

of expenditures in excess of reported income tends to establish one element of the crime, but in this case does not logically fortify the truth of the admission); evidence which tends to fortify the truth of the admission, but which need not touch any element of the corpus delicti (evidence of large expenditures during the prosecution period also fails logically to fortify the truth of the defendant's admission that he had no prior accumulated funds). Evidence insufficient to establish the whole of the corpus delicti cannot be used to corroborate an admission of one element of the corpus delicti when that evidence does not fortify the truth of the admission. Of course, this objection to the adequacy of corroboration can be made only if elements of the method of proof are treated as elements of the corpus delicti.

In holding that the requirement of corroboration extends to extrajudicial admissions, the Court was probably motivated by a desire to preserve the effectiveness of the net-worth method for proving tax evasion. Corroboration is a firmly rooted and psychologically appealing requirement in the criminal law, and perhaps the Court cannot be criticized for straining to find that the corpus delicti was sufficiently established by independent evidence of an equivocal sort. It might be wished that the Court had seen fit to wipe the slate clean by abolishing the requirement of corroboration, for it seems there would be few cases in which the prosecution could not meet the requirement of corroboration by the standards the Court accepts. Instead it will remain a superfluous technicality which will furnish grounds for allegations of error. What the Court gives with one hand, it seems to take away with the other.

SOLVING AN INDUSTRIAL RELATIONS DISPUTE THE ATTITUDE OF THE NLRB AND REVIEWING COURTS

On March 26, 1952, Eleanor Steib, a member of the Communication Workers of America, CIO, sent a letter of resignation to her union and notified her employer, the New Jersey Bell Telephone Company, to cancel her union dues deduction authorization. These actions were taken by Miss Steib while a collective bargaining agreement containing a "maintenance of membership" clause was in effect.¹ The agreement was to expire on April 5, 1952. Although Miss Steib did not pay her dues for any part of April, the union did not insist upon her discharge until October 7, 1952, explaining that the delay was ne-

¹ A maintenance of membership clause requires that employees who are members of a union at the beginning of a collective bargaining agreement or those who join during the life of the agreement must remain members until the expiration of the agreement. The provision affords less union security than a union shop clause by which an employee must join the union sometime after his employment. The usual maintenance of membership clause provides an escape period at the end or beginning of an agreement during which an employee may withdraw his membership without forfeiting his job.

cessitated by a "grace period" in its constitution.² By October, however, a new agreement was in force which contained a maintenance of membership provision substantially similar to the one contained in the prior agreement.³ The second agreement had been signed on April 14, 1952, leaving a nine-day interim between agreements.

In compliance with the union demand the company discharged Miss Steib. Subsequently she complained to the National Labor Relations Board that her discharge constituted an unfair labor practice.⁴ The Board issued a cease-and-desist order requiring reinstatement,⁵ and a divided court enforced the order.⁶ Despite the union contention that membership was terminated only by expulsion, promotion, or transfer, the court believed Miss Steib had effectively resigned and that because of the "grace period" she could not have been discharged before the expiration of the older agreement. The court also stated that because of the interim period, Miss Steib was not a member of the union during the new agreement and therefore not subject to its union security clause. Thus the court found the union by "the peculiar facts of this case . . . in a dilemma" from which "we cannot extricate it, without adding to the only agreement emerging from the bargaining table."⁷

The case involves an unusual fact situation, but it indicates the present attitude taken by the Board and the reviewing courts in solving industrial relations problems. This comment will examine the consequences of such an approach and will suggest other possible approaches.

It was clear to the court that Miss Steib's resignation was not forbidden by the union constitution. The union, however, had argued that it alone should prescribe and interpret its rules and that its interpretation did not permit

² "Article VI—DUES, FINES AND ASSESSMENTS. Section 5—Non-Payment of Dues, Fines and Assessments. A member in default, without good cause, in the payment of any installment of dues or any fine or assessment for sixty (60) days from the date such amount becomes due, shall be automatically suspended from the rights of membership and, if the default continues without good cause for an additional thirty (30) days, after notice in writing by the Local Secretary, shall be automatically expelled from the Union. 'Good Cause' shall be that which the governing body of the Local determines to be good cause."

³ "Article XI—MAINTENANCE OF UNION MEMBERSHIP. Section 1. Employees who are members of the Union as of the effective date of this agreement shall, as a condition of employment, maintain membership in the Union until termination of this agreement or until promoted or transferred out of the bargaining unit.

"Section 2. Employees who are members of the Union on or after the 30th day following the beginning of their employment or the effective date of this agreement, whichever is the later, shall, as a condition of continued employment, maintain membership in the Union until the termination of this agreement or until promoted or transferred out of the bargaining unit."

⁴ The specific allegations of the complaint are in *Communication Workers of America, CIO v. NLRB*, 215 F. 2d 835, 837 (C.A. 2d, 1954).

⁵ *New Jersey Bell Telephone Co.*, 106 N.L.R.B. 1322 (1953).

⁶ 215 F. 2d 835 (C.A. 2d, 1954).

⁷ *Ibid.*, at 839-40.

resignations. In a footnote to its opinion, the court remarks, "It is interesting to note that the Union itself recognized a right to resign. In a letter to Miss Steib, the Union stated the following: 'Resignations can only be accepted when they comply with the terms of our past and present contract or are tendered when no contract exists.'"⁸ But rather than declaring that this letter demonstrated that the union did in fact permit resignations, the court apparently accepts the union's later contention and proceeds unnecessarily to discuss the review to be given union rules. Thus the entire question of the extent of regulation of the internal affairs of unions was considered.

Much writing has been directed toward defining the extent to which a union shall remain autonomous in its disciplinary actions.⁹ In the federal area, Section 8(b)(2) of the National Labor Relations Act¹⁰ limits the right of a union to ask for discharges to severances due to failure of a member in meeting his financial obligations of dues or initiation fees. The limitations were the result of much concern over rather arbitrary dismissals for "disloyalty," "dissension" or "dishonorable conduct."¹¹ It is submitted, however, that the freedom of unions to regulate their internal affairs, like other freedoms, is not to be unnecessarily invaded.¹² An example of the dangers of intrusion is revealed in a statement by the union counsel after the court's decision:

⁸ *Ibid.*, at 837.

⁹ E.g., Forkosch, *Internal Affairs of Unions: Government Control or Self-Regulation?*, 18 U. of Chi. L. Rev. 729 (1951); Summers, *Disciplinary Powers of Unions*, 3 *Indust. & Lab. Rel. Rev.* 483 (1950); *The Power of Trade Unions To Discipline Their Members*, 96 U. of Pa. L. Rev. 537 (1948); *Procedural "Due Process" in Union Disciplinary Proceedings*, 57 *Yale L. J.* 1302 (1948).

¹⁰ 61 Stat. 141 (1947), 29 U.S.C.A. § 158(b)(2) (Supp., 1950).

¹¹ In a way, the democracy of the typical union constitution is the democracy of the Soviet constitution of 1936. Both provide for a rigorous solidarity in the face of "capitalistic encirclement." And both are applied in the double-edged atmosphere of a one-party situation—the International Typographical Union is one of the rare two-party unions in this country. The analogy is not peculiar to unions, however—e.g., the "crime" of "uncommercial conduct" in the commodities exchange field. What seems peculiar to unions is the extent of government regulation of their affairs, while at the same time, little attempt at a contract interpretation peculiar to the needs of the industrial community is made by the enforcing courts.

¹² For those who like their problems placed in the "larger setting," it is suggested that the issues to be discussed are part of the problem of the freedom to be given voluntary associations. John Stuart Mill, in his essay *On Liberty*, regarded as the essential liberties, liberty of conscience, liberty of tastes and pursuits, and liberty of combination among individuals. Little attention was directed to the latter by Mill—but now the problem of association is the typical and thereby important problem of modern liberty: "The central issue in labor law today is probably whether there is not too much of it—partly in terms of how much law is necessary to achieve certain ends, but partly, too, in terms of whether democratic law works at all when it crosses certain lines drawn sometimes by individuals in their demand for freedom and sometimes by private groups in their exertion of a power not fundamentally different from that of government." Wirtz, *The New National Labor Relations Board; Herein of "Employer Persuasion,"* 49 *Nw. U. L. Rev.* 594, 618 (1954).

It may also be noted that the result of the majority's decision is to cause unions to refuse to grant any "grace periods" to any members who may be in default in the payment of dues. This undoubtedly will work hardships upon individual members and will also be used to cause opposition to the "harshness" of labor unions in demanding immediate payment of dues.¹³

It is submitted that the court should have resolved the resignation issue by the union's own admission of the right to resign.¹⁴ To deserve autonomy, unions should draft their constitutions, by-laws, and rules clearly so as to erase all suspicion of arbitrariness.¹⁵ In this case such drafting was not evidenced; but the court does not confine its opinion to such matters. It declares that the "proviso [to 8(b)(1)(A)] only states that the union shall be free to prescribe its own rules with respect to membership, it does not prohibit the Board and the courts from interpreting those rules"¹⁶—relying upon a case not in point.¹⁷ This seems unnecessary dictum dangerous to the autonomy of any union.

A constant motive in the majority opinion is the fear of reading too much into the collective bargaining agreement, of adding to what was obtained at the bargaining table. One might expect that the court would look to the intent of the parties to determine what was to govern during the interstitial period. But the majority merely observes that "the parties were without any agreement."¹⁸ The dissent, however, takes issue:

In the setting of the labor relations at this plant, the factor of the technically new contract, even with the few days' intervening interval, was not of realistic

¹³ Lab. Rel. Rep., 34 Analysis 92. A more surprising actual result is also revealed by Mayer: "Anybody who belongs to a union which has a union-maintenance clause could, by using the court-approved gimmick of resignation, block the union from thereafter insisting upon discharge for failure to pay dues. The New Jersey Bell Telephone Company has already taken the position that despite a union-maintenance clause, it will not discharge employees who fail to pay dues if those employees had already resigned from the union." Daily Labor Reporter, No. 189: A-2. This position is hardly tenable; it is clear from the court's opinion that after the time allowed by the "grace period" has expired, the union may insist upon a discharge if the same collective bargaining agreement is in effect.

¹⁴ The court might also have reasoned that the union could have had Miss Steib discharged before April 5, since the "grace period" may be said to apply only to a "member in default" (see note 2 supra). That is, upon resignation one is no longer a "member"—default or otherwise; the clause concerns delinquent members, not those who are no longer members.

¹⁵ For a full list of suggestions as to what unions should do to preserve their autonomy by placing themselves beyond reproach, consult Forkosch, *Internal Affairs of Unions: Government Control or Self-Regulation?*, 18 U. of Chi. L. Rev. 729, 744-45 (1951).

¹⁶ 215 F. 2d 835, 838 (C.A. 2d, 1954).

¹⁷ *NLRB v. National Seal Corp.*, 127 F. 2d 776 (C.A. 2d, 1942), where, unlike the *Communication Workers* case, the issue was not the review of union interpretation of union rules but whether or not the company could successfully argue that a default in dues because of a delinquency provision in the union constitution meant that those members in default were no longer represented by the union.

¹⁸ 215 F. 2d 835, 836 (C.A. 2d, 1954).

significance, since the parties intended to and did go on just as before, so far as this aspect of their relationship is concerned.¹⁹

That the contract was intended to operate until a new agreement was negotiated is emphasized by the fact that no strike occurred during the interim despite the usual union position of "no contract, no work."

An example of a more "realistic" approach is the arbitrator's decision in *Monogram Productions, Inc.*,²⁰ where the arbitrator decided that "as a matter of practice" the parties continued to observe most of the important provisions of an expired agreement during a contract negotiation period.²¹ In any event, instead of examining the behavior of the parties during the interstitial period to determine their intent, the *Communication Workers* court is worried lest it afford the union more security than it had obtained at the bargaining table by in effect extending the old agreement. The worry seems perhaps unnecessary since "[a] 1954 BNA survey of representative contracts showed that 82 percent provided for automatic renewal"²²—suggesting that a renewal provision would meet with little opposition at the bargaining table.

To the union's argument that discharge was justified under the first agreement the court replies that "the company's obligation to discharge and Miss Steib's liability to be discharged for non-maintenance of union membership terminated with the 1950 agreement" so that after April 5, a discharge by the company would be an unfair labor practice. The court explains that they are not saying that "the remedy for a breach of contract may not survive the contract."²³ Thus, the question of whether or not a right to remedy accrued before the termination of the first agreement is posed. Suppose a dispute arises under a collective bargaining agreement as to an employee's wage rate under a prior agreement which included grievance machinery—the issue being the classification of the worker's job under the former agreement. This court

¹⁹ *Ibid.*, at 840. The reluctance to examine intent may arise from the court's apparent hesitation to view Miss Steib as "in effect a party—a co-obligor—to the agreement," for the proposition is accepted only "arguendo." That is to say, because of an unwillingness to consider Miss Steib a "party" there is reluctance to extend any agreement to which she may be a party. For the status of the individual employee to sue on a collective bargaining agreement, consult *The Ability of an Individual Employee To Sue His Employer on a Collective Bargaining Agreement*, 3 *Buffalo L. Rev.* 270 (1954). Consult also 67 *Harv. L. Rev.* 1430 (1954), noting *Ass'n of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 210 F. 2d 623 (C.A. 3d, 1954), for criticism of a case deciding that a labor organization could not bring action for declaratory judgment of the salaries owed individual employees because of an alleged violation of the collective bargaining agreement.

²⁰ 13 *Lab. Arb. Reports* 782 (1949).

²¹ The arbitrator also rejected a statute of frauds argument by which it was claimed that the agreement to be valid must have been in writing: "contractual relationships in the labor field and the commercial field differ markedly, and it is not valid to apply the provisions of the Civil Code to the former field in any mechanical or automatic manner." *Ibid.*, at 784.

²² *Lab. Rel. Rep.*, L R X 94.

²³ 215 F. 2d 835, 839 (C.A. 2d, 1954).

might argue by analogy to the present case that the employer's obligation to submit the issue to the grievance machinery had terminated.

This result seems illogical. Reference to the tools of Hohfeldian analysis suggests that the *Communication Workers* court should have reached a different conclusion, assuming, with the court, that Miss Steib had effectively resigned.²⁴ Because of the maintenance of membership clause,²⁵ there was a *duty* by Miss Steib to the union to maintain her membership and a correlative *right* by the union to the benefit of her membership. Also, because of the maintenance of membership clause, the union had a *conditional right* against the company to cause Miss Steib's dismissal upon her failure to maintain her membership (the company having a *conditional duty*). As between Miss Steib and the company there was a *power* by the latter to discharge and, of course, a *liability* on the former. Therefore, when Miss Steib resigned, she failed in her *duty*, giving the union an *unconditional right* at that time to demand her discharge—the "grace period" provision²⁶ involving merely a passage of time, not limiting the *right*.

Thus, the dissenting view of Judge Clark seems well founded: "But I do think the Board holding, reiterated here, that termination of the contract wipes out previous defaults is definitely erroneous and quite unfortunate as a future precedent."²⁷ This view becomes more apparent upon realizing the inevitability of lags in any large concern.²⁸ In *International Harvester Co.*,²⁹ the arbitrator expressly rejected the "familiar rule of contract interpretation that all obligations under a contract are discharged by the termination of the contract unless the contract specifically provides otherwise."³⁰ Here, during a contract which had followed a short period without agreement, a worker established an average piece-work earning rate which by terms of a prior contract was to be retroactive. The Board has come close to the arbitrator's position in this case. In *National Lead Company*,³¹ discharge was permitted because of failure to pay dues under a prior agreement since the second contract followed the first with no hiatus:

²⁴ Consult besides Hohfeld's own articles: Corbin, *Legal Analysis and Terminology*, 29 *Yale L. J.* 163 (1919); Corbin, *Conditions in the Law of Contracts*, 28 *Yale L. J.* 739 (1919).

²⁵ See note 3 *supra*.

²⁶ See note 2 *supra*.

²⁷ 215 F. 2d 835, 841 (C.A. 2d, 1954).

²⁸ An example of the recognition given delays in the business community is the latitude provided carriers in complying with a seller's stop-delivery order by section 13 of the Uniform Bills of Lading Act and by section 2-705(3)(a) of the Uniform Commercial Code. Consult Uniform Commercial Code, section 1-201(27) for a wider scope of this principle.

²⁹ 16 *Lab. Arb. Reports* 775 (1951).

³⁰ *Ibid.*, at 778.

³¹ 106 *N.L.R.B.* 545 (1953).

To find that these employees are relieved from the payment of dues owing at the conclusion of the first in a series of uninterrupted contract terms would, we believe, place undue emphasis upon the form of the contractual arrangement.³²

It is difficult to see how the *Communication Workers* court distinguished this case if its decision really rests on the idea that the obligation to discharge terminated with the original agreement; for how could even an immediately succeeding contract revive the obligation?³³

Again in *Monsanto Chemical Co.*,³⁴ a board of arbitration rejected an employee's contention that he had resigned during an escape period, finding that the new agreement had retroactive application:

[T]he "collective bargaining" agreement, while relatively new in our economy and in our law, has many, if not most, of the characteristics of ordinary contracts; and it is to the interests of Management, Labor and the Public that such agreements be given the stability that arises from applying to them many, and indeed most, of the "rules" applicable to ordinary contracts. On the other hand, in the "emerging jurisprudence of labor relations," it is equally important that the "rules" be modified and adapted to the essential differences between "collective bargaining" agreements and other contracts. This modification and adaptation of the "rules" to the essential nature of the particular transaction involved is not novel; it is not "extra-legal"; it is, indeed, quite in keeping with what has been the development of what we glibly term the law of "ordinary" contracts. The law courts, in most instances without the aid of express statutes, have adopted for contracts of insurance, suretyship contracts, and many more, special rules that recognize the particular social function of such contracts. So here.

It has been repeatedly recognized in the decisions of arbitrators, who in the main are molding the "emerging jurisprudence of labor relations," and in some administrative and judicial decisions, that there is a "continuing contractual" relation between employer and union. True, this contractual relation contains terms which are changed or modified through periodic, frequently annual, "negotiations"; and it is true that the contract relation is periodically, frequently annually, re-stated in a new document which bears new "terminal" dates. But it is also true that, in the main, the basic terms of the contract between the parties remain the same from year to year and that the periodic adjustments are concerned principally with direct wage rates and with "fringe" wage rates resulting from paid vacations, additional paid holidays, "call-in" pay, etc. Terms relating to "union recognition," the processing of grievances, arbitration, and the like, remain the same from year to year, without even more than slight verbal change.³⁵

This position was later rejected by the Board.³⁶

In the *Communication Workers* case the court pursued a policy of strict

³² *Ibid.*, at 548.

³³ Consider also the dilemma a union faces: it must either act at once and disclose its weakness by discharging before an agreement expires and negotiations begin, or it must waive action upon its delinquent members.

³⁴ 12 Lab. Arb. Reports 1175 (1949).

³⁵ *Ibid.*, at 1182.

³⁶ *Monsanto Chemical Co.*, 97 N.L.R.B. 517 (1951). In *Phelps Dodge Copper Products Corp.*, 63 N.L.R.B. 686 (1945), discharge was not permitted although all routine procedures leading to dismissal had been taken.

contract construction to avoid "adding" to the collective bargaining agreement, the bargaining table and not the courts being the proper place for "addition." But less stringent approaches are possible. Such approaches often result from a conception of "industrial jurisprudence":

Collective bargaining is primarily an institution of industrial self-government. Its constitution is the National Labor Relations Act, the Railway Labor Act and similar basic statutes and court decisions. Its statutory law is written in collective agreements during the annual bargaining conferences between employers and the representatives of their employees. In the grievance and arbitration procedure are found its administrative and judicial tribunals.³⁷

And, therefore, "The determination of disputes arising during this process is more a matter of creating new law than of construing the provisions of a tightly drawn document."³⁸ The "industrial jurisprudence" position is overstated, however, if much emphasis is given "new law." The creation of "new law" is not the proper function of a court presented with a dispute arising from a collective bargaining agreement. Contracts are made for serious purposes, and the Board and courts must in this area respect a statute which has many definite policy preferences. Thus, the real contribution of "industrial jurisprudence" is not a "liberal" contract construction policy as opposed to a "strict" contract construction policy, but rather an "intelligent" contract construction policy.

The differences between the strict contract construction approach and the "industrial jurisprudence" approach can be seen in several cases. In *Idarado Mining Co.*,³⁹ a member of the Mine Production Workers voluntarily left his employment as an electrician. A year later, within the same agreement, he was hired as watchman by the same employer. The Board decided that continuation in the union was unnecessary since the maintenance of membership clause had not expressly provided for this situation. A dissenting member of the Board argued:

But the fact, which I feel that my colleagues have overlooked, is that employees are also individuals. As such individuals when re-employed by the respondent, their obligations fairly assumed cannot be so lightly disregarded. Otherwise the union security clause would become inoperative as to every employee, otherwise bound, who resigned or was discharged, even if for only a day, and was subsequently rehired.⁴⁰

³⁷ Cox, *Cases on Labor Law* vii (1948).

³⁸ Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 *Harv. L. Rev.* 274, 305 (1948).

³⁹ 77 N.L.R.B. 392 (1948). The clause provided "All employees who on October 6, 1944 are members of the Unions in good standing in accordance with their respective constitutions and by-laws, and all employees who become members after that date shall, as a condition of employment, maintain their membership in the Unions in good standing for the duration of this agreement."

⁴⁰ *Ibid.*, at 395.

Here is a clear example of the conflicting policies of strict contract construction and "industrial jurisprudence." The Board has not always favored the former policy, however. In *Regal Shoe Co.*,⁴¹ a union security provision illegal on its face (which usually renders a contract ineffective as a bar to an election) did bar a representation election where external evidence demonstrated the total ineffectiveness of the illegal clause. And in *Firestone Tire & Rubber Co.*,⁴² an employee whose dues were one month in arrears lost his seniority in accord with a union by-law, but not his job:

True, the Union demanded a *lesser* discrimination than the union-security clause entitled it to demand: it actually requested only that Rhodus be dropped to the bottom of the seniority list. But this leniency on the part of the Union cannot reasonably be said to have detracted from the otherwise meritable position of either the Union or Employer; nor should it enhance Rhodus' claim to protection.⁴³

This position was abandoned, however, in *Krambo Food Stores, Inc.*,⁴⁴ where a sharply divided Board overruled the *Firestone* case, holding that the withholding of vacation benefits was "over and above the threat of discharge."⁴⁵

The usual approach by the Board seems to favor the policy of strict contract construction. This may be a matter of training and background;⁴⁶ reference has often been made to the dominance of legalism in the agency.⁴⁷ It should be understood, however, that the use of "legalism" by writers to characterize the fault they find in the Board's present approach is not really appropriate. A court properly decides disputes by recourse not to "law"—but to the sound legal principles of the law. If blameworthy decisions are rendered by courts, it is those courts and not the "law" that should merit criticism. The Board's approach in its differences with the arbitration award in the *Montanto* case can be described as "legalistic" only if the word means a misuse of legal principles and not the application of legal principles. Of course, any narrowness in approach may also be mixed and perhaps guided by the political persuasion of the Board member.⁴⁸ The Board's approach has also been said to result from an unawareness by the members that policy decisions are neces-

⁴¹ 106 N.L.R.B. 1078 (1953). ⁴² 93 N.L.R.B. 981 (1951). ⁴³ *Ibid.*, at 982.

⁴⁴ 106 N.L.R.B. 870 (1953). ⁴⁵ *Ibid.*, at 878.

⁴⁶ For the qualifications of the most recently nominated Board member, consult 35 Lab. Rel. Rep. 355.

⁴⁷ Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389, 429 (1950): "The refusal of Congress to appropriate funds for experts in industrial relations handicaps the NLRB in solving the questions of labor policy for which it is already responsible"; Humphrey, The Government at the Bargaining Table, 6 Syracuse L. Rev. 129, 141 (1954) ("technical and legalistic approach"). Board member Rodgers stated in a recent address at Duke University: "Indeed, this agency has by congressional mandate been confined to the relatively formal, or if you will, legalistic aspects of labor relations."

⁴⁸ For a reminder of the many recent major policy shifts of the Board, consult Lab. Rel. Rep., 34 Analysis 69. The Senate Labor Committee chairman had indicated that with consideration of Board Member Beeson's successor would come a review of recent NLRB policy changes. 35 Lab. Rel. Rep. 355. This review might have included not only a political review but a review of the problems noted in the text as well. But because of the

sary in the adjudication of labor disputes.⁴⁹ The argument is that the constant reiteration by the members in their public speeches of the belief that the Board need not and should not decide policy matters is distressingly unrealistic because the statute to be administered is but a guide, necessarily giving the Board discretion. Thus, the argument continues, the Board, by ignoring policy, meets problems case by case without the benefit of perspective (only rarely, for instance, are briefs *amicus curiae* solicited).⁵⁰ Another examination of the Board's activities sees the Board's approach as the consequence of a "reference to broader legal doctrines" which tend to "obscure the real questions."⁵¹

But to attribute the policy of strict construction to "legalism" in any sense of the word is, perhaps, to beg the question. We have noted a more "liberal" approach by arbitrators:

On the question of explicit criteria for decision, the fact that the arbitrator need not be a member of any craft connected with the formal legal institution is of peculiar importance. Who would think of arguing to a lay arbitrator in a commercial case the rules of formal law alone? Obviously he is as much if not more interested, and explicitly so, in the conflict of interest which exists, the practices which are normal, the allocation of risks which parties in the business normally make, and any factor which makes the particular case materially different from the normal.⁵²

But do we wish the NLRB members and the reviewing judges to be like arbitrators?⁵³ Arbitration, of course, has a possible weakness in the precedent value of its decisions. The question is not soon answered, moreover, since it is not clear what arbitrators are really like.⁵⁴ But if arbitrators are successfully

"mounting workloads" of the Board a successor was approved (as well as a general counsel) at a fifteen-minute session on February 25, 1955. 35 Lab. Rel. Rep. 385.

⁴⁹ Summers, Politics, Policy Making, and the NLRB, 6 Syracuse L. Rev. 93 (1954).

⁵⁰ "It is submitted that the adoption and extensive use of rule making procedures would substantially improve the policy developing functions of the Board. It would compel the Board to face more directly its policy problems, would provide more complete and pointed discussion, and would encourage the Board to make more articulate the rules and policies which it follows." *Ibid.*, at 106.

⁵¹ Wirtz, The New National Labor Relations Board; Herein of "Employer Persuasion," 49 Nw. U. L. Rev. 594, 613 (1954): "The new Board membership has, in its handling of these employer persuasion cases, been looking less intently than its predecessors at the original purpose of the particular law involved and more at general principles borrowed from other fields of the law and from wider areas of human experience. This kind of change in statutory administration results inevitably in a lessening of the statute's impact" (*ibid.*, at 615). A possible example is the application by the Board of general notions about voluntary associations to the dispute in the Communication Workers case.

⁵² Mentschikoff, The Significance of Arbitration—A Preliminary Inquiry, 17 Law & Contemp. Prob. 698, 701 (1952). But cf. The Arbitrator's Approach to Labor Contract Interpretation, 64 Harv. L. Rev. 1338 (1951).

⁵³ For an example of how the courts of a particular state feel about arbitration (a feeling narrowing the arbitrator's function in this instance), consult Judicial Innovations in the New York Arbitration Law, 21 U. of Chi. L. Rev. 148 (1953).

⁵⁴ Mentschikoff, *op. cit. supra* note 52, indicates a research program on this question. The solutions to other problems are also dependent upon such research—e.g., the defining

applying "industrial jurisprudence," as seems likely, the Board and courts could well follow the arbitrators in this respect. And it is suggested that one way the Board might achieve this result is to give more weight to the conclusions of its trial examiners, who may approximate arbitrators in "industrial jurisprudence."⁵⁵ (The trial examiner's report was rejected in the *Communication Workers* case.)

The National Labor Relations Board and the courts, however, need not wait for the complete answer to these problems before acting. This examination of the *Communication Workers* decision suggests the undesirability of the present approach (enhanced in the court of appeals by dubious fears of helping the union at the bargaining table) to the solution of one industrial relations problem.⁵⁶ The remarks concerning "industrial jurisprudence" could indicate a more meaningful approach in rapport with the needs of the industrial community.

of the limits to judicial exercise of equitable discretion in the enforcement of arbitration contracts.

⁵⁵ Trial examiners are selected by members of the Board from Civil Service registers and serve subject to Civil Service regulations and the Administrative Procedure Act. Field examiners are also important. Although they do not actually "arbitrate," the field examiners were responsible in 1953 for closing 5100 of 5800 unfair-labor-practice cases without the necessity of formal action. Eighteenth Annual Report, NLRB 99, Table 7 (1953). The present standard for the scope of judicial review of Board decisions and the weight to be accorded to trial examiners' reports is set forth in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

⁵⁶ And it bears repeating that if the Board and court had but applied the most "legal" of analyses—the Hohfeldian analysis—they would not have erred.

THE CONSTITUTIONALITY OF THE PATENT PROVISIONS OF THE 1954 ATOMIC ENERGY ACT

The Constitution provides that:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.¹

During the past half-century it has often been suggested that our patent law, founded on this provision of the Constitution, should include a compulsory licensing provision.² Since the expressed constitutional purpose is to promote the progress of science and the useful arts, it has been argued that compulsory licensing should be employed at least where patents have been suppressed or

¹ U.S. Const. Art. 1, § 8.

² The first bill of significance was the "Oldfield Revision," H.R. 23417, 62d Cong. 2d Sess. (1912). See Hearings before the Committee on Patents, 62d Cong. 2d Sess. (1913); subsequent hearings on other bills are listed in Wyss and Brainard, *Compulsory Licensing of Patents*, 6 Geo. Wash. L. Rev. 499, 500 (1938).