Labor Law—Picketing before and after Certification by National Labor Relations Board—[Federal].—An employer engaged in interstate commerce alleged compliance with National Labor Relations Act pertaining to collective bargaining, and a contract governing wages, hours, and working conditions was accepted by all but two employees, who belonged to another union and demanded recognition of their union as sole bargaining agency. Refusal by the employer to recognize them resulted in picketing by the two employees, against which the employer petitioned in the district court for an injunction. *Held*, that the case presented a "labor dispute" under the Norris-LaGuardia Act, and none of the prerequisites to injunction established by that statute was dispensed with by compliance with the collective bargaining provisions of the National Labor Relations Act. *Houston and North Texas Motor Freight Lines, Inc. v. Local Union No. 886.*[1]

In *Lauf v. Shinner*[2] an employer had entered into an agreement with his employees, after which an outside union picketed to organize his shop. The United States Supreme Court rejected his contention that this activity constituted merely a dispute between rival labor organizations, and not a "labor dispute" under the Norris-LaGuardia Act,[3] since he was not an active participant. Where the interstate nature of his business has subjected him to the provisions of the Wagner Act,[4] the employer has further maintained that any concerted activity on the part of a minority is an obstacle to performance of his duty collectively to bargain with the majority of his employees, and as such should be enjoined. Two distinct situations must here be noticed: (1) that in which the employees have not petitioned the Board to assume jurisdiction, and (2) that in which the Board, having taken jurisdiction, has held an election and certified the appropriate bargaining unit.

Where, as in the instant case, the first of these conditions exists, courts have shown admirable restraint in refusing to enjoin the alleged minority. A salutary basis for this refusal, apart from the Norris-LaGuardia Act, lies in Section 13 of the Wagner Act.[5] The strike has been termed an alternative remedy, "parallel with recourse to the Board."[6] Furthermore, a court in considering the plea for an injunction would have to ascertain whether in fact the defendants constituted a minority of the plaintiff's employees, and whether the alleged majority (to constitute a proper bargaining agency under the act) was not achieved as a result of employer domination or other un-

[1] 24 F. Supp. 619 (Okla. 1938). See on this type of case generally, Lund v. Woodenware Workers' Union, 19 F. Supp. 607 (Minn. 1937); M. & M. Woodworking Co. v. Union No. 102, 23 F. Supp. 11 (Ore. 1938). Compare: Retail Food Clerks Union v. Union Premier Stores, CCH Labor Service ¶ 18222 (C.C.A. 3d 1938); Grace v. Williams, 96 F. (2d) 478 (C.C.A. 8th 1938); Chas. F. Cushman v. Mackesy, CCH Labor Service ¶ 16372 (Me. Sup. Jud. Ct. 1937).

[2] 303 U.S. 323 (1938). See also Donnely v. International Ladies' Garment Workers' Union, 99 F. (2d) 309 (C.C.A. 8th 1938).

[3] 47 Stat. 70, § 13 (1932), 29 U.S.C.A. § 113 (Supp. 1938).

[4] 49 Stat. 449 (1935), 29 U.S.C.A. §§ 151–166 (Supp. 1938).

[5] "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." 29 U.S.C.A. § 163 (Supp. 1938). That the term strike was intended to include other concerted activities, see National Labor Relations Report to Accompany Senate 1958, 74th Cong. 1st Sess., Rep. 573 (1935).

[6] See N.L.R.B. v. Remington Rand, 94 F. (2d) 862, 871 (C.C.A. 2d 1938).

fair labor practices. The Wagner Act, however, confines initial jurisdiction to determine such issues to the Board, solely at the instance of labor;[7] permits judicial review only on a final order by the Board;[8] and limits such review exclusively to the circuit court of appeals.[9]

Where, on the other hand, the Board has taken jurisdiction over the dispute and has certified the proper bargaining unit, a nicer problem arises. The court in *Oberman v. the United Garment Workers of America*[10] passed lightly over section 13 of the Wagner Act and the prerequisites to injunction set forth in the Norris-LaGuardia Act[11] in granting an injunction to the employer. The decision apparently rests on the court's belief that certification by the Board terminates the existence of a "labor dispute."[12] This argument is, however, elliptical and misleading. For though no "labor dispute" exists under the Wagner Act, in the limited sense that for the present no minority may petition the Board to intervene,[13] it does not follow that there is not such a "labor dispute" as to preclude the court from enjoining the minority under the Norris-LaGuardia act.

It is sometimes contended that picketing, no matter how peaceful, aimed at forcing the employer to bargain with a group other than the exclusive certified representative, intends an unlawful result, and is hence enjoinable.[14] Such an argument, however, fails to appreciate that the Norris-LaGuardia Act does not purport to legalize anything; it merely delimits the instances in which labor's activities are subject to the injunctive process.

It must, however, be remembered that the impeccable logic upon which refusal to grant an injunction may be based will hardly reconcile the employer to his predicament. The conscientious employer, who, in the absence of certification makes a mistake in choosing the group with which to bargain, is, technically at least, guilty of a violation of section 8(5) of the Wagner Act.[15] If rival unions are fighting to gain a majority among his employees, neither will be willing to petition the Board until certain of a majority. Furthermore, since employees alone can seek the jurisdiction of the Board, the employer may be forced to shut down his plant until the strike is

[7] See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

[8] See N.L.R.B. v. Anwelt Shoe Mfg. Co., 93 F. (2d) 367 (C.C.A. 1st 1937).

[9] See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

[10] 21 F. Supp. 20 (Mo. 1937), noted in 36 Mich. L. Rev. 844 (1938); see also Lund v. Woodenware Workers' Union, 19 F. Supp. 607 (Minn. 1937). For a general discussion of the minority problem, see Larson, The Labor Relations Acts—Their Effect on Industrial Warfare, 36 Mich. L. Rev. 1237, 1270–1283 (1938).

[11] *Op. cit. supra* note 3. The Oberman case preceded the Lauf case and may have been affected by the limited definition of a "labor dispute" in United Electric Coal Companies v. Rice, 80 F. (2d) 1 (C.C.A. 7th 1935), *cert. denied*, 297 U.S. 714 (1935).

[12] Oberman & Co. v. United Garment Workers of America, 21 F. Supp. 20, 25, 26 (Mo. 1937).

[13] The Board has not as yet placed any definitive duration upon certification.

[14] See Eastwood Nealley Corp. v. International Association of Machinists, 1 A. (2d) 477, 480 (N.J. Eq. 1938). *Cf.* Magruder, A Half Century in the Development of Collective Bargaining, 50 Harv. L. Rev. 1071, 1107 (1936).

[15] Matter of Bradford Dyeing Association, 4 N.L.R.B. 604 (1937); N.L.R.B. v. Remington Rand, 94 F. (2d) 862 (C.C.A. 2d 1938).

ended.[16] After certification, the employer expects a respite from his labor troubles only to find that the minority has started a campaign to displace the majority as the sole bargaining agency. Whatever the remedy that may be suggested[17] for the plight of the employer, it is submitted that interference by injunction on the part of the district courts is unjustifiable. The National Labor Relations Act lends its sanction to the closed shop agreement between an employer and the majority of his employees.[18] Such contracts invariably lead to the discharge of those who refuse to join the majority union.[19] No *terminus ad quem* is fixed for the duration of certified majorityship, and no provisions, statutory or otherwise, have as yet appeared requiring unions to cast open the doors of membership to everyone.[20] Hence if the means of organization, persuasion, and education, be taken away from the minority by injunction,[21] majority groups may as a practical matter become self-perpetuating. The universal desideratum of minorities is to become majorities; and it is one of the functions of a democracy to make this evolution possible.

Labor Law—Power of National Labor Relations Board To Invalidate Contracts of Independent Union—[Federal].—The Consolidated Edison Company, upon withdrawing its support from its company dominated unions, immediately recognized the International Brotherhood of Electrical Workers, an American Federation of Labor affiliate, whose membership was neglible, despite knowledge that the United, an affiliate of the Committee for Industrial Organization was the only active labor organization among its employees. The company continued to favor the American Federation of Labor by permitting its officers to utilize company facilities in the ensuing organizational drive, by exerting pressure upon the employees to join the locals or be discharged, and by permitting it to carry on activities on company time, at the same time denying similar privileges to the rival union. This favoritism was

[16] The Board has sanctioned this means of getting employees to petition for certification. Matter of Bartlett & Snow Co., 4 N.L.R.B. 113 (1937). On the subject of employer's remedies generally, see 38 Col. L. Rev. 1243, 1262 (1938).

[17] A dictum in the instant case offers a possible solution of the problem. When the Board has certified the proper unit for bargaining, and a minority decides to strike and picket for recognition, the majority employees—it is said—may petition the Board to have the circuit court of appeals issue an injunction against the rebellious group. This would constitute some sort of supplementary process to help effectuate the Wagner Act's primary purpose of creating a peaceful atmosphere for collective bargaining; but this would necessarily entail creation of an unfair labor practice among employees, since only orders to prevent unfair labor practices are enforcible by the circuit courts under Section 10(a) and (e) of the Wagner Act.

[18] 49 Stat. 449, § 8 (3) (1935), 29 U.S.C.A. § 158 (3) (Supp. 1938).

[19] See Williams v. Quill, 277 N.Y. 1, 12 N.E. (2d) 547 (1938).

[20] See Miller v. Ruehl, 166 Misc. 479, 2 N.Y.S. (2d) 394 (1938). Pennsylvania does have a provision in its Labor Relations Act refusing to recognize any organization which discriminates because of race, color, or creed, 43 Purdon's Penn. Stat. § 211.3 (Supp. 1938), but this is a minimum requirement.

[21] The Wisconsin Labor Relations Statute anticipated just such cases as have been dealt with here. To the section retaining in labor the right to strike is appended "or to deprive any party to a labor dispute as defined in this chapter and in the [anti-injunction] act of the rights, benefits, and protection of the . . . . [anti-injunction] act. Wis. Stat. 1937, § 111.17.