709 were cast for the International Seamen's Union; 24 for the Marine Workers' Industrial Union; and 220 for "employee representation" schemes.³⁵

NRA CODE BOARDS

As noted in Chapter X, only a few NRA codes provided for labor adjustment machinery. Only under a handful of codes was any such machinery truly operative.

THE NEWSPAPER INDUSTRIAL BOARD

The Newspaper Industrial Board was set up by administrative order, April 5, 1934, on the basis of Section 5 of the daily newspaper publishing code as approved on February 17, 1934. Section 5 started out by providing for the establishment of a bi-partisan board to be

³⁴ For details of the award, see *Labor*, Oct. 23, 1934. The Board was unanimous except on the pay increases. Mr. Cushing, the employer member, held that the rates were too high.

³⁵ For details of the election, see *American Federation of Labor Weekly News Service*, Jan. 12, 1935. This election result is among those tabulated in *Labor and the Government*, pp. 92-93.

composed of "four publisher members to be designated by the code authority, and four members representing the employees, to be selected by the NRA Labor Advisory Board." These eight members, it was provided further, "shall select a permanent panel of five impartial chairmen, from which panel, in the event of a deadlock on any question, shall be chosen by lot a ninth member of the Board who shall act as a chairman and cast the deciding vote."

The general powers of the Board were to "consider controversies arising from the application of this code" and to "promulgate rules and regulations for the determination of such controversies." Wherever a contract or agreement which provided for mutual adjustment machinery was in force, that method had to be respected, and the Board could not take jurisdiction. All controversies "concerning hours, wages, and conditions of employment" which arose from the application of the code had to be settled, if possible, by local adjustment. If the controversy could not be thus adjusted, it had to be referred to the Board, whose decision "shall be accepted by the parties . . . as effective for a provisional period of not longer than one year, but not beyond the life of this code to be fixed by the Board." While any such controversy was being considered, neither party could "change the conditions existing at the time the controversy arose, or utilize any coercive or retaliatory measures to compel the other party to accede to its demands." In representation controversies within the meaning of Section 7(a), the Board had the power to investigate and determine the question.

All the available evidence suggests that the Newspaper Industrial Board was established in order to supplement the joint conference machinery by which the

printing trades unions had traditionally settled differences with publishers over wages and hours. The original composition of the Board, the requirement that existing adjustment apparatus should not be disturbed, the further requirement that all disputes should first be "adjusted locally" if possible, and the high degree to which arbitratinal machinery had formerly been carried in the industry—all point to the same conclusion. In this report to the President recommending approval of the code, General Johnson made clear the anticipated scope of the Board's activities as follows:

It is anticipated that by reason of the provisions of the code "that existing hourly differentials above the minimum shall be maintained," the maximum hours may vary, and labor controversies will arise. To deal with these controversies the code sets up a Newspaper Industrial Board. . . . Many newspapers in the United States have long been accustomed to impartial machinery for the settlement of labor disputes. This machinery has been both local and national. The code makes provision for the functioning of any local machinery of conference and gives the Newspaper Industrial Board jurisdiction as an appellate body in case the local machinery is unable to effect the adjustment.⁸⁰

It seems reasonable to suppose, therefore, that it was not originally contemplated that the Newspaper Industrial Board would deal with complaints of discriminatory discharge arising under Section 7(a). This supposition notwithstanding, the Board gained greatest notoriety by the part it played in the so-called Jennings case.⁸¹ Throughout its existence the Board was perhaps the most ineffective of all active industrial relations tribunals, inside or outside the NRA. It voted four to four on decisions, on taking jurisdiction over cases, on

⁸⁰ Code of fair competition for the daily newspaper publishing business, as approved on Feb. 17, 1934, pp. 75-76.

⁸¹ See Chap. XI, p. 303.

the admission of evidence—in fact, it deadlocked on almost all matters brought before it for consideration, including the device of choosing an impartial arbitrator in the event of deadlock. Thus, although functioning in theory, the Board was in fact virtually impotent as an interpreter of Section 7(a).

LABOR BOARDS UNDER THE CONSTRUCTION CODE

The construction code, as approved on January 31, 1934, provided for two types of labor boards. First, provision was made in Article 3, Section 5 for the establishment of a National Construction Planning and Adjustment Board to consist of 21 persons, "ten of whom shall be selected by the Industrial Advisory Board . . . from nominations by the construction code authority and ten shall be selected by the Labor Advisory Board . . . from nominations of the construction employee organizations . . . and one person to act as disinterested chairman to be selected by the President upon the recommendation of the Administrator." The fundamental purposes of the Board were stated as follows:

The planning and the development of policies that embrace the broad spirit of co-operation and good will in the furtherance of all matters that relate to the promotion of better relations between employers and employees within the industry and the furtherance of other matters of their mutual interest.

The Board was empowered, upon the joint submission of disputes by the parties in interest, to "give consideration and make determinations on all such differences as may arise relating to wages, hours of employment, and working conditions." Its decisions were final and binding unless the representative of the government (the disinterested chairman) dissented, in which case a decision was held in abeyance until approval or disapproval

had been given by the Administrator. The National Board was authorized to set up, "in properly defined areas," regional construction planning and adjustment boards. These boards were to have an equal number of employer and employee representatives, but *no* impartial chairman. Action taken by the regional boards was in all instances to be "submitted to the National Board for final action."

Second, provision was made in Article 3, Section 1 for the establishment by the Administrator of joint conference boards with jurisdiction over the divisions or subdivisions of the industry which might thereafter be covered by "area agreements" executed pursuant to Section 7(b) of the Recovery Act. Each such board was to consist of an employer member, an employee member, and an impartial chairman; and each was empowered to investigate any complaint that an employer had failed to comply with the standards on wages and hours set forth in the area agreement. After investigation the boards might "report" to the Administrator, "as a basis for appropriate action to enforce the requirements of this code."⁸⁸

After many months of delay, the National Construction Planning and Adjustment Board was finally established by administrative action on June 14, 1934. It was expected that its principal specific functions would be (1) to adjudicate on a nation-wide basis the jurisdictional disputes so frequent among the building trades unions; and (2) to facilitate the drafting of area agreements between building trades unions and employers. Any chance the Board might have had to function suc-

⁸⁸ Little if any effective action was taken toward putting Art. 3, Sec. 1 into effect before the NRA codes were destroyed by Supreme Court action on May 27, 1935.

cessfully was destroyed by strife within the A. F. of L. Building Trades Department—strife which led, in the winter of 1934-35, to a split within the department itself.⁹⁹

OTHER BOARDS AND COMMITTEES

Article 6 of the textile print roller engraving industry code, approved March 8, 1934, provided for the establishment of a Joint Industrial Relations Board. It was to consist of three employer representatives designated by the voting members of the code authority, and three employee representatives designated by the Friendly Society of Engravers. In the failure of a majority agreement, the Board might select an "impartial chairman" to render a decision. The Board had power "to deal with all matters in the code relating to labor." It was instructed to adapt its procedure to Section 7 of the Recovery Act and to issue decisions, which upon approval by the Administrator should be final and binding. Except to learn that the Board was in existence, the authors were unable to secure further information on its problems and operations.

The shipbuilding and ship repairing code was equipped with an Industrial Relations Committee set up by an NRA administrative order on November 7, 1934, after several tentative experiments along similar lines had collapsed. The Committee was composed of three trade union officers and three shipbuilders. Its principal task was expected to be the settlement of wage and hour disputes. The need for such a tribunal had made itself

⁹⁹ On Feb. 11, 1935, it was announced that the A. F. of L. building trades unions had agreed among themselves on a plan for settling jurisdictional disputes. This agreement raised the hope that the facilities of the NCPAB might soon be put to use. (*NRA Release No. 10038*). The hope proved to be unjustified.

felt ever since the approval of the code on July 26, 1933 because, unlike some other codes in industries which were fairly well organized on the labor side, the shipbuilding code failed to set forth a classified wage scale applicable to super-minimum workers, semi-skilled and skilled.⁴⁰

Two major codes, trucking and graphic arts, contained provisions for the establishment of industrial relations boards on which no final action was ever taken. The trucking code authorized the establishment of a National Industrial Relations Board of three employer and three employee members, who might together choose an impartial chairman to reach a majority agreement. This Board was empowered "to deal with alleged violations and non-observance of the labor provisions of this code and disputes between employers and employees." The executive order of February 17, 1934, which gave presidential approval to the graphic arts code, also authorized the establishment of a National Graphic Arts Labor Board to consist of five employer members, five employee members, and one disinterested member to act as chairman, to deal with "any and all disputes between employers and employees with respect to wages, hours, and other conditions of employment."⁴¹

A number of the graphic arts industries were nevertheless equipped with true industrial relations boards or

⁴⁰ Art. 4(b) provided simply that "the amount of differences existing prior to July 1, 1933 between the wage rates paid various classes of employees receiving more than the established minimum wage shall not be decreased. In no event shall any employer pay an employee a wage rate which will yield a less wage for a work week of 36 hours than such employee was receiving for the same class of work for a 40 hour week prior to July 1, 1933. It is understood that there shall be no difference between hourly wage rates on commercial work and on naval work, for the same class of labor, in the same establishment."

⁴¹ The amendment, introduced by the executive order, was in response to objections by the trades unions and the Labor Advisory Board to the system of boards provided in the code itself.

with labor complaints committees not sharply distinguishable from the former. The photo-engraving code, approved December 23, 1933, and the electrotyping and stereotyping code, approved the same date, provided for the establishment of such boards. In each case the available information indicates that the boards were functioning and active in the winter and spring of 1934-35.⁴² What seem to have been labor complaints committees with restricted jurisdiction over disputes were established under the graphic arts code itself in connection with national lithographic printing and with commercial relief printing in Zone 16.

We should mention, finally, a number of labor complaints committees and bi-partisan code authorities which the absence of specific and detailed information makes it difficult to distinguish from industrial relations boards in the strict sense of the term. To this category belonged the adjustment apparatus set up in connection with the following codes: men's clothing, coat and suit, dress manufacturing, cotton garment, infants' and children's wear, men's neckwear, printing ink, cigar manufacturing,

⁴² Sec. 8 of the electrotyping and stereotyping code read: "A labor board to consist of three members shall be established, two members truly representative of the industry to be selected by the International Association of Electrotypers, and one member to be selected by the International Stereotypers and Electrotypers Union of North America. The Board shall consider and pass upon alleged violations, disputes, or nonobservance of the labor provisions of this code. All decisions . . . shall, if unanimous, be final. In the event that no agreement is reached the matter shall be referred to the appropriate governmental agency."

Sec. 8 of the photo-engraving code read: "A Labor Board to consist of one member selected by the American Photo-Engravers' Association, one member selected by the Employing Photo-Engravers' Association of America, and one member selected by the International Photo-Engravers' Union of North America shall consider and pass upon any alleged violations, disputes, or non-observance of the labor provisions of this code. All decisions . . . shall, if unanimous, be final. In the event that no agreement is reached the matter shall be referred to the appropriate governmental agency."

importing, burlesque theatrical, and breweries. The heavy concentration of such apparatus in the needle trades is notable. What happened in these industries was that the needle-trade unions projected into the codes their pre-existing arrangements for the application and enforcement of collective agreements. Compliance with code standards on wages and hours was apparently the most important activity of these several agencies.⁴⁸

⁴⁸ A more detailed analysis of NRA labor disputes' boards and labor complaints' committees will be found in Leverett S. Lyon and Others, *The National Recovery Administration*, 1935, Chap. XVII.

CHAPTER XVI

ISSUES AND POLICIES

The several labor relations boards described in the preceding chapters were concerned in part with the short-run objective of preserving industrial peace on terms consonant with Section 7(a) of the Recovery Act. From the long-run point of view, the boards were engaged in the task of formulating what may be termed a "common law" of collective bargaining. They laid down a set of principles, which, if put into effect, would get a particular complex of collective bargaining procedures started in establishments where wage earners were striving toward self-organization.

Until the very day when the NRA codes were held unconstitutional—that is, May 27, 1935—the principles developed by the labor boards remained affirmations of intent alone. These principles were not adequately enforced by nor did they constitute the accepted policy of the federal government. The fact, however, that such principles were put forth raises two important questions:

1. Was the NLB-NLRB "common law" a proper and reasonable construction of the statute?
2. What collective bargaining policies might and should the federal government pursue in the future?

Before attempting to answer the foregoing questions, it is necessary to consider the changes made in the legal status of collective bargaining by Section 7(a), and to visualize clearly the doctrines bearing on industrial relations which were laid down by the NLB and the NLRB in their interpretation of the statute.¹

¹The discussion which follows is independent of the constitutional question: Can Congress properly invoke the "interstate commerce" and

CHANGES EFFECTED BY SECTION 7(a)

Section 7(a)—if constitutional—would profoundly affect the legal status of collective bargaining.² In a general sense, it recognized collective bargaining as a proper part of the machinery of industrial relations. Thus it continued the legislative tendency manifested by the Clayton Act, the Railway Labor Act, and the Anti-Injunction Act. In a general sense, once again, Section 7(a) sought to articulate collective bargaining into the scheme of "industrial self-government" under codes of fair competition. No code could go into force unless it contained the requirements of the statute.

More specifically, Section 7(a) fortified the pre-existing right of collective bargaining by imposing restraints upon the employer's freedom to block employees in organizing to exercise that right. The right to organize was long established in American law. It had been recognized by American courts for some 90 years or more that wage earners were free to combine for the purpose of exerting pressure upon employers to raise wages, shorten hours, and grant other concessions.³

Employers were nevertheless at liberty—with the ex-

"general welfare" clauses to guarantee the right and define the procedure of collective bargaining?

² Judge Nields, in the Weirton decision of Feb. 27, 1935, ruled that Sec. 7(a) was unconstitutional because "manufacturing" cannot be regarded as "interstate commerce." A Supreme Court decision on Sec. 7(a) was still lacking when the NRA codes met their demise. Those features of Sec. 7(a) which invalidated anti-union contracts negated Supreme Court rulings of past years in the Adair, Copping, and Hitchman cases. But "freedom of choice" provisions virtually identical with those of Sec. 7(a) were upheld by the U. S. Supreme Court in the Texas and New Orleans case. In the Schechter case decision of May 27, 1935, the Supreme Court did not concern itself with the collective bargaining requirements of the Recovery Act.

³ The case usually chosen by students of collective bargaining as decisive in this matter is *Commonwealth v. Hunt*, 4 Met. 111, 1842 (a Massachusetts decision).

ception of those subject to the Railway Labor Act of 1926, as noted below—to fight against, and to break up if they could, trade unions formed by their employees. Employers were also legally free to impose upon their employees any forms of labor organization which it suited their convenience to impose. Employers also had the right to hire and fire for any and all reasons. Most significant with reference to labor organizations was the right of employers to hire and fire on the basis of the wage earner's labor union affiliations.

Section 7(a) greatly modified the legal status of employer-employee relationships. It applied to industry in general—that is, to all employers who became subject to codes of fair competition or who subscribed to the President's Re-Employment Agreement—the same regulations which had been established by the Railway Labor Act of 1926 for a limited area of industry. The latter law required that no employer who came under its terms might interfere with, restrain, or coerce his employees in their free choice of representatives for the purpose of collective bargaining. Section 7(a), in extending these requirements to industry at large, greatly curtailed the power of employers to thwart the organization of labor groups.

Similarly, Section 7(a) made a great change in the status of the so-called "yellow dog contract." In general, the employer's right to require that the workers in his hire agree as part of the labor contract not to join trade unions had been unrestrained.* True, the Anti-Injunction Act of 1932 had affected this relationship significantly by withdrawing the remedies of equity relief from

*The ruling cases were *Coppage v. Kansas*, 236 U. S. 1 (1915); *Adair v. U. S.*, 208 U. S. 161 (1908); *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229 (1917).

the enforcement of yellow dog contracts. But Section 7(a) by restraining employers from requiring as a condition of employment that workers join company unions or desist from participating in labor organizations of their own choice, definitely outlawed contracts of this kind, and thus supplemented and fortified the law of 1932.

Significant as were the enumerated changes in the legal status of collective bargaining, even further modifications of the situation have been ascribed by some persons to Section 7(a). As the authors read the statute, however, much has been ascribed to it which it did not in fact require. Despite the opinions of many trade union leaders, Section 7(a) did not require the recognition of existing trade unions, inside or outside the American Federation of Labor, as exclusive agencies for collective bargaining. Nor, in the authors' view, did the statute outlaw the company union; that is, invalidate employee representation plans as instrumentalities for collective bargaining. Section 7(a) neither compelled wage earners to join labor organizations nor prohibited them from bargaining individually. And the statute did not compel employers to come to terms with employee representatives with whom they bargained; that is, to accept any specific proposals on wages, hours, and other working conditions.

On the other hand, the authors believe that Section 7(a) did not effect the changes ascribed to it by some anti-union employers. The statute did not invalidate the closed-shop contract between a *bona fide* labor organization and an employer. It did not limit the right to strike. It did not require compulsory arbitration of labor disputes.⁵

⁵ The discussion in the text may profitably be compared with the statements by Paul F. Brissenden, "Genesis and Import of the Collective Bar-

THE NLB-NLRB "COMMON LAW"

The materials submitted in Chapter II indicate that by the enactment of Section 7(a) Congress intended to encourage and promote collective bargaining; to make sure that it would be conducted by labor organizations chosen by the workers themselves; and to protect workers against any tactics or practices by which employers might seek to penalize their efforts to engage in collective bargaining. Taking such an assumption of legislative intent for granted, the labor boards developed a "common law" of Section 7(a) in an attempt to put operative meaning into the statute. The leading doctrines of this "common law" may be summarized as follows:⁹

1. It was unlawful for an employer to impose on his workers any scheme of collective bargaining against their will.
2. Workers were lawfully free to choose between representation by trade unions or company unions.
3. The government was to settle representation controversies by elections or by other means of ascertainment.
4. The labor boards were to define appropriate units for collective bargaining in all cases where questions of this nature were raised.
5. The labor organization which commanded a majority of the voters among the employees engaged within the collective bargaining unit was entitled to certification as the employees' representative.
6. The employer was obliged to "recognize" representative labor organizations; that is, to negotiate with them in good faith.
7. Employers and employee representatives alike were bound to "exert every reasonable effort" to make and maintain collective agreements.

gaining Provisions of the Recovery Act," *Economic Essays in Honor of W. C. Mitchell*, 1935, Chap. II.

⁹The most important doctrine—the prohibition against anti-union contracts of employment—was expressly stated by the statute itself.

8. No employer was to lay off, discharge, or otherwise discipline his workers for their union membership or activities.⁷

These doctrines, although anticipated in part by the Railway Labor Act and before that by the work of the National War Labor Board, were new.⁸ They gave specific content to the general modifications of the concept of "liberty of contract" made by Section 7(a). The application of these doctrines required that the federal government intervene in the regulation of industrial relations by establishing appropriate tribunals, by holding elections, by certifying representative labor organizations, and by passing upon complaints of discrimination.

Allowing for what appears to have been the intent of Congress in enacting Section 7(a), the authors believe that the NLB-NLRB "common law" reasonably construed and gave proper operative meaning to the intent of the statute. The underlying concept which the boards put to use in interpreting the requirement that workers were to have representatives of their own choosing was that employees should enjoy "self-determination." Far from favoring trade unions or discriminating against company unions, the boards sought to safeguard employees in the free choice of representatives. Secret ballot elections, brought over from the field of political life to that of industrial relations, provided a convenient administrative device to ascertain the freely chosen collective bargaining agents or agencies. Majority rule—in the sense of authorizing one determinate set of representatives to negotiate the collective agreement within

⁷ An elaborate analysis of the labor board "common law" can be found in "The Decisions of the National Labor Relations Board," *Harvard Law Review*, Vol. 48, No. 4, Feb. 1935, pp. 629-59.

⁸ Similar principles were incorporated into the Emergency Transportation Act of 1933 and the Railway Labor Act as amended in 1934.

a given bargaining unit, properly defined—was a logical necessity so far as collective bargaining implied the consummation of collective agreements. By affirming majority rule, the boards fell in with the traditional “unitary” patterns of collective bargaining in the United States. The stress they put upon the making of collective agreements was properly placed. If collective bargaining deserves to be encouraged by law, it deserves to be encouraged as means toward an end: bilateral contracts which establish the terms and conditions of employment. Finally, the limitations placed by the boards upon the employer’s right to hire and fire were well considered, inasmuch as the abuse of this right can materially curtail the prospects of extending labor organizations.

The labor boards, it should be stressed, did not affirm that Section 7(a) “outlawed” company unions or that the statute made membership in trade unions compulsory. They did not assert that workers were obliged to join, as dues-paying members, the labor organization which polled a majority of the votes within the bargaining unit. They did not maintain that employers must accept the specific terms and conditions of employment proposed to them by representative labor organizations. They did not argue that individual workers or minority groups could secure redress of grievances only by relying on the labor organization which spoke for the majority.

THE CHOICE OF ALTERNATIVES

By reason of their uncertain basis of authority when issuing interpretations of Section 7(a), and their virtual impotence to enforce decisions and orders, the labor relations boards as they existed up to May 27, 1935 could not be regarded as a system of agencies worthy of perpetuation without substantial statutory change. In the

absence of a frank and unequivocal declaration of congressional intent on collective bargaining, the doctrines enunciated by the boards were not securely invested with a binding and authoritative quality. Although the boards superficially possessed enforcement powers which could be brought to bear against non-complying employers in Section 7(a) rulings, these powers were nominal rather than operative. By May 1935, therefore, questions of public policy had come to center around the search for reasonable alternatives to Section 7(a) on the one hand, and to the co-existent system of labor boards on the other. These alternatives are discussed in the present chapter as living issues, brought to a focus by the judicial overthrow of the NRA codes and by the consideration in Congress of the Labor Relations bill.

Perhaps upon mature consideration of the various issues involved, Congress may come to the conclusion that Section 7(a) as such was a mistaken experiment.⁹ Whether or not it is sound public policy to promote collective bargaining through independent labor organizations, to prohibit anti-union contracts of employment, and to restrain employers from imposing company unions on their workers—these are certainly arguable questions. Other questions must also be met: Is it a proper part of the business of government to intervene in industrial relations and to seek to shape the patterns and procedures thereof? Is it an illusion to suppose that the administrative and judicial machinery necessary to enforce any nation-wide statutes on collective bargaining can be brought into effective play by legislative fiat? Is it likely that Section 7(a), if diligently enforced, would have put dangerous monopoly powers into the hands of the trade

⁹ It should be emphasized once again that the authors do not concern themselves with questions of constitutional law.

unions affiliated with the A. F. of L.? Must the existence of a statute similar to Section 7(a) serve as an ever active menace to industrial peace?

It is not the intention of the authors to evaluate and pass judgment upon these and many other questions which might be raised concerning the wisdom of Section 7(a). This is not to say that the issues are spurious or trivial. On the contrary, they are genuine and substantial. But it would be fruitless to reach any conclusions on these issues without entering into a detailed analysis of the economics of individual and collective bargaining, into a detailed survey of the labor movement in the United States, and into a profound survey of the law of industrial relations.

If Congress should come to the conclusion that Section 7(a) as such was a mistaken experiment, then no statute similar to it should be enacted. Nor should a system of labor relations boards be brought into being.

But Congress, upon mature deliberation, may conclude that the public interest requires the promulgation of such doctrines as those which the labor boards developed in the course of interpreting Section 7(a). If so, these interpretations should be written into the statute books. The statute should contain a straightforward recital of precise definitions, rules, and procedures. What was amorphous in Section 7(a) would thus take on form; where the statute was once ambiguous, it would then be unequivocal.

Equally important, such a law, if enacted, should make adequate provision for judicial enforcement of the findings, rulings, and orders of all labor relations boards established in accordance with the statute. As matters stood under Section 7(a), the boards assumed responsibility for quasi-judicial interpretations with no genuine power to put their interpretations into effect. The neces-

sary result was that wage earners became suspicious of the government's good faith, while recalcitrant employers were incited to non-compliance.

The Labor Relations bill of 1935, regardless of the merits of its detailed content, may be said to replace the obscurities of Section 7(a) with the clear and direct statements of the NLB-NLRB "common law." At the same time, the measure may be said to remedy the principal defects of Recovery Act enforcement procedure—its prolonged vagaries and divided responsibilities. In considering this bill Congress has the opportunity, should it see fit, to write the NLB-NLRB interpretation of Section 7(a) into the law of the land, and to give this interpretation a measure of enforceability it never possessed at any time from August 5, 1933 to May 27, 1935.

If the Labor Relations bill or some similar measure is enacted, it would be desirable to integrate the various labor relations boards which were functioning at the demise of the Recovery Act codes into a single unified system.¹⁰ Such a system should contain a new National Labor Relations Board, which, like the earlier board, could possess regional affiliates. Various major industries, such as steel, automobiles, petroleum, and textiles, might well be equipped with their own industrial boards. Original jurisdiction with the regional and industrial boards and review jurisdiction with the national board would probably be the best working arrangement. Each board comprised within the system would need to be composed of "impartial" members, acting exclusively as spokesmen of the public interest.

All things considered, it would be preferable to dissociate such labor relations boards from direct concern

¹⁰ The National Mediation Board (under the Railway Labor Act) is a special case, which should be exempted from the force of the statement in the text.

with mediating and conciliating in labor disputes. The activities of such boards would of course call for close cooperation with the Conciliation Service of the United States Department of Labor and with similar agencies attached to state labor departments. But the direct adjustment of labor disputes by tribunals of administrative adjudication brings into play forces which thwart the exercise of quasi-judicial functions.

Suppose, finally, that Congress takes a position between the two indicated above, and enacts a statute which recites the language of Section 7(a) without further clarification or adequate provision for enforcement. In this event, any and all labor relations boards that may be brought into being should be restricted in activities to the mediation, conciliation, and voluntary arbitration of labor disputes. It is true that such restriction would compel employees to rely exclusively for the enforcement of their statutory rights upon the slow, uncertain, and cumbersome procedures of the federal courts, which have been permeated in the past by a distrust of labor self-organization. But it is better to depend upon an uncertain reed, the qualities of which are known, than to have boards which proceed as if they possessed quasi-judicial authority, where in fact they possess nothing more than moral authority.²³

²³ On July 5, 1935, while this study was page proof, the Labor Relations bill became law. By enacting this bill, Congress and the President have chosen one of the several possible lines of public policy presented in the present chapter. Committed to the belief that Sec. 7(a) is an experiment worthy of perpetuation, the government has taken the logical step which follows from such a belief. It has written the NLB-NLRB "common law" into the statute books; it has implemented the National Labor Relations Board for more adequate enforcement. The range of industries to which the act can legally apply is very uncertain and may be quite narrow if the Supreme Court supports possible implications of the Schechter case decision. On this account, and because of novel administrative features, little can be prophesied concerning the activities of the new board to be established under the act.

CONCLUDING APPRAISAL

The work of the labor relations boards must be set down as a gain to American experience in dealing with problems of industrial relations. The boards clarified the ideas underlying the processes of collective bargaining. They brought into sharp focus the issues of principle and the areas of conflict necessarily involved in a public policy of stimulating and promoting labor self-organization. They developed administrative procedures, based on democratic concepts, for handling disputes arising out of the efforts of employees to organize for collective bargaining. And if they could not succeed in having their decisions enforced, at least they helped to formulate and establish quasi-judicial techniques for dealing with controversies between trade unions and employers. The work and experience of the labor relations boards form a rich fund of data from which any further tribunals for the administration of collective bargaining rules will find it profitable to draw.

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