BOOK REVIEWS

Labor and the Law. By Charles O. Gregory. New York: W. W. Norton & Co.. Inc., 1946. Pp. 467. $5.00.

Thoughtful citizens have long been concerned with the inadequacy of our present federal labor laws in coping with the recurrent industrial crises which have cast a shadow upon the prospect of successful reconversion. Before this concern can be translated into any truly constructive changes by congressional action, however, a much more widespread understanding of existing law and its implications is necessary. For example, during the debates in the 79th Congress on the Case bill, the Ball-Burton-Hatch bill, and the President's proposals, it was not unusual to find ordinarily well informed Senators and Representatives defending the Wagner Act and the Norris-La Guardia Act in the same breath—apparently being unaware that these two laws represent different philosophies with respect to labor problems and are quite inconsistent in purpose.

The publication of Mr. Gregory's scholarly account of the development of labor law and the problems which today call for legislative and judicial solution should do much to shape a more enlightened body of opinion. Despite its arresting title, the layman as well as the lawyer will find the book lucid and readable.

The book is also distinctive in another respect. Mr. Gregory, after serving for a year with the government as Solicitor for the Department of Labor, returned to the University of Chicago to teach law in 1937. During the emergency period, he devoted a large part of his time to serving on panels of the War Labor Board and acting as an arbitrator pursuant to the designation of that agency in various Middle Western industries. Unlike so many of the men who have had extensive experience in the field of labor arbitration, however, Mr. Gregory has no qualms about speaking his mind. And contrary to the tradition established by his brethren, he takes the position today that there is a real need for reform in the field of labor law. It was unfortunate that he was not called as a witness before the Senate Committee on Education and Labor when a number of fair-minded Senators were earnestly striving to devise new legislation which would meet some of the problems then plaguing the start of the reconversion program, only to be told by the putative experts that all that was needed was more mediation and more good will.

The early chapters of the book trace the development of American law affecting trade union organizations—a period of repression, a period of limited tolerance, a period of laissez faire with the passage of the various anti-injunction acts, and a period (beginning with the passage of the Wagner Act) of affirmative encouragement to concerted employee activity.

The most interesting part of the book, however, is Mr. Gregory's analysis of the overextension of these policies by the courts and Congress and his proposals for what should be done about it. A large part of the difficulty, the author indicates, stems from what he regards the unrealistic notion of the Supreme Court in the *Thornhill* case[1]

[1] Thornhill v. Alabama, 310 U.S. 88 (1940).

which held that peaceful picketing was a facet of free speech and therefore protected by the First Amendment. Although a majority of the Court, including some of the justices who joined in this opinion, have since narrowed the rule, he feels that the effects of this doctrine are still being felt because the practical result has been to deprive state legislatures and possibly Congress of power to deal with certain kinds of disputes. This original error he regards as compounded by the limited construction of the Sherman and Clayton Acts given by the Supreme Court in the *Hutcheson* case.[2] As he points out, a statute regarded as procedural by its proponents—the federal anti-injunction act—was treated in this case as substantive legislation repealing by implication the application of the anti-trust laws to most phases of union activity. Out of this doctrine developed such incongruous situations as the one which the Court considered in *Hunt v. Crumboch*[3] where a trade union, by refusing to let any of its members work for an employer against whom it had a grudge, effectively drove him out of business. Faced with the relentless logic of its earlier decisions, the Court held that this conduct of the union was immune from the law.

The line of decisions in the secondary boycott cases, he believes, has failed to reconcile the inherent conflict between the Wagner and Norris-La Guardia acts. Prior to the passage of the latter statute, the Supreme Court in the *Danbury Hatters*[4] and *Duplex*[5] cases had upheld injunctions against boycotts of unions directed not against their own employers but against the employers of other workers not affiliated with the moving union. Mr. Justice Brandeis eloquently dissented in both cases, arguing with great persuasiveness that concerted activity of this sort was necessary for workmen in order to preserve their standards against competition by nonunion employees. The enactment of the anti-injunction act made his views the law of the land so far as the federal courts were concerned. Three years later, however, Congress not only made it an unfair labor practice for an employer to bargain collectively with any other union than the one desired by a majority of his workers, but also made closed-shop agreements (as well as such variations of the closed shop as maintenance of membership) illegal unless the signatory union represented a majority of the employees when the contract was signed. Here was a clear instance of a supervening legislative policy with respect to secondary boycotts by unions insisting upon recognition or closed shop agreements to cover employees whom they did not represent. Nevertheless, even where the secondary boycott was undertaken for the direct purpose of compelling an employer to refuse to deal with a union certified as the majority representative by the National Labor Relations Board, the lower federal courts have refused to grant any relief. As a result, law-abiding employers are frequently in the unhappy dilemma of having to run the risk of being cited for violations of the National Labor Relations Act or of seeing their markets vanish because of boycotts in the transportation companies or retail outlets.

This paradoxical condition, however, should not be charged against the Supreme Court. Congress should have been more specific when it passed the National Labor Relations Act. Moreover, while such lower court holdings are perhaps inevitable in the cases where the boycotting is confined to peaceful picketing from the principle that such picketing is protected by the First Amendment, a trial judge might distinguish

[2] United States v. Hutcheson, 312 U.S. 219 (1941).

[3] 325 U.S. 821 (1945).

[4] Loewe v. Lawlor, 208 U.S. 274 (1908).

[5] Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

these cases from boycotts where the picketing is accompanied by a concerted refusal to handle goods or transport them in interstate commerce because the original producer is dealing with a rival union designated by the majority of his own employees. In the absence of any square holding on this precise question by the highest tribunal, I have never felt that the lower federal courts were compelled to treat such tactics as beyond their jurisdiction to redress. The supervening legislative theory upon which the *Hutcheson* case was rested might be taken as justifying similar technique to effectuate the policies of the Wagner Act when in collision with the language of the anti-injunction provisions. In certain state jurisdictions where a "little" Norris-La Guardia Act is in effect the courts have managed to construe their statutes so as not to deny judicial relief.[6] It is Mr. Gregory's recommendation that the Norris-La Guardia Act be amended by Congress so that appropriate relief may be given by the courts in these situations. He also favors similar amendments to enable the courts to remedy the kind of revengeful activity which gave rise to the *Hunt* case,[7] and would again restore the application of the anti-trust laws to union combinations undertaken to prevent the marketing of outside commodities in a particular area. Under certain Supreme Court cases, the anti-trust laws are regarded as coming into force in such instances only where the unions make an overt agreement with employers to bring about such embargoes. Yet even without employer collusion, certain craft organizations which have "a monopoly of the skill can erect equally effective barriers to interstate commerce." In other words, the author seems to believe that experience has amply justified the provisions of the Senate amendments to the Case bill with regard to secondary boycotts.

In another chapter, Mr. Gregory deals with a problem which the Case legislation also attempted to handle—the enforcibility of collective agreements. The author believes that there should be a rather summary method of enforcing such contracts. His theory is that arbitrators rather than the courts are the proper tribunals to pass on the substantive questions of such disputes. He would, however, provide for enforcement of such awards in federal courts. Although Mr. Gregory does not expressly say so, he apparently regards the present Federal Arbitration Act as not being the cornerstone on which to develop such legislation. Such a point might profitably be explored, as the only decisions of the circuit courts of appeals which have considered the application of this statute to labor disputes have been in conflict.

The author is aware, of course, that his recommendations are not a panacea for all the major strikes. He points out the fallacy of compulsory arbitration for disputes in which there are neither collective agreements nor statutory provisions as guides. He objectively appraises the benefits which the labor unions have conferred on workers, regards unions as here to stay, but feels that the time has come when Congress should use its powers under the commerce clause to curb some of their monopolistic and anti-social excesses.

If his considered proposals have any defect, it is perhaps in the direction of not considering how the administrative processes of the National Labor Relations Board, rather than the courts, might be developed by Congress to meet some of these situations. In labor disputes time is always of the essence and procedures should be fair but expeditious. The Supreme Court, itself, has tended, by its recent decisions in the

[6] R. H. White v. Murphy, 310 Mass. 510, 38 N.E. 2d 685 (1942); Florsheim Shoe Store v. Retail Shoe Salesmen Union, 288 N.Y. 188, 42 N.E. 2d 480 (1942).

[7] Note 3 supra.

Hearst[8] and *Switchmen's*[9] cases to circumscribe its own powers of review over even the legal questions passed upon by the National Labor Relations Board and the Railway Mediation Board, so that these administrative agencies have the real formulation of labor legal policy.

Moreover, the role of the anti-trust laws in the labor field has been peripheral. If such legislation as Mr. Gregory seems to favor were adopted, it would permit the Department of Justice to carry out the kind of prosecutions which Mr. Thurman Arnold so vainly undertook. But it is doubtful that this would do more than curb some of the malpractices of several local craft unions, whereas our principal difficulties today stem from the highly centralized control vested in a few intransigent leaders in many of the big industrial organizations. Such a study of our basic laws as Mr. Gregory has made, however, is equally essential for the legislator and government official who has to meet this challenge.

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Arbitration of Labor Disputes. By Updegraff and McCoy. Chicago: Commerce Clearing House, Inc., 1946. Pp. xi, 291. $3.75.

This book, according to the authors, is designed to accomplish two objectives: (1) to serve as a useful reference work for lawyers; and (2) to be a not-too-technical guide for laymen who are called upon to conduct arbitrations without benefit of counsel. In my opinion, it achieves neither of these aims. The book is not sufficiently comprehensive to satisfy professional needs. Similarly, it is not spelled out enough to constitute a safe guide to the uninitiated.

Like too many of the current crop of legal and quasi-legal books, the present work is obviously and unjustifiably padded. While it has 291 pages, there are, in fact, only 154 pages of text. The balance of the volume consists of an appendix containing a few forms and a number of specimen arbitration awards. Although forms and illustrative material are to be welcomed, those in the book are not adequate to be really useful, just as the text is not sufficiently extensive.

The sketchy character of the development of the subject is illustrated by a section entitled "Historical Backgrounds." Here the authors in four pages attempt to trace the history of arbitrations. They go back to the beginning of law, refer in the next paragraph to Roman jurisprudence, hasten to Bracton's *Note Book* and Coke, manage in the process to interpolate several Latin expressions, and conclude with modern times. In the course of this blitzkrieg, they omit any reference here or elsewhere in the book to the long and honorable history of labor arbitration in the garment industries. How any book can deal with labor arbitrations without even a passing reference to the pragmatic experience in these trades is unintelligible to me.

In their treatment of labor arbitration in modern times the authors seem too much influenced by their experience as arbitrators for the War Labor Board. Arbitration of labor disputes did not commence with the creation of the War Labor Board and will not end with the liquidation of that agency. Moreover, during the war, labor arbitra-

[8] NLRB v. Hearst Publications, 322 U.S. 111 (1944).

[9] Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943).

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