entered into expressly without prejudice to any rights in the *American Petroleum Institute* case.[50]

Labor Law—Specific Performance of Collective Bargaining Contract with Union Whose Majority Status Is Uncertain—[California].—Two AFL locals, the plaintiff paperworkers' union and a local of the pressmen's union, were engaged in a dispute as to which should be recognized as the exclusive bargaining agent for the employees of the defendant paper box manufacturer. The two locals agreed to a privately conducted election, which the plaintiff union won by a small majority. The plaintiff union and the defendant then entered into a closed-shop contract. Several months later the plaintiff union demanded that the defendant discharge those employees who were not members of the plaintiff union, while the pressmen's union threatened to strike if it did. Another election was held and the plaintiff union, winning again by the same majority, once more demanded that the defendant discharge members of the pressmen's union. The pressmen's union insisted that the second election had been fraudulent, claiming for itself the actual majority and repeating its threat to strike. The defendant thereupon refused to negotiate further with either union until the jurisdictional dispute had been settled between the two locals. The plaintiff union sought a decree for specific performance of the contract. The defendant contended not only that the contract was based upon the misapprehension that the contracting union had a majority, but also that specific performance might subject him to charges of unfair labor practice by the NLRB. *Held*, the principal consideration moving from a labor union to an employer in a collective bargaining agreement is the promise of "industrial peace." Upon the plaintiff union's failure to keep its promise of "industrial peace," the consideration failed. The parent body of both unions, the AFL, not the courts, should decide which is the appropriate bargaining agent. Petition dismissed. *Barnes v. Angelus Paper Box Co.*[1]

Many courts now grant specific performance of collective labor agreements,[2] and

[50] It is not to be expected that a lowering of pipe line rates as a result of the consent decree will have any immediate effect on the price of gasoline; the payment of rates and the receipt of profits being mere intercompany bookkeeping, the same profits will be shown on another phase of the operations of the integrated corporate system. In the past, profits on pipe lines have covered losses in other departments, especially marketing. Prewitt, op. cit. supra note 15, at 199–201. The effects of the consent decree are to be found not in any change in the costs of the major oil companies, but in a readjustment of the competitive situation.

[1] 9 Lab. Rel. Rep. 386 (Calif. Super. Ct. 1941).

[2] See the cases and articles collected in Witmer, Collective Labor Agreements in the Courts, 48 Yale L.J. 195 (1938). A reading of these cases gives a remarkable cross section of the social awareness of American courts. Thus we have, on the one hand, the eloquent and realistic dictum, "An agreement upon wages and working conditions between the managers of an industry and its employees, whether made in an atmosphere of peace or under the stress of a strike or lockout resembles in many ways a treaty. As a safeguard of social peace it ought to be construed not narrowly and technically but broadly and so as to accomplish its evident aims and ought on both sides to be kept faithfully and without subterfuge." Yazoo & Mississippi Valley R. Co. v. Webb, 64 F. (2d) 902, 903 (C.C.A. 5th 1933). On the other hand, we find such statements as, "The breach of a contract to employ only members of a certain union will not be enjoined. 32 Corpus Juris 199." Bakery and Confectionery Workers' Internat'l Union v. Clifton Bakery Corp., 3 C.C.H. Lab. Cas. ¶ 60,066 (N.J. Ch. 1940).

the question of consideration has not, as a rule, caused them much trouble. Courts have been able to find consideration in the implied promise of the union to furnish a supply of labor to the best of its ability and to refrain from striking during the life of the agreement.[3] Other courts have enforced these agreements without mentioning the matter of consideration, probably because they believe that these agreements are so desirable socially that it is well to enforce them.[4] The present court's holding that the consideration is so broad a thing as "industrial peace" is unprecedented. It implies that the union undertakes not only that it will remain at peace with the employer for a stated term, but also that no other union will attempt to interfere with the employer's peace. Such a holding saddles the union with a responsibility which it could never fulfil and which the law could not in any case aid in enforcing.[5] It would thus seem to render *all* collective labor agreements unenforceable, since the consideration in each is illusory.[6]

Likewise, the "remand" of this case to the AFL for determination does not seem particularly helpful. Experience has shown that the organization and powers of the AFL are not such as to bring these disputes to a final determination.[7]

The defendant's contention in the principal case, that specific enforcement of the contract might make him guilty of an unfair labor practice, makes it of interest to determine just what the employer's position is in this respect under the Wagner Act. The act requires him to bargain with the majority union as the exclusive representative of his employees,[8] and if he signs a closed-shop contract with the majority union, he can discharge the members of the minority group.[9] Thus, it would seem that the employer has to determine at his peril whether a particular union which claims a majority

[3] Harper v. Local Union No. 520, 48 S.W. (2d) 1033 (Tex. Civ. App. 1932); 1 Teller, Labor Disputes and Collective Bargaining § 160 (1940). Contra: Wilson v. Airline Coal Co., 215 Iowa 855, 246 N.W. 753 (1933).

[4] Weber v. Nasser, 286 Pac. 1074 (Cal. App. 1930), rev'd on ground that question had become moot 210 Cal. 607, 292 Pac. 637 (1930); 1 Teller, op. cit. supra note 3, at § 160. Also indicative of this tendency is the failure of two books on drafting collective labor agreements to treat the problem of consideration as being of particular significance. Lieberman, The Collective Labor Agreement 22–24, 75 (1939); Bureau of National Affairs, Collective Bargaining Contracts 444 (1941), reviewed by Despres, 9 Univ. Chi. L. Rev. 559 (1942).

[5] The court which decided the principal case has refused to grant an *employer* an injunction against a minority union's picketing after the conclusion of a collective labor agreement with the majority union on the ground that such picketing is protected by the constitutional guarantee of free speech. Los Angeles County Fair Ass'n v. Pomona Valley Central Labor Council, 4 C.C.H. Lab. Cas. ¶ 60,626 (Calif. Super. Ct. 1941).

[6] Under the traditional doctrine of illusory contracts, courts refuse to enforce a promise to purchase plaintiff's output when plaintiff has no means whatsoever to produce an "output" of anything. Nassau Supply Co. v. Ice Service Co., 252 N.Y. 277, 169 N.E. 383 (1929). In the principal case, the court implied a promise on the part of plaintiff union to produce an output of "industrial peace," a commodity which it could never supply, and then refused to enforce the contract on the ground that the union had broken its implied promise.

[7] Jaffe, Inter-Union Disputes in Search of a Forum, 49 Yale L.J. 424, 429–43 (1940).

[8] National Labor Relations Act § 9(a), 49 Stat. 453 (1936), 29 U.S.C.A. § 159(a) (Supp. 1941).

[9] National Labor Relations Act § 8(3), 49 Stat. 452 (1936), 29 U.S.C.A. § 158(3) (Supp. 1941).

has one in fact. If he refuses to recognize its majority status, he is guilty of an unfair labor practice for refusing to bargain in case the union actually has a majority. If he recognizes it as having a majority, signs a closed-shop agreement with it, and discharges members of the other union, he is guilty of an unfair labor practice in case the contracting union does not in fact have a majority. The employer is thus, in effect, forced to resort to the NLRB whenever two unions present conflicting claims as to representation, thereby making the board rule[10] *permitting* employer access to it mandatory.[11] The act notwithstanding, the board has not imposed so strict a liability on the employer. It has held repeatedly that where the employer is honestly in doubt as to the majority status of a union, he is not guilty of an unfair labor practice in refusing to recognize the union as exclusive bargaining agent until its majority status has been determined by the board.[12]

A careful reading of the National Labor Relations Act also raises the question of whether an employer may lawfully refuse to deal with a union as representative of its members, regardless of the justification for his refusal to recognize its exclusive bargaining position. If he may not, the defendant in the instant case would have been guilty of an unfair labor practice by flatly refusing to negotiate with either union until their conflicting claims had been determined. If such an interpretation were correct, the employer's choices would be 1) continuing to deal with both unions until the majority had been determined, 2) seeking the intervention of the board, or 3) hazarding a guess as to whether the contracting union did in fact have a majority. Since the board has never held the employer to this degree of responsibility,[13] however, the defendant's conduct with respect to the unions in the instant case was probably proper.

[10] Code of Fed. Reg. tit. 29, § 203.1 (Supp. 1939).

[11] The board does not, however, permit employer access where only one union presents a claim to exclusive bargaining status. Code of Fed. Reg. tit. 29, § 203.3 (Supp. 1939). In such a case the employer would seem to be in an inextricable difficulty.

[12] The board appears to have been extremely solicitous in regard to the position of the employer in these circumstances. In West Virginia Pulp and Paper Co., 3 N.L.R.B. 675 (1937), where there were two unions with overlapping claims of membership and the employer refused to bargain exclusively with either one until there was a certification, the board simply ordered the certification and made no findings as to unfair labor practices. The board has also refused to sustain charges of refusal to bargain where the union could not prove a majority. M. Lowenstein & Sons, Inc., 6 N.L.R.B. 216 (1938) (two disputing unions refused to put membership cards into evidence); Swift & Co., 10 N.L.R.B. 991 (1939) (doubt as to genuineness of signatures on some of the cards). And in West Kentucky Coal Co., 10 N.L.R.B. 88 (1938), the union would not put its membership lists into evidence for fear of reprisal against its members on the part of the employer. The board felt that the union's action might well be justified under the circumstances, but decided that since they were unable to find that there was a majority, they could not sustain the charge of refusal to bargain. The board seems to have gone farthest in its desire to protect the employer under these circumstances in McKell Coal & Coke Co., 4 N.L.R.B. 508 (1937). There, a union asked an employer to bargain collectively three different times. The employer refused to do so, saying that he did not think that it represented a majority of the men. The board did not sustain the charge of refusal to bargain and simply ordered an election, saying that they interpreted the employer's conduct as expressing uncertainty regarding the status of the union.

[13] In Mooresville Cotton Mills, 2 N.L.R.B. 952 (1937), the board held that it was not an unfair labor practice to refuse to discuss grievances with employee representatives when such

Under these circumstances should specific performance have been granted in the instant case? It is submitted that had the court done so it would have been usurping the board's function of determining whether the contracting union had a majority.[14] The proper solution for the petitioning union would have been to resort to the board for the purpose of determining its majority status, which if established would have removed the basis for the employer's refusal to bargain and would have permitted the employer to discharge the minority members. If the union had then sought relief in the courts, specific performance would have been properly granted. A more difficult question would be presented to the court if the board found that the contracting union did not have a majority. Had this situation existed at the time the contract was signed, there would have been no difficulty in abrogating the contract on the ground of mistake of fact and ordering the employer to deal with the other union. Assuming, however, that the contracting union had had a majority but that there had been a change of affiliation subsequent to the signing of the contract, what would the court do? Should the contract be enforced regardless of the change of affiliation,[15] and if so would the employer be guilty of an unfair labor practice in fulfilling a contract with a union he knows to be a minority by discharging members of the majority union? Or should changes in affiliation during the life of the agreement be regarded as abrogating the contract?[16] Or, as has also been suggested, should the contract remain in effect with the new majority union "substituted" for the original contracting union?[17] It is widely recognized that there must be some stability in labor relations (the type of "industrial peace" mentioned by the court in the instant case may be indicative of the trend); but this should not be permitted to outweigh the desirability of democratic representation

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representatives did not represent a majority of the employees. And in Wisconsin Tel. Co., 12 N.L.R.B. 375, 393 (1939), an employer refused, as in the principal case, to negotiate with either of two labor organizations until the appropriate unit should be determined. The board found that a question of representation existed but did not make a finding of unfair labor practice on the part of the employer.

[14] Such an attempt on the part of the court would probably have had no effect on the board's conduct. The board has disregarded a state court order specifically enforcing a closed-shop contract and has ordered an election where it appeared that there had been a presentation to the employer of a formal claim of a majority by the rival union. Nat'l Electric Products Corp., 3 N.L.R.B. 475 (1937), noted in 47 Yale L.J. 799 (1938).

[15] The board has tried to prevent this from happening, but has met with disfavor on the part of the court. NLRB v. Electric Vacuum Cleaner Co., Inc., 120 F. (2d) 611 (C.C.A. 6th 1941), rev'd on other grounds 10 U.S.L. Week 4297 (1942).

[16] Where the contract has more than a reasonable time to run, the board has tried to follow the policy of abrogation. The reaction to this policy on the part of the courts has been mixed, with the majority of decisions probably refusing to apply anything but standard contract concepts and holding the contracts valid in these circumstances. Change of Bargaining Representative during the Life of a Collective Agreement under the Wagner Act, 51 Yale L.J. 465, 475 (1942).

[17] This policy has been followed in certain cases by the board, but it, likewise, has foundered in the courts. Ibid., at 474. However, even Mr. Edwin S. Smith, the board member most in favor of the policy of substitution, was not satisfied that the closed-shop provision in a contract with the superseded union was "intended" to benefit the successor union. Pacific Greyhound Lines, 22 N.L.R.B. 111, 145 (1940).

which the spirit of the Wagner Act demands.[18] Either abrogation or substitution is preferable to the strict enforcement of contracts where there has been a change of affiliation.

Oil and Gas—Applicability of Rule against Perpetuities to Grant of Oil and Gas—[Federal].—In 1905 the defendants' predecessor in title conveyed and warranted to the plaintiffs' predecessor in interest "all the coal, oil, and gas in and under" certain premises, together with the right to "take and use so much of the surface of said lands as the grantee" might deem necessary or convenient for the production of the coal, oil, and gas, provided, however, that "all the land the surface of which is so taken shall be paid for when so taken at the rate of $50 per acre." After the co-defendant lessees discovered oil and gas on the premises in 1941, the plaintiffs claimed ownership of these minerals and sought to enjoin the defendants from interfering with their possession and development. The defendants insisted that the provision in the deed respecting the acquisition of surface area violated the rule against perpetuities, and by counter-claim sought to quiet their alleged title to the oil and gas. *Held*, that the provision for payment did not violate the rule against perpetuities. *Chicago, Wilmington & Franklin Coal Co. v. Herr.*[1]

The defendants argued that the deed gave the plaintiffs only an option to acquire the use[2] of surface areas to be designated at an indefinite time in the future and contended that this option was void since an option in gross of unlimited duration violates the rule against perpetuities.[3] However, the court felt itself bound by the case of *Threlkeld v. Inglett.*[4] In that case the Supreme Court of Illinois held that all the means necessary to produce oil and gas pass with a grant of these minerals even without any express provisions in the deed to that effect;[5] one of these means was the right to use

[18] Restriction of the life of a contract to a one-year term has been suggested as the most workable mean between undesirable "freezing" and desirable "reasonable stability" of representation. The establishment of a continuous administrative process would permit the adjustment of contract rights according to the requirements of each case. Legislative promulgation of standard agreements would remove the whole problem from control by union contract. Change of Bargaining Representative during the Life of an Agreement under the Wagner Act, 51 Yale L.J. 465, 481 (1942). If the contracts were to be limited to one year, with a new election to be held after that period, there would no doubt have to be legislation governing the behavior of any growing minority group during that time so that its opportunity for growth might be impeded no more than is required by the legitimate interests of the union holding the present contract. Judicial attacks on this problem have not, as yet, been too felicitous. See Cohen, The Minority Union's Right to Strike, 16 Ind. L.J. 377 (1941).

[1] 40 F. Supp. 311 (Ill. 1941).

[2] That the deed is to be interpreted as providing for the use rather than the fee in such areas is indicated by the phraseology of the clause in question, viz., "the right to take and use so much of the surface. . . ."

[3] London & Southwestern R. Co. v. Gomm, 20 Ch. Div. 562 (C. A. 1882); Lewis Oyster Co. v. West, 93 Conn. 518, 107 Atl. 138 (1918); Barton v. Thaw, 41 Pa. Co. Ct. 396 (1913); Starcher v. Duty, 61 W.Va. 373, 56 S.E. 524 (1907); Winsor v. Mills, 157 Mass. 362, 32 N.E. 352 (1892); cf. Keogh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925).

[4] 289 Ill. 90, 97, 124 N.E. 368, 371 (1919).

[5] See Glassmire, Oil and Gas Leases and Royalties 135 n. 129 (2d ed. 1938).