

ter what party is in power. Its main lines will be determined by the Congress. Nothing is more important than the continuous election of wise and able men as Congressmen and Senators. Of course, the same goes for the President, but that need not be said.

Second only to enactment is administration. If the complex machinery we have set up is to operate with any sort of success we must get the best and most disinterested men we have into administrative posts, and keep them there.

Continuous studies from the outside, like these Brookings volumes, can be of the greatest help. I only wish these studies told us with more freedom what their authors really think. But if information, and few judgments, are what is wanted, then these books are fine.

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The National Labor Policy and How It Works. By Joseph Rosenfarb. New York: Harper & Bros., 1940. Pp. xxxvi, 732. \$5.00.

Government and Economic Life, Vol. I.† By Leverett S. Lyon, Myron W. Watkins, Victor Abramson, and Associates. Washington: Brookings Institution, 1939. Pp. xvi, 519. \$3.00.

Briefly reviewed, the chapters dealing with labor in the Brookings volume may be called a readable, compact description of the relation of government to labor in the United States, while the Rosenfarb book is, except for the annual reports of the National Labor Relations Board, the most important and detailed exposition of governmental regulation of collective bargaining that has been published. Rosenfarb, an attorney of the board, is an insider, not an impersonal outsider, like the Brookings Institution. In form too, the books differ widely: not only is Rosenfarb's style, unlike that of Lyon and Abramson, argumentative, but he has so little skill in writing English that his feast, unlike the neatly packaged Brookings-brand product, is somewhat unpalatable due to bad seasoning in its preparation.

The message of Senator Wagner's preface to Mr. Rosenfarb's book is the high significance of the promotion of employees' collective participation, jointly with employers, in the establishment of rules governing wages, hours, and conditions of employment. "The suppression of the rights which the Labor Act seeks to preserve," Senator Wagner says, "was almost invariably the first step of those dictators who have supplanted democracy with the totalitarian state. . . . Where the liberties of the workingman have been crushed, . . . liberty of thought, liberty of expression, liberty of religion, and government by the people have been slain. . . . We, in America, determined never to bow to tyranny . . . , must first of all make sure that men and women enjoy the dignity of freedom and self-expression in their daily working lives." And Chairman Madden, whose wisdom and energy have been the heart of the administration of the Wagner Act, declares in the foreword that "an attempt to give legal expres-

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† The two volumes of the Brookings study, other than the chapters dealing with labor, are reviewed elsewhere in this issue, supra p. 172.

sion to the interests of employees under these new circumstances [of twentieth century industrialization of the human family] must have an importance in modern industrial affairs comparable to that exerted by the Bill of Rights at a period when the definition of their civil and political rights was the issue before the people of a younger United States."

The conviction of these leaders is fully shared by Mr. Rosenfarb, and shared with a fervor which is not tempered by the age and urbanity of Senator Wagner, who has "never doubted for a moment that the Labor Act would need to be perfected from time to time as experience pointed the way."

Though the author recognizes (page 640) that the act "regulates but one phase of labor relations," his perfervid devotion may be responsible for the grandiose title *The National Labor Policy*. At least he makes no pretense of discussing, or apology for not discussing, other manifestations of national labor policy—such as, the Fair Labor Standards Act and accident compensation and safety and health legislation relating to workers in government service and in interstate and international transportation—or those manifestations of labor policy, in the broader sense national, that take legal form in the great network of state statutes.

No doubt the author was intent to persuade as well as to enlighten, but to me his fuse of description and justification is disturbing rather than convincing.¹ So is his antipathy toward employers and any who may assist them.² Nor has he a winning style. Repetition, exaggeration, and verbosity³ enlarge the book unpleasantly. More

¹ I wonder whether a little less verbal modesty would not make books (and book reviews) that combine exposition and opinion better reading. The first personal pronoun is unfortunately written with a capital in English. Would it be easier to use I if it were written i? Other languages capitalize You. Will U (as Netherlanders say) join me in decapitalizing i and thus lessening gentle writers' embarrassment in speaking of their own opinions?

² "Where the antiunion employer is engaged in a crusade against unions it cannot be supposed that the employer himself, or high officials of a corporation, will be selfish enough to refrain from personally engaging in the ennobling activity of spying upon the employees." P. 65.

"The Civil Liberties Union has also evinced an interest in whether the board's orders are in violation of the freedom of speech of the employer. One of the characteristics of a bleary-eyed, punch-drunk battler is an inability to distinguish his opponent and to find his corner." P. 81 n. 65.

"The thread is endless but the pattern is the same: the subservience of the political authorities to the large-scale antiunion employer." P. 95.

Those who are constantly treating pathological situations sometimes develop pathological attitudes. Mr. Rosenfarb tends to do so. (See pp. 256-57.) He needs to practice his own caution (p. 686) that "it is an expression of human egotism to attribute to one's own affairs an importance in the general scheme of things quite out of proportion to actuality."

³ "The putative might of the British Empire looms inconsequential compared with the menace implicit in the disapproving glance of a straw boss." P. 117.

"Belonging to a union or being active in it is not a form of job insurance. Any charge that the act is being administered by the board with that intent and effect is a fugitive from truth and integrity." P. 138.

"The bridge that is relied upon to span the void between the conflicting positions of employer and employees is the medium of negotiation." P. 204.

irritating are the weird figures of speech,⁴ the mixed metaphors,⁵ bad grammar,⁶ misuse of words,⁷ confused language,⁸ and adolescents' jargon and syntax.⁹ Less frantic

⁴ "That the parasitic nature of the racial history of genus company-union is not due to a stigmatic interpretation is attested by the virtually universal prevalence of the employer influence in the company unions." P. 105.

"The function of weighing conflicting evidence . . . is performed within the four corners of the facts of each particular case." P. 165.

"An agreement on the issues involved, of course, tolls the end of the negotiating process" (i.e., agreement ends negotiation). P. 217.

⁵ "A similar milieu of antiunion threats . . . took place." P. 77.

"The obvious reluctance of the board to do more than perform the immersion operation by one toe at a time is understandable, but the problems with which it is faced with deciding are already adumbrated on the horizon of the administration of the act. It will do no harm to examine the nature of the bridges even though their crossing must await approach, or retracing of steps." P. 270.

"[Girdler's] halo is certain to find its own proper niche." P. 554.

⁶ "We still find employers, like Ford, who talk and act as if the Wagner Act was not the law of the land." P. 27.

"Obviously the reasons usually advanced for placing government employees in a separate category in so far as their right to engage in certain union activities are concerned no longer holds true in the case of employees engaged in nongovernmental functions." P. 59.

"There was also the ubiquitous Citizens' Committee, which held a meeting in the town armory and at which groups of the employees were addressed." P. 76.

"The unions concerned did not contest the unit requested which ought to include the licensed and unlicensed personnel and whom all the unions admitted to membership." P. 348.

"Male and female workers were included in the same unit in Hat Corp. of America, where the company union so requested but which a national union opposed." P. 348.

"The principle of that case applies . . . and of which principle the A. F. of L. unions have availed themselves." P. 381.

"Since an administrative order seeks to enforce a public duty [an overlarge generalization, by the way], there is more reason for preventing its evasion than claims [i.e. than the evasion of the claims] of private creditors." P. 626.

⁷ "Adopted" for adapted (p. 27); "permissive" for permitted (pp. 131 and 164); "in the four corners of the employer aurora" (p. 132); "in vogue" for in use (p. 171); "incantation" for recantation (p. 231); "contractual union" and "contractee union" for contracting union (p. 281); "more preferable" (pp. 315 and 518); "sententiousness" for wisdom (p. 317); "indicium" for index (p. 354); "fori" for fora (p. 555); "affect" for effect (p. 378); "a Frankenstein" for a monster of Frankenstein (p. 471); "status ante quo" (p. 533); "judgmatic," "dishabile" (p. 607); "demarche" for attack (p. 636); "during its aegis" (p. 664); "it could not otherwise than be" for it could not be other than (p. 674).

⁸ "Although the individual American worker has a voice in the election of municipal, state, and federal officials, and thus indirectly a voice in approving or disapproving their policies, none of these officials, by what he does or does not do, so immediately affects his or his family's well-being as his employer's wage policies, for instance, in the determination of which he has no voice." P. 24.

"Akin to union activities and membership as an illegal reason for discrimination is the attitude of nonunion or rival union employees." P. 166.

"Indeed the march of democracy is along an ever-inclusive spiral of class legislation, joining classes or groups, if you please, of people heretofore excluded from the body politic." P. 473.

"There is no person who has reached the stage of prominence to be an incumbent of a seat on the bench who can lay claim to emotional and judgmatic dishabile." P. 607. Does this mean that judges are old enough to have emotions and opinions?

⁹ "It is unlikely that the future inevitable efforts of the American people along the same

haste¹⁰ to defend the citadel and more consultation with persons having stronger foundations in English speech might have saved the author from these serious linguistic defects.

The book is apparently intended to be read rather than to be used as a compendium of information about the National Labor Relations Act, for, though it is the latter, the author having spared no pains to tell a very complete story, which only one with his superlative knowledge could do, the paraphernalia for reference use are inadequate. A detailed table of contents partly compensates for a worthless general index. But,

direction will not find in the N.R.A. experience valuable guidance in what pitfalls to avoid." P. 16.

"The unfair labor practices specified have crystallized from experience of predecessor labor boards as the types of practices to which employers resort to in union-busting campaigns." P. 38.

"The first unfair labor practice interdicted declares that it shall be an unfair labor practice. . . ." P. 62.

"Since company unions are not intended to be genuine collective bargaining agencies, and in fact frequently do not even pretend to do so." P. 134.

" . . . with oodles of sodium chloride. . . ." P. 149.

"This [preference of the employer for one of rival unions] is betrayed no little by the choice he makes of the employees of which union to retain in order to . . . restore harmony." P. 161.

"Alibi" to mean a defense in general. P. 171.

"It [granting the employer the right to petition for an election] would operate in somewhat the following fashion: Where there would be an incipient unionization campaign, and the union did not request the employer to bargain with it for all the employees in the unit, the board would refuse to act prematurely because no question concerning representation would have arisen." P. 303.

" . . . renders the likelihood . . . unlikely. . . ." P. 323.

" . . . unless the employees are small in number. . . ." P. 347.

¹⁰ Certain inaccuracies and omissions seem explicable only on this ground. Wilson was not president in 1912 (p. 8). Frank P. Walsh was joint chairman with William Howard Taft (p. 9) of the National War Labor Board, not of "the National World War Board" (p. 10). Some of the contemporaries of the first National Labor Relations Board (see p. 225 l. 3) were, like the NLRB, based on Public Resolutions 44 and not on NRA codes (p. 15). The 1939 Labor Peace Act of Wisconsin is not an amendment of the 1937 Labor Relations Act (p. 22); the 1937 act, frequently spoken of as if now in effect (p. 19, p. 50 n. 32), is repealed and replaced by the 1939 act. *United Shoe Workers v. Wisconsin Labor Relations Board* (p. 290 n. 92) was appealed and decided (227 Wis. 569, 279 N.W. 37 (1938)) over two years ago. The implication of the statement that "there is no more reason for placing a minimum age limit of thirty for trial examiners than for representatives in Congress" (p. 468) is untrue (U.S. Const. Art. 1, § 2 ¶2 and § 3 ¶ 3). No reference is given for a quotation from Solicitor General Reed (p. 528); there is inadequate identification of certain actions of private parties ("a convention," p. 539) ("Mr. O'Brian" and "Mr. Stimson," that is, John Lord O'Brian and Henry L. Stimson, p. 461); of the board (pp. 508-9); and of the courts (p. 505). Obviously, no bill would "make unfair labor practices in the maritime industry enforceable" (p. 630). The incorrect statement that "The [old NLR] Board took jurisdiction only in cases involving violations of sec. 7(a) of the NIRA" (p. 14) is followed by the correct statement that "Part of the function of the old National Labor Relations Board was concerned with [i.e., was] mediation and arbitration" (p. 548). "Moral compulsion" is a misquotation of "legal compulsion" (p. 668). And there are numerous erroneous omissions and insertions of articles, prepositions, and punctuation marks, even in quoted passages.

though an appendix lists court cases under the act up to a date not stated (about January, 1940), there is no index of cases or other authorities cited and quoted in the text. Moreover, the footnoting is sketchy²¹ whenever it goes beyond NLRB decisions.

In contrast, the 130 pages of Volume I of *Government and Economic Life* that treat of government policy concerning adjustment of labor disputes and regulation of labor activity and labor relations, give in simple, agreeable, and generally precise language a summary of these matters and a summary well integrated with the rest of the book. While it may appear captious to complain of too much generality where brevity is essential, yet generality and brevity mislead when they result in saying (page 405) that in a NLRB election the voters' list comprises "(1) names on the payroll [when?] or (2) in the event of a strike, names on the payroll on the last effective [in what sense?] date preceding the strike"; or (page 407 note 80) that the Supreme Court in the *Columbian Enameling* case²² "substituted its appraisal of the evidence for that of the Board." And the too general becomes the ridiculous when the typographer changes one letter in a sentence so that it reads (page 437): "There is little question but that some of the tactics resorted to by some labor organizations and leaders—even though sometimes in defiance of more restraining national union leadership—were factors working in the some [sic] direction." And one discovers less excusable inaccuracies. Why "at least" in the statement (page 474) that the wage minima of the Fair Labor Standards Act "are, at least for the first seven years of the act's operation, specifically declared to be subject to alteration on the upward date"? How justify the statement (page 425) that "The National Labor Relations Act of 1935 specifically provides that agreements requiring membership in a bona fide labor union as a condition of employment are lawful, and the logical implication of this provision is that strikes for the closed shop are lawful," when the act makes such agreements *unfair* (an unfair labor practice) *unless* made with the majority representative, and says nothing about their *lawfulness* in any general sense *even when* they are made with such a bargaining agent? Nor does the succeeding statement, that "the employer-closed [i.e. all non-union] shop has in effect [why only "in effect"] been outlawed by the Railway Labor Act," give a true picture without the complementary fact that the all-union shop is equally outlawed by that act. But, all told, we have an excellent miniature portrait of the government and labor.

Nor is Mr. Rosenfarb's large-scale picture of a part of this field a badly distorted one. Despite its faults no one can fail to admire the extent of his reach into all the ramifications of his subject, and his masterly presentation of weighty objections to all amendments proposed in 1938 and 1939. The committee headed by Congressman Howard W. Smith had not yet reached the public hearing stage of its investigation when the book went to press, but one can be sure that Mr. Rosenfarb could expose the destructive character of its recommendations with as much success as he does that of the Walsh and the Burke series that earlier came to failure.

The remainder of this review is confined to comment on certain provoking passages in Mr. Rosenfarb's text of over 300,000 words.

Who are the parties on the employee side of the collective contracting that the act promotes and how does the ebb and flow of employee loyalty to unions affect the life of

²¹ Exception may be taken also to their form, e.g. reported decisions are frequently referred to by court and date rather than by report volume and page.

²² NLRB v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939).

collective agreements? The author comes to a fairly definite answer, but not the one which one foresees from his initial principle (page 203) that "The agreement must be with the union, not with the employees," citing *Independent Pneumatic Tool Co.*¹³ He at once qualifies (if not contradicts) this principle by saying: "Recognition of the employees' representatives,¹⁴ qua representatives, is of the essence of the duty to bargain collectively"; and later (page 275) he develops this thesis at length: "Any contract entered into by the representatives of a majority is entered into in behalf of the employees and in the capacity only as the agents of the majority and not as principals [i.e. (i understand) and only as agent of all employees, not as principal]. This is true even though the written contract, for a closed shop or otherwise, names a local or national union as principal. Otherwise the democratic principle of the act is destroyed, for collective bargaining will then be the right of the union and not of the employees. . . . A change of representatives during the existence of a contract, closed-shop or otherwise, would not cause the contract to expire but only to be transferred for administration to the new representatives to be binding on them as well as [i.e. (i understand) but would cause it to become binding on the union that is now representative in lieu of the original union and to remain binding] on the employer under its terms." How far Mr. Rosenfarb thinks this doctrine is accepted,¹⁵ he does not say. To me it seems a highly doubtful solution of a perplexing problem.¹⁶ But Mr. Rosenfarb, though he recognizes (page 275) that "there may be cases presenting difficulties in administration where the contract [i.e. (i understand) presenting such difficulties in administration that the contract] would be impossible of performance," puts up a good case and one that may prevail, as it does under the Railway Labor Act (which, however, prohibits closed-shop contracts).

¹³ 15 N.L.R.B. 106 (1939).

¹⁴ The author here and elsewhere uses "representatives" when he means "representative" (union). Of course employees may choose men to represent them; but actually they don't; so that the NLRB always, as the author notes (p. 188), has certified an organization, never a natural person. But see National Mediation Board, Fourth Annual Report 19 (1938); and *Delaware-New Jersey Ferry Co. v. NLRB*, 90 F. (2d) 520 (C.C.A. 3d 1937).

¹⁵ "The act contemplates the making of contracts *with labor organizations*. That is the manifest objective." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938). "The purpose of the statute was to compel employers to bargain collectively *with their employees* to the end that employment contracts binding on both parties should be made." *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342 (1939). (Italics added.) The foregoing passages are quoted as if in accord with one another, in *Independent Pneumatic Tool Co.*, 15 N.L.R.B. 106, 114 n. 4 (1939). More recently the board has held that when *both* the national union dischartered a local having a closed shop contract *and* most of the employees joined a newly chartered local and thus remained in the national union, the contract became that of the new local so that the discharge of the employees who stuck with the dischartered local was not an unfair labor practice. *General Furniture Co.*, 26 N.L.R.B. No. 8 (1940). Another case tending to support Mr. Rosenfarb is *Transformer Corp. of America*, 26 N.L.R.B. No. 44 (1940), where, following dismissal, pursuant to a closed shop contract, of employees who were of the majority that changed allegiance, resulting in a strike of these employees and their replacement by union members, which in turn was followed by dismissal of the latter and rehiring of the strikers, the board ordered an election based on the roll of employees *before the change of allegiance* (without intimating what was the status of the contract, which was about to expire).

¹⁶ Rice, *The Legal Significance of Labor Contracts under the N.L.R.A.*, 37 Mich. L. R. 693, 720 (1939).

And what of the position of the employee who is not of the administration party? All employees and groups of employees have, under Section 9(a) of the National Labor Relations Act "the right to present grievances at any time to their employer." What does this mean? Though a *duty* of the employer to bargain was discovered in Section 7(a) of the National Industrial Recovery Act because it gave employees the *right* to bargain with him, Mr. Rosenfarb says (page 228) that the right to present grievances to him "does not place a correlative duty on the employer to receive such grievances." While no one questions the board's jurisprudence that the employer has no duty to *bargain* about grievances with anyone with whom he does not have to bargain about other matters (page 195), why has he no duty to "receive" grievances? While the act itself provides no redress for a sole employee and probably he has no court remedy either, does not the employer's refusal to listen to grievances that a minority group wishes to present at least make a particularly clear case of interference with his employees' right "to engage in concerted activities" "for mutual aid or protection"?¹⁷

As Mr. Rosenfarb points out (page 231), this express recognition of the right of individuals and minorities to the freedom of speech of presenting grievances, though there be an exclusive (majority-chosen) bargaining agent, is an indication that they have not then the more substantial right to require the employer to bargain. But has the employer such a duty in the absence of a representative of all? The board holds that he has not. Mr. Rosenfarb, however, takes the deep plunge of disagreeing—which he very rarely does—with an established rule of the board. "There are definite, indeed imperative, reasons," he says (page 239), "why the board should alter its position and adopt a different interpretation, that is, that until a majority arises the employer should have a duty to bargain collectively with representatives in behalf of the employees they actually represent." He makes an effective argument that the word "exclusive" in Section 9(a) is useless unless there are also nonexclusive bargaining agents with whom the employer is bound to treat in the absence of an exclusive (majority-chosen) agent. This interpretation he avers (page 240) to be in keeping with the purpose of promoting the institution of collective bargaining, for "if a majority is made the condition precedent from which all collective bargaining springs, the majority rule may become a double-edged sword slaying unionism during infancy when it needs protection most." Though "where two or more rival organizations are involved, the bargaining process may not be without obstacles," he thinks them superable and points out (page 242) the practical value of minority bargaining which has resulted in "some of the most noteworthy collective bargaining agreements, such as Big Steel, General Motors, and Chrysler."

While his drastic interpretation of the statutory obligation to bargain is within the bounds of reason,¹⁸ Mr. Rosenfarb's further suggestion (page 258) that it should be deemed an unfair labor practice for an employer to enter into a contract with one union and not do so with a rival, is, in my opinion, out of bounds. Surely the act does not require the employer to give "the prestige" of a contract to every rival union. Surely a duty to *bargain* equally with all¹⁹ is not a duty to *agree to terms* proposed by one union

¹⁷ The board has recently declared such a refusal not unfair "unless the manner and circumstances of the refusal in themselves coerce employees in the exercise of their rights of self-organization." *New York Times Co.*, 26 N.L.R.B. No. 112 (1940).

¹⁸ Compare *National Lawyers Guild, Proceedings of Conference on Contemporary Problems in Labor Law and Relations*, Washington, 1940, at 92 (Boudin) and at 121 (Emerson).

¹⁹ *R. C. Mahon Co.*, 23 N.L.R.B. No. 116 (1940).

merely because he has "recognized" a rival union by agreeing to other terms proposed by the latter.

But our author is a booster. As he wants the board to move in here, so he wants the board to extend its reach in other directions. Thus he thinks (page 645) the board's mediatory intervention would have been opportune in the Little Steel Strike of 1937, for "a few rounds of the stroke dramatic may go a long way toward bringing down the walls of Jericho between the board and the public."

Mr. Rosenfarb certainly contributes here and there his stroke dramatic by positive declarations where others would unquestionably doubt or qualify. (1) "If an exclusive bargaining agency may make a contract containing an extreme type of closed-shop provision," he says (page 279), the agency may make "a fortiori a contract containing a provision not quite so favorable to the union"—with no mention of the *Clinton Cotton Mills* case.²⁰ (2) Also (page 282) (without citation of authority), "An employer [bound by a lawful closed shop agreement] may not discharge a nonunion employee unless requested to do so" by the union. Would Mr. Rosenfarb say the existence of a closed shop contract would likewise not be enough to allow an employer to refuse to hire a non-union man unless the union requested the refusal? (3) Again (page 470), "What the political party is to the formalistic tripartite division of our government up to the enactment of legislation, the administrative agency is after its enactment." Despite his inaccuracy in attributing to courts, as well as to executive and legislative officers, a part in the enactment of legislation, the analogy is worth pondering.

And so is his comment (page 99) on the sit-down strike:

Stripped to realities, a sit-down strike is a picket line inside the plant. After the strike, the picket line is disbanded and operations are resumed as in any strike. Its effectiveness lies in the fact that because of it the employer is unable to hire strikebreakers. That is the legitimate ultimate objective of any picket line. In other words, the sit-down technique achieves for the strikers what not every picket line outside the plant is quite able to do—reduce the struggle to an endurance contest, as in England.

And because of its mechanical effectiveness there may be expectations of its wider use in the future, if other means of preventing strikebreaking fail. The fact that it is now generally considered illegal, and state statutes are passed against its use does not solve the problem raised by it. Its disappearance from the current scene is due in no small measure to the pacific influence of the act. But if the large reservoir of labor caused by unemployment will facilitate strikebreaking, resort to the sit-down or its equivalent may be expected to increase. When men fight for their livelihood, when economic interests collide, we may expect that the boiling caldron will overflow the bounds of the permissible. At one time, unions' picketing and any kind of strike were illegal. Nevertheless, the pressure of economic and social interests forced ultimately a revision in the law to conform to reality. Legal development, whether in the legislative or the judicial field, is not the result of considerations of abstract justice and wisdom. It is the consequence of pressure of economic and social forces which cannot find satisfactory expression in the accepted legal molds.

I turn now to representation problems. Regarding the board's function of delineating bargaining units, he remarks (page 367): "Collective bargaining abhors a vacuum of unorganized workers. . . . The fertile soil of labor organization belongs to those who till it. . . . The unorganized workers are 'ferae naturae.' Their form of organization is not predetermined by jurisdictional arrangements. It is to be decided by the response which they make to the organizers of the various forms of unionism." Of the

²⁰ National Lawyers Guild, Proceedings, note 18 supra at 108 (Ward).

three views of the three board members in the case of the *American Can Co.*,²¹ he prefers (page 376) the dissent of Chairman Madden, who in general "would recognize change both from the craft to the industrial and from the industrial to [the] craft autonomy" and in this case would therefore apply (page 374) the *Globe* doctrine²² of craft unit option, notwithstanding the previous negotiation of an industrial unit contract.

Another recent division within the board is on the counting of strikebreakers as employees when the strike is neither caused nor prolonged by any unfair labor practice. The majority over Member Leiserson's objection, holds them not employees for the purpose of determining representation (page 391). This *Sartorius* rule,²³ however, does not deny such persons all rights; it merely prefers to them the strikers whose places they fill, where it would be illogical to treat both as employees. Mr. Rosenfarb agrees with this treatment (page 392).

The board's recent policy of habitually holding elections rather than relying on other evidence in contested representation cases, Mr. Rosenfarb does not consider (page 314) "in itself . . . undesirable," but warns that it may "furnish to employers unwilling to accept the policy of the act a means of sabotaging the bargaining process through dilatory tactics."

He apparently approves (page 235) the board's introduction of the "neither" (i.e., no collective representation) choice into ballots containing the names of two or more nominees for representative, the rule of the *Interlake Iron Corporation* case.²⁴ But for run-off elections he disapproves (page 237) a ballot containing such a choice; that is, he favors the form of ballot since espoused by Member Edwin S. Smith,²⁵ or else the use in the original election of a ballot allowing voters who vote against collective representation to vote at the same time for the representative they prefer in case a majority of the employees vote for collective representation. Though Member Leiserson had declared himself against the use of the run-off,²⁶ Mr. Rosenfarb does not discuss this view, which now, owing to the three-way disagreement of the board members, is triumphant.²⁷

As to the extent of labor relations board jurisdiction, he defends the widest meaning

²¹ 13 N.L.R.B. 1242 (1939). Followed in *White Motor Co.*, 23 N.L.R.B. No. 96 (1940).

²² *Globe Cotton Mills*, 6 N.L.R.B. 461 (1938).

²³ *A. Sartorius & Co.*, 9 N.L.R.B. 19 (1938), 16 N.L.R.B. 493 (1939). Leiserson's dissent is in *Easton Publishing Co.*, 19 N.L.R.B. No. 43 (1940). It has since been held that the strikers lose their employee status if they cease strike activities after their places are filled. *Standard Insulation Co.*, 22 N.L.R.B. No. 46 (1940). But both groups count as employees if the strike settlement gives those not working preferences in hiring. *Tennessee Copper Co.*, 25 N.L.R.B. No. 22 (1940).

²⁴ 4 N.L.R.B. 55, 58 (1937). The New York State Labor Relations Board has recently altered its form in the same way. *Hotel St. George Corp.*, N.Y.S.L.R.B. Decisions No. 655b (1939).

²⁵ *R. K. LeBlond Machine Tool Co.*, 22 N.L.R.B. No. 17 (1940), where this practice momentarily prevailed with Member Leiserson's vote. This is the present practice of the New York State Labor Relations Board. Report of the New York State Labor Relations Board for 1937-39, at 137.

²⁶ *Coos Bay Lumber Co.*, 16 N.L.R.B. No. 50 (October, 1939).

²⁷ *General Motors Corp.*, 25 N.L.R.B. No. 30 (1940).

of "interstate commerce" so as to give the national board jurisdiction over cases involving employees of filling stations (page 435), mines (page 436), banks (page 438), insurance companies (page 438), retail stores (page 440), perhaps motion picture houses (page 440), and notes how far the board has gone, and with what success in the courts, in this marginal area. On the other hand he does not doubt (page 443) the concurrent operation of similar state acts in a large region which the national act covers. For (page 448) "the federal and state governments ought not to be looked upon as rival and mutually conflicting entities but as two governmental arms of the same organism. . . . The principle of concurrent jurisdiction, unless otherwise demanded by the dictates of uniformity between national and state agencies, holds promise for the continued functioning of states even in matters where the federal government can assert supremacy, thus posing the jurisdictional question as truly functional—whether the matter demands uniform national treatment or may be taken care of by state action. . . . Perhaps not the least historical importance of the act lies in the fact that it has served as the occasion for an important constitutional advance in the direction of functional federalism."

In a long and excellent chapter on board procedure (pages 477-528) the author proposes (page 525) that the present administrative practice of giving the respondent an opportunity to examine and oppose either (1) the "intermediate report," or (2) the proposed findings of the board, be changed so that the respondent may challenge both at once. "Thus, the trial examiner would file a report which would not be served upon the parties at this juncture. The board's subordinates in the review section would prepare proposed findings and conclusions of law as found by the board which would be together with the intermediate report [i.e., which, together with the intermediate report, would be] served upon the parties, who would then be given an opportunity of oral argument and filing of briefs. The board would then render its final decision. The advantage of this combined procedure lies in affording the parties an opportunity without additional delay to argue to the board about the correctness of the findings and analyses as made by all the board's subordinates." I understand that recent developments in board procedure, under the impulse of suggestions of the staff of the Attorney General's Committee on Administrative Procedure in May, 1940, tend with similar advantage to merge the work of trial examiners and review attorneys into a single document.

It is in his still longer chapter on the board's administrative remedies (pages 529-91), and particularly in his examination (pages 541-83) of the remedies of reinstatement and pay for the period of unemployment (somewhat undescriptively styled as "back pay"), that Mr. Rosenfarb particularly enlarges understanding of the act. Here the board is developing rules, analogous to common law rules of specific and substitutive restitution ("mandatory injunction" and "damages"), in a territory hitherto outside the realm of law.

His criticism (page 562) of the Supreme Court's *Fansteel* decision²⁸ is extremely severe: "The doctrine of the Chief Justice is essentially subversive to law and order. He would reduce the law of the land to a code of relationship between private parties in the enforcement of which the public has no interest. Where two parties violate the law in their relationship to each other, the Chief Justice would propose that the law withdraw from that sector and permit them to settle matters by the code duello.

²⁸ NLRB v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

The board is opposed to such a tenet of anarchy. . . . Someone with a realistic view of the facts of the *Fansteel* case might suggest that this statement of the Chief Justice's doctrine is unfair. He would point out that the majority . . . really do not believe that two wrongs make a right, but only that the employees' wrong is punishable but not the employer's. It was not enough that the employees were fined and imprisoned for engaging in an unlawful strike. They also lost their jobs. And the employer? The company by provoking the unlawful acts of the employees succeeded in destroying the union and in avoiding any obligation to bargain with it."

But (page 563) "The *Fansteel* and the *Sands*²⁹ decisions are not, of course, the final chapter. After the *Carter Coal*³⁰ case came *Jones & Laughlin*³¹ Meanwhile it must be admitted that the process of amending the act by the addition of a prohibition of 'interference and coercion from any source' is more expeditious through the bench than through Congress." (Granted that the court went astray in these cases, how do they concern interference from any source?)

Though what Mr. Rosenfarb says about the discretion of the board in issuing complaints (page 615) is now strengthened by the *Rochester Telephone Co.* case,³² even that repudiation of the "negative order" doctrine does not seem to me, in view of the extremely *permissive* language of the act,³³ likely to lead to the result that he foresees, namely, that the courts may *require* the board to issue a complaint in certain situations. This language of the act is not mentioned by Mr. Rosenfarb in his discussion of the indirect reviewability,³⁴ at the instance of unions, of the board's certifications of representation. He maintains (page 621) that a union which has been the loser in a representation case, may obtain court review as to the law of the unit issue or of the agent issue by (1) making demand on the employer to bargain (which he will presumably refuse in view of the contrary certification), then (2) filing an unfair labor practice charge grounded on such refusal (on which the board will presumably refuse to act in view of its contrary certification), and then (3) bringing a court action to compel the board to issue a complaint on this charge. "A review of the board's refusal to issue a complaint would lie in this case," he claims (page 622), "because it would be predicated upon a complete record in the representation case and hence would be analogous to the review of an order made in a complaint case after a hearing."³⁵ But a refusal to issue a complaint seems to me a bird of quite another feather than a refusal to grant the relief sought in the course of a complaint case, and a bird that is not "a

²⁹ *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

³⁰ *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

³¹ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

³² *Rochester Telephone Corp. v. U.S.*, 307 U.S. 125 (1939).

³³ National Labor Relations Act § 10(a) "The board is empowered, as hereinafter provided, to prevent any person from engaging in an unfair labor practice . . . (b) Whenever it is charged that any person has engaged in or is engaging in any unfair labor practice, the board . . . shall have power to issue . . . a complaint. . . ."

³⁴ That there is no direct review under the act, the Supreme Court has since held, as Mr. Rosenfarb expected. *AFL v. NLRB*, 308 U.S. 401 (1940). But note the intimation of the last paragraph of this opinion. Suit pursuant to it is pending. 6 Lab. Rel. Rep. 519 (1940); 7 Lab. Rel. Rep. 48 (1940).

³⁵ Review of an order of dismissal after a hearing seems within the contemplation of § 10(f). Cf. *Brown Paper Mill Co. v. NLRB*, 108 F. (2d) 867, 872 (C.C.A. 5th 1940).

final order" within section 10(f) but only a refusal to exercise "power" the exercise or nonexercise of which, under section 10(b), is within the legally unfettered discretion of the board.

Anent Justice Stone's opinion for the majority in the *Columbian Enameling* case,³⁶ which contained "the oft-repeated maxim that substantial evidence 'means such evidence as a reasonable mind might accept as adequate to support a conclusion' and then proceeded to reverse the board's order," Mr. Rosenfarb asks (page 604): "Are we to conclude that five justices of the Supreme Court would care to contend that the three members of the board, three members of the circuit court of appeals who sustained the board on that point, and Justices Reed and Black who dissented are not of 'reasonable mind'? Why, then, state so-called rules which prove meaningless upon analysis?" But Mr. Rosenfarb's rhetorical question is unfair. For in the first place if the question before the ten judges in the two courts is whether the board was of "reasonable mind," the five who say "no" are by no means asserting that their judicial colleagues who say "yes" are not of "reasonable mind"; they are only differing with them in their appraisal of the reasonable-mindedness of the board. And secondly, to deny that "a reasonable mind might accept" a conclusion that the board has reached certainly does not mean that the board is composed of irrational or unreasonable people, but only that a mind that is reasonable in this particular operation could not reach the board's conclusion. In short, the majority of the Supreme Court, differing with, but not disparaging the reason of, their brothers in adjudication, deemed the mental operation of the board in this particular case unreasonable. Why, then, does Mr. Rosenfarb give this ugly twist of the judicial lion's tail? Probably because, in his votarial view, the board can do no wrong. For him that is almost the alpha and the omega of the national labor policy.

WILLIAM GORHAM RICE, JR.*

The Judicial Power of the United States. By Roy J. Harris. University, La.: Louisiana State University Press, 1940. Pp. viii, 238. \$2.50.

This volume is the result of the study of many cases which construe the judicial power of the United States as set down in Article III of the Constitution. For the most part those cases were decided by the Supreme Court upon appeal from lower federal courts. A few cases from state courts are cited. About one hundred and thirty-five cases are discussed in the text. In his preface the author states that the book represents "an attempt to depict the phantasmagoria produced by the blending and at times contradictory elements of the judicial power of the United States." Mr. Harris divides the work into four chapters under the following titles: External Limits of the Judicial Power, Power of Congress to Regulate Jurisdiction, Incidental or Implied Power of Federal Courts, and Legislative Courts.

At the outset of his discussion of the external limits of the judicial power, the author states that "the courts have achieved a degree of independence from statutory regulation and control that exists in no other country." This is shown to be due to constitutional limitations, which, by judicial interpretation, not only forbid Congress to vest in the courts any functions which are not strictly judicial in their nature but also deny

³⁶ NLRB v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939).

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