POLICY-MAKING BY THE NEW "QUASI-JUDICIAL" NLRB*

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IN 1947, when Congress amended the National Labor Relations Act by adopting the Taft-Hartley proposals, it established the independent office of General Counsel of the Board and to that office assigned many of the administrative and prosecuting functions which had previously been performed by the Board. The purpose of stripping the Board of these powers was, as the Report of the Conference Committee explained, to limit the Board "to the performance of quasi-judicial functions."¹ At the same time, Congress increased the membership of the Board from three to five. By March, 1954, as a result of resignations and expirations of Board members' terms of office, the Republican administration elected in 1952 had filled a majority of the seats with its own appointees. Since that time many changes in NLRB policy have been effectuated through the decisional process. It is the purpose of this paper to examine some of these changes and, through them, to evaluate the new Board's performance of its statutory function.

I

Evaluation of recent changes in NLRB policy begins with consideration of the nature of the policy-making role which Congress assigned to the Board. No one doubts that in exercising its quasi-judicial functions the Board possesses a latitude of policy-making discretion greater than that which is vested in the courts. We are told authoritatively that "The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."² And so, for example, the Board may put to work, in fashioning remedies "to effectuate a policy of the Act," understanding and insight which it gains from cumulative experience, even though its conclusions can be neither supported nor validated objectively by the particular record before it.³

Again, there is perhaps wider latitude for policy-making than the courts pos-

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¹ H.R. Rep. No. 510, on H.R. 3020, p. 38, 80th Cong., 1st Sess. (1947).

² *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953).

³ *Ibid.*

sess in the area of reconciling competing and apparently inconsistent congressional objectives, where one goal cannot be fully attained without overriding completely another, and equally important, goal. This was the nature of the problem which the Board faced in interpreting the sweeping and literally unqualified prohibitions of Section 8(b)(4)(A) of the Taft-Hartley Act⁴ in the light of Congress' manifest intention, expressed in Sections 7⁵ and 13,⁶ to preserve and not prohibit the utilization by labor organizations of traditional weapons of economic conflict in primary disputes. The same kind of problem was met by the Board in reconciling the apparently unqualified guarantee of the right to organize with employer interests in maintaining plant discipline and effective production. Commending the Board's solution in both cases—the primary-secondary distinction in one; freedom to solicit membership on company property, but only during non-working hours, in the other—the Supreme Court emphasized that the Board's evaluation of such competing interests and its policy resolution as to which interest should, in particular circumstances, prevail, is entitled to weight.⁷

But the scope of the Board's policy-making discretion is not unlimited. The basic outlines of national labor policy have been laid down by Congress in the statute, and it is that policy, and no other, which the Board is authorized to enforce and to effectuate. It is true today, as it was under the Wagner Act, that Congress' policy, as expressed in the statute, "cannot be defeated by the Board's policy"; the Board is not permitted "under the guise of administration to put limitations in the statute not placed there by Congress." In short, the Board may not reform the Act "to conform to the Board's idea of correct policy."⁸

⁴ "It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is . . . forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . ." 61 Stat. 141 (1947), 29 U.S.C.A. § 158(b)(4)(A) (Supp., 1954).

⁵ "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." 61 Stat. 140 (1947), 29 U.S.C.A. § 157 (Supp., 1954).

⁶ "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151 (1947), 29 U.S.C.A. § 163 (Supp., 1954).

⁷ *NLRB v. Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 692 (1951); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 799-800 (1945).

⁸ *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 363 (1949), reversing a Board decision under the Wagner Act.

The provision for judicial determination, first by the Court of Appeals and then by the Supreme Court of the United States, whether policies adopted by the Board conform to the statutory policy, establishes a superstructure of limitation within which the Board must confine its discretion. It is true, of course, that in deciding whether particular policies adopted by the Board conform to the statute's objectives courts "must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."⁹ And it therefore follows that in not every instance in which the Board's policy is upheld by the Court is the Board thereafter precluded by judicial approval alone from altering its policy. Where, however, judicial approval of Board policy is based upon the Court's appraisal of the terms of the statute where the Court holds, in effect, that the Board's policy is the only one consistent with effectuation of the Act's objectives the Board is no longer free to adopt a contrary policy, just as it is not free after the Supreme Court has held a particular Board policy inconsistent with the language or purposes of the Act to continue to apply that policy.

Within the framework of these limitations changes of Board policy are inevitable. Judicial disapproval of the Board's interpretation of particular provisions of the Act; the administrative process, which invites the Board to review the effects of its policies in the light of its "cumulative experience"; and the shifts in Board member personnel, each contribute a share to that end. Changes so motivated were plentiful during both Wagner and Taft-Hartley days, prior to the time when a majority of the Board became composed of appointees of the present administration. Of the many examples available, a few must suffice. When the Supreme Court refused to review the decision of the Second Circuit in *NLRB v. American Tube Bending Co.*,¹⁰ the Board bowed and changed its policy of condemning, as illegal interference, anti-union speeches made by an employer for the purpose of influencing the outcome of an election. Adoption of the *Woolworth* formula,¹¹ for computing back pay on a quarterly instead of a

⁹ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

¹⁰ 134 F. 2d 993 (C.A. 2d, 1943), cert. denied 320 U.S. 768 (1943).

¹¹ *F. W. Woolworth Co.*, 90 N.L.R.B. 289 (1950). Prior to *Woolworth*, the Board totaled the losses incurred by employees who were found to have been discriminatorily discharged during the entire period from the date of their discharge until the date they were offered reinstatement. Against this total of wage losses the Board credited all earnings obtained by the employee during the entire period. Frequently, when economic conditions improved, employees who had suffered a period of total unemployment later obtained jobs paying more than those from which they had been discriminatorily discharged. The excess earnings in such cases diminished and sometimes wiped out altogether the back pay obligation which had accrued during the period of unemployment. The result, the Board found, was to provide an incentive to employers to delay offers of reinstatement and to induce employees to waive reinstatement and thereby terminate the back pay period. It was to avoid these consequences that the Board decided to divide the back pay period into three month terms, thereby diminishing the impact of future employment developments on the back pay obligations. The *Woolworth* formula was sustained by the Supreme Court in *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

total period basis, reflected the Board's observation of the cumulative effects of its former policy in defeating offers of reinstatement. The gyrations of Board policy on the question of bargaining rights for foremen, from *Union Collieries*,¹² to *Maryland Drydock*,¹³ to *Packard Motor Car Co.*,¹⁴ may fairly be deemed to have reflected the preponderance, at varying times, of a majority of members who held one view or the other on this close policy issue.

It should be emphasized, however, that in 1947, Congress took from the Board a large measure of the policy-making discretion which the Board had theretofore possessed. When it passed Taft-Hartley, Congress did far more than add to the existing provisions of the Wagner Act new provisions defining union unfair labor practices and other regulations which had no counterpart in the earlier law. As the Supreme Court said in *Gullett Gin Co. v. NLRB*, "In the course of adopting the 1947 amendments Congress considered in great detail the provisions of the earlier legislation as they had been applied by the Board."¹⁵ In a footnote to this statement the Court said: "Ample evidence of this may be found in the Committee reports accompanying the bills which were the basis of the comprehensive 1947 Act."¹⁶ In many instances Congress disapproved the Board's prior policy and amended the Act to change it. For example, the elimination of "supervisors" from the definition of "employee" in Section 2(3);¹⁷ the "free speech" guarantee embodied in Section 8(c);¹⁸ the requirement, incorporated in Section 10(c),¹⁹ that the Board accord uniform treatment to affiliated

¹² 41 N.L.R.B. 961 (1942).

¹³ 49 N.L.R.B. 733 (1943).

¹⁴ 64 N.L.R.B. 1212 (1945). In *Union Collieries*, the Board found that bargaining units composed of supervisory employees were appropriate for purposes of collective bargaining and certified a labor organization as bargaining agent of such a unit. In *Maryland Drydock*, the board found that supervisors could not constitute an appropriate unit. In *Packard*, the Board reverted to the *Union Collieries* rule.

¹⁵ 340 U.S. 361, 366 (1951).

¹⁶ See H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947); S. Rep. No. 105, 80th Cong., 1st Sess. (1947).

¹⁷ "The term 'employee' . . . shall not include . . . any individual employed as a supervisor. . . ." 61 Stat. 137-38 (1947), 29 U.S.C.A. § 152(3) (Supp., 1954). "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 61 Stat. 138 (1947), 29 U.S.C.A. § 152(11) (Supp., 1954).

¹⁸ "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 61 Stat. 142 (1947), 29 U.S.C.A. § 158(c) (Supp., 1954).

¹⁹ "[I]n determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of Section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope." 61 Stat. 147 (1947), 29 U.S.C.A. § 160(c) (Supp., 1954).

and unaffiliated labor organizations, and limitation of the "extent of organization" concept, written into Section 9(b),²⁰ reflected Congress' judgment that prior Board policy was unsound and should be altered. By the same token, however, Congress after examination approved dozens of Board policies and practices and evidenced its approval by re-enacting without change the statutory language on which they rested. Particularly was congressional approval manifest where a Board practice or policy had been followed for a considerable period prior to 1947, and where the policy or practice had received judicial sanction. Thus, in the *Gullett Gin* case, the Supreme Court noted that the Board's policy of refusing to deduct unemployment compensation benefits from back pay awards issued under Section 10(b)²¹ had been followed for many years and had twice been approved by the courts. "Under these circumstances," said the Court, "it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts."²² There is authority for the view that when Congress so examines and adopts an administrative policy as its own, Congress gives to it "the force of law"²³ and the administrative agency thereby loses whatever discretion it may previously have had to alter or depart from it.²⁴ But even if naked power to alter should remain,²⁵ it would seem that after such congressional approval, an administrative agency should change its policy only upon a concrete showing that supervening events have reduced or impaired its effectiveness.

II

It is in this background that the changes in Board policy which have been accomplished over the past year, largely by the Eisenhower appointed members of the Board, must be judged. Viewed in proper context, it becomes apparent that some of the changes which have been most bitterly criticized by spokesmen for both labor and employer groups reflect not reversal of policy by the Board in an area where it possesses discretion, but rather recognition that judicial condemnation of past policy compels its abandonment. For example, the decision in *Blue Flash*,²⁶ overruling the doctrine that employer interrogation is *per se* an

²⁰ "[T]he Board shall not . . . (2.) decide that any craft unit is inappropriate for . . . purposes [of collective bargaining] on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation. . . ." 61 Stat. 143 (1947), 29 U.S.C.A. § 159(b) (Supp. 1954).

²¹ 61 Stat. 146 (1947), 29 U.S.C.A. § 160(b) (Supp., 1954).

²² 340 U.S. 361, 366 (1951).

²³ *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 116 (1939).

²⁴ *Squibb & Sons v. Helvering*, 98 F. 2d 69, 70 (C.A. 2d, 1938).

²⁵ *Cf. Helvering v. Reynolds*, 313 U.S. 428 (1941).

²⁶ 109 N.L.R.B. 591 (1954).

unfair labor practice, was preceded by decisions of at least six circuits which had refused to enforce orders predicated on the *Standard-Coosa-Thatcher* principle.²⁷ When the Supreme Court denied the Board's petition for certiorari in *NLRB v. Winer*,²⁸ there would seem to have been little left for the Board but gracefully to retreat. So, too, the Board's renunciation of its prior policy against retaliatory employer association lockouts was virtually dictated by the condemnation of that policy in decisions of the Seventh and Ninth Circuits in *Morand Bros. Beverage Co. v. NLRB*²⁹ and *Leonard v. NLRB*.³⁰ Nor can the Board be fairly charged with changing policy when it holds now, reversing earlier cases, that an employee does not enjoy the protection of Section 7³¹ when, in the course of his employment, he refuses to cross a picket line at the premises of an employer other than his own, and there is no provision in the collective bargaining contract covering his own employment which vouchsafes that privilege to him.³² The Supreme Court in *NLRB v. Rockaway News Supply Co.*³³ so held and, whatever the personal views of its members might be as to the correctness of that decision, the Board could do nothing but follow.

Limitation, in *Livingston Shirt Corp.*,³⁴ of the *Bonwit Teller* doctrine,³⁵ that an employer who makes a pre-election speech to a massed assembly of employees on company time and property must give the union an equal opportunity to reply, may likewise be considered a reflection of judicial restrictions, rather than an independent evaluation of policy. For in reviewing the *Bonwit Teller* decision, the Second Circuit, the very court upon whose decision in *NLRB v. Clark Bros.*³⁶ the *Bonwit Teller* policy was based, indicated disapproval of the doctrine except insofar as it reflected discriminatory application of a no-solicitation rule.³⁷

²⁷ *NLRB v. Associated Dry Goods Corp.*, 209 F. 2d 593 (C.A. 2d, 1954); *Wayside Press, Inc. v. NLRB*, 206 F. 2d 862 (C.A. 9th, 1953); *NLRB v. England Bros., Inc.*, 201 F. 2d 395 (C.A. 1st, 1953); *NLRB v. Arthur Winer, Inc.*, 194 F. 2d 370 (C.A. 7th, 1952); *NLRB v. Montgomery Ward & Co.*, 192 F. 2d 160 (C.A. 2d, 1951); *NLRB v. Tenn. Coach Co.*, 191 F. 2d 546 (C.A. 6th, 1951); *Sax v. NLRB*, 171 F. 2d 769 (C.A. 7th, 1948); *Jacksonville Paper Co. v. NLRB*, 137 F. 2d 148 (C.A. 5th, 1943). See *Standard-Coosa-Thatcher*, 85 N.L.R.B. 1358 (1949).

²⁸ 194 F. 2d 370 (C.A. 7th, 1952), cert. denied 344 U.S. 819 (1952).

²⁹ 190 F. 2d 576 (C.A. 7th, 1951).

³² *Auto Parts Co.*, 107 N.L.R.B. 242 (1953)

³⁰ 197 F. 2d 435 (C.A. 9th, 1952).

³³ 345 U.S. 71 (1953).

³¹ Statute quoted note 5 supra.

³⁴ 107 N.L.R.B. 400 (1953).

³⁵ 96 N.L.R.B. 608 (1951). The *Bonwit Teller* case enunciated, as an alternative ground for decision, the rule that an employer who makes a pre-election speech on company time and property to his employees must, if the union involved so requests, afford the union an opportunity to address the employees under comparable conditions. The *Livingston* case rejected the doctrine, as thus broadly phrased, and limited its application to instances in which the employer who gave such a speech also had in effect an illegally broad rule barring union solicitation on his premises.

³⁶ 163 F. 2d 373 (C.A. 2d, 1947).

³⁷ Compare *NLRB v. Bonwit Teller, Inc.*, 197 F. 2d 640 (C.A. 2d, 1952), with *NLRB v. F. W. Woolworth Co.*, 214 F. 2d 78 (C.A. 6th, 1954).

By the same token, however, the one case which is frequently pointed to for the purpose of demonstrating that the policy changes effected by the reconstituted Board are not exclusively anti-labor justifies no such claim. It is true that in *Whitin Machine Works*,³⁸ the Board phrased the duty of the employer to supply to the union information pertinent to collective bargaining in somewhat broader terms than had earlier Board cases. And in so doing the Board reversed at least one decision in which the duty had been subjected to restrictive qualifications.³⁹ But the duty itself had been held to flow from the statute in an unbroken line of court decisions handed down before *Whitin*.⁴⁰ The rationale for enforcement of the Board order in those cases implied, at least, that the duty was as broad as *Whitin's* subsequent statement of it. The alacrity with which the courts of appeals have enforced *Whitin*,⁴¹ and subsequent decisions based upon the test therein enunciated,⁴² adds weight to the view that, to the extent *Whitin* marked a change in Board policy, it was a change dictated not so much by the individual opinions of the Board members as by the dictates of judicial authority.

Another group of policy changes, including a number of cases which have been most widely commented upon during the past year, appear to reflect little more than reappraisal and adjustment of prior policies in an effort better to effectuate objectives which, themselves, are indisputably those adopted by Congress. In this class fall such cases as *American Potash & Chemical Corp.*,⁴³ altering, to some degree, the prior rules for craft and departmental severance, and *Pacific Intermountain Express Co.*⁴⁴ and *Mendon Co.*,⁴⁵ altering the method of tallying ballots in Globe elections⁴⁶ so as to give to voters in the Globed units

³⁸ 108 N.L.R.B. 1537 (1954).

³⁹ *Crompton-Highlands Mills*, 70 N.L.R.B. 206 (1946).

⁴⁰ *Leland-Gifford Co.*, 95 N.L.R.B. 1306 (1951), enforced in *NLRB v. Leland-Gifford Co.*, 200 F. 2d 620 (C.A. 1st, 1952); *NLRB v. Jacobs Mfg. Co.*, 196 F. 2d 680 (C.A. 2d, 1952); *Union Mfg. Co. v. NLRB*, 179 F. 2d 511 (C.A. 5th, 1950); *NLRB v. J. J. Allison & Co.*, 165 F. 2d 766 (C.A. 6th, 1948), citing *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944) and *May Department Stores Co. v. NLRB*, 326 U.S. 376 (1945); *Aluminum Ore Co. v. NLRB*, 131 F. 2d 485 (C.A. 7th, 1942); *Hearst Corp.*, 102 N.L.R.B. 637 (1953); *Boston Herald-Traveler Corp.*, 102 N.L.R.B. 627 (1953); *Hekman Furniture Co.*, 101 N.L.R.B. 631 (1952), enforced *NLRB v. Hekman Furniture Co.*, 207 F. 2d 561 (C.A. 6th, 1953); *Montgomery Ward & Co.*, 90 N.L.R.B. 1244 (1950); *Electric Auto-Lite Co.*, 89 N.L.R.B. 1192 (1950); *B. F. Goodrich Co.*, 89 N.L.R.B. 1151 (1950).

⁴¹ *NLRB v. Whitin Machine Works*, 217 F. 2d 593 (C.A. 4th, 1954), cert. denied 349 U.S. 905 (1955).

⁴² *NLRB v. Item Co.*, 220 F. 2d 956 (C.A. 5th, 1955), cert. denied 24 U.S.L. Week 3094 (Oct. 10, 1955); *Truitt Mfg. Co.*, 110 N.L.R.B. 856 (1954); *Boston Herald-Traveler Corp.*, 110 N.L.R.B. 2097 (1954).

⁴³ 107 N.L.R.B. 1418 (1954).

⁴⁴ 105 N.L.R.B. 480 (1953).

⁴⁵ 108 N.L.R.B. 310 (1954), as amended by 108 N.L.R.B. 309 (1954).

⁴⁶ So called because the first such election was conducted in *The Globe Machine and Stamping Co.*, 3 N.L.R.B. 294 (1937).

an opportunity, if they so choose, to influence the outcome in the production and maintenance unit. In this category, too, fall such decisions as *Peerless Plywood*,⁴⁷ establishing a 24-hour moratorium on pre-election speeches to employees on company time and property. The wisdom and efficacy of the *Peerless* policy may be debatable, but few will deny that its objective—to safeguard employee voters against undue pressures—is firmly anchored in the statute.

III

Official announcements proclaim that the new Board recognizes the limitations upon its policy-making function. Speaking for his colleagues, as well as himself, Chairman Farmer stated: "We are not authorized to make labor policy; we enforce a specific statute, and that is all."⁴⁸ In the same speech, Chairman Farmer stressed that it was the Board's intention "to administer the law as written and as intended by Congress."

In the past eighteen months, however, there have been a considerable number of changes in Board policy which appear to be inexplicable either as reflections of judicial compulsion or as products of appraisal based on cumulative experience of the effect of prior policy upon the effectuation of statutory objectives. These policy changes can be attributed to the change in composition of the Board. For that reason they constitute a true barometer of the direction in which Board policy is moving. Since they mirror the significantly different views of the new members, they disclose the nature of the objectives which the Board, as reconstituted, now seeks to promote; and they provide opportunity to appraise the real views of the new majority as the nature of the function which is theirs to perform.

REFUSAL TO ASSERT JURISDICTION

Quantitatively, the most significant change effected by the new Board was the revision of jurisdictional policy standards, announced in July, 1954, and explicated, several months later, in *Breeding Transfer Co.*⁴⁹ Superficially, the new standards bear striking resemblance to the old; with relatively minor exceptions the changes were accomplished by revising upward the dollar volume of interstate commerce which must be affected before the Board will assert jurisdiction. But the resemblance is superficial only. What distinguishes the new policy from the old is the motivation which produced it.

Prior to July, 1954, the Board declined to exercise jurisdiction over certain classes of relatively local enterprises which were subject to the Act, because limitations of budget, available personnel, and time precluded it from processing and deciding all of the cases which were presented to it. As a practical

⁴⁷ 107 N.L.R.B. 427 (1953).

⁴⁸ Before the Fourteenth Annual Law Institute, University of Tennessee College of Law, Nov. 6, 1953.

⁴⁹ 110 N.L.R.B. 493 (1954).

matter, since the Board could not handle all the cases, it was compelled to decline to exercise jurisdiction over some. Reasonably, it concluded that rather than declining jurisdiction haphazardly, it should decline jurisdiction by category of enterprise affected, and selected as a class those enterprises which least affected the economy of the nation as a whole.

But, in making that choice, and in formulating the 1950 standards, the Board was fully conscious that in the Taft-Hartley Act, Congress had not restricted the Act's coverage so as to leave out enterprises of a "local" nature. Taft-Hartley, like Wagner, is a classic example of Congress' exercise of the fullest scope of the commerce power. It contrasts sharply with the Wage-Hour law, the Federal Trade Commission Act, and others, in which Congress chose not to extend the reach of the federal law to the constitutional boundary. Since Congress intended the National Labor Relations Act to apply to all enterprises and all employees who were subject to federal power under the Commerce Clause,⁵⁰ the Board recognized that its obligation was to administer the Act to the widest possible extent, refraining only where practical necessity compelled it to do so.

We are told authoritatively by members Murdock and Peterson, in their dissents in the *Breeding* case, and the majority does not even challenge their statement, that application of the 1950 standards had not resulted, by July, 1954, in any serious backlog of cases either in Washington or the field. The Board members were suffering no dearth of time in which to consider important cases. No budget cut or sudden rise in case load suggested that it would be unduly difficult in the future to handle inflow based upon the old standards.

Why, then, the change? We quote from member Murdock's dissenting opinion:

The slash in jurisdiction now consummated has been frequently promised and predicted in public speeches of members of the majority during the past year in keeping with an announced belief in the philosophy of returning a greater share of federal authority to state and local governments. Typical of such utterances are the following:

The one thing this nation needs more than anything else to maintain its vigor and strength is a revival of interest by local government in tackling and solving the problems of their local people. *That is why I strongly advocate a gradual but nevertheless marked withdrawal of the hand of the NLRB from strictly local disputes.* (Emphasis supplied.) [Address of Chairman Guy Farmer, NLRB, before the Joint Conference of the Industrial Relations Committees of the Edison Electric Institute, the Southeastern Electric Exchange and the Southwestern Personnel Group, New Orleans, Louisiana, January 21, 1954.]

... regardless of the legal scope of the commerce clause, the Federal Agencies should, as a matter of self-restraint, impose limits on their own power and thus provide the opportunity for local problems to be settled on a local basis by the citizens of the community in which those problems arise. [Chairman Farmer be-

⁵⁰ *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 383, 391 (1951).

fore the National Conference of Business Paper Editors, Washington, D.C., October 21, 1953, after noting that the jurisdiction of the Board was to be re-examined.]

The first of these actions (which should be taken by the new members) is to limit the jurisdiction of the Board—to free it from the consideration of hundreds, if not thousands, of cases which are markedly local in nature and in impact. Such cases should, in keeping with our American system of constitutional government, be dealt with by the localities and the states. [Member Rodgers before the American Bar Association, Atlanta, Georgia, March 15, 1954.]

This is, after all, a Federal State, and it is the underlying philosophy of our government, and I might add of our President, that the states and communities not only should, but must, assume and discharge the responsibility of local affairs. I believe that this agency must use sound restraint in the exercise of its jurisdiction. *I believe that this agency should assist this administration in pulling back the outer reaches of federal bureaucracy, and thus encourage rather than impede the development of our communities and our states.* (Emphasis supplied.) [Member Rodgers before the National Retail Dry Goods Association, New York, New York, January 12, 1954, in noting that "Probably the most pressing administrative problem confronting the Board at this time is the problem of jurisdiction."]⁵¹

On the other hand, we are assured by the majority in the *Breeding* case that "desire to establish broader State jurisdiction is in no wise a factor in our decision."⁵² Taking the majority at its word, does this mean that the new policy is not the product of purely political considerations, of a desire to "assist this administration in pulling back the outer reaches of federal bureaucracy"? Not at all. It serves merely to indicate that the new majority is conscious that Section 10(a),⁵³ which authorizes the Board to cede its jurisdiction over "local" enterprises to the states but which prohibits cession where state law is inconsistent with the National Act, prevents the Board from transferring regulatory power to the states by the simpler device of declining to exercise its own jurisdiction.⁵⁴

⁵¹ 110 N.L.R.B. 493, 502-503 (1954).

⁵² *Ibid.*, at 497.

⁵³ "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith." 61 Stat. 146 (1947), 29 U.S.C.A. § 160 (Supp., 1954).

⁵⁴ *Retail Clerks v. Your Food Stores*, 225 F. 2d 659 (C.A. 10th, 1955); *New York State Labor Relations Board v. Wags Transportation System*, 130 N.Y.S. 2d 731 (1954), *aff'd* 134 N.Y.S. 2d 603 (1954); *Universal Car Co. v. International Association of Machinists*, 35 L.R.R.M. 2087 (1954). It should be noted, however, that the Supreme Court has recently twice reserved the question whether the states are empowered to regulate in areas where the NLRB declines to assert jurisdiction. *Garner v. Teamsters Union*, 346 U.S. 485 (1953); *Bldg. & Construction Trades Council v. Kinard Construction Co.*, 346 U.S. 933 (1954).

Since state power is not enhanced by the Board's increased abstention, the principal result of the change is to increase substantially the number of persons from whom legal remedies for infringement of their statutory rights and peaceful processes for resolution of their representation disputes are withheld. To square a policy which has that result with the announced objectives of the statute would take a feat of legerdemain. Congress established the Board to remedy unfair labor practices and to resolve questions concerning representation, not deliberately to leave them unremedied and unresolved. The policy of the congress which passed the Taft-Hartley Act is to regulate labor relations in all enterprises, great or small, which come within federal power, and to make that regulation effective to the outer limits of the Board's capacity. If a change in statutory policy is desired, that may be accomplished by submitting appropriate proposals to Congress.

There seems little room for doubt that the Board's new jurisdictional standards are designed to increase the pressure on Congress to amend Section 10(a) so as to facilitate the exercise of state jurisdiction in areas in which the Board declines to act. It is, of course, impossible to predict the outcome. But it may be well to bear in mind that the restrictive cession clause of Section 10(a) was virtually the only provision of the entire Act that both supporters and opponents of Taft-Hartley favored.⁵⁵ The reasons for excluding state regulation of labor relations inconsistent with Taft-Hartley's policies are as valid today as they were in 1947, and they apply, today, as then, with equal vigor to local as to nationwide establishments. In any event, the Act has not yet been amended.

EROSION OF EMPLOYEE RIGHTS GUARANTEED BY SECTION 7

We turn now to a group of cases, of critical importance because they deal with the scope of Section 7's protection of concerted activity,⁵⁶ in which the new Board has made major changes in policy. In contrast to the cases earlier discussed, these changes cannot be justified on the ground that the courts had disapproved the earlier Board policy. Nor can they be related to any congressional changes in statutory language or policy. These changes were made despite the fact that Congress re-enacted the relevant statutory language in *haec verba* and the fact that the courts had unanimously and consistently, both before and after the Taft-Hartley amendments, supported the very resolutions which the new Board rejects.

In the *B.V.D.* case,⁵⁷ the Board denied reinstatement and back pay to unfair labor practice strikers who continued peacefully to picket after acts of violence had been committed against the employer's property by unidentified third parties. The Board conceded that the strikers neither instigated, participated in, nor authorized the acts of violence. It found no conspiracy between the strik-

⁵⁵ S. Rep. No. 105, 80th Cong., 1st Sess. 26 (1947). See minority views, *ibid.*, Pt. 2, 38, agreeing as to this feature of the legislation.

⁵⁶ Statute quoted note 5 *supra*.

⁵⁷ 110 N.L.R.B. 1412 (1954).

ers and others to commit illegal acts. It admitted that the strikers neither had nor exercised any control over the unidentified guilty parties. Nevertheless, the Board held that those strikers who continued to picket after the acts of violence had been committed must be deemed to have approved and ratified the acts of violence. To avoid forfeiture of the right to picket after the acts of violence were committed, the Board held, the strikers were required by "admonishment, denunciation or public pronouncement" to dissociate themselves from the violence. For having failed to comply with this previously non-existent condition, those strikers who continued to picket were denied redress.

The new Board's policy of denying relief to strikers who are themselves innocent of wrongdoing, because others engaged in reprehensible and unlawful conduct during the course of the strike, flies in the face of an unbroken line of court decisions holding such denial improper.⁵⁸

The courts have held that misconduct of some persons during a strike or on a picket line is not to be attributed to others in the absence of proof identifying such others as participants in the misconduct. Since these cases bar attribution to strikers of the guilty deeds of other strikers, they demonstrate how drastic a change the new Board made, when, in *B.V.D.*, it attributed to innocent strikers the misdeeds of unidentified parties, who, for all the strikers or the Board knew, may well have been *agents provocateurs*.

The Board's pronouncement that, to retain their statutory remedies after the unauthorized misconduct occurred, the strikers would have had to abandon the picket line demeans and limits the right to strike, and its concomitant, the

⁵⁸ *Pre-amendment decisions*: Republic Steel Co. v. NLRB, 107 F. 2d 472, 479 (C.A. 3d, 1939); NLRB v. Stackpole Carbon Co., 105 F. 2d 167, 176 (C.A. 3d, 1939); Stewart Die Casting Co. v. NLRB, 114 F. 2d 849, 856 (C.A. 7th, 1940), cert. denied 312 U.S. 680 (1941); NLRB v. Quality & Service Laundry Co., 131 F. 2d 182, 183 (C.A. 4th, 1942), enforcing 39 N.L.R.B. 970, 988 (1942); NLRB v. Ohio Calcium Co., 133 F. 2d 721, 726 (C.A. 6th, 1943); NLRB v. Mt. Clemens Pottery Co., 147 F. 2d 262, 268 (C.A. 6th, 1945).

Post-amendment decisions: NLRB v. Marshall Car Wheel & Foundry Co., 218 F. 2d 409, 417, 418 (C.A. 5th, 1955); NLRB v. Deena Artware, Inc., 198 F. 2d 645, 652 (C.A. 6th, 1952), cert. denied 345 U.S. 906 (1952); NLRB v. Wallick, 198 F. 2d 477, 485 n. 10 (C.A. 3d, 1952); NLRB v. Crowley's Milk Co., 208 F. 2d 444, 446 (C.A. 3d, 1953).

The Supreme Court has recognized that it is "necessary to identify individual employees . . . and to recognize that their discharges were for causes which were separable from 'the concerted activity' of others"; at the same time, it held, it is "equally important to identify employees . . . who participated in simultaneous concerted activities" with others "but who refrained from joining the others in separable acts of insubordination, disobedience or disloyalty." NLRB v. Local Union No. 1229, 346 U.S. 464, 474, 475 (1953), affirming in this respect the rule stated by the Board at 94 N.L.R.B. 1507, 1512, 1513 (1951).

The rule requiring actual personal participation in wrongdoing is likewise shown by the holdings that an employee who has not engaged in strike misconduct, but to whom the employer has denied reinstatement in reliance on the employer's honest but mistaken belief that he had, must be put back to his job with compensation for lost time. NLRB v. Industrial Cotton Mills, 208 F. 2d 87, 89, 93 (C.A. 4th, 1953), cert. denied 347 U.S. 935 (1954); Cusano v. NLRB, 190 F. 2d 898, 902 (C.A. 3d, 1951); NLRB v. Cambria Clay Products Co., 215 F. 2d 48, 53 (C.A. 6th, 1954). The first two cases were cited with approval in Radio Officers' Union v. NLRB, 347 U.S. 17, 45 n. 53 (1954).

right to picket, which Congress in the Act so carefully preserved.⁵⁹ Particularly with reference to disputes generated by unfair labor practices, Congress deliberately preserved the right to strike and picket, in addition to, and not in lieu of, the administrative remedies which it provided through the Board.⁶⁰ To compel employees to forego their right to picket peacefully merely because unauthorized and unidentified third parties have engaged in acts of violence is to attach limitations and qualifications upon the right to strike which are nowhere expressed or implied in the Act itself—and that flies in the face of the express language of Section 13.⁶¹

What objective is it that the Board by its new policy seeks to promote? Ostensibly, so the majority opinion says, the Board desires to discourage strike-connected misconduct. But we are not told how "admonishment, denunciation or public pronouncement" by strikers of the acts of unidentified outsiders over whom the strikers have no control could possibly be efficacious of that end. There is an even deeper flaw. Even if the Board's new policy could curb strike-connected violence, it would still be beyond the Board's province to adopt it. The Board was not commissioned by Congress to put an end to strike-connected misconduct, regardless of its source. Assuming the stated objective to be proper, still the Board "is not free to set up any system of penalties which it would deem adequate" to achieve it.⁶²

In Section 2(13) of the Act, Congress enjoined the Board to impute guilt only under common law agency principles. Summing up those principles the Supreme Court has said: "Guilt with us remains individual and personal. . . . It is not a matter of mass application."⁶³ As far as the new Board is concerned, however, if any misconduct occurs in connection with a strike, the strikers are now guilty en masse until proven innocent. Moreover, strikers can safely establish their innocence only by foregoing the exercise of those very rights which the statute was enacted to preserve and protect. The Third Circuit predicted in *Republic Steel Corp. v. NLRB*⁶⁴ that to adopt such a policy as the Board has now adopted would make the "rights afforded to employees by the Act . . . indeed illusory." The real purpose behind its adoption seems to be just that.

Another noteworthy inroad upon the settled area of protection of employee concerted activities was made by the new Board in *Terry Poultry Co.*⁶⁵ In this

⁵⁹ *UAW v. O'Brien*, 339 U.S. 454, 456, 457 (1950); *Amalgamated Ass'n v. Wisconsin Employment Relations Board*, 340 U.S. 383, 389 (1951); *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672 n. 6 (1951).

⁶⁰ Congress voted down the provision of the House bill, Section 12(a)(3)(c)(ii) of H.R. 3020 (1947), which would have prohibited strikes "to remedy practices for which an administrative remedy is available under this Act."

⁶¹ Statute quoted note 6 supra.

⁶² *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940).

⁶³ *Kotteakos v. United States*, 328 U.S. 750, 772 (1946).

⁶⁴ 107 F. 2d 472, 479 (C.A. 3d, 1939).

⁶⁵ 109 N.L.R.B. 1097 (1954).

case, two employees left their work, without notifying their foreman, for the purpose of presenting to the plant superintendent a grievance arising over their foreman's mishandling of their complaint about certain working conditions. For this, they were discharged. Acknowledging that the concerted presentation of grievances is activity protected by Section 7, the new Board members nevertheless sustained the discharge on the ground that the employees thereby violated a company rule prohibiting employees from leaving work without notifying their foreman. The company's right to enforce its rule, the Board held, took precedence over the employees' right to present grievances during working hours.

The new policy, to accord greater weight to the right of the employer to make and enforce plant rules than to the statutory rights of employees to engage in concerted activities, repudiates a substantial body of judicial precedent which dictates precisely the contrary evaluation.⁶⁶ The courts, like the Board in earlier days, have always recognized that to the extent that Section 7 permits concerted activity, such as presentation of grievances, or strikes, to proceed during working hours, the employer cannot be permitted to restrict, curtail or limit those activities by plant rule or otherwise. If plant rules and the right to enforce them were decisive, employers could deprive the right to strike of all statutory sanction by the simple expedient of adopting a rule prohibiting employee refusal to perform regular duties during working hours. As members Murdock and Peterson stated in their dissent:

In giving controlling effect to the plant rule as justifying discharge, our majority colleagues are simply refusing to recognize established judicial doctrine. Were the law to the contrary, little would be left of the employees' statutory right to engage in a temporary work stoppage for mutual aid and protection. The majority's attempt to justify the restriction on the employees' exercise of this statutory right ignores the fact that leaving the job is as much a part of the concerted activity as the actual presentation of the grievance to management, as the Board and court decisions plainly establish. Although there may be some interference with production resulting from such a temporary work stoppage, it is purely incidental as it is in the case of a strike and may not afford a legal basis for denying the employees protection from discharge.⁶⁷

⁶⁶ *NLRB v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (C.A. 6th, 1953), cert. denied 347 U.S. 976 (1954) (spontaneous walkouts and temporary work stoppages to protest excessive heat); *Modern Motors, Inc. v. NLRB*, 198 F. 2d 925 (C.A. 8th, 1952) (stopping work and concertedly presenting a grievance concerning a Christmas bonus grievance); *NLRB v. J. I. Case Co., Bettendorf Works*, 198 F. 2d 919 (C.A. 8th, 1952), cert. denied 345 U.S. 917 (1953) (walking off the job without permission and attempting to incite plant walkout in protest against discharge of a union steward); *Kitty Clover, Inc. v. NLRB*, 208 F. 2d 212 (C.A. 8th, 1953) (leaving work in mass to seek interview with employer concerning a grievance); *NLRB v. Globe Wireless, Ltd.*, 193 F. 2d 748 (C.A. 9th, 1951) (leaving job to protest discharge of fellow employee); *NLRB v. Kennametal, Inc.*, 182 F. 2d 817 (C.A. 3d, 1950) (engaging in work stoppage to secure higher wages); *Gullett Gin Company, Inc. v. NLRB*, 179 F. 2d 499 (C.A. 5th, 1950) (discussion of wage grievances during working hours).

⁶⁷ 109 N.L.R.B. 1097, 1102 (1954).

The significance of this reversal of policy can hardly be over-emphasized. Does the new Board really believe that Congress' policy of minimizing industrial conflict by fostering the prompt presentation of grievances will be better effectuated by compelling dissatisfied employees to remain at their work stations until their employer sees fit to release them? Is not such a policy, as the Third Circuit observed in *NLRB v. Kennametal, Inc.*,⁶⁸ apt to transform minor grievances, easily adjusted, into full-fledged strikes? Or, can it be that the new Board is concerned, not with the impact of its policy upon the mitigation of industrial strife, but upon revising the relative rights and privileges of employer and employee to the end that employers may escape the burden which the exercise of statutory rights by their employees entails?

CURTAILMENT OF THE ECONOMIC POWER OF LABOR ORGANIZATIONS

The advent of the new majority has brought a significant trend toward treating as secondary, and prohibited by Section 8(b)(4), strike tactics of labor organizations which previous policy treated as primary and protected. Restriction of the "roving situs"⁶⁹ doctrine to cases in which the primary employer does not have a permanent place of business which can be picketed,⁷⁰ the new qualifications on picketing where employees of secondary employers are present at the primary situs,⁷¹ and many others,⁷² all tend to strengthen the hand of the primary employer in resisting union demands, and, in turn, weaken the power of the union to bring effective pressure upon the employer who is its adversary in the dispute.

But the most important of the policy reversals accomplished by the new majority in this area is the decision in *McAllister Transfer, Inc.*⁷³ As two of the new, and the two dissenting, members of the Board saw it, the issue in *McAllister* was identical with the issue which had earlier been decided in *Conway's Express*,⁷⁴ namely, whether a "hot cargo" clause⁷⁵ in a collective bargaining con-

⁶⁸ 182 F. 2d 817, 819 (C.A. 3d, 1950).

⁶⁹ The roving situs doctrine allows picketing of the instrumentalities of an employer which are not stationary. Common examples are trucks, busses, ships, etc. Reference to the doctrine can be found in *Schultz Refrigerated Service, Inc.*, 87 N.L.R.B. 502 (1949); *Moore Dry Dock Co.*, 92 N.L.R.B. 547 (1950); *Crowley's Milk Co.*, 102 N.L.R.B. 996 (1953), enforced 208 F. 2d 444 (C.A. 3d, 1954). See also Nineteenth Annual Report, NLRB, p. 106 et seq. (1954).

⁷⁰ *Washington Coca Cola Bottling Works*, 107 N.L.R.B. 299 (1953).

⁷¹ *Professional and Business Men's Life Ins. Co.*, 108 N.L.R.B. 363 (1954).

⁷² E.g., *Royal Typewriter Co.*, 111 N.L.R.B. No. 57, 35 L.R.R.M. 1474 (1955); *Pittsburgh Plate Glass Co.*, 110 N.L.R.B. 455 (1954); *Columbia-Southern Chemical Corp.*, 110 N.L.R.B. 206 (1954); *Independent Lumber Corp.*, 108 N.L.R.B. 1323 (1954); *Climax Molybdenum Co.*, 108 N.L.R.B. 318 (1954).

⁷³ 110 N.L.R.B. 1769 (1954).

⁷⁴ 87 N.L.R.B. 972 (1949), enforced 195 F. 2d 906 (C.A. 2d, 1952).

⁷⁵ A "hot cargo" clause is an agreement between a union and an employer (or group of employers) by which the employer agrees in advance that he will not subsequently handle, during the contract period, any shipment of goods which had been shipped by struck employers. See *Rabouin v. NLRB*, 195 F. 2d 906, 912 (C.A. 2d, 1952).

tract between the union and a secondary employer removed non-handling of the primary employer's goods from the scope of the Section 8(b)(4)(A) prohibition. In *Conway*, and again in *Pittsburgh Plate Glass Co.*,⁷⁶ the Board had held that it did, and the Second Circuit had expressly approved that construction of the Act in affirming the Board's order in *Conway*. In *McAllister*, however, two of the new appointees voted to reverse *Conway*. They held, in short, that "hot cargo" contracts were contrary to public policy; that secondary employers could not, by contract, waive immunity against refusals by their employees to handle unfair goods, and that, since the contracts were contrary to public policy, they could not be relied upon as defenses to unfair labor practice charges.

Chairman Farmer revolted. He observed that his newly appointed colleagues, in their freewheeling divination of "public policy," were glossing over the "plain language of the Statute."⁷⁷ The language shows, said the Chairman, that Congress deliberately left secondary employers free to boycott primary employers. "I suppose," said the Chairman, "that what an employer may do he may also agree in advance to do."⁷⁸ The Chairman reminded his colleagues that the Board is not "the guardian of the public welfare, except to the extent we are charged with responsibility for administering a particular statute."⁷⁹ So far did his colleagues depart from the accepted norm of administrative policy making that the Chairman found it necessary to say: "Judges must resist the temptation to devise legal precepts to accommodate their moral judgments that this conduct or that is either laudable or indefensible."⁸⁰

Neither space nor the subject matter permits detailed analysis here of the *McAllister* opinions. But certain observations are pertinent, for they disclose how sweeping a departure the new Board members have made from the policies which Congress enacted into law. For example, the two Board members who would reverse *Conway* deny that a labor organization may bargain collectively to exclude from the course of employment, as that term is used in Section 8(b)(4), the handling of unfair goods. "Course of employment," say these members, includes, as a matter of law, all action taken by employees, qua employees, and excludes only action taken by employees as ultimate consumers. But definition and limitation of the course of employment is one of the oldest and most fundamental of the objectives of collective bargaining. To prescribe the kind of work which may be assigned to particular employees and classifications of employees is standard practice in the vast majority of collective bargaining contracts obtained by industrial as well as by craft unions. If Congress intended in Taft-Hartley to make so serious an inroad upon historical collective bargaining practice as to outlaw bargaining about the course and scope of employment, one would reasonably suppose that in the course of the hearings, debates, and

⁷⁶ 105 N.L.R.B. 740 (1953).

⁷⁷ *McAllister Transfer, Inc.*, 110 N.L.R.B. 1769, 1788 (1954).

⁷⁸ *Ibid.*, at 1789.

⁷⁹ *Ibid.*, at 1788.

⁸⁰ *Ibid.*

reports on the Act, someone would have thought to mention the subject. But the legislative history is completely silent on the point. Manifestly, Congress did not intend to affect the right of unions to bargain for restrictions upon the scope and course of employment.

Confirmation lies in the fact that, admittedly, Congress left employers free to exclude the handling of unfair goods from the course of their employees' employment. If Congress did not preclude employers from doing that unilaterally, it would take specific statutory language to warrant the conclusion that Congress precluded employers from contracting with a labor organization to do it. That the new Board members do not like the results of such a contract does not empower them, as the Supreme Court emphasized in *Colgate-Palmolive-Peet Co. v. NLRB*,⁸¹ to "reform" the contract to "conform to the Board's idea of correct policy."

In permitting employers who have bound themselves to "hot goods" clauses to renege on their agreements and thereby brand union reliance upon their contract rights an unfair labor practice, Chairman Farmer's opinion also departs from principles rooted deeply in the law and in Board policy. For example, in *Briggs-Indiana Corp.*,⁸² the Board refused to lend its sanction to a union which sought to secure representation rights for a group of employees whom it had, by contract with the employer, agreed not to organize or represent. Although the union's contractual undertaking clearly foreclosed the employees from effective exercise of their statutory right to bargain collectively through representatives of their own choosing, and although the employees were not parties to the contract, the Board refused to "facilitate" the union's avoidance of its contractual commitment. To lend its sanction to contract breaking, said the Board, "is not the business of the Government of the United States." And, it may be asked, if that was not the proper business of government under the Wagner Act, before Congress had provided specific remedies for enforcement of collective bargaining agreements, how much less is it the government's business under Taft-Hartley, in which Congress made adherence to and enforcement of collective bargaining contracts a cornerstone of national labor policy?

None of the three members who voted to sustain the complaint in *McAllister* purport to repudiate *Briggs-Indiana*. Wherein lies the distinction between the two cases? Can it be that the difference is that the statutory policy affected by the contract in *Briggs-Indiana* is the freedom of employees to bargain collectively, whereas the policy promoted by the majority in *McAllister* is the lessening of strike pressure on primary employers? *McAllister*, surely, is a bold departure from the maxim that what is sauce for the goose should be sauce for the gander.

Just as the new Board members are misusing Section 8(b)(4) to impose novel and unwarranted curbs upon the power of unions to engage in economic con-

⁸¹ 338 U.S. 355, 363 (1949).

⁸² 63 N.L.R.B. 1270 (1945).

flict, so they are distorting Section 8(b)(2)⁸³ to diminish the prestige of unions and reduce their influence in establishing and maintaining conditions of employment. Perhaps the clearest example of this is *Pacific Intermountain Express*,⁸⁴ followed in *North East Texas Motor Lines, Inc.*⁸⁵ In that case a collective bargaining contract provided that the union was to have exclusive authority to resolve all disputes over seniority, and the union bound itself in that contract not to base any seniority decision on the union membership or non-membership of any employee in the bargaining unit. The Board, however, was not satisfied with the bona fides of the union's promise. It observed that the records in the employer's files would be more reliable than any information the union might have available to it with respect to seniority. It then concluded:

It is to be presumed, we believe, that such delegation [of power to the union to settle seniority disputes] is intended to and in fact will be used by the union to encourage membership in the union.⁸⁶

On the face of it, this is far worse even than holding that the union is guilty until proven innocent. The Board denies the union the right to act at all merely because the Board *presumes* that it will not act innocently. Where did the Board suddenly acquire the power to indulge that kind of presumption of future guilt? The elaborate procedural structure established by Congress for the trial of charges of unfair labor practice becomes a farce if the Board can disregard the absence of past violations and predicate an order to desist from a proposed course of lawful conduct on its mere presumption that future violations may develop. It is precisely for this reason that the courts long ago held that the Board was not empowered to enter "cautionary" orders against future viola-

⁸³ "It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 61 Stat. 141 (1947), 29 U.S.C.A. § 158(b)(2) (Supp., 1954). Subsection (a)(3) reads as follows:

"It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ." 61 Stat. 140, 141 (1947), 29 U.S.C.A. § 158(a)(3) (Supp., 1954):

⁸⁴ 107 N.L.R.B. 837 (1954).

⁸⁵ 109 N.L.R.B. 1147 (1954).

⁸⁶ 107 N.L.R.B. 837, 845 (1954).

tions in the absence of a finding, sustained by evidence, that similar violations had occurred in the past.⁸⁷

Denial to the union of its contractually won privilege of settling seniority disputes on the ground that the union may utilize that privilege to discriminate is the precise equivalent of depriving an employer of the right to bargain for unilateral control over, for example, merit increases. It is as reasonable to presume that an employer will use his power to grant merit increases discriminatorily to undermine the union as to presume that the union would exercise its power to settle seniority disputes discriminatorily to strengthen its position. One can perhaps visualize the storm of protest from employers and from the bar were the Board to attempt so to trench on employer prerogatives.

The Board's determination that unions should not be permitted to bargain for unilateral control over the resolution of seniority disputes is another attempt to substitute for Congress' policy a contrary policy which the new Board members prefer. In *NLRB v. American National Insurance Co.*,⁸⁸ the Supreme Court held that Section 8(d) permitted each party to bargain for unilateral control of subjects in the field of wages, hours, and conditions of employment. Seniority rights are, of course, such a subject. Indisputably, the employer is free to bargain for unilateral control over resolution of seniority disputes. Yet the Board precludes the union from doing likewise.

The Board's rationale, that the employer is in a better position than the union to determine seniority disputes on their merits, does precisely what the Supreme Court in the *American National Insurance* case enjoined the Board not to do; namely, substitute its views as to what substantive terms of collective bargaining contracts are reasonable and proper, for the views of the parties. And the Board's assumption, that the union could desire unilaterally to control resolution of seniority disputes only for the purpose of discriminating, betrays either a woeful ignorance of the significance in industrial life of the union's role under union shop contracts as arbiter of disputes between members, or a malicious purpose to strip unions of power to function in this area and thereby to diminish their prestige. When one observes that in the proviso to Section 8(b)(1)(A)⁸⁹ Congress removed internal union affairs completely from the Board's reach, it becomes apparent how far this policy of the new Board strays from the avowed objective, "effectuation of the policies of the Act."

⁸⁷ *NLRB v. Goodyear Tire & Rubber Co. of Alabama*, 129 F. 2d 661, 667-68 (C.A. 5th, 1942); *Reliance Mfg. Co. v. NLRB*, 125 F. 2d 311, 316-17, 321 (C.A. 7th, 1942); *NLRB v. Arma Corp.*, 122 F. 2d 153, 156-57 (C.A. 2d, 1941); *NLRB v. Superior Tanning Co.*, 117 F. 2d 881, 891 (C.A. 7th, 1940); *NLRB v. West Kentucky Coal Co.*, 116 F. 2d 816, 821-22 (C.A. 6th, 1940).

⁸⁸ 343 U.S. 395 (1952).

⁸⁹ "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." 61 Stat. 141 (1947), 29 U.S.C.A. § 158(b)(1)(A).

Another example of the new Board's tendency to intervene in the internal affairs of labor unions and to impose upon union operations burdensome restrictions which the statute neither contemplates nor sanctions is *Metal Ware Corp.*⁹⁰ In that case the new Board overruled *Chrisholm-Ryder*.⁹¹ The *Chrisholm-Ryder* case held that once an employee had been expelled from membership in the contracting union, and his discharge requested for failure to tender periodic dues uniformly required under a valid union shop contract, the employee could not thereafter acquire immunity to discharge by making a belated tender. The decision on its face showed a careful evaluation by the Board of the terms of Sections 8(a)(3) and 8(b)(2)⁹² and of the legislative history of both sections, all of which led inevitably to the conclusion that, at least where suspension or expulsion preceded the union's request for discharge, the date of the request was controlling. The Board said:

... to hold, as the General Counsel urges, that proviso (B) to Section 8(a)(3) and Section 8(b)(2) permit employee-members subject to a valid union-shop agreement to disregard with impunity the union's uniform requirements respecting the time for payment of "*periodic*" dues as a condition of retaining membership, would be a distortion of the manifest sense of these sections. Moreover, such an interpretation would materially detract from the substance of union-security agreements which Congress vouchsafed to unions and would leave individual employees free to ignore an important condition of membership, which unions are permitted to impose.⁹³

In contrast, the *Metal Ware* decision does not even refer to the language of the statute or to the legislative history. On *ipse dixit* alone, the new Board now declares that:

A full and unqualified tender made any time prior to actual discharge and without regard as to when the request for discharge may have been made, is a proper tender and a subsequent discharge based upon the request is unlawful.⁹⁴

Manifestly, this decision permits employees to make a mockery of union rules governing the time by which periodic dues must be paid. By one stroke of the pen the Board declares those rules, no matter how fair, and how uniformly applied, unenforcible. Can this decision be squared with the policy of Congress as expressed in the proviso to Section 8(b)(1)(A)⁹⁵ and with the legislative history? And what are the practical consequences of this decision from the employer's point of view? Now the employer cannot rely upon the employee's delinquency which resulted in his expulsion; he must now satisfy himself, before making the discharge, that the employee has not tendered dues up until the very last minute before the discharge becomes effective. The additional compli-

⁹⁰ 112 N.L.R.B. No. 80, 36 L.R.R.M. 1077 (1955).

⁹¹ 94 N.L.R.B. 508 (1951).

⁹² Statutes quoted note 83 *supra*.

⁹³ 94 N.L.R.B. 508, 510 (1951).

⁹⁴ 112 N.L.R.B. No. 80, 36 L.R.R.M. 1077, 1078 (1955).

⁹⁵ Statute quoted note 89 *supra*.

cation and annoyance which this entails for the employer, to say nothing of the additional risk which it imposes, may prove a substantial deterrent to the execution and enforcement of valid union security agreements. If the Board, like any one else, is presumed to intend the normal consequences of its acts, one may well conclude that discouragement of enforcement of union security agreements is precisely the objective which the *Metal Ware* decision seeks to achieve.

ATTENUATION OF STATUTORY RESTRICTIONS ON EMPLOYER OPPOSITION TO UNIONIZATION

This paper must, of necessity, pass lightly over the new Board's policy of drawing those teeth which Congress left in Sections 8(a)(1) and (3) when it adopted Section 8(c).⁹⁶ Suffice it to say that Congress reaffirmed, in the clearest possible statutory language, that promises of benefit and threats of reprisal, designed to defeat unionization, are outlawed by the Act. Under the new Board's policy, applied in a host of cases, the rule has become a ghost, "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."⁹⁷ As Professor Wirtz has demonstrated,⁹⁸ employer language which in the past was found unmistakably to promise benefits is now characterized as innocuous "prophecy" or "prediction";⁹⁹ threats of reprisal, clear to the least sophisticated of employees, are now passed off as privileged statements of legal position; and even the clearest of threats are excused, wherever feasible, under the "isolated instance" rubric.¹⁰⁰

It is significant, too, that the new Board in Section 8(a)(3) cases appears to be more willing to reverse trial examiner fact findings where the examiner concludes that the employer's motive was discriminatory than when the examiner finds the employer's motive pure. During the past year and a half the Board eleven times reversed trial examiners who had found discharges discriminatory.¹⁰¹ In only four cases, however, during the same period, did it reverse where

⁹⁶ Statute quoted note 18 supra.

⁹⁷ *Edwards v. California*, 314 U.S. 160, 186 (1941).

⁹⁸ The New National Labor Relations Board; Herein of Employer Persuasion, 49 Nw. U. L. Rev. 594 (1954); Board Policy and Labor-Management Relations: "Employer Persuasion," NYU Seventh Annual Conference on Labor, p. 79 (1954).

⁹⁹ *National Furniture Mfg. Co.*, 106 N.L.R.B. 1300 (1953); *Chicopee Mfg. Corp.*, 107 N.L.R.B. 106 (1953); *Deming Co.*, 107 N.L.R.B. 1100 (1954); *Sparkletts Drinking Water Corp.*, 107 N.L.R.B. 1462 (1954).

¹⁰⁰ *Esquire, Inc.*, 107 N.L.R.B. 1238 (1954).

¹⁰¹ *Morganton Full Fashioned Hosiery Co.*, 107 N.L.R.B. 1534 (1954); *Leisure Lads, Inc.*, 112 N.L.R.B. No. 38, 36 L.R.R.M. 1017 (1955); *Union News Co.*, 112 N.L.R.B. No. 57, 36 L.R.R.M. 1045 (1955); *Tropix-Togs, Inc.*, 111 N.L.R.B. No. 157, 35 L.R.R.M. 1622 (1955); *Florida Builders, Inc.*, 111 N.L.R.B. No. 130, 35 L.R.R.M. 1575 (1955); *School-Time Frocks, Inc.*, 110 N.L.R.B. 1659 (1954); *Diaper Jean Mfg. Co.*, 109 N.L.R.B. 1045 (1954); *Petroleum Carriers, Inc.*, 109 N.L.R.B. 495 (1954); *Mills-Morris Co.*, 108 N.L.R.B. 1241 (1954); *East Texas Steel Castings Co.*, 108 N.L.R.B. 1078 (1954); *Price Electric Corp.*, 107 N.L.R.B. 1474 (1954); *Braswell Motor Freight Lines*, 107 N.L.R.B. 790 (1954).

the examiner failed to find discrimination.¹⁰² Of course, these results alone are not conclusive, but, viewed in context of the significant policy changes in other areas, they tend to suggest that the decisions in discriminatory discharge cases are now colored by an unarticulated premise that the employer's control over his labor force should not be impeded by too careful or penetrating an analysis of his motives in instances of alleged discrimination.

IV

The recent major policy decisions reveal a total disregard for the fact that in Section 1 of the Taft-Hartley Act, as in Section 1 of the Wagner Act, Congress declared it to be the policy of the United States to encourage unionization for the purpose of "restoring equality of bargaining power between employers and employees,"¹⁰³ to eliminate employer imposed obstacles to self-organization and collective bargaining which "lead to strikes and other forms of industrial strife or unrest, which have the . . . necessary effect of burdening or obstructing commerce,"¹⁰⁴ and to eliminate obstructions to commerce . . . "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."¹⁰⁵ Today, as under the Wagner Act, "the right of employees to organize for mutual aid without employer interference . . . is the principle of labor relations which the Board is to foster."¹⁰⁶

To say the least, self-organization is not promoted by decisions which sanction employer interference with unionization by all but the most blatant and stupidly phrased of promises and threats. That these decisions make it infinitely easier for employers to defeat employee efforts to organize for collective bargaining itself shows them to be incompatible with the declared objective of the Act. But they have other consequences additionally destructive of Congress' purposes. Congress provided the election machinery of Section 9 in the hope that its availability would induce labor organizations to resort to the administrative process to establish bargaining rights. When, however, the beginning of an organizational campaign or the filing of a petition with the Board becomes an invitation to the employer to interfere with his employee's choice, resort to the administrative process becomes a futility. The more employees and labor organizations come to realize that by skillfully utilizing their new won license

¹⁰² *Pyne Moulding Corp.*, 110 N.L.R.B. 1700 (1954); *Colonial Fashions, Inc.*, 110 N.L.R.B. 1197 (1954); *Wagner Transportation Co.*, 110 N.L.R.B. 1179 (1954); *Texas Independent Oil Co.*, 108 N.L.R.B. 617 (1954).

¹⁰³ 61 Stat. 136 (1947), 29 U.S.C.A. § 151 (Supp., 1954).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

employers can virtually insure the union's defeat at the polls, the more will they resort to organizational picketing and recognition strikes to establish collective bargaining. Such strikes and picketing the Board cannot end by conducting elections on employer petitions. For Congress made it perfectly clear that the administrative processes of Section 9 were established to supplement, and not supersede, the right of employees and labor organizations to strike and picket for organizational and recognition purposes. As the Joint Committee on Labor Management Relations reported:

The right to strike for recognition is only foreclosed when another labor organization has been certified as the bargaining representative.

A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it.¹⁰⁷

The result is that instead of assisting in the accomplishment of Congress' purpose—to reduce strikes and picketing provoked by employer opposition to unionization—the new Board's policies proliferate such disputes and frustrate Congress' purpose.

The same consequence results from the new jurisdictional policy which compels resort to strikes by barring access to the Act's administrative remedies. It is true, of course, in the short run, that the effect of that policy is to bar employer resort to the Board to remedy union unfair labor practices, as well as to bar union resort against employer unfair practices. But that is merely additional evidence of the incompatibility of the Board's policy with Congress' policy. Moreover, if, as it would appear, the real objective of the new policy is to induce Congress to turn over to the states the regulation of labor relations in those industries which the Board eschews, then the jurisdictional policy is part and parcel of a scheme to deny to employees and labor organizations the rights which they are entitled to enjoy under federal law.

The pitfalls and restrictions which the new Board has imposed upon the right of employees to engage in strikes and other concerted activities for mutual aid and protection are incompatible with Congress' recognition that the right to strike is the only means through which workers can make effective the collective bargaining power which the Act assures them. To impute to innocent strikers, as the Board now does, responsibility for the acts of unidentified third parties, and to have that imputation result in denial of reinstatement, is to make the right to strike so hazardous as seriously to impede its exercise. These changes, like the projected outlawry of "hot goods," clauses the prohibition of union resolution of seniority disputes, and the prohibition upon enforcement of uniform union rules governing the time for payment of periodic dues, all tend to weaken the bargaining power of employees vis-a-vis the employer, and to diminish union prestige and influence.

¹⁰⁷ Sen. Rep. No. 986, part 3, p. 71, 80th Cong., 2d Sess. (1948).

The sweeping and crucial character of the policy changes which the Board has made during the past eighteen months, taken together, amount to amendment of the statute in a manner far more drastic than anything this administration has proposed to Congress. To accomplish its objective the Board has cast aside compelling judicial authority. Judicial determination, as in *Conway*, that "hot cargo" clauses are not illegal seems inadequate to convince the new Board members that redetermination of the issue must be left to the legislative process. The fact that Congress, while enacting Taft-Hartley, considered and approved the earlier policies has given the Board members no pause in making changes, and even the legislative history of newly added provisions has in some cases been disregarded. It is ironic that such a development should occur at this stage, after Congress took special care, in the 1947 amendments, to adopt provisions which "effectively limit . . . the Board to the performance of quasi-judicial functions."¹⁰⁸

¹⁰⁸ H.R. Rep. No. 510, on H.R. 3020, p. 38, 80th Cong., 1st Sess. (1947).