RARELY has legislation evoked such articulate endorsement and abuse as the Labor-Management Relations Act of 1947. It is, depending upon where you sit, either the "Magna Charta of Management" or the "Valhalla of Organized Labor." The mere discussion of the bill inflamed two such sound and restrained gentlemen as Senator George and David Dubinsky to erupt on the same day with these unsound and unrestrained overstatements: the country, said the Senator, is under "the stranglehold of the labor bosses"; the legislation, exclaimed Mr. Dubinsky, is a "snake-bite into the heart of our American liberties."

That was June 24, 1947. It is now April 1948, ten months after the law was enacted and eight months after the bulk of it became effective on August 22, 1947. Has the alleged "stranglehold" relaxed? Was the alleged "snake-bite" venomous? Just what is this law and what has transpired during the first ten months of this labored labor law's dramatic life?

But first let us take a quick glance at the philosophic changes wrought by the Act in the law of labor relations.

THE PHILOSOPHY OF THE LAW

The basic philosophical changes are seven. *First: In the law's statement of policy, industrial strife is attributed not solely to the denial of employee rights by employers, as was asserted in the Wagner Act, but also to "certain practices by some labor organizations."*
Second: The Labor Board is no longer judge and prosecutor. Instead, those two functions are separated, and the general counsel of the Board now is in charge of all regional offices and has “final authority” to determine which charges should be investigated and whether complaints should be issued thereon.3

Third: The Act confers for the first time upon employees the right to “refrain” from exercising the right to join a union, except in the case of a union shop.

Fourth: Now unions, as well as employers, may be prosecuted for unfair labor practices and sued as entities in the federal courts for breach of contract.

Fifth: The closed shop is abolished.

Sixth: The secondary boycott and the jurisdictional strike are declared unlawful.

Seventh: Elaborate procedures are set up for the handling of labor disputes entailing national emergencies.

The Act is extraordinarily complex. It is the purpose here merely to deal with the more controversial phases of the law from a purely objective point of view. While this analysis is, in the main, slanted from a ten-months’ hindsight, it is nevertheless necessary to review the substance of the various clauses under consideration and the intent of Congress in enacting them.4

THE HIGH-LIGHTS OF THE LAW
UNFAIR LABOR PRACTICES OF EMPLOYERS

The section dealing with unfair labor practices of employers remains the same, with one important exception, as in the original Wagner Act.5

UNFAIR LABOR PRACTICES OF UNIONS

1. Coercion and Restraint. The law forbids the restraint or coercion by unions of employees in their right to join or not join a union.6 It is rather

3 For a recognition of the vast powers of the general counsel and for a delegation of further powers to him, see “Memorandum Describing Statutory and Delegated Functions of the General Counsel” issued by the NLRB and published in 13 Fed. Register 654 (1948); C.C.H. Lab. L. Serv. ¶5774.03 (1947).


5 Labor Management Relations Act § 8(a), 61 Stat. 140, 29 U.S.C.A. § 158(a) (Supp., 1948). Sections of the Act hereinafter referred to by section number only. These employer unfair labor practices are: (a) interference, restraint, and coercion, (b) domination of unions, (c) discrimination in hiring and firing, (d) discrimination for filing charges or giving testimony under the Act, and (e) refusal to bargain.

6 § 8(b).
clear that the real purpose of this prohibition was to outlaw such practices as the notorious "goon squads."7 Thus a decent burial has been accorded to the infrequent but reprehensible practice by a very few unions of gaining members by "blood" instead of by "sweat and tears." The first ten months of the Act's existence have been uneventful under this clause.

The only available remedies for coercion or restraint by a union are a "cease and desist" order by the Board, after full hearing, and the discretionary right in the Board to seek an injunction restraining the unfair labor practice if it feels that some material damage may otherwise ensue before the Board's final order can issue.8

2. Discrimination Against Expelled Union Members. The second union unfair labor practice inveighed against is to attempt to cause an employer to discriminate against an employee who has been ousted from the union for reasons other than his failure to pay dues.9 Now, in discussing the unfair labor practices of employers, they were said to be the same as before with one important exception. That exception is this: A new provision has been added to Section 8(a)(3) stating, in effect, that in a union shop an employer must not discharge a worker for union nonmembership "if he has reasonable grounds for believing" that the worker was expelled from the union for reasons other than the nonpayment of dues.

7 Senator Ball, a member of the Senate Labor Committee, in a speech in the Senate, 93 Cong. Rec. 4137 (Apr. 25, 1947). It will be noted that the words "interfere with," which appear in the analogous section relating to employers, § 8(a)(1), do not appear in this section. These words were deleted under an amendment offered by Senator Ives (N.Y.) so as not to imply that unions are prohibited from using peaceful persuasion to obtain new members.

8 §§ 10(c) and 10(j). The International Typographical Union has unsuccessfully asserted in a proceeding filed against it in the United States District Court at Indianapolis by an NLRB regional director, under § 10(j) of the Act (authorizing the Board to seek an injunction to restrain an unfair labor practice after the issuance of a complaint), that the Act does not authorize regional directors to seek such injunctions and that in any event the clause is unconstitutional. The constitutional attack asserted that the court must grant relief if there is a mere prima facie showing of the facts, even though later on the Board may come to a different conclusion after the trial has been held (since the court's findings are not binding on the Board), and that, therefore, the courts are deprived of their judicial power contemplated by the Constitution, i.e., the power to render a final and conclusive judgment to determine all issues of fact and law, and the union, in turn, is deprived of its rights without due process of law. On February 25, 1948 the Court denied the union's motion to dismiss this injunction suit, thereby upholding the constitutionality of § 10(j); and on March 27, 1948 the Court issued an injunction restraining the International Union from all action which causes its local unions to refuse to bargain, refuse to sign contracts except with 60-day cancellation rights, insist upon "conditions of employment" in lieu of contracts, and from supporting strikes—all until the NLRB issues its final order in Case 9-CB-5. NLRB v. International Typographical Union, 14 C.C.H. Lab. Cas. ¶64,344 (D.C. Ind., 1948). For a recognition of the limited authority of the courts in connection with mandatory injunctions under § 10(l) of the Act, see Douds v. Wine, Liquor & Distillery Workers Union, 14 C.C.H. Lab. Cas. ¶64,258 (D.C. N.Y., 1948).

9 § 8(b)(2).
So, read together, these sections mean that a worker in a union shop cannot be discriminated against by management (that is, he cannot be fired) because he has been thrown out of his union if the employer has mere "reasonable grounds for believing" that the worker was suspended from the union for some reason other than failure to pay dues. Let's see what that might mean: Even though a union member also joins another union (the bad practice of "dual unionism"), or reveals confidential union information, or seeks to destroy the union, or if he is a Communist or a strikebreaker or a grafter or just a plain troublemaker, the employer cannot be required to fire him from his job so long as he offers to pay his union "periodic dues and the initiation fees." Now, of course, that does not mean that the employer is powerless to discharge the employee; it merely means that he cannot do so for the sole reason that the worker is no longer in the union.

Senator Taft told the Senate that this clause was aimed solely at arbitrary and capricious action by unions—such as the New York case where, according to Senator Taft, ten men had to be discharged from a union shop because the union decreed that no one could be a union member unless he was a son of a union member; and such as the situation where, as told by Mr. Taft, a union member had to be discharged from his job because he was expelled from the union for truthfully testifying in court, under subpoena, that he saw a union steward knock down a foreman.

On the other hand, Congress neither desired nor intended to interfere with a union's internal affairs and, indeed, the Act says that the union's right to prescribe its own rules with respect to union membership shall not be impaired.

The unions are upset by this clause. They say: The Act makes us liable for the acts of our agents, even though we neither authorized nor ratified those acts—so that we are probably even liable for "wildcat" strikes—and yet we are not allowed to discipline our members by causing their dis-
charge from a union shop so long as they pay their dues. Perhaps it is permissible to digress for a moment to discuss the oft-expressed fear of unions that the law makes them liable for "wildcat" strikes if there is a "no-strike clause" in the contract. There was extensive debate in the Senate on the specific question of whether the word "agents" as used in the term "labor organization or its agents," where it appears several places in the Act, is broad enough to embrace employees who are mere members of the union.6

Senator Ferguson said:

I think the legislative history should make it clear that it is not the intent of the proposers of the amendment that "agent" should cover every employee.7

And Senator Taft during the same colloquy said that "the fact that a man was a member of a labor union in my opinion would be no evidence whatever to show that he was an agent."

So, it is not easy to understand why there has been so much talk about unions being liable for unauthorized and illegal strikes by their members where no representative of the union participated in or approved the strike.8 In other words, there is little or no basis for concern on the part of unions about the liability that might be inflicted upon them for "wildcat" strikes even if there is a provision in the contract prohibiting strikes, because it seems rather obvious that "no-strike" clauses would not be construed to be applicable where the union not only did not authorize the strike but where it made a conscientious effort to prevent it.9

Returning to Section 8(b)(2)—depriving unions of effective sanctions over their members in a union shop—the clause has been of no consequence during the first ten months of the law's life. The fact is that the average employee is union-minded and it is hard to envision unions encountering to any appreciable degree situations where recalcitrant mem-

6 Bulletin No. 4 on the Taft-Hartley Act, issued by the office of the General Counsel of the AFL.
6 §§ 8(b) and 301(b); 93 Cong. Rec. 4561 (May 2, 1947) and 93 Cong. Rec. 6608 (June 5, 1947).
7 93 Cong. Rec. 4561 (May 2, 1947).
8 A trial examiner held, in December 1947, in the Perry Norvell case, C.C.H. Lab. L. Serv., Report Letter No. 377 (Dec. 18, 1947), that a union was not responsible for the acts of its members who were on strike. But see note 137, infra, where General Counsel Denham seems to disagree.
9 Gerard D. Reilly, former member of the NLRB and said to be the chief draftsman of the Senate labor bill, wrote the author of this article, saying on this point: "It depends on the 'no-strike' clause,—i.e., if the pledge is unqualified, the union is liable even though a strike was called by a rival union which had some recruits in the bargaining unit. See Joseph Dyson and Son, 60 N.L.R.B. 867."
bers would seek to harm or bait their unions in reliance upon the union’s inability to exert effective and lawful reprisal.\(^{20}\)

The penalty for practicing this second union unfair labor practice is the same as for the first—a “cease and desist” order and the discretionary right in the Board to seek an injunction.\(^{21}\) The Board also has the power to require the union to pay the employee for wages lost by him as a result of the union’s having unlawfully persuaded the employer to discharge him, in view of the fact that Section 10(c) provides that “where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.”

3. Secondary Boycotts and Jurisdictional Strikes. The next union unfair labor practice is to refuse to bargain;\(^{22}\) and then we come to the prohibition against encouraging strikes or boycotts if as—(the word “an” must be stressed)—if an object is (a) to force anyone to cease dealing with another (i.e., secondary boycotts), (b) to force another employer to recognize an uncertified union, or (c) to force any employer to assign to workers of one craft work already assigned to those in another craft (i.e., a jurisdictional strike). But this same section expressly protects the right of workers to refuse to cross picket lines of another company unless the lines are supporting a “wildcat” strike by an uncertified union.\(^{23}\)

Thus, the secondary boycott and the jurisdictional strike pass from the American scene. The judicial decisions on good and bad secondary boycotts were confused and confusing—not only before the Norris-LaGuardia Act, but also since.\(^{24}\)

Secondary boycotts were declared unlawful, even after Sections 6 and 20 of the Clayton Act were enacted, on the ground that the words “labor dispute” embraced only primary boycotts (i.e., conflicts between employers and their own employees); and then the Duplex and Bedford Stone de-

\(^{20}\) Dr. John R. Steelman, Assistant to the President of the United States and former Chief of the U.S. Conciliation Service, in a letter to the author has said that some reference might well be made at this point to §§ 8(a)(3)(A) and 8(b)(2) which, in effect, prevent the discharge of an employee in a union shop if the employer “has reasonable grounds for believing that such membership (in the union) was not available to the employee on the same terms and conditions generally applicable to other members.” Dr. Steelman writes that this is “an element which some students find reminiscent of the FEPC.”

\(^{21}\) §§ 10(c) and 10(j).

\(^{22}\) §§ 8(b)(3).

\(^{23}\) § 8(b)(4).

cisions of the Supreme Court caused Congress to pass the Norris-La-
Guardia Act, which extended the ban on injunctions far beyond the direct
management-worker relationship and prevented courts from restraining
secondary boycotts.\footnote{Secondary boycotts effectuated by peaceful picketing have, in recent years, been lawful in Illinois. 2063 Lawrence Avenue Bldg. Corp. v. Van Heck, 377 Ill. 37, 44, 35 N.E. 2d 373, 375 (1941); Maywood Farms v. Milk Wagon Drivers, 313 Ill. App. 24, 26, 38 N.E. 2d 972, 973 (1942); Montgomery Ward & Co. v. Franklin Union, 323 Ill. App. 590, 593, 56 N.E. 2d 476, 478 (1944).}

No one mourns the demise of jurisdictional strikes, but unions contend
that secondary boycotts should not be outlawed because to do so preju-
dices the inherent right of citizens (a) to exercise peaceful persuasion over
fellow citizens to assist them to bring in line nonunion or unfair employers
and (b) to refrain from work for any reason they see fit or for no reason at
all. This is the chief reason labor characterizes this Act as the "slave la-
bor" law, and it is frequently overlooked that Congress tacked on a section
at the very end of the Bill intended to meet this criticism and reading,
in part:

Nothing in this Act shall be construed to require an individual to render labor or
service without his consent . . . ; nor shall any court issue any process to compel
the performance by an individual employee of such labor or service . . . [Section 502].

The three remedies available where secondary boycotts or jurisdictional
strikes occur are in two respects rather drastic. First, if after investigation
of such a charge the regional attorney of the Board "has reasonable cause
to believe such charge is true," he must seek an injunction in the district
court even before the issuance of a complaint by the Board. This same
clause gives the district court "jurisdiction to grant such injunctive relief
or temporary restraining order as it deems just and proper, notwithstand-
ing any other provision of law."\footnote{\S 10(1).}

It is a little puzzling how this remedy is consistent with our Constitu-
tion\footnote{The Thirteenth Amendment prohibits "involuntary servitude."} and with Section 502, which says that courts may not compel em-
ployees to work. If a secondary boycott is being achieved by a strike of
employees of an employer whom they desire to have refuse to buy the
goods of the objectionable third party, how, you may wonder, can the
strike be stopped except by an injunction commanding the strikers to re-
turn to work? Yet Section 502 forbids such relief. And if the boycott is in
the form of a refusal of workers to make products involving the use of ma-
terials from the third party, but without a strike, how can a court direct
them to do the objectionable work, in view of our Constitution and Section 502 of the Act.\footnote{See Timken Roller Bearing Co. v. NLRB, 161 F. 2d 949, 954 (C.C.A. 6th, 1947), where the court held it could not compel workers on strike to return to work even though a “no-strike” clause was in their contract.}

Section 10(l) even extends this injunctive procedure to mere jurisdictional disputes (under Section 8(b)(4)(D)) “in situations where such relief is appropriate.” But how can a jurisdictional dispute be settled by injunction unless someone is restrained from striking? Of course, if no strike is even threatened, the problem won’t arise, because then the Act provides for the settlement of the jurisdictional conflict in a hearing before the Board (Section 10(k)). However, Section 10(l) expressly contemplates mandatory injunctive relief “in situations where such relief is appropriate”—whatever that means.

Now, we all know that the stock answer to this question is this: The courts won’t presume to order the strikers to go to work; they will simply command the union leaders to rescind the strike order and as a matter of course this will result in the strikers’ returning to work. Well, first of all, this result may not ensue because the word can easily be passed out along the “grapevine” that even though the strike is called off by the union, the workers may and should stay out on strike. And, secondly, if the union is “encouraging” a boycott by means of peaceful picketing, and if the injunction would have the effect of calling off the picketing, suppose the union says something like this to the court:

Judge, you simply can’t direct us to rescind our picketing order because our members are engaged in peaceful picketing and, under the Thornhill and Swing cases of the Supreme Court, peaceful picketing is lawful as an exercise of the right of free speech. A restraining order against us will result, as a practical matter, in the deprivation of the right of our members to engage in peaceful picketing; so, your honor, the labor law, in so far as it presumes to authorize injunctions to restrain peaceful picketing, is unconstitutional!\footnote{Thornhill v. Alabama, 310 U.S. 88, 102-4 (1939); AFL v. Swing, 312 U.S. 321, 325 (1940). But cf. Carpenters Union v. Ritter’s Cafe, 315 U.S. 722, 728 (1942).}

Senator Ball, who was one of the best informed and most effective pro-
ponents of this legislation, has written the author as follows in connection with this point:

Section 502 protects the individual's right to work or not as he pleases, which is inviolable under the Constitution anyhow. The injunction would run against the union and its officers and agents doing certain things, among them, promoting or running a strike. There is a vast difference.

Well, maybe so, but on page 29 of the book entitled Analysis of the Taft-Hartley Act, issued by the General Counsel of the CIO late in 1947, appears this in connection with strikes and picketing for secondary boycotts:

All of these so-called union unfair labor practices can be committed only by a union and its agents. There is therefore nothing to prevent individual employees from engaging in any activities, including picketing.

The second remedy for boycotts and jurisdictional strikes is a "cease and desist" order by the Board, and the third remedy is a suit in the district court for damages by "whoever shall be injured in his business or property" and even though the amount sued for may be less than $3,000.30

So, henceforth, "whoever" is damaged by a secondary boycott may sue the union. This is one of the real philosophic transitions in our law because previously the Supreme Court allowed recovery, if at all, only where the primary objective and activities of the union were "control of the (interstate) market and were so widespread as substantially to affect it."31

From the first Coronado case (written by Senator Taft's father) on down, it has been the primary intent which has been scrutinized. If that has been unlawful (such as a deliberate conspiracy to interfere with products entering interstate commerce rather than to strike to achieve higher wages with an inevitable secondary intent of restricting the employer's production or sales), then "whoever" was damaged by the boycott could recover from the union.32

Under the new law anyone damaged by a secondary boycott, irrespective of the primary objective of the boycott (remember that the act of the union is unlawful if "an" object is a secondary boycott), can recover damages against the union, even though the monetary injury may be less than $3,000.

Now, what does all this mean? Suppose the employees of the X Baking

30 §§ 10 and 303.
31 Apex Hosiery Co. v. Leader, 310 U.S. 469, 506 (1940).
Company are well satisfied with their wages and working conditions but another local of the same union is unable to organize the "Eureka Yeast Company," from which the baking company buys its yeast. A strike is called at the baking company, or by means of picketing that company's plant the union "encourages" a strike, so that the company will exert pressure on the yeast company (either expressly or by refusing to buy yeast from it) to sign up with the union. In such case the innocent party—the baking company—could file a charge against the union with the Board, in which event the Board must give priority to the case and the Board's regional attorney must seek an injunction to stop the strike or picketing if he believes the charge to be true. In addition, the baking company could sue the union for damages in the federal court.

Has this aspect of the law been efficacious in the first ten months? Yes, certainly as to the abolition of jurisdictional disputes. This phase of the Act was not fought by organized labor; in fact, most unions undoubtedly welcomed the assistance it afforded their own efforts to stamp out the blight of the jurisdictional dispute.

As to secondary boycotts, only 144 such charges were filed with the Board through February 29, 1948. But it would be unrealistic to look solely at statistics in evaluating the efficacy of this phase of the Act, for it cannot seriously be gainsaid that the mere fact that the drastic remedies were available under the Act may have constituted a latent threat of such grave proportions as to abort many gestating secondary boycotts. Senator Taft, after summarizing instances where proposed boycotts have been abandoned, has recently said:

Are unions calling off their secondary boycotts... because of possible court injunctions or cease and desist orders obtained by NLRB, or because the new law gives the injured party a right to sue and collect damages out of union treasuries...?

Few cases on boycotts have reached the courts under the new law, but these problems may be gleaned from them:

(A) Must the district courts issue an injunction to restrain a secondary boycott? The Act requires the Board to petition for such relief when investigation discloses reasonable cause to believe that the charge is true. The district courts are given jurisdiction to grant such injunctions as they deem "just and proper, notwithstanding any other provision of law." Thus far the courts have not been in full agreement (1) whether this means

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23 For example, in the entire months of November and December 1947, only twelve jurisdictional disputes were reported to the NLRB.

24 Taft, Toward Peace in Labor, Collier's, p. 21 (March 6, 1948).

25 § 10(l).

26 Ibid.
that the traditional conditions precedent to the granting of an injunction (i.e., irreparable injury and the lack of an adequate remedy at law) should be read into this law or (2) whether the common law requirements do not apply so that the injunction must issue upon a mere prima facie showing that the court has jurisdiction and that the Board's Regional Director has apparent justification for his belief that the charge of a secondary boycott is true. The latter view, followed in the Securities and Exchange Commission cases, has found its most spirited application under the Taft-Hartley Act in the *Brotherhood of Teamsters* case, where District Judge Brennan said:

The relief provided is entirely statutory. The common law requirements do not apply. The statutory scheme is complete in itself.37

It should be remembered, however, that the Act affirmatively states that such injunctions may be granted as the courts deem "just and proper." That these words may be construed to justify the application of the orthodox equitable showings in cases of this sort was impressively held by District Judge Ryan in *Douds v. Wine, Liquor & Distillery Workers Union* where, a secondary boycott having been terminated subsequent to the filing of the petition and prior to the hearing, the court said:

Consideration of the provisions of Section 20(l) of the Act giving the court "jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper," clearly discloses the intention of Congress that the court was to exercise its discretion to fit the needs and circumstances of each particular case.38

The court denied an injunction on the ground that there appeared to be no intention on the part of the union to renew the boycott and that, therefore, there was no likelihood of substantial and irreparable injury being done to the flow of interstate commerce, general welfare, the charging parties or anyone else.

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38 *Douds v. Wine, Liquor & Distillery Workers Union*, 14 C.C.H. Lab. Cas. ¶64,268 (D.C. N.Y., 1948). And in *Sperry v. United Brotherhood of Carpenters*, 14 C.C.H. Lab. Cas. ¶64,249 (D.C. Kan., 1948), the court chose to solve this question by finding that unless a secondary boycott was enjoined "the policies of said Act will be irreparably impaired." See also *Styles v. Local 74, United Brotherhood of Carpenters*, 13 C.C.H. Lab. Cas. ¶64,093 (D.C. Tenn., 1947). In *Dixie Motor Coach Corp. v. Amalgamated Ass'n*, 14 C.C.H. Lab. Cas. ¶64,232 (D.C. Ark., 1947), the court issued an injunction where the boycott was merely threatened and was not being carried on.
Nor should sight be lost of these words of Mr. Justice Douglas in Hecht v. Bowles, in disposing of a somewhat similar point under the Fair Labor Standards Act:

A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.39

One factor which distinguishes this problem from most injunction precedents is that here the district courts fulfill only an interim function, since the controversy must, under the law, be heard and disposed of by the Board itself. So, it is conceivable that the district courts will tend to be somewhat chary about granting their most extraordinary mode of relief (i.e., an injunction—sometimes even without notice),40 not to maintain the status quo until the court can hear all the evidence, but merely to supplement the processes and procedures of an administrative body.41

(B) Will the courts adopt the “unlawful purpose” doctrine and thereby modify the rule of the Thornhill and Swing cases by enjoining peaceful picketing in furtherance of unlawful boycotts? Reference has already been made in this article to the constitutional attack which might be asserted on the injunctive segment of the ban on secondary boycotts. Indeed, it is difficult to see how the Thornhill and Swing decisions of the Supreme Court can be squared with the obvious implication in the Taft-Hartley Act that peaceful picketing, when indulged in for the purpose of “encouraging” a secondary boycott, is unlawful.42 Free speech (as expressed through peaceful picketing) would seem to be equally inviolable, under the doctrine of those two cases, whether engaged in to further a strike or a boycott. The lower courts thus far have stepped gingerly, indeed, in passing over this high hurdle.

“Is the picketing directed toward the attainment of a lawful purpose?” This approach may be the device which will give the courts clearance over this barrier. Prior to the new labor law, but after the Thornhill and Swing cases were decided, there was no sort of peaceful picketing which was unlawful under statute or case law; or, more accurately, no matter what goal

40 § 10(l).
41 But see LeBaron v. Printing Specialties Union, 14 C.C.H. Lab. Cas. ¶64,290 (D.C. Cal., 1948), where the court said that where a “credible petition” is filed by a regional director under § 10(l), “this court should grant an appropriate injunction auxiliary to the proceedings in the Board and until the labor dispute pending before the Board is finally adjudicated by the Board.”
was sought by means of innocuous picketing (with one exception), it was lawful. Then, in the *Dixie Motor Coach* case, decided the last day of 1947, a district court in effect distinguished the situations before the court in the *Thornhill* and *Swing* cases from peaceful picketing to further a secondary boycott subsequent to the new law. The district judge said:

"Here we have no violence but we do have coercion and oppressive conduct, and also conduct expressly declared to be unlawful by the Taft-Hartley Act."

The thought apparently is that what was benign picketing prior to the Taft-Hartley Act is now "coercion and oppressive conduct." The district court need not, it is suggested, have gone so far. The new law makes unlawful the mere encouragement of secondary boycotts; and hence even peaceful picketing, if its purpose is to foster a boycott, is prohibited. At least this would seem to be the nub of the *Dixie Motor Coach* doctrine.

Even more dramatically, the Supreme Court of the State of Washington has reversed its field (for the second time) and now holds that "stranger picketing" is unlawful if its objective is unlawful. That court first switched its view after the *Swing* decision, holding that, in view of the *Swing* precedent, peaceful "stranger picketing" could no longer be enjoined. Then came the *Gazzam* case, late in 1947. The court, no doubt heartened by the Taft-Hartley Act and by some words it found in the *Ritter's Cafe* case, expressly reversed its *S & W Fine Foods Co.* ruling and held that the state labor disputes statute (which limited the jurisdiction of the courts to enjoin unions in labor disputes) did not prevent the issuance of an injunction to restrain peaceful picketing in support of a primary boycott (plus the issuance by the union of a "we do not patronize" list). The reasoning:

"Organized labor has the right to communicate its views either by word of mouth or by the use of placards. This is nothing more nor less than a method of persuasion."

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43 The exception is found in the *Ritter's Cafe* case, where the Court held that a union could be enjoined from peacefully picketing a restaurateur whose only alleged vice was in having made a construction contract with a contractor who employed non-union labor, because a Texas antitrust statute, under which the injunction was issued, was not an unreasonable limitation of free speech for the common good. *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722 (1942); see also *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 775 (1942).


46 *S & W Fine Foods v. Retail Delivery Drivers Union*, 11 Wash. 2d 262, 128 P. 2d 962 (1941); see also *State ex rel. Lumber & Sawmill Workers v. Superior Court*, 24 Wash. 2d 314, 164 P. 2d 662 (1945), where the same court refused to enjoin a boycott solely because, under the reasoning in *Thornhill v. Alabama*, 310 U.S. 88 (1940), such picketing was a privileged exercise of free speech.

But when picketing ceases to be used for the purpose of persuasion—just the minute it steps over the line from persuasion to coercion—it loses the protection of the constitutional guaranty of free speech. . . .

Thus we find the ascendancy of the lawful-purpose doctrine. If it persists, injunctions to restrain peaceful picketing which encourage unlawful boycotts would be permissible. But it may not persist, because the doctrine assumes that the courts are conclusively bound by a Congressional enactment. Can Congress delimit the scope of free speech, as fixed by the Supreme Court, by declaring unlawful the aim of such speech? Congress, for example, could not constitutionally decree that it would be unlawful for union leaders to criticize employers in a volatile manner, as long as such speech was wholly disassociated from conduct or threatened conduct inimical to property rights or to public policy. On the other hand, Congress undoubtedly can outlaw acts which it reasonably deems would foment interstate industrial strife. Whether or not our Supreme Court will conclude that Congress intended, in prohibiting the mere "encouragement" of secondary boycotts, to frustrate peaceful picketing and, if so, whether Congress acted reasonably in so doing, is an area of forecast into which even fools will be unlikely to rush.

4. Excessive Union Fees. The next union unfair practice is to require workers to pay an "excessive" initiation fee. The criteria are to be the customs of unions in the industry and the wages being received. This is "window dressing" which won't mean (and thus far hasn't meant) very much in practice. The penalty for this is a cease and desist order.

5. "Featherbedding." The last unfair practice is to attempt to cause management to pay an "exaction" for services not rendered. This is directed at "featherbedding"—the thought being to extend the so-called "Anti-Petrillo" law (the Lea Act) to all unions. It is conceivable, say the unions, that the Act could be construed to prohibit pay for lunch-time, rest periods, and lawful "call-in" pay. The unions are unduly worried. The clarifying and saving word is "exaction." Obviously, Congress merely intended

48 Gazzam v. Building Service Employees Union, 188 P. 2d 97, 102 (Wash., 1947); see also Dinoffria v. International Brotherhood of Teamsters & Chauffeurs, 311 Ill. App. 129, 72 N.E. 2d 635 (1947), and same case on appeal to the Illinois Supreme Court, 14 C.C.H. Lab. Cas. 64,261 (Ill., 1948).

49 On September 10, 1947 a California court ruled that the new law does not outlaw peaceful picketing in connection with boycotts. Perhaps not, but the signs carried by the pickets would have to be very innocuous, indeed, because the Act expressly prohibits acts which merely "encourage" strikes or boycotts. Ensher v. Fresh Fruit Union, 16 U.S.L. Week 2161 (October 7, 1947). On October 3, 1947 the California Supreme Court held unconstitutional the California Secondary Boycott Law in an exhaustive and knowledgeable opinion on this aspect of the "free speech" problem. In re Blaney, 184 P. 2d 892 (Cal., 1947).

50 § 8(b)(5).

51 § 8(a)(6).
to prohibit the rare abuse of requiring the hiring of workers who are genuinely not needed.\textsuperscript{52} The penalty for "featherbedding" is a cease and desist order.

Now, this seems simple enough, and yet there may be some difficulty over this provision. Suppose that a union has been requiring a company to employ ten firemen in a boiler room, and yet management knows very well that because of mechanical improvements in the boilers only seven firemen are really needed. Now, mind you, all ten have been working—but not very hard. When management demands that three firemen be discharged, the union may take this position: "The law says 'featherbedding' means an exaction for services which are not performed or not to be performed; the ten men are all working and hence there's no violation if we demand that you keep all ten!"

Of course, management could still discharge the three extra men, but if it did the union could strike, and if it prevailed in its contention, the strike would not be unlawful.

PRIVATE REMEDIES TO ENJOIN UNFAIR LABOR PRACTICES
A JURISDICTIONAL CONFLICT BETWEEN THE BOARD AND THE COURTS

In leaving Section 8, which proscribes unfair labor practices, some notice should be taken of the simmering quarrel between the NLRB and the courts over the jurisdiction of the latter to grant injunctions on motion of a private party to restrain such practices. Those familiar with the legislative history of the Act will be surprised to learn of this conflict because it is abundantly clear from the Congressional reports and debates that it was intended to exclude private parties (unions and employers) from the injunctive remedy. Senators Taft, Ball, Donnell, and Jenner, of the Senate Committee, filed with the Majority Report a document entitled "Supplemental Views" in which they bemoaned the fact that no such remedy was available to employers to enjoin secondary boycotts.\textsuperscript{53}

Senator Taft was able to have adopted Section 303, giving the right to file private suits for damages for secondary boycotts and jurisdictional strikes, but the provision in his amendment authorizing private injunction suits to restrain those unfair practices was defeated. In fact, during consideration of that amendment, this colloquy occurred:

Senator Morse: Since the amendment does not go on to provide that there is no intention on the part of the proponents of the amendment to prevent employers from

\textsuperscript{52} 93 Cong. Rec. 7001–2 (June 12, 1947).

\textsuperscript{53} Supplement to S. Rep. 105, 80th Cong. 1st Sess., at 54 (1947).
seeking injunctions in secondary boycott cases, I am inclined to believe that... there is automatically restored to the employer injunctive relief.

Senator Taft: That is not the intention of the author of the amendment. It is not his belief as to the effect of it. It is not the advice of counsel to the Committee. Under those circumstances, I do not believe that any court would construe the amendment along the lines suggested by the Senator from Oregon.54

Senator Taft guessed wrong in the light, at least, of early returns. Two district courts have already ruled that the courts do have jurisdiction to enjoin unfair labor practices on the motion of private parties. In Textile Workers Union v. Amazon Cotton Mill, a district judge in North Carolina held that an employer could be enjoined from committing an unfair labor practice because the Act omits the word "exclusive" in referring to the jurisdiction of the Board and because the Norris-LaGuardia Act does not apply to suits brought by unions.55

In the other case, a district court in Arkansas held that the Dixie Motor Coach Company was entitled to an injunction to restrain a secondary boycott because (a) the Norris-LaGuardia Act did not apply since the boycott would be induced by "stranger picketing" and hence a labor dispute did not exist, and (b) "the Taft-Hartley Act does not forbid the issuance of an injunction under these conditions."56

The NLRB later intervened in the Amazon Cotton Mill proceeding in an effort to persuade the court to change its mind, but the court ruled against it, saying in effect that the courts can, under their general equity jurisdiction, protect private rights (such as enjoining an employer's unfair labor practice on motion of a union) without interference with "the public remedies of the Board."57 This theory may be more unique than sound.

The third court to tackle this issue, a state court in California, has ruled that the Board has exclusive jurisdiction (except where expressly provided to the contrary in the Act), since Congress intended to create a comprehensive system of administrative remedy with provision for injunctive relief only on petition of the Board itself.58 This court took the trouble to inquire into the legislative history of the law and thus had no hesitancy in dismissing the proceeding.

54 93 Cong. Rec. 5065, 5074 (May 9, 1947) (italics added).
NEW STATUTE OF LIMITATIONS

In leaving this segment of the law—unfair labor practices—passing mention should be made of the important new limitations period which prohibits the issuance of a complaint "based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge" with the Board.\(^9\)

THE "FREE SPEECH" CLAUSE

And now for the "free speech" clause. Because of the tremendous importance and the possibility of an attack on the validity of Section 8(c), the entire clause will be quoted:

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 Act, if such expression contains no threat of reprisal or force or promise of benefit.

In the Senate there was considerable opposition to this provision on the ground that unless an employer actually enunciated a threat, his remarks not only would not constitute an unfair labor practice, but they could not, as will be seen from the clause, even be used as "evidence of an unfair labor practice." For example, Senator Taft agreed with Senator Pepper that if on a Monday an employer said to all his employees: "I hate labor unions, and I think they are a menace to the country!" nevertheless this remark would not be competent cumulative evidence to shed light on whether a union steward discharged by the same employer three days later was fired for cause or for union activity.\(^6\)

Even the General Counsel of the National Association of Manufacturers, R. S. Smethurst, has blinked a little at this prohibition in the statute, saying:

Obviously, this construction would impose a harsher rule of evidence even than existed under common law rules in criminal cases.\(^6\)

\(^{9}\) § 10(b).

\(^{6}\) 93 Cong. Rec. 6604 (June 5, 1947). On the same day Senator Taft said: "All these questions involve a consideration of surrounding circumstances." And yet the Senator stated, with regard to Senator Pepper's example: "That statement would not be any evidence of a threat. There would have to be some other circumstances to tie in with the act of the employer." 93 Cong. Rec. 6604 (June 5, 1947). Later, on June 12, 1947, Senator Taft said that the new section "has no application to statements which are acts in themselves or contain directions or instructions. These, of course, would be deemed admissions and hence competent." 93 Cong. Rec. 7002 (June 12, 1947). The situation is confused. For a further discussion of the legislative history of this section, with particular regard to the deletion by the Conference Committee of the words "under all the circumstances," see Cox, Some Aspects of the Labor Management Relations Act, 61 Harv. L. Rev. 1, 17 (1948).

\(^{6}\) Smethurst, 9 N.A.M. Law Digest 66 (June 1947). Mr. Smethurst has written the author as follows concerning the above quotation in this article: "It might give the impression that
And Senator Morse charged in the Senate that in criminal law evidence of a defendant's "views, arguments and opinions are received as competent evidence of motive." To this Senator Taft replied:

Consider a more exact comparison. In a murder trial in which the defendant is accused of killing a Republican senator his political views or opinions would not be competent testimony. Yet the Board has permitted employers' expressions of opinion on unionism to be used to sustain the theory that he was guilty of violations of the N.L.R.A. Senator Taft's example may not be entirely apt; much would depend upon what the defendant had actually said, and when. If he had exclaimed: "I hate Republican senators and think they are a menace to this country!" and then two days later a Republican senator was found murdered under circumstances which threw suspicion toward the defendant, his volatile views would probably be admissible.

If the intent of Congress has been accurately appraised, this free speech clause represents a significant development in labor-law philosophy, because the old theory was that, by virtue of the inherent craving for economic security and the ancillary fear of biting the hand that feeds, employees were always to be protected against pregnant, trenchant implications expressing employers' views on labor matters.

This thought comes to mind: Can Congress legislate with respect to a constitutional freedom? Free speech, we all know, is a qualified freedom, as Mr. Justice Holmes said in the Schenck case in pointing out that a man may not lawfully shout "Fire!" falsely in a crowded theater. But doubts arise when Congress presumes to remove some of those qualifications in a particular sphere of activity. Now, of course, Congress may validly limit the right of free speech if it acts reasonably to protect the public interest. But can Congress legislate away, in effect, the qualifications placed on a constitutional freedom by judicial decree?

we concurred with Senator Morse in objecting to the provision in the Act pertaining to 'free speech.' We did agree that under one possible construction, it might result in a rule of exclusion more stringent than followed even in criminal cases. We certainly did not agree with Senator Morse, however, that the whole provision was undesirable."

62 93 Cong. Rec. 6610 (June 5, 1947).
63 93 Cong. Rec. 7002 (June 12, 1947).
64 See, for example, cases cited in 31 C.J.S. § 258 (1942); People v. Fisher, 295 Ill. 250, 258, 129 N.E. 196, 199 (1920); MacNeil, Illinois Evidence § 34 (1927).
So far the Supreme Court has ruled that employers cannot be deprived of their right of free speech so long as their statements are not "coercive," but that "the mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with . . . its employees, the Board has the right to look at what the Company has said, as well as what it has done." Now Congress says, in effect, that the Board cannot look at what the employer has said unless he has expressly threatened reprisals or promised benefits. The courts may not construe this clause as broadly as a few members of Congress had hoped and intended.

Mr. Justice Rutledge said in *Thomas v. Collins* that Congress has the power in the first instance to delineate the qualifications which attach to the right of free speech, but that "... in our system where the line can constitutionally be placed presents a question this court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition."

So only time and the Supreme Court can tell us the fate of, or the judicial limitations on, the free speech clause of the new law.

Passing from this complex question of constitutional law, what are the practical aspects of this clause? Henceforth employers may tell their employees what their views are concerning unions, freely and forcefully, provided that management does not use threats or favors as weapons or rewards to force those views upon the employees. Subject to this limitation employers may safely "take sides" in union matters. But they must not, of course, in any way attempt to implement their opinion by overt acts

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65 See, for example, 93 Cong. Rec. 7002 (June 12, 1947); 93 Cong. Rec. 6604 (June 5, 1947); see also Cox, Some Aspects of the Labor Management Relations Act, 61 Harv. L. Rev. 17, 17 (1948), where it is said: "Section 8(c) itself contains nothing to suggest that in determining the presence of a threat or promise the Board is to shut its eyes to extrinsic circumstances and look only to the naked words. In the labor field, as elsewhere, language takes on its meaning from its context."
71 NLRB v. Mylan-Sparta Co., 14 C.C.H. Lab. Cas. ¶64,366 (C.C.A. 6th, 1948); see NLRB v. Clark Bros. Co., 163 F. 2d 373 (C.C.A. 2d, 1947) (decided prior to the new law). And see Ames Spot Welder Co. v. United Electrical Workers, 1 C.C.H. Lab. L. Serv. ¶6208 (NLRB, 1947), where the employer was held to have committed an unfair labor practice (i.e., coercion) when he had questioned an employee as to union affiliation and threatened to reduce the work week if the union came into the plant. Compare the Board's ruling of Dec. 10, 1947 that, where the solicitations of rival unions for members were seriously interfering with production, the employer was protected by the free speech clause in threatening to close the plant (and later actually doing so) unless the solicitations stopped. Trilli (Bluefield Garment Manufacturers), C.C.H. Lab. L. Serv. ¶6308 (NLRB, 1947).
which could fairly be construed as discrimination against the union or its members—such as, for example, discharging an employee because he joins a union which management does not favor. The distinction, it would seem, is between *speech* and *conduct.*

The first ten months under the Taft-Hartley Act have shed little light on the trend of judicial construction of the free speech clause. By far the most significant developments were (a) the ruling of General Counsel Denham, privately issued in November 1947 to all Board attorneys, directing them to ask trial examiners to receive in evidence all statements made by employers, leaving to the Board itself to decide whether the statements were coercive or non-coercive; and (b) the truly important decision of the Board in the Bailey case in which it reversed the trial examiner and held that the employer was not guilty of an unfair labor practice in distributing circulars to his employees during a pre-election campaign discussing “the bad reputation of the union,” the union’s failure to secure benefits for its members in other companies, its participation in “disgraceful mob picketing” and “riots,” and the fact that the local was affiliated with a union “whose Chicago branch became notorious as being a racket and controlled by a member of the Capone gang,” the Board saying that: “Although they clearly indicated the respondent’s antipathy toward the union and its leaders and the respondent’s preference for individual bargaining, they appear to be only such expressions of opinion as are protected by the constitutional guarantee of free speech.”

On Sept. 23, 1947, Dr. John R. Steelman wrote to the author as follows regarding this part of the article: “Basically, I agree with you that the extent to which Congress can qualify the limits of free speech is a matter for decision by the Supreme Court. I cannot entirely agree with your analysis, however, of the distinction between the new and old law on this point. For one, in the colloquy between Senator Taft and Senator Pepper to which you refer, I would mention that Senator Taft admitted that, although a bare statement by itself could not be deemed evidence of a threat, surrounding circumstances might be taken into account and such statement could be considered if a discharge was determined to be illegal. [Author’s note: see note 60 supra, where reference is made to this.] Thus, the harshness of the new evidence rule is somewhat tempered and made to conform more to the prior practice. In another way, the prior practice is not too far different, since the Board, in the course of time, refused to consider anti-union expressions by themselves if unaccompanied by threats; it did, however, regard them as part of the background.” On March 18, 1948 Paul M. Herzog, Chairman of the NLRB, said: “The Board has not yet discovered the precise extent to which it is now precluded by Section 8(c)—commonly known as ‘the free speech amendment’—from considering as evidence of unfair labor practices, whether charged against employers or against unions, statements that had probative value under the original Wagner Act. *There is no doubt that the law has been modified;* by applying the new section in several old unfair labor practice cases, we have recently found it necessary to reverse a number of Trial Examiners’ Intermediate Reports. See, for example, Matter of Fulton Bag & Cotton Mills, 75 N.L.R.B. 111.” Release 50 of the NLRB (italics added).

See, for example, the two Board rulings of December 1947, note 71 supra.

The Board rejected without discussion the trial examiner's theory that the employer's statements were part of a coercive "course of conduct." This is particularly significant because in the same case the Board held that the employer had unlawfully interfered with the union in calling the employees to his office, immediately preceding the election, and promising them substantial economic benefits. It will be seen that the Board did not strike from the evidence the testimony concerning the statements made in the circulars by the employer, as Section 8(c) would have justified its doing, but instead interpreted the proof as merely the exercise by the employer of his right of free speech.

**TERMINATING UNION AGREEMENTS**

The collective bargaining section of the Act provides that if the bargaining results in a contract, then neither party may terminate it unless it gives 60 days' notice in advance. During that cooling-off period the union may not strike.

Unions and management should remember that, failing the giving of such a notice, their contract continues in effect, even beyond its stated termination date, until such a notice and cooling-off period occur. The law of contracts tells us that parties who hold over under a one-year agreement are bound by operation of law for another full one-year period. Perhaps this principle is modified where the holding-over was compulsory under a statute of this type, but the issue can be avoided entirely by the simple expedient of taking care to comply strictly with the contract termination requirements of the law.

But here's the real "catch," say the unions, in Section 8(d): if an employee does strike within that 60-day cooling-off period, under the law he thereby loses his "status as an employee," as well as most of his rights under the Act. On the other hand, they say, management could, during this same 60-day period, engage in unfair labor practices to goad the union into an unlawful strike; yet management would be entirely free from redress, except a "cease and desist" order after hearings before the Board which would consume months of time. In the meantime, during the unlawful strike management could possibly have obtained a new representation election at which all union strikers would be ineligible to vote.

While on paper this is an inequitable situation, in practice it is most unlikely that it will harass employees or unions. In instances where manage-

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25 § 8 (d).


ment's conduct is improperly provocative, the union need only delay its strike until the end of the 60-day cooling-off period.78

**REPRESENTATION PROCEEDINGS**

Of the several changes effected by Section 9(c) in the procedure for determining which union the employees desire to have represent them, these three are uppermost:

1. **Petition for Election:** Now employers will have the right to file a petition for an election if one or more workers or unions have presented a claim that it or they represent a majority in the plant. Before, as you know, an employer could not do this unless two unions were pressing on him conflicting claims.79

2. **Decertification:**80 One or more workers or a union (but not management) may now also file a petition for decertification of a union on the ground that it no longer represents a majority. The Board is given power to decide, after investigation, whether to hold a hearing on the representation claims, but is required to conduct an election, not oftener than once a year, if it finds at the hearing that the claim has some substance.81

3. **Loss of Vote:** "Economic strikers" (i.e., those on a strike not caused by unfair labor practices) who have been permanently replaced, and employees who strike during a 60-day cooling-off period, are denied the right to vote in a representation election.82

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78 Dr. Steelman wrote the author concerning this point: "Your comments on termination of union agreements are very apt, since at this time we cannot foretell the effect of the new law on contracts. The suggestion you make about delaying strikes, however, might be considered in the light of the oft-cited argument that time is of the essence in strike strategy." 79 §§ 9(c)(A) and (B). Two regional directors of the NLRB have held that an employer's petition will be dismissed where the sole union involved has not complied with the filing requirements of the Act (non-Communist affidavits, etc.) because they would not order an election where such a union would be the sole participant. C.C.H. Lab. L. Serv., Report Letter No. 376 (Dec. 11, 1947). And on December 2, 1947 the NLRB held that on an employer's petition the non-complying union would be kept off the ballot and only the other union appear thereon. Lowenstein, Inc., C.C.H. Lab. L. Serv. ¶6286 (NLRB, 1947). However, the Board will permit a non-complying union which has an unexpired contract to intervene in a representation proceeding for the purpose of asserting the contract as a bar to the proceeding. American Chain & Cable case, C.C.H. Lab. L. Serv. ¶6356 (NLRB, 1948).

80 Gerard D. Reilly, in a letter to the author, said: "This [decertification] is not a good term, since recognized, as well as certified, unions can be the subjects of non-union petitions." In the first decertification election under the new law, the Board directed that the name of a non-complying union be placed on the ballot, the Board saying: "Under our policy, the union would be certified if it wins the [decertification] election, provided that at that time it is in compliance with Section 9(f) and (h) of the Act. Absent such compliance, the Board would only certify arithmetical results of the election." Harris Foundry and Machine Co., C.C.H. Lab. L. Serv. ¶6347 (NLRB, 1948).

81 § 9(c)(1).

82 § 9(c)(2); see 93 Cong. Rec. 4320 (April 29, 1947); see also NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345 (1938), where economic strikers who had been replaced were
4. Determination of Bargaining Units: Section 9(b) provides that (a) professional employees may not be grouped with non-professionals without the consent of the former, (b) craftsmen may not be grouped with other employees merely because such grouping was followed in a previous Board determination, (c) plant guards must be separated from other employees, and (d) the extent of organization in a company is not to be a decisive factor in the selection of the appropriate bargaining unit.

These innovations are important and, in the main, constructive. Organized labor, however, feels that the right of an employee to file a petition for decertification will enable management to harass unions by causing the bargaining agent’s majority status to be repeatedly attacked. And the CIO in its official booklet on the law says that employers should permit unions to prove their majority representation of the employees by informal means without Board participation and that “an employer who insists on getting us involved in the machinery of the new Act for this purpose is only making clear the fact that he wants to resist and delay recognition and hopes for a possible slow death for the union.”

These are strong sentiments. In conforming with the procedure required by the law most employers will have no such vicious motive in mind. Furthermore, it is difficult to see how the new election machinery can in any way hurt unions which are giving their members effective representation. Incidentally, the AFL does not seem to share these violent views of the CIO.

How has organized labor fared under this new representation election machinery? Here are the data as issued by the Board under the new law in the period from August 22, 1947 through February 28, 1948:


83 Gerard Reilly’s observation on this sentence is this: “But how? It would be interference if instigated by management.”


85 See AFL pamphlets 1–5 on the new law, as issued in 1947 by its General Counsel’s Office. Dr. Steelman’s comments to the author on this part of this article are as follows: “Your section on representation proceedings appears to be incomplete without reference to the amendments affecting appropriate bargaining units. As you know, the exclusion of supervisors from protection of the Act—an issue now before the Federal District Court for the District of Columbia—and the new rules respecting professional employees, guards and crafts employee, were the subject of considerable discussion. Under this same heading, your comments on economic strikers might be improved by distinguishing between the right of such strikers to reinstatement and the right to vote.”
COLLECTIVE BARGAINING ELECTION RESULTS FROM AUGUST 22, 1947 THROUGH MARCH 31, 1948

I
Elections in which AFL unions participated
Total elections ................ 748
Won by AFL .................... 479

II
Elections in which CIO unions participated
Total elections ................ 288
Won by CIO ..................... 184

III
Elections in which Independent unions participated
Total elections ................ 394
Won by Independent unions .... 272

It would be unwise to draw any conclusions from these sketchy figures, and particularly so without some reference to the experience under the old law. Here are the figures for 1945 and 1946, as contrasted with the results under the new law since August 22, 1947.

COMPARATIVE COLLECTIVE BARGAINING ELECTION RESULTS UNDER OLD AND NEW LAWS SHOWING PERCENTAGE OF ELECTIONS WON OF THOSE IN WHICH THE UNIONS PARTICIPATED

<table>
<thead>
<tr>
<th></th>
<th>1945</th>
<th>1946</th>
<th>Through 3-31-48</th>
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<tbody>
<tr>
<td>AFL won</td>
<td>68%</td>
<td>67%</td>
<td>64%</td>
</tr>
<tr>
<td>CIO won</td>
<td>71%</td>
<td>67%</td>
<td>64%</td>
</tr>
<tr>
<td>Independents won</td>
<td>64%</td>
<td>67%</td>
<td>71%</td>
</tr>
</tbody>
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Again we stress that the data under the new law are too spotty to justify any final inferences, but one cannot help being intrigued by the tentative trend indicated by these interim figures. If these percentages should be maintained for a substantial period, say for a year, they will afford some credence to the cry of organized labor that the new law will injure affiliated unions.

Data taken from official monthly releases of NLRB.

Data for 1945 and 1946 computed from figures shown in annual yearbooks for those years issued by the NLRB. Percentages since August 22, 1947, computed from figures given by the NLRB in its official releases for those months.

The possible unreliability of early statistics is underscored by the fact that during the months of November and December 1947, which the author had thought might be typical months, the AFL won only 54% of the collective bargaining elections in which it participated and the CIO won only 59% of the elections in which it participated, whereas
THE UNION SHOP

Now we come to one of the great battlegrounds of the Act: the abolition of the "closed shop" and the imposition of stringent conditions precedent to a "union shop." As to the demise of the closed shop, it is not easy to understand what all the shouting is about. Unions are not materially prejudiced if they secure a union shop in its stead; and employees have gained scant ground, indeed, as to freedom of choice, in achieving a union shop in lieu of a closed shop. There is precious little difference in principle, since under a union shop an employee must join the union within thirty days after he is hired.

Senator Ball disagrees. He objected to this, saying in a letter to the author:

There is a terrific difference between a union and a closed shop. In the latter the union controls the individual’s choice to get a job in the first instance. In the union shop freedom of job opportunity is safeguarded. To me that is essential to economic freedom.

The author is in no sense opposed to the union shop. It is our considered view that in most instances management encounters fewer annoyances and higher personnel morale in a union shop because of the absence of the diversions flowing from competing unions or dissatisfied employees. But speaking, just for a moment, solely of the workers’ so-called "economic freedom," no significant difference is readily envisioned, from the individual employee's viewpoint, in (a) being required to be a member of a union before he applies for a job or (b) being required to join a union within thirty days after getting a job.

The abolition of the closed shop does do away with the "hiring-hall" technique so annoying to some closed-shop employers who had to call the union every time they needed a new worker. In a few industries requiring highly skilled employees (such as, for example, the typographical aspect of the newspaper publishing business), the "hiring hall" has apparently been helpful to and favored by employers because it rid them of the nuisance of quickly searching out qualified workers when sudden vacancies occurred.

Unaffiliated unions won 71% of the elections in which they participated. As will be gathered from the tables published in the text, the results of elections conducted during the succeeding two months of January and February 1948 were more nearly comparable to the figures for 1946 and materially increased the percentages shown for November and December of 1947.

§§ 8(a)(3) and 9(e).

The closed shop was outlawed in all railroads more than 20 years ago, without apparent effect on the vigor of the powerful railroad brotherhoods. 44 Stat. 577 (1926), 45 U.S.C.A. § 152 (1943).
The press has reported that after a conference with Mr. Lundeberg, head of a maritime union in California, Senator Taft said that he "might consider" revision of the labor law to permit continuance of the hiring-hall system for maritime unions.\textsuperscript{97}

But it is the mechanics of obtaining a union shop which inflame the unions and which have been a source of heavy work for the Board. If a certified union petitions the Board that 30 per cent or more of those in the unit desire a union shop, the Board must conduct an election.\textsuperscript{92} But a majority of all those in the unit, not just a majority of those who vote, must vote in favor of a union shop before it can be authorized.\textsuperscript{93} Organized labor complains that democratic processes require the victor in any election to achieve only a majority of the votes actually cast, and not of the votes eligible to be cast.

If 30 per cent of the employees petition the Board to rescind the union-shop agreement, the Board must conduct an election.\textsuperscript{94} The law is silent, and hence ambiguous, as to whether a rescission must also receive a majority vote of all those in the unit; but Senator Ball has written the author that Congress intended by this clause to require a majority vote of all those in the unit to achieve a rescission and that he believes "the Board will so interpret it."

One of the vagaries of the new law is whether such rescission would be effective at once or at the end of the then current contract. If the latter, and if the contract ran for two years, a most unusual and highly undesirable situation would ensue.\textsuperscript{95}

But the union's worries are not over when the union shop is authorized by the secret ballot, because even then the employer may refuse to agree to a union shop for the reason that Section 8(d) provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal." The House version of the bill would have required an advance showing by the union that the employer had agreed to a union shop before the union would be entitled to have a secret ballot taken to determine

\textsuperscript{97} Chicago Tribune, p. 1 (Sept. 14, 1947). But recently Mr. Taft indicated that he has no intention of favoring such a revision. Taft, Toward Peace in Labor, Collier's, p. 21 (March 6, 1948).

\textsuperscript{92} § 9(e)(1). The 30 per cent figure is a ruling of the Board. C.C.H. Lab. L. Serv., ¶5776.17 (1947). The International Woodworkers of America (CIO) has attacked the 30 per cent standard as invalid and without basis under the law. C.C.H. Lab. L. Serv., Report Letter No. 383 (Jan. 29, 1948).

\textsuperscript{93} § 8(a)(3).

\textsuperscript{94} § 9(e)(2).

\textsuperscript{95} Gerard Reilly has written the author: "It was not intended to change the Board rules regarding a contract being a bar until the end of its term."
whether the employees approved a union shop. This was rejected by the Conference Committee so that now the expensive secret ballot must be conducted by the Board before it can be known whether or not the employer will agree to a union shop—with this administrative exception: On March 4, 1948 General Counsel Denham ruled that it would be legal for an employer and a union to include in a contract a union-shop provision, in advance of an authorization election, if the contract specified that the provision would be effective only in the event the Board certified after the election that a majority of the employees eligible to vote have authorized a union-shop clause. Of course the union may lawfully strike if management refuses to agree to a union shop after the employees have approved it by secret ballot.

Since there are between 20,000 and 30,000 union-shop or closed-shop contracts in force, the overwhelming extent of the Board's task in conducting elections under the new clause regarding union shops can be well imagined. For example, in January 1948 the number of cases filed with the Board represented an increase of 45% over the preceding month of December, 1947 (while, in turn, the December cases exceeded the November cases by 49%); and of the 10,530 election petitions filed during the six months ending February 29, 1948, almost 75% (7,718) were for union-shop authorization elections.

The first ten months under the Act have failed to establish sufficient basis for this costly and awkward procedure, for it is a remarkable fact that union shops have been authorized by the employees in all but 38 out of 3,130 such elections (i.e., a winning percentage of almost 99%) which have been conducted under the new law. Nor has the margin of victory been slight. In excess of 90% of the votes in union-shop elections thus far held have been cast in favor of the union shop.

ANTISUBVERSIVE AFFIDAVITS AND FINANCIAL STATEMENTS

This same part of the law deprives unions of their right to invoke the benefits of the Act unless they file anti-Communist affidavits with the Board and lodge financial statements and other union data with the Secretary of Labor. They must also distribute copies of the financial reports to

96 § 9(g) of the House Bill; see House Conference Report 510 on H.R. 3020, 8oth Cong. 1st Sess., at 50 (1947); and see Senator Taft, 93 Cong. Rec. 5087 (May 9, 1947).


98 Official monthly NLRB releases.

99 Ibid. These figures are for the period ending February 29, 1948.

100 Ibid. As of March 1, 1948.
their members. These requirements extend to the international union, as well as the local, but the Board overruled its General Counsel and held that such affidavits need not be filed by officers of the AFL or, in effect, by officers of the CIO.

Prior to the Board's ruling, Senator Ball was reported by the press as saying that Mr. Denham's interpretation was not the intent of Congress, but rather that affidavits from local union officials and from officers of the particular international union with which the local is affiliated, would be sufficient. Senator Taft was also reported as having taken somewhat the same position.

When Senator Ball read this part of this article, he wrote the author thus:

You do not quote me correctly. I said Denham's ruling was thoroughly consistent. However, the drafters never discussed whether AFL and CIO were covered, but did want to make sure internationals were required to file before locals could use the Act.

Incidentally, the remedy for a local is very simple. It can go independent and file. Which is why I am convinced AFL and CIO will both get in line before long.

It is interesting to note that the original drafts of both Senate and House bills provided for disqualification of unions if any of their officers could "reasonably be regarded" as Communists in accordance with prescribed tests. However, in deference to the delay and difficulty inherent in proving communist affiliation, the Conference Committee substituted the formality of affidavits. The sworn statements are conclusive of the question, except that if the officer has sworn falsely he may be prosecuted

102 §§ 9(f) and (g). The NLRB has tentatively interpreted this requirement for distribution of financial reports in a most liberal fashion. The form of certificate to be filed on this subject by unions, as issued by the NLRB, lists four alternative methods of establishing that copies of the statements have been furnished to all members of the union. Two of those alternatives are a) supplying locals with copies for each member with directions to post one copy and "to announce that copies are available for all," and b) "publication of a copy of the financial report in the union paper distributed in regular course to all members."


103 Northern Virginia Broadcasters and Local Union No. 1215, C.C.H. Lab. L. Serv. ¶6257 (NLRB, 1947).

104 Chicago Sun, p. 5, col. 1 (Sept. 10, 1947), reporting interview of Senator Taft of previous day in Chicago.

105 Letter to author. See also Senator Morse's statement in the Senate, 93 Cong. Rec. 5290 (May 3, 1947).

106 93 Cong. Rec. 6604 (June 5, 1947).
by the Department of Justice and suffer a fine of $10,000 or 10 years in prison or both.\textsuperscript{106}

The form of oath required by the Board (which must be filed annually) reads as follows:

I am not a member of the Communist Party or affiliated with such party. I do not believe in and I am not a member of or support any organization that believes in or teaches the overthrow of the U.S. Government by force or by any illegal or unconstitutional methods.\textsuperscript{107}

Although it is not strictly analogous in a legal sense, it is perhaps worthy of mention that Congress has in recent years appended to all appropriation acts a clause that no part of the appropriation may be used to pay the salary of any person who advocates, or is a member of an organization that advocates, the overthrow of the government by force, and that any person who entertains such beliefs or is a member of such an organization and who accepts salary from the government shall be guilty of a felony and be fined not more than $1,000 or imprisoned for not more than one year, or both. This clause, which is substantially the same in the various appropriation laws, also contains the following proviso:

Provided, that for the purposes hereof an affidavit shall be considered prima facie evidence that the person making the affidavit ... does not advocate, and is not a member of an organization that advocates, the overthrow of the Government of the United States by force or violence. ... \textsuperscript{108}

The Board cannot entertain petitions for relief from unions which have not filed the required financial statements and Communist affidavits, but individual employees would not be barred; it is perhaps conceivable, though most unlikely, that the Board would act to penalize management for violations of the Act on the information of workers where their own union was in default for failure to file these affidavits.\textsuperscript{109} In fact, the AFL has stressed to its members that, even though the union has not complied with this section of the law, "individual union members are free to invoke the protection of the Act."\textsuperscript{110}

In the Bindery Workers Union case, the majority of the Board ordered an employer to bargain with a union which had failed to file the required

\textsuperscript{106} § 9(h); 35 Stat. 1095 (1909), as amended, 18 U.S.C.A. § 80 (Supp., 1947); see also House Conference Report 510 on H.R. 3020, 80th Cong. 1st Sess., at 49 (1947).
\textsuperscript{107} C.C.H. Lab. L. Serv. ¶¶3820, 8455 (1948). Of these affidavits, 42,847 were filed with the Board prior to March 1, 1948.
\textsuperscript{108} This same provision appears in all appropriation laws but a typical clause may be found in § 501 of Title V of the "Departments of State, Justice and Commerce, and the Judiciary Appropriation Act, 1948," approved July 9, 1947, 80th Cong. 1st Sess., Ch. 211, P.L. 166 (U.S.C., Cong. Serv., Adv. Sheet No. 7, p. 312, Sept. 1947).
\textsuperscript{109} § 9(h).
\textsuperscript{110} Page 2 of Bulletin No. 3 of the AFL on the new Act.
affidavits and financial statements, but only on the condition that the union comply with the law in these respects within thirty days. In that case the Board said:

We cannot believe that Congress intended the force of Government to be brought to bear upon an employer to require him to bargain in the future with a union which we now lack the authority to certify.

This may reflect a disinclination, on the part of the majority of the NLRB, to penalize management for a refusal to bargain, if a complaint were filed by an employee, where the union of which the complainant was a member had failed to file the required affidavits and financial reports. Associate General Counsel Charles M. Brooks of the NLRB has said informally that non-complying unions will not be permitted to evade the filing requirements by having individual members institute charges against employers who refuse to bargain with such unions, and that the regional agents of the Board will not act on such charges where a non-complying union is involved.

Constitutionality of the Anti-Communist Clause. The requirement of anti-Communist affidavits is offensive to some as an affront perpetrated on only one small group of citizens—union officials. For example, Harold Stassen has recently said:

This clause is as much against the American grain as would be a White House directive requiring every citizen to report once a year to the police station and file an affidavit that he has not violated the law of the land. Men are presumed to be law-abiding and loyal . . . unless lawfully accused and legally found guilty.

It cannot be seriously doubted that the responsible leaders of the Senate favored these affidavits in the expectation that such a requirement would assist unions in their efforts to drive out of office the relatively few Communists in their midst. But, however sincere the Congressional intent and however meritorious the goal, a question of constitutional law could conceivably be found to exist here. Obviously, Congress may impose

111 Marshall & Bruce Co., Nashville Bindery Workers Union, C.C.H. Lab. L. Serv. ¶6262 (NLRB, 1947). To the same effect see Plankinton Packing Co., C.C.H. Lab. L. Serv. ¶6276 (NLRB, 1947). And on Nov. 20, 1947, it was reported that the Board had revoked five directions of election prior to the effective date of the new law because the unions had failed to comply with the registration and affidavit requirements of the Act. C.C.H. Lab. L. Serv., Report Letter No. 373, p. 6 (Nov. 20, 1947). See also note 79 supra.

112 C.C.H. Lab. L. Serv. Report Letter No. 385, p. 11 (Feb. 19, 1948). However, Mr. Brooks added that the General Counsel's office will continue to act on discrimination charges filed by individuals.

113 Stassen, Where I Stand (1947).

114 On December 3, 1947 the National Maritime Union (CIO) filed a suit in the U.S. District Court for the District of Columbia attacking the constitutionality of this aspect of the new law; a special three-judge court ruled in a 2-to-1 decision, that the clause was constitutional. National Maritime Union v. Herzog, 21 L.R.R.M. 2648 (1948).
conditions precedent to the enjoyment of remedies created by it, in this instance the benefits of the labor law. But may Congress do so as to only one of three groups of citizens to whom those remedies are available (i.e., union officials, employees, and employers)? We believe it may.\footnote{In Cummings v. Missouri, 4 Wall. (U.S.) 277 (1866), and Ex parte Garland, 4 Wall. (U.S.) 333 (1866), statutes were declared unconstitutional, in 4 to 3 decisions, which forbade persons to engage in certain professions unless they first signed affidavits that they had never borne arms against the United States. Justice Field said, in Cummings v. Missouri, supra, at 328: "The clauses in question subvert the presumptions of innocence. . . . They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown in only one way—by an inquisition, in the form of an expurgatory oath, into the conscience of the parties." But these two cases are distinguishable on the ground that the statutes were \textit{ex post facto} bills of attainder because, in effect, they inflicted punishment for a past act.}

Presumably the constitutional attack which would be made is that this requirement of the law violates the due process clause of the Fifth Amendment in that it fails to extend equal protection to unions whose officials refuse to file the affidavits. But the Fifth Amendment, unlike the Fourteenth, has no equal protection clause.\footnote{Steward Machine Co. v. Davis, 301 U.S. 548, 584 (1937).}

The Congress has broad power to exercise its judgment as to which practices injurious to interstate commerce shall be prohibited, and how. The fact, for example, that this affidavit is required of union officials and not of employers or employees is a distinction which Congress may make if its judgment has "support in considerations of policy and practical convenience that cannot be condemned as arbitrary."\footnote{Ibid.}

Surely the courts will not substitute their judgment for that of Congress as to (a) whether communism in labor unions is damaging to interstate commerce, and (b) if so, whether denying the benefits of the labor law to unions whose executives are Communists will deter the growth of communism, and (c) whether requiring affidavits of all union officials attesting that they are not Communists is a reasonable substitute for the onerous procedure of denying the enjoyment of the law only to those \textit{proved} to be Communists. It would be difficult, indeed, to assert persuasively that the conclusions on these questions reached by Congress, after months of public hearings, as well as the mechanics which it adopted to implement those conclusions, are unconstitutionally arbitrary because unsupported by "considerations of policy and practical convenience."\footnote{Ibid.; and see United States v. Petrillo, 67 S. Ct. 1538, 1542 (1947), where Justice Black said, "Consequently, if Congress believes that there are employee practices in the radio industry which injuriously affect interstate commerce, and directs its prohibitions against those practices, we could not set aside its legislation even if we were persuaded that employer..."}
As the Supreme Court said in upholding the Wagner Act:

The Act has been criticized as one-sided in its application; ... that it fails to provide a more comprehensive plan, with better assurances of fairness to both sides. ... We have frequently said that the legislative authority ... need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power.\textsuperscript{19}

The NLRB has gone so far in a pending case to say that the courts do not even have jurisdiction of the issue of the constitutionality of this clause when raised by a union which has been denied the processes of the Board due to failure to file non-Communist affidavits.\textsuperscript{120} The Board insists that no private rights were created by the Taft-Hartley Act,\textsuperscript{121} and that since Congress giveth so may Congress take away. Failure to file these affidavits, the NLRB would argue, does not forfeit the substantive private rights to self-organization and collective bargaining which unions had even before the Wagner Act, but instead merely deprives unions of the protection and enforcement of those rights under the administrative procedure created by the Act.

On this whole question of communism it is odd that Congress, since it and most voters have such antipathy toward the overthrow-of-the-government-by-violence precept of that political sect, has failed to outlaw the Communist Party in so far as Congress may properly do so. Thus far it has merely made liable to deportation aliens who are members of any group which advocates "the overthrow by force or violence of the Government of the United States."\textsuperscript{122} The Supreme Court, incidentally, has expressly refrained from deciding whether the Communist Party does in fact advocate governmental overthrow by force.\textsuperscript{123}

**BAN ON POLITICAL EXPENDITURES**

The ban on political expenditures is one of the most distasteful to or-

\textsuperscript{19} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937); see also North American Co. v. SEC, 327 U.S. 686, 705 (1946).


\textsuperscript{121} As to the provisions of the law authorizing suits in the federal courts for damages for secondary boycotts, the Board would doubtless assert that new remedies, rather than new substantive rights, were thereby created.

\textsuperscript{122} 40 Stat. 1012 (1918), as amended, 8 U.S.C.A § 137 (1942).

\textsuperscript{123} Schneiderman v. United States, 320 U.S. 118, 148 (1943).
ganized labor because unions sincerely feel that it is unjustifiably severe and, at least in part, unconstitutional.\(^{124}\)

The law amends Section 313 of the Federal Corrupt Practices Act by not only making unlawful political "contributions" by unions and corporations but also all "expenditures in connection with any election, primary, convention or caucus for the purpose of selecting" federal elective officials. The word "expenditures" is what distresses the unions. It is one thing, they assert, for Congress to prevent political contributions but quite another to legislate against all "expenditures" in connection with an election, because the latter would outlaw such activities as radio political speeches paid for by unions, political editorials in union papers not sold for profit, the issuance of pamphlets praising or damning a candidate, and even the free distribution of excerpts from non-union newspapers.\(^{125}\) Employers would likewise be prevented from doing any analogous things having a political tinge.

The penalty is a fine of $5,000 for unions and corporations, plus $1,000 against every officer and director who consents to the expenditure, or a year in jail, or both.

It is curious that management has not shown some concern over this section. Senator Taft said in the Senate that corporations can no longer insert editorials praising or criticizing political candidates or parties in their own company publications if corporate funds are used to finance the publication thereof.\(^{126}\) Such publications are lawful only if fully supported by advertising or circulation revenue.

It would seem that corporations will, as a practical matter, find this section even more confining than will the unions for this reason: unions can and no doubt will organize separate entities, such as the old Political Action Committee, to receive contributions from individuals for use in political campaigns. An association of manufacturers could accomplish the same result, but since it would have to be an unincorporated entity and since the contributions to it would have to come from individuals and not from corporations, it might not be a feasible alternative.\(^{127}\)

On February 11, 1948 a federal grand jury in Washington, D.C., indicted the CIO and its president, Philip Murray, for violating this section by publicizing in the *CIO News* on July 14, 1947 the endorsement by Mr. Murray of Edward A. Garmatz for reelection to Congress. The CIO and

\(^{124}\) § 304.

\(^{125}\) 93 Cong. Rec. 6593–6605 (June 5, 1947).

\(^{126}\) 93 Cong. Rec. 6594 (June 5, 1947).

\(^{127}\) 93 Cong. Rec. 6595 (June 5, 1947).
AFL have been spoiling for a fight over this clause, but the Department of Justice has ignored the earlier instances of defiance, such as this statement of Walter Reuther, president of the United Automobile Workers, CIO, as printed in the union's newspaper:

> In deliberate and conscious defiance [of the Act] I urgently urge union members and all other citizens of the 8th District [Penn.] to work for the election [to Congress] of Phil Storch.28

It has been said that the motivating factor in the enactment of this section was the widely publicized Cecil B. DeMille situation. DeMille was, along with all members of the American Federation of Radio Artists, assessed $1 in September of 1944 to raise funds to enable the union to fight a proposed amendment to the California constitution. DeMille, who favored the amendment, refused to pay the assessment and was promptly suspended from the union. Since the union had a monopoly in the radio field, this meant that DeMille was ruled off the air and thereby was prevented from continuing with his weekly dramatic program which reputedly paid him $5,000 per week.29 Congress, it has been surmised, felt that few workers could afford such costly political independence and therefore barred political "expenditures" as well as contributions.30

Every observer should "go off the deep end" at least once, and therefore the guess is hazarded that the Act will be upheld as to the ban on expenditures made by unions or corporations direct to candidates or political parties, but that it will either be (a) found unconstitutional as to expenditures made in the pure expression of the views of the organization on political candidates, or (b) construed so narrowly as not to prohibit such expenditures.31

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28 Chicago Daily News, p. 10, col. 2 (Sept. 9, 1947); and see AFL pamphlet No. 1 on the new law.

29 DeMille sought to restrain the union from expelling him from membership. On December 16, 1947 the California Supreme Court, in a unanimous decision, ruled that the expulsion was a lawful penalty for DeMille's failure to abide by "majority rule" and that it did not deny DeMille the exercise of "free speech." DeMille v. AFRA, 13 C.C.H. Lab. Cas. ¶64,195 (Cal., 1947).

30 This is not authoritative. It does not appear in the Congressional debates or committee reports. However, it is a story which has had rather general acceptance in certain quarters. See, for example, New York Sun (Oct. 23, 1947), which relates the story without qualification as being the reason Congress incorporated § 304 in the Act.

31 See Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 69 N.E. 2d 115 (1946), where a somewhat similar law was held unconstitutional as an abrogation of the rights of freedom of press and peaceable assembly, since under such a law a union would be unable to "get its messages to the electorate." Professor Sutherland, after stating that the situation dealt with in § 304 may be said to be distinguishable from the facts of Thomas v. Collins, 323 U.S. 516 (1945), where the Court held a Texas statute unconstitutional which required labor organizers to obtain a license before soliciting union memberships, said: "But is it so very dif-
THE TAFT-HARTLEY ACT IN, ACTION

BREACH OF CONTRACT CASES

Either party to a union contract may now sue for breach of contract in the district courts "without respect to the amount in controversy or . . . the citizenship of the parties"; and unions may be sued as an entity for their own acts and those of their agents. However, judgments against unions are payable only out of union assets and are not enforceable against individual members.132 Breach of contract is not an unfair labor practice.

This section is especially important here in Illinois where (unlike many jurisdictions) neither the legislature nor the courts had as yet authorized suits at law against unions as such.133

By enacting Section 301, Congress probably laid to rest the theory that collective bargaining agreements are not orthodox contracts at all but, instead, are akin to treaties of peace which require or deserve special treatment under our laws. In 1944 Mr. Justice Jackson likened such contracts to tariffs established by a common carrier or to utility rate schedules, which do not of themselves create relationships but which do govern the terms of the carrier or shipper whenever and with whomever such relationships are established. Indeed, in some European countries, according to Professor Gregory, the terms of a collective bargaining contract become official government regulations when approved by the government.134 But the new labor law seems to view union contracts as third-party-beneficiary agreements, subject to the conventional law of contracts.

This section retains in the statute the "apparent authority" rule of the law of agency, by providing that in determining the liability of a principal for the acts of his agent the question whether the act complained of was actually authorized or subsequently ratified by the principal shall not be controlling.135 This same phraseology appears in the list of definitions of

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132 §§ 301(a) and (b).
134 Gregory, Labor and the Law 385 (1946); J. I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944).
135 § 301(e).
terms used in the Act. The General Counsel of the Board has taken an extreme view of the effect of this provision on the responsibility of unions for picketing.

This brings to mind the new definition of the word "employer." Now the law says that it includes "any person acting as an agent of an employer," whereas under the old Act "employer" embraced any person acting "in the interest of the employer." Under the old law the Board and the courts held management responsible for the acts of their supervisors not only where they had not authorized or ratified the acts but where they had instructed the supervisors to maintain strict neutrality toward union activity. And sometimes mere "leaders," who were not even of the stature of foremen or supervisors, were held to have bound their employers by their actions.

But this fact should be underscored: The new law in no way changes the principle of respondeat superior in this field, and employers will continue to be liable for the unauthorized acts of their supervisory employees who to a third party would appear to have "apparent authority," unless the management informs all employees that specified supervisors do not have authority to bind the company.

So, employers for all practical purposes are in the same position in this particular respect as they were before. These same rules are applicable to unions also, although there is this difference: The Congressional debates establish clearly that the word "agents," when used in conjunction with "labor organizations" in the law, does not embrace mere members of the union. Hence, at least until General Counsel Denham asserted his surprising interpretation in the Sunset Line & Twine case, unions needed only to be concerned about the acts of their own officials and organizers.

136 § 2 (13).

137 In the Sunset Line & Twine Case, General Counsel Denham argued that a union, as principal, must be held accountable for the acts not only of its officers but also of every person in a picket line if a union officer was present during the objectionable incident. The trial examiner did not have to rule on this contention but did go out of his way to say that if the contention were upheld it "would reduce to shambles the long established law of agency" which places the burden of proving agency through ratification on the party who relies on such ratification. C.C.H. Lab. L. Serv., Report Letter No. 383, p. xi (Jan. 29, 1948).

138 § 2(2).

139 American Steel Scraper Co., 29 N.L.R.B. 136 (1941); International Ass'n of Machinists v. NLRB, 317 U.S. 72, 79 (1940); North Carolina Finishing Co. v. NLRB, 133 F. 2d 714, 716 (C.C.A. 4th, 1943).

140 For a ruling showing how severe the Board is in its requirements in this connection see Fulton Bag & Cotton Mills, C.C.H. Lab. L. Serv. ¶6352 (NLRB, 1948).

141 93 Cong. Rec. 4561 (May 2, 1947).

142 See note 137 supra.
whereas employers are responsible for everything done or said by their superintendents, foremen, supervisors, and others having minor authority (listed in the Act) if “such authority is not of a merely routine or clerical nature but requires the use of independent judgment.” However, if Mr. Denham’s view concerning union responsibility for the actions of picketers is adopted, organized labor will have far graver problems than management in this respect.

**UNLAWFUL PAYMENTS TO UNIONS**

There is a fine of $10,000 or one year in jail, or both, for violation of Section 302, which makes unlawful the payment of “money or other thing of value” to union representatives except the following:
1. Payments for services rendered.
2. Payments of bona fide claims and judgments.
3. Selling or purchasing commodities in “the regular course of business.”
5. Payments to welfare funds established since January 1, 1947, subject to certain conditions, including the administration of the trust fund by management and employees jointly.

A fact rarely mentioned in connection with this section is that violations thereof may also be the basis for injunction suits brought by employers, as well as the government, because the protection afforded unions by the Clayton Act and the Norris-LaGuardia Act is expressly withdrawn.

It must be kept in mind that management may check off only “membership dues,” and then only if authorizations are executed by the employees. One union is contending that the words “membership dues” are broad enough to include initiation fees and special assessments, but nothing can be found in the Congressional debates or committee reports to substantiate this assertion. John L. Lewis, however, seems to have persuaded the mine owners, in his 1947-48 wage agreement (signed subsequent to the enactment of the new law), to check off initiation fees and assessments, as well as dues.
It is to be hoped that Congress, in its desire to favor employers and individual employees, has not rendered a disservice to management by requiring individual authorizations from employees for the checking-off of dues. It places a burden on employers to make certain that dues are not deducted from the wages of employees who have never given authorization or who have revoked their original authorization. This means more bookkeeping.\textsuperscript{148}

And since Section 302 inflicts criminal penalties, how about the custom of some large corporations of placing "good-will" advertisements in union journals? It is difficult to see how management can safely justify a continuation of this nice gesture because it just simply doesn't clearly fall within any of the exemptions. The only remotely analogous exemption is Section 302(c)(3) authorizing payments to unions "with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business."

Good-will ads are hardly a commodity purchased in the usual course of business, unless the employer makes a product of such a nature that the sale thereof might be directly or indirectly fostered by the union readers. On the other hand, Senator Ball disagrees with the foregoing sentence and writes: "I would say good-will ads are a commodity."

Actually, of course, this section was intended only to frustrate "shake-downs" and to regulate welfare funds, but nevertheless management may, since criminal laws are always to be strictly construed, wish to await a ruling from the courts before risking criminal penalties for violation of this section.\textsuperscript{149}

\textsuperscript{148} A treasurer of an interstate corporation gave the author this list of payroll deductions already in effect at his company:

- Federal Withholding Tax
- Federal Social Security (O.A.B.)
- State Unemployment Insurance
- Group Life Insurance
- Group Accident and Health Insurance
- "Blue Cross" Hospital Plan
- "Blue Shield" Medical Service Plan
- Philadelphia City Income Tax (as to employees in that city)
- Rhode Island State Sickness Insurance (for workers in that state)
- Uniform and tool deductions
- Company pension plan.

This company has had to have new and larger payroll sheets printed because there was no space left in which to keep check-off records.

\textsuperscript{149} 93 Cong. Rec. 4805–83 (May 5, 1947).
EVIDENTIARY AND APPEAL QUESTIONS

Rules of evidence of the district courts are now to be controlling in Board proceedings, although unfortunately Congress managed to detract from this constructive provision by tacking on the words "so far as practicable." The Wagner Act expressly said that rules of evidence "shall not be controlling."

Next, we find that the Board's conclusions must now be supported by "the preponderance of the evidence" and not, as before, merely by "all the testimony." This is intended primarily to prohibit the Board from invoking its so-called "expertness" in labor matters which enabled it to draw inferences from evidence which in and of itself did not constitute credible evidence of such weight as to support the Board's findings.

On review, the court of appeals may inquire to see whether the Board's findings of fact are "supported by substantial evidence on the record considered as a whole." Before, the Board's findings were conclusive "as to the facts, if supported by evidence." Although the House felt that the courts were being given wider latitude in reviewing findings of fact, Senator Morse said in the Senate that it was the intention to have the findings of the Board subject to the same scope of review as the findings of other agencies under the Administrative Procedure Act, i.e., the findings shall be conclusive "if supported by substantial evidence." In short, this means that no change has been made at all because even the old law had been construed, you will recall, to mean that substantial evidence must be the basis for the Board's fact findings, even though the Act itself only required that the findings be supported by "evidence."

Senator Ball, commenting on this part of the article, wrote:

"Senator Ives, not Morse, originated the findings of fact language; and the requirement that the record as a whole must be considered was intended to go further than present rules."

But in NLRB v. Austin Co. the Court held that "we are compelled to the conclusion that, in effect, the scope of our review under the new Act is..."
is only immaterially changed from the scope of our review under the N.L.R.A.\textsuperscript{158} It is surprising to find in an address written by William M. Leiserson, former member of the NLRB and now Director of Labor Organization Study at Johns Hopkins University,\textsuperscript{159} that unions should not hire lawyers to handle their important complaint cases under the new law, nor should employers do so; and that, instead, unions should be represented by "union representatives" and employers by "experienced labor relations men." However, Dr. Leiserson did say that whenever the cases "get into the courts for review or on appeal, or for any other reason, they should be turned over to lawyers." In other words, after the record is made, after the proofs are closed, after the horse is stolen, call in the lawyers and let them at least lock the barn.\textsuperscript{160}

NATIONAL EMERGENCY STRIKES

Space limitations forbid a discussion of the provisions of Title II of the Act dealing with the conciliation of labor disputes. And with respect to the handling of strikes involving a national emergency, only a sketchy summary may be given.

Whenever, in the President's opinion, a strike involving a substantial part of an entire industry will imperil the national health or safety, he may appoint a board of inquiry and, upon receipt of the report from that board, direct the Attorney-General to obtain a 60-day injunction. At the end of the 60-day period the board of inquiry shall report to the President the then current position of the parties, including the employer's last offer of settlement. The Labor Board then must take a secret vote of the employees as to whether they wish to accept the final offer of settlement made by their employer. The Attorney-General must then move to discharge the injunction and the President must submit to Congress a full report on the situation, together with such recommendations as he may see fit to make for appropriate action.\textsuperscript{161} The events of March and April 1948 have confirmed the foregone conclusion that this tedious and ineffectual machinery will not cause one such as John L. Lewis to suffer any sense of frustration.

\textsuperscript{158} 13 C.C.H. Lab. Cas. ¶64,193 (C.C.A. 7th, 1948).

\textsuperscript{159} On January 30, 1948 the President appointed Mr. Leiserson chairman of an emergency board to hear a wage dispute involving 125,000 railroad workers.

\textsuperscript{160} The speech was delivered on August 4, 1947 to the International Brotherhood of Boilermakers. See pages 18–20 of printed booklet of speech of Dr. Leiserson as published by the Brotherhood.

\textsuperscript{161} §§ 206–10.
CONTRACTING AWAY THE LAW

Some unions are endeavoring to obviate the impact of the new law by insisting upon the insertion of special clauses in union contracts. The following are perhaps the most significant:

1. The omission from contracts of the “no-strike” clause, or the incorporation of a clause that nothing in the contract shall prohibit a strike.

2. Where no-strike clauses are inevitable, the unions like to include a clause that the responsibility of the union for a strike is confined to strikes which its responsible officers have actually authorized or ratified. Now, as we have pointed out earlier in this article, it is doubtful whether Congress intended or the courts would hold unions liable for unauthorized strikes which they made a sincere effort to avert or to terminate. However, if the author’s view is wrong, then the clauses agreed to by the International Harvester Company and later by Lever Brothers Company in their new union contracts seem to be an excellent middle ground because they recognize the undeniable fact that the law is too harsh in penalizing unions (if it does) for wholly unauthorized “wildcat” strikes, and yet at the same time they also make it incumbent upon union officials to do everything reasonably possible to persuade the unauthorized strikers to return to work.162

3. AFL unions are seeking to incorporate in their contracts a liquidated damages clause so that in the event either the union or management breach the contract the damages will be limited.

4. Unions favor clauses which require avoidance of court procedure through arbitration in the hope that they can thus avoid breach of contract cases in the federal courts. The United Mine Workers contract, negotiated since the new law went into effect, embodies this thought, although it does not affirmatively say that the arbitration is in lieu of the remedies specified in the Act.163

5. Unions will make every effort to avoid having their international union made a party to contracts. Obviously, this is to avoid the risk of depleting the treasury of the international union through judgments for damages for breach of contract and for secondary boycotts.

These efforts on the part of unions to limit or avoid liability under the Act are in several instances of questionable legality. For example, it is entirely possible that the courts may, on the ground of public policy, refuse to recognize contract clauses barring court actions for breach of con-

tract or which set up arbitration as the exclusive remedy between the parties.\textsuperscript{164}

After all, the public has a deep interest in the peaceful determination of labor disputes and with that end in view has a vested right to have the law of the land enforced in accordance with its terms. To paraphrase the language of Judge Evans in the *General Motors* case, the issue here would be, in effect, between the federal government on the one hand (represented by the Labor Board) and the offending union or employer on the other hand. The controversy would not be to vindicate a private right but to give effect to the public policy as enunciated by Congress in the new labor law, namely, the avoidance of "industrial strife which interferes with the normal flow of commerce."\textsuperscript{165} It is well settled, for example, that neither individuals nor their representatives could effectively waive benefits arising under the Wagner Act.\textsuperscript{166}

But, obviously, the precise question is not free from doubt because if the remedies which the unions seek to have waived are only those purely private remedies open to the parties themselves (such as suits for damages for breach of contract or for secondary boycotts) and in no sense affect or prejudice the remedies involving, or the jurisdiction of, the Labor Board itself, then perhaps the public weal is not endangered. If so, a covenant not to sue in a labor contract may be just as valid as in any other contract.\textsuperscript{167}

Furthermore, even if no-strike clauses are deleted from union contracts, it is conceivable that the courts will imply a covenant to refrain from striking.\textsuperscript{168}

On the other hand, it is possible that exclusive arbitration procedures may be upheld under the Federal Arbitration Act solely to the extent that district court damage suits for breach of contract and for secondary boycotts might be stayed under Section 3 of that statute until the arbitration procedure in the contract had been carried out. However, unless the arbi-

\textsuperscript{164} See Brucker \textit{v.} Georgia Casualty Co., \textit{326 Mo.} 856, 866, 32 S.W. 2d 1088, 1091 (1930); Gatlin Coal Co. \textit{v.} Cox, \textit{142 F. 2d} 876, 880-81 (C.C.A. 6th, 1944); \textit{17 C.J.S.} \textit{$\S$ 229} (1939).

\textsuperscript{165} \textit{\S} 1(b); see NLRB \textit{v.} General Motors Corp., \textit{116 F. 2d} 306, 312 (C.C.A. 7th, 1940).

\textsuperscript{166} Ibid.; and see Schulte \textit{v.} Gangi, \textit{328 U.S.} 168, 175 (1946), where it was held that employees were powerless to waive effectively their rights under the Wage and Hour Act because "in a bona fide adjustment on coverage [of the Act] there are the same threats to the public purposes of the Wage-Hour Act that exist when liquidated damages are waived."

\textsuperscript{167} See NLRB \textit{v.} General Motors Corp., \textit{116 F. 2d} 306, 312 (C.C.A. 7th, 1940).

\textsuperscript{168} See Heinz Co. \textit{v.} NLRB, \textit{311 U.S.} 514, 524 (1941), where it was held that a signed union contract is regarded as the effective instrument for preventing strikes and industrial strife; see also Harper \textit{v.} Local Union, \textit{48 S.W. 2d} 1033, 1040 (Tex. Civ. App., 1932), where a covenant not to strike was actually implied by the court.
tration procedure embraced only specific problems (rather than all undefined controversies) it would probably be void under the laws of many jurisdictions.69

Senator Taft, in addressing himself recently to this whole question of absolution by contract of union liability under the Act, has said:

Of course a contract which entirely exempts a union from any responsibility at all is not a contract. A union which insists on such a clause is engaging in an unfair labor practice and the employer may file charges with the Board.17

CONCLUSION

Ten months in the life of a profoundly important new law is, relatively, but a fleeting moment. Scarcely a week goes by without at least one pregnant decision on some significant aspect of the law. Indeed, during the several weeks required to publish this law review, much is sure to happen; perhaps some of the views and theories expressed in this article will be relegated to limbo by the courts even before your eyes can hazily hurry over these words.

And as to the factual reporting reflected in this paper—the data revealing the operational results during the months since the bulk of the Act became effective on August 22, 1947—even that may be outmoded by June and July of 1948. While this is less likely, nevertheless it is conceivable that the proceedings thus far filed with the Board and in the courts are atypical because so very many unions, in collaboration with management, rushed through new contracts in June and July of 1947 in order to postpone for at least one year the impact of the new law. Does this delaying maneuver render suspect all statistics and trends during the last ten months? We do not think so—but others do.72

Watchful waiting, therefore, should be the order of the day.


70 Taft, Toward Peace in Labor, Collier's, p. 21, at 38 (March 6, 1948).

71 On January 29, 1948 the Executive Council of the AFL, meeting in Miami, Florida, issued a statement saying, according to the Associated Press: "America is now experiencing a lull before the storm. When present collective bargaining contracts expire, the most difficult period in the history of labor relations in this country threatens to ensue. The signs are unmistakable." The AFL did not specify what those ominous "signs" were, except to refer to the International Typographical Union’s strike against newspaper publishers in certain cities. And Senator Taft wrote in March, 1948: "It has been a period of comparative industrial peace. I am not enough of an optimist to believe that such is a permanent state of affairs. Most of the contracts expire during the next six months."