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THE NATIONAL LABOR RELATIONS ACT*

I

DISCUSSION OF CHARLES FAHY†

Personally I am delighted to be here and discuss with you the National Labor Relations Act because of my own personal and professional interest in it, and also because I think, with the Board, that it is a good thing for those concerned with the administration of laws in behalf of the whole people to come out and discuss them with groups such as this.

We are headed for quite a long day, a number of hours will be spent, we expect, in discussing this Act. I am not going to burden you, as Mr. Merrell indicated, with a prepared address. I am going to be informal and I hope that you will also relax and prepare yourselves, as we go along, for any questions that you might want to ask. I anticipate that the discussion period, as is usual in such gatherings, will perhaps be the most interesting part, so far as my participation in the program is concerned.

This Act, as you know, has been controversial, and widely debated and discussed. I think it is true, too, that it is discussed by a great many people and that it is written about...
by a great many people, with somewhat inaccurate knowledge
as to just what it is and what it stands for and what it means.

I want to go back first into the roots that led to the flowering
of the Act, if I may use that expression.

We are a very great nation with many millions of people
in different walks of life, and we are a great deal different now
and have been for some decades than we were in the begin-
nning. Towards the latter part of the Nineteenth Century
particularly and during the Twentieth Century thus far, we
have grown not only into a great agricultural nation but into
a great industrial nation, and among the people of the United
States are almost countless millions of wage earners, men who
toil and men who work for a living, in the factories and in
various types of enterprises.

Among those people there grew up sixty or more years ago
the beginning of the trade union movement in the United
States. Now, the trade union movement in simple terms
means simply that the men who work join in association with
each other in the effort to solve problems of mutual concern to
themselves and of mutual concern to themselves and their
employers. For a long period of time in this country that
right was in a way recognized but never protected. The union
movement, as it is sometimes referred to, concerned itself
with organizing campaigns in different industries and gradu-
ally gained, I think, the predominant public favor of the
country; that is, the right of labor unions to exist. The move-
ment was led for a long period of time by the American
Federation of Labor.

But in a large part of industry, the predominant part of
industry, notwithstanding the fact that public opinion sup-
ported the right of men to organize if they could, employers
were in a position to destroy unions by the exercise of the right
of hiring and firing, to put the problem in its simplest terms.

Unions, in order to survive, where the employer was unwill-
ing that a union live, had to fight for their lives. And yet
the unions continued to fight for their lives, and why? Because
the right of association together about matters which con-
cerned the working men was a right that a sufficient number
of working men felt was of sufficient importance to them and their families that they could not abandon it.

They did not give it up; and the law recognized their right to survive by economic warfare, that is, they could strike, and pit their power against the power of the employer, if the employer sought to destroy the union. So that there was recognition by the courts, as you who are lawyers know, of the right to strike, and the right to conduct certain types of boycotts—the use of economic force. And, of course, the employer, on the other hand, had the similar right to pit his full economic power against the union.

That situation kept unions very often on the warpath for recognition. The result was that, if the Labor movement was to survive, if trade unions were to survive, they could only survive, where they were not voluntarily accepted by the employers, by economic strife.

Unions were voluntarily accepted by a great many employers, but they were fought bitterly by a great many more, and yet during all that period of time public opinion began more and more to support labor. Congressional committees were appointed, presidential commissions were appointed, to study the causes and effects of industrial strife and means of remedi- ing it. Beginning at least as far back as 1898 and continuing through the administrations of Theodore Roosevelt and Wilson, then during the World War period, the War Labor Board era, and afterwards, during the twenties, Congressional committees were created, long before there was any legislation of the type we are discussing today. The result of the studies of the various public commissions and of students, economists, and statesmen, was that the almost unanimous concensus of opinion became that the chief cause of industrial strife in this country was the failure of acceptance on the part of management of the principle of the right of self-organization on the part of employes and the right of collective bargaining. It was con- cluded that the best solution of the problem was at once the recognition of the basic right of self-organization and at the same time recognition that collective bargaining was the sound- est method of seeking to avoid strife under fair and decent
conditions. The Railway Labor Act\(^1\) came into existence in the Twenties, the first of the modern statutes, although the history of that legislation goes back beyond the Railway Labor Act enacted in 1926, and more recently amended in 1934. Before that the War Labor Board itself, during the period of the World War forecast the future trend of legislation functioning under the co-chairmanship of ex-President Taft and Frank P. Walsh, by laying down the principles that governed that Board in the settlement of labor relations problems during the World War. It ruled that employes had the right to join unions without the interference of the employer, and that that right should not be abridged by the employers. That principle was very clearly embodied in national legislation by the Railway Labor Act of 1926 and is the keystone of that legislation.

Following that, there was the Norris-LaGuardia anti-injunction statute\(^2\), and although that statute had in its substantive provisions nothing to do with promoting the right of self-organization and collective bargaining, it did set forth in its preamble the national policy that employes should have the right of self-organization and collective bargaining. Other legislation followed, carrying forward the same principle. The Bankruptcy amendments of 1934\(^3\) stated the public policy of the United States in similar language, and then came the well-known Section 7-A of the National Industrial Recovery Act.\(^4\) So that when the National Labor Relations Act,\(^5\) which we are discussing this morning, was enacted in 1935, after the invalidation by the Supreme Court of the Recovery Act, its basic provisions were nothing new to those who had followed the course of development of the things that the Act stands for. The right of self-organization and collective bargaining had developed outside the legislative field, in the field of actual labor relations, in industry in the United States, and also had gone into legislation through the Railway Labor Act and into

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\(^1\) 45 U. S. C. A. 151.
\(^3\) 11 U. S. C. A. 203.
other legislation such as the Norris-LaGuardia Act and the Bankruptcy amendments, as the statement of the public policy of the United States.

Now, that is something of the history leading up to the legislation, in very sketchy form.

Let me say something as to its social and economic significance, before we turn to the precise terms of the Act. It has been said by the highest authority (and I think no reasonable man can dispute it) that an individual employee—I say the highest authority, it was Chief Justice Taft in the Tri-City case decided by the Supreme Court when he was Chief Justice—is helpless when he must be left to deal individually with his employer, because the employer holds in his hand the individual’s daily livelihood and right to work in the sense of the man having a job. Prior to legislation on the subject, by the mere exercise of that right with respect to the individual, the employer could deprive the individual of his daily wage and livelihood. And because the individual employee was helpless, due to the superior economic power of the employer, there came the recognition of the inequality of that situation. Public opinion came to the support of the principle that the employees could combine in unions in order to bring to a more equal balance the economic or bargaining power between management and employee.

In a constitutional sense, the background of the legislation as a regulation of commerce is that more than 50% of all industrial strikes in the United States up to the time of the enactment of the statute, varying from year to year, some years dropping below 50% and some years going above 50%—were caused by the denial by employers of the right of employees to join unions and to engage in collective bargaining. The economic losses, as well as the human suffering resulting from that strife, cannot be calculated.

I am not going into a review of some of the terrible things that happened in the industrial world in our country in fights over the right of unions to exist, or to recount the deaths, the suffering and the hardships that were caused by the battles over that right. But in a constitutional sense, it is sufficient
to say that such strife interrupted and burdened the commerce of the Nation, and so Congress based this legislation on the commerce power because of the relation of the thing regulated to the protection of interstate commerce from the burdens and obstructions of industrial war and in order to protect that commerce.

Speaking of the statute in the constitutional sense, it went to the causes of the burdens and obstructions to commerce and by doing so at the same time solved the problem, not simply of the protection of commerce, but of the protection of men in certain rights which the Congress of the United States determined they should have, not only should have in the sense that they could be protected by fighting for them, but that they were so important and so just that they should be protected by statutory enactment.

The statute provides simply that employes shall have the right to form, join or assist labor organizations and to engage in collective bargaining, through representatives of their own choosing.

Fundamentally and in essence that is all that the statute is, its substantive provisions, namely that employes shall have the right to have self-organization, to form, join, or assist labor organizations and to bargain collectively through representatives of their own choice.

I say that is all, in substance, that the Act is. It is not an arbitration statute; it is not a mediation statute. It does not cover the whole field of labor relations. Congress merely by the statute guarantees that right, the right of self-organization and the right of collective bargaining. Certain incidents that follow from that I will go on to enlarge upon, but the emphasis that I desire to place now is that it simply protects and guarantees the right of self-organization and collective bargaining.

Now, the question whether or not Congress had the power to do that is distinct in one sense from the question of the commerce power. Whether or not the doing of that, protecting the right of self-organization and collective bargaining, assuming its relation to interstate commerce, could satisfac-
torily be done without depriving the employer of his constitutional rights under the due process clause of the constitution, was one of the main issues to be determined. That has been determined, and not only did the Supreme Court uphold the statute as a regulation of commerce and uphold it as not depriving employers of any rights guaranteed to them by the Constitution of the United States, but in doing so the Supreme Court said that this statute protects nothing more than fundamental rights of employes—those were the words of the Chief Justice for the Supreme Court—that employes have just as much right to organize concerning matters of interest to them as employers have the right to organize. Now, no one questions the right of employers to organize, speaking generally, in any form that they want to. I mean you may associate together in a corporate form or in an association or other forms. Employers have always had the right of self-organization, freedom of association.

This statute gives the correlative right, as the Supreme Court called it, to employes, and the reason it was necessary that a statute do this was that with respect to employes the right simply could not exist unless it were given statutory protection, except as it might exist through economic warfare, or through voluntary acceptance.

Now, I say, taking the statute as it is, in its simple terms, and seeing it only as it is, because it must be judged and studied, analyzed and appraised with accurate knowledge of what it is instead of what it is not, I think that the American people generally, and lawyers must as they have in the past, agree that the statute in protecting these fundamental and essential liberties of employes necessary to their proper association and economic welfare, is a just statute in its substantive provisions because in the end it gives only to employes the rights which employers have, unchallenged.

The guarantee of Congress could not exist, of course, simply by a mere declaration of the guarantee. There must be a means whereby, if this guarantee is to be effective, the

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rights can be protected where they are infringed. Congress, in doing that, specified five unfair labor practices—enumerated them in the statute. They are, in brief, that an employer may not interfere with, restrain or coerce employes in the exercise of the rights guaranteed, and he may not dominate or interfere with the formation or administration of any labor organization or contribute support to it, and he may not discriminate in regard to the hire or tenure of employment and he may not refuse to bargain collectively.

Now, if the guarantee is right, then the unfair labor practices which are prohibited are necessarily right, because self-organization and collective bargaining cannot exist on the part of employes unless the employer is prevented from the use of his superior control and his economic power to interfere by discrimination or in any other material respect with the exercise by his employes of the rights guaranteed.

You cannot have true collective bargaining; that is, the meeting of representatives of the employes with management, in a good faith effort to settle whatever differences there are between them, unless each party may freely select his own representatives in any negotiations between people who are entitled in their own right to negotiate. The representatives who negotiate for their constituents must indeed and in fact represent those they are supposed to represent. So that a company-dominated union, that is, a union whose formation or administration is set up by the employer, is not the representative of the employes. It is the representative of its master, the one who created it or the one who set it up or the one who supports it. Therefore, the Act naturally says that that may not be done, because it destroys true collective bargaining which is guaranteed by the statute. You cannot have collective bargaining through freely chosen agents representing the people they are supposed to represent in the face of discrimination against men because they engage freely in selecting their representatives; that is, by joining a union. So the statute naturally prohibits discrimination because of union activities, or any other interference with the right of self-organization or collective bargaining.
In order that collective bargaining may be engaged in, the statute makes it mandatory under certain conditions; that is, where the majority of the employes in an appropriate bargaining unit have designated representatives for the purpose of collective bargaining, the employer may not refuse to deal with them for purposes of collective bargaining. He may not refuse to recognize them and engage in an honest effort to settle differences.

Those are the substantive provisions of the statute.

Now, how does the law go about its administration or the carrying out of these substantive provisions? Well, there are two branches of that subject: One, the prevention of unfair labor practices; that is, the prevention of interference and domination, the doing away with company-unions, etc., and the other, where there is a dispute as to whether the men have selected representatives in an appropriate bargaining unit, machinery is provided for solving that dispute.

The most important of the procedural provisions of the statute, the method of functioning of the Act so far as employers are concerned, are those provisions which have to do with the prevention of the unfair labor practices; that is, the administration and enforcement of the statute revolving around the unfair labor practices. Those are what we call Section 10 cases.

I imagine a good many of the lawyers present are familiar with those provisions, but I want to spend some minutes in outlining them for the benefit of those who may not be familiar with them because I think it is important to understand how we go about our work. I have told you now all that there is, as I see it, to the substantive provisions of the Act.

As to the procedural provisions: there is a Board of three men appointed by the President, and approved and confirmed by the Senate, and there is an organization under that Board which administers and enforces the statute, and that is this: We have twenty-two regional offices in the principal industrial centers, such as Indianapolis, throughout the United States, each region under the regional office covering a certain defined territory, and the regional office is administered by a regional
director. There is a regional attorney heading up the legal staff in the office, and field examiners, and the usual clerical help.

If an employer in Indianapolis, for example, where there is a regional office, or in any other part of the region is thought by any one or more of his employes or by a labor organization interested in the employes in his business, to have violated the statute by engaging in any of the unfair labor practices, that person or those persons may file a charge to that effect with the Board, and under our rules and regulations, unless special permission is granted, it is filed with the regional office, and not with the Board in the sense of the Board at headquarters in Washington. It sets forth the details of the violation claimed and is sworn to.

You see the Board does not act of its own motion; the Act is brought into operation through a charge being filed with the Board that the Act has been violated. That charge is then investigated by the regional office. It is not at that stage a formal Board proceeding. It is a charge that someone else had filed with the Board which is under investigation. That investigation has two aspects: The first is whether the enterprise alleged to have violated the statute is engaged in interstate commerce or engaged in business so closely related to interstate commerce as to come within the jurisdiction of the Board, under the commerce power. If not, that is an end of it, but if so then the investigation is taken up as to the merits of the charge.

We have had filed with us, since the life of the Board began, over twenty-two thousand charges and petitions for elections, and we have closed over seventeen thousand of them in one way or another. About sixteen per cent of all charges of the character I mentioned have been closed out by the Board dismissing them, deciding the case at that initial stage in favor of the employer, either because we do not have jurisdiction or because the charge lacks merit. About twenty-six per cent of all cases are withdrawn at this preliminary stage. Usually they are withdrawn, though not always, on the advice of the regional office that we do not have jurisdiction or that the
case is without merit. Now, that takes care of about fortytwo per cent of all these cases that we have thus far disposed of. Fifty-two per cent additional are adjusted at that preliminary stage in a manner satisfactory to the parties concerned, including, of course, the Board with its eye to compliance with the Act. This leaves approximately six per cent for formal proceedings.

Those six per cent proceed in this manner: The investigation has indicated that the case is not subject to adjustment, that it is within the jurisdiction of the Board, and that it is probably meritorious. At least a hearing is warranted under the statutory procedure, and so the Board issues, by the regional director, a complaint. The Board may issue the complaint itself, but the usual practice is that the regional director on behalf of the Board issues the complaint. That complaint is the formal proceeding of the Board against the respondent employer for alleged violation of the statute, and sets forth the alleged violation and the basis on which the Board claims jurisdiction. With the complaint goes a notice of hearing, which the statute says shall not be held in less than five days and which now under our recent amended rules and regulations may not be held in less than ten days from the time the complaint and notice of hearing are issued.

At the designated time and place, unless further time is given for one reason or another, the case goes to hearing before a trial examiner of the Board. The trial examiner is a presiding quasi judicial official. He presides over the hearing and you have a trial of the issues in the case just like you have a trial of the issues in a court case. The respondent files his answer, if he desires, or whatever motion he is advised he should file. The motions are ruled on and the case goes to hearing. It is a trial. Witnesses are called by the Board, acting through the regional attorney or one of his assistants who prosecutes the case before the trial examiner. There is examination and cross-examination. The Board closes its case, the respondent takes up his defense, calls his witnesses, who are examined and cross-examined by the Board if desired. There is a trial in all respects similar to a trial in court except
we are not bound by the rules of evidence pertaining to common law trials or trials in equity, under a statutory provision which embodies the same principle that applies to all administrative or quasi-judicial hearings; that is, that they are not limited by the orthodox rules of evidence. Upon the conclusion of the hearing of the case, one or the other of two procedures is followed, and usually the first, which I will now refer to: The trial examiner, after hearing oral argument and consideration of briefs if they are desired or are filed, makes his intermediate report containing his findings and his recommendations as to the disposition of the case, which is served on the parties. The parties may then file with the Board their exceptions to the intermediate report. The case then goes before the Board for consideration and disposition. If desired, oral argument may be had before the Board in Washington and briefs may be filed with the Board. The Board then considers and decides the case. Under the statute it is required to make its findings of fact and to make an order, and it does so. It makes detailed findings of fact on the record and then makes an order for the proper disposition of the case. If it is found that the unfair labor practices as alleged are not proved, the complaint is dismissed. If it is found that in one or more respects respondent has engaged in unfair labor practices a cease and desist order is issued under the requirements of the statute that the employer who has engaged in the unfair labor practice cease and desist so doing. The order specifies the kind of thing which he is to cease and desist doing, and the statute also provides that the Board may—and the Board usually does—make an order requiring affirmative action on the part of the employer which will effectuate the policies of the Act. For example, in an ordinary case of discriminatory discharge where the man discharged in violation of the statute is reinstated, he is made whole the losses he has suffered by reason of the violation of the Act—that is, back pay, less earnings while he was in the status of a discharged employe, or if it is a company-dominated union case, the employer is required to cease recognizing the company-dominated union, withdraw recognition from it, and to dis-establish it as a
bargaining agency, because it is not a true collective bargaining agency.

There are also various other types of orders made in connection with particular cases, some of which you may want to go into more fully.

If the Trial Examiner does not make an intermediate report, then, before final decision, the Board itself issues proposed findings and a proposed order, to which exceptions may be filed and argued orally or in writing before the Board.

After all this rather elaborate procedure has been gone through with—the elimination in the preliminary stages of the great number of cases by dismissals, the carrying through of formal complaints, formal trial examiners' reports or proposed findings, and Board decisions, in only six per cent or so of cases—after all that has been done, what happens to the employer, under this statute often referred to as something very terrible and drastic? Nothing; absolutely nothing. There is an order of the Board that he shall cease and desist, and that he shall take certain affirmative action, such as reinstating men, etc. But under the statute the order thus far carries no legal compulsion. That is, violation of it is not a crime, and subjects one to no fine or punishment, no imprisonment or penalty of any sort. But if it is not complied with, the Board may take its order into a Circuit Court of Appeals in the circuit wherein the employer resides or does business or where the unfair labor practice has occurred. Or the employer, if he desires to seek to have the order set aside, may himself take it into such a Circuit Court of Appeals or into the Court of Appeals of the District of Columbia, where the Board's Headquarters are, and ask that the order be set aside. This is the statutory procedure I am giving you. Then the case becomes in either event, whether we take it in or whether an employer takes it in, a case for the Circuit Court of Appeals just like any other case in the Circuit Courts of Appeals of the United States, with the modification to that statement which I will soon make. The record on which the whole case was decided by the Board, going back to the complaint and the hearing—the verbatim transcript of the testimony which is preserved
and the rulings of the trial examiner and the intermediate report and the exceptions thereto and the Board's decision, findings and orders, all go to the court. The whole record goes to the Court and the case is briefed in the Circuit Court of Appeals by both parties, the Board and the respondent, and it comes on for argument before the Court.

If the Court determines that the Board was correct and in fact the unfair labor practices did occur, and that the order of the Board to remedy them was an appropriate order under the circumstances and not arbitrary or unreasonable, it enforces the Board's order. It makes an order enforcing the Board's order; and if it finds in any respect that the order is not proper or the findings are not proper, it sets aside the order in whole or in part, and modifies it; and if an employer, after the Court has approved an order does not comply, he becomes in contempt of the decree of the Court. The enforcement of the order is left to the Circuit Court of Appeals through contempt proceedings. That is the first point where the employer is under legal compulsion.

In the review by the Circuit Court of Appeals of the order and the record, this statute provides, as do other statutes governing Circuit Courts of Appeals or other court review of administrative or quasi-judicial agencies' orders, that the findings of the Board as to the facts, if supported by evidence, shall be conclusive. The Supreme Court has passed upon this provision in this statute. It seems that almost every possible question that could have been raised with respect to administrative agencies has been raised and decided under the Act—almost all, I should say. Some of you will recall that in the Consolidated Edison decision7 of the last term the Supreme Court went into this matter of what the statute means about the findings of the Board when supported the evidence being conclusive, and again laid down the rule that "supported by evidence" means supported by substantial evidence. So that the findings of the Board as to the facts if supported by substantial evidence are conclusive upon the review by the court.

Now, as to representation cases: they are different, but before I go to them, let me make this observation. I have, I think, correctly set forth the manner in which the statute operates in unfair labor practice cases and I assert that it is fair and should meet the approval of the Bar of the country. It is a substitute of a quasi-judicial method, tied in with the regular federal judicial system, of an administrative process for the settlement of these vital and important questions which lead to strife and dissatisfaction between employer and employee, and it does this by a procedure that by every criterion in the development of methods of administering law in the United States under our Constitution is full and fair. I am not talking about the constitutionality of the Act. There is no question about that. That was fought out in the entire judicial system in the first two years of the Board's operation and was settled by the Supreme Court unanimously; and with respect to due process the Court upheld the procedure of the Act and the methods of operation under it by the Board. But aside from this question of whether the statute is adequate so far as constitutional provisions of due process are concerned, I say the Act goes beyond the necessities of due process, that it is full and fair, and when you consider the vital nature of the rights protected by the law and the consequences to millions of individuals of violations of those rights, and the opportunities for defense afforded employers against the accusation of violation, and the elaborateness of the statutory and board procedure before finally there is found a violation, it is incomprehensible to me that any reasonable person would say that any employer is likely to be found to have violated this law, when as a matter of fact he has not done so.

Of course, boards make mistakes, just like courts make mistakes, and sometimes the orders of the Board, although relatively few considering the full operations of the Act, have been set aside; and even then there may be a question whether the Board was right or whether the courts were always right. But my point is that this procedure is not only consistent with due process, but it is full and it is fair and that it is a far better method of trying to settle the questions involved in the right
of self-organization and collective bargaining than leaving them only to be settled by the battle of force where the strong alone prevail, or to the slow process of the growth voluntarily of the acceptance of the principle of collective bargaining.

There was one additional thing that had to be done by the statute because collective bargaining contemplates the selection of representatives by a majority in an appropriate unit. So the statute of necessity, it seemed to Congress, must provide a method for the settlement of controversies as to whether or not a particular representative who claimed to represent the majority in an appropriate bargaining unit and thereby became entitled to the bargaining rights for all the employes in that unit, in fact did represent the majority. That gave rise to the provisions of the statute contained in Section 9,\(^8\) which have nothing to do with the unfair labor practice provisions of the Act, but have to do only with the so-called representation cases which arise under the statute.

Those cases are not adversary cases, that is, they are not proceedings against employers for alleged violations of the law. They arise on petitions of employes, and since July 14th, on petitions under certain circumstances of employers, to determine the question which is alleged to have arisen concerning the representation of employes. The employer, although this is not a proceeding against him, is made a party to these representation cases. It is interesting to note that under the Railway Labor Act administered in comparable provisions by the National Mediation Board, which holds elections and determines questions concerning representation of employes on the railroads, the employer is not even made a party to the representation cases, that Board having considered that the question concerning the representation of the employes was a question which concerned the employes alone. The National Labor Relations Board does and always has made the employer a party to these representation cases. And that is the type of case which involves the very difficult and sometimes very controversial question as to what is the appropriate bar-

\(^8\) 29 U. S. C. A. 159.
gaining unit. The statute says that in such case the Board shall decide whether the appropriate unit is the employer unit, the plant unit, or the craft unit, or sub-division thereof. That has placed the responsibility upon this Board of deciding those controversial issues. This is not an easy job and is one that has caused a good deal of comment and many headaches to the Board. The unit is determined by the Board after the taking of testimony in a hearing before a trial examiner, in that respect similar to proceedings in Section 10 or Unfair Labor Practice cases. The different unions and employers interested bring forth their testimony, with the Board's attorney taking no position in the matter as an advocate of one unit or another where there is controversy concerning the unit. He assists in the development of such testimony as is necessary to enable the Board to make an intelligent decision on the facts as to the particular plant or industry as to what the appropriate unit should be.

Those are the cases too in which elections are often held. After the unit is determined the only remaining question is whether or not a labor organization or other representative claiming to represent the majority of the men in fact does represent a majority in that unit. The unit really fixes the eligibility of those who may participate in the election or designation of representatives. If there is adequate proof of majority developed at the hearing, the Board may certify without the holding of an election. There is a tendency now toward the holding of elections rather than certifying on the record, although the Board has the right to certify on the record if there is adequate proof of the majority. So you have these elections going on all the time throughout the United States. I think that that is one of the most significant contributions of the Act and the Board to industrial peace, because usually if the election is won by an organization, the employer is ready to engage in collective bargaining. This usually follows after an election. As a matter of fact, a large percentage of the elections are held on the consent of the labor organization or organizations and the employer. We have a great many consent elections. We have held elections in which more
than six hundred thousand ballots, to date, have been cast. I do not think there has been a single charge that the secrecy of the ballot has ever been invaded in an election conducted by the Board. The elections have inspired the confidence and respect of the employees, the labor organizations involved, and the employers. I am not speaking now about controversies over units. I am speaking about the elections after the unit is determined, the actual conduct of these elections, when the men in industry have the opportunity to engage in the democratic process of voting by secret ballot for their representatives in dealing with the employer.

It is also significant that the percentage of participation in those elections is almost ninety per cent of those eligible to participate, so that these Board elections have a substantially higher percentage of participation than any other elections held in the United States, for political or other office.

Of course, sometimes there are protests of elections, alleging that the employer engaged in interference, and that kind of thing must be solved. There is a procedure under the statute which solves it; but there is no criticism, that I know of, as to the preservation of the secrecy of the ballot or the manner of supervision of the election by the Board, and these elections are all held under the supervision of the Board.

I will just say a few words about jurisdiction and then I will cease. You are probably familiar with the leading cases on jurisdiction. The most recent one was the Fainblatt decision⁹ (decided April 17, 1939) and, prior to that, the Consolidated Edison case¹⁰ (decided December 5, 1938) and at the previous term, the Santa Cruz Fruit Packing case¹¹ (decided March 28, 1938) and then in April, 1937, the decisions in the three cases, namely, The Jones and Laughlin Steel Corpora-

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tion, the Fruehauf Trailer, the Friedman, Harry Marks Clothing Corporation. Those are all in 301 U. S.

It is perfectly true that the Act does not cover by any manner or means all business. But the precedents and decisions of the Supreme Court, particularly the Fainblatt case, do give the scope of the operations of the Act a very broad field. We are constantly concerned with the question of jurisdiction and it must be settled in each case. The Board must believe it has jurisdiction before it goes ahead in each case, but it is perfectly true now, I think, that it would be unsafe to assume that you are not within the jurisdiction of the Board if you are engaged in a business which in any substantial degree is engaged directly in interstate commerce either through the receipt or distribution of goods, or in a business in which a strike would interfere to a substantial degree with interstate commerce. In neither the Fainblatt nor the Consolidated Edison case did the decision of the Supreme Court rest on the fact that the particular concern held to be within the jurisdiction of the Board was itself engaged in interstate commerce; but the circumstances were such that the court held that a strike in these concerns would substantially affect the interstate commerce of others. In other words, it is interstate commerce that is protected by the Act, and not the interstate commerce of any particular party.

I have taken so much time thus far that, although I have not said all that I would like to say, I think I should discontinue so that you will have the opportunity to ask me questions and to engage in open discussion.

Please feel free as far as I am concerned to ask any question that you would like to, although I shall feel free, if I think it is wise, to refuse to answer.

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II

DISCUSSION OF ROBERT LITTLER*

The widespread debate over the Wagner Act has raised such sound and fury, and the sentiments upon it have been so flavored with salt and vinegar, that in listening to anyone else express his opinions upon the subject I find it helpful to know something of his point of view. By reason of Mr. Fahy's distinguished position you naturally know his attitude. Candor compels me to tell you my general opinions at the very outset.

I am in accord with the broad principles of the Act. I think it is proper to guarantee by statute the right to bargain collectively. The results of the Wagner Act thus far I appraise to be generally in the public interest. As to the accusation against the Board that it is hopelessly biased against employers, I find no sufficient objective evidence to support it; I do not believe that the Board is conclusively prejudiced against the American Federation of Labor. I shall be critical of a good many things the Board members have done; but I have great sympathy for them. It is a difficult task they have to perform under novel and trying circumstances. The Board has made mistakes; some of them are serious. But I cannot say that were I on the Board I could do any better. I might not make the same mistakes, but I might make others that are worse. I expect that the Act will be amended somewhat to expand it or to restrict it. I do not anticipate that the Act will be repealed, nor that it will be emasculated. Now, you do know what is my point of view and you can discount appropriately what I shall have to say.

The problem to which I want to address myself is this: Assume a lawyer who is well-informed on the general subject of law, but who has not had a great deal of experience in the field of labor law, and assume that he is suddenly confronted with some problem coming under the Wagner Act, what should he look out for? I believe that most of our mistakes,

* Of the San Francisco Bar.
Brothers of the Bar, are mistakes of omission and not of commission. If we don’t know and know that we don’t know, then usually we can look it up and find, if not the answer, at least an answer. Our worst errors are made when we don’t know, and don’t know that we don’t know.

Now, in all that I shall have to say I assume, of course, that our clients want to obey the law. They may not agree with the law, they may feel that it should be amended or repealed, but I assume that as long as it is a law they will abide by it. If that be not so, then I have no suggestions to offer.

Perhaps the first and most useful suggestion I can make is as to the sources of information on the subject. I have been asked many times, by my brothers of the San Francisco Bar, where they can turn to learn about the Wagner Act and about the Board. It is not difficult. The Board has published its own rules and the statute, both in one pamphlet. I have not yet seen the new rules, but you can purchase them from the Superintendent of Documents for ten cents. If you catch Mr. Fahy before he leaves, perhaps he might get you a copy for nothing.

The reports of the Board set forth the principles established. It is quite unnecessary to buy any of the expensive books which have been written on the subject. The Board has published three annual reports. They are very excellent. The last one available from the Superintendent of Documents has brought the activities of the Board down to June, 1938. The one which will summarize the decisions of the Board down to June, 1939, will not be available until late in the fall. Beyond all of this I should say the most useful place to look for information is in the law reviews.

If you are confronted with some problem in the field of the Wagner Act, and are not familiar with it, then if the problem is of importance, I would suggest that you call in some attorney who has had some experience in the field. I would never dare say this out in California. They would think I was soliciting business. They might be right. But I conceive it to be a useful suggestion. If not that, I would urge that you confer with one of the attorneys for the Board. I do not know your
regional officers here in Indianapolis. In San Francisco when we get into a procedural jam, we ask the advice of the regional attorneys; and I can say that I have always been received courteously and helpfully. Even when I was urging a point of view diametrically opposed to their notions, the regional attorneys have been more than willing to take their time to assist me to find the proper procedure.

One of the principal duties of one who is engaged in the practice of law with respect to the Wagner Act is to see that his clients are properly educated as to their obligations under the law. It would seem that on this day of grace, after the Wagner Act has been in force for four years and some weeks, there ought to be little misunderstanding of the duties of the employer and the purposes of the Board under the Act; but there is. It is not easy to elucidate to a client exactly what he must do and must not do. He may have been dealing with his men for a long time. He has helped them when they were in trouble; when their wives piled up bills that were too large, he has consoled them about it; and he thinks it perfectly proper to tell them what union to join.

I find that the best analogy by which to explain an employer's relation to his employees and their union under the law is to say that an employer owes to the union-employee relationship about the duty that an attorney owes to the attorney-client relationship of another party. If you are in litigation, and the client of the opposing counsel comes to you, and says, "Have I a good lawyer?" your mouth is necessarily closed. If he comes to you and asks you to help him get rid of his lawyer, you are unable to act. The duty of the employer to the union and to his men is substantially the same.

Another point which I think should be emphasized to the clients is the degree of responsibility to which the Board holds them for the acts of their subordinates. In the view of the Board, it is not only "topside management" which may bind an employer by an unlawful act, but the Board applies the doctrine of respondeat superior through the chain of command clear down to the most inconspicuous of straw bosses. The Board holds that even though the executives assume an atti-
tude which is quite legal, nevertheless the company may be bound by acts done by some very inconsequential foremen. In the recent *Pacific Gas and Electric* case, the company was held liable for activities of subordinate supervisory officials who were so low in rank that they were included within the appropriate bargaining unit. They were eligible for membership in the union. A few did join the union. Yet with some minor supervisory authority, a few of them committed certain acts of misconduct, or so the Board found: and the company was held to be responsible for them. Thus, the employer is liable not only for what he does and for what his superintendent does, but he is also liable all the way down the chain of command, even to the most inconspicuous of them all.

Under the decisions of the Board it is almost impossible to specify what particular acts of an employer are always lawful and what are unlawful. You will find that most of the decisions of the Board are based on circumstantial evidence; and it is the factors involved that are important. There is a reason for that. If an employer is going to adopt anti-union tactics, he does not issue written instructions, or have the policy embodied in a resolution by the directors. The whole thing is done in a circumstantial manner. So the Board has to consider circumstances. Therefore, we are concerned primarily with what factors are significant.

Now, let us take a typical and most usual case. When an attempt is first made to organize the plant, what can the employer do? The answer is nothing—nothing, either to hinder or to help. For if he assists the union organization, another union may come along at another time and in another place and complain that he has interfered with them. The Board has expressly held that it is improper for an employer to assist any union to organize. Of course, he can not discharge the organizers even though they be agitating for a strike. This is their right under the law. He can not spy on the organization and its proceedings, even only to see how well it is progressing. The Board has been most strict.

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1 IV. *Decisions and orders of the National Labor Relations Board* 180.
In one case I remember—it was one of the Greyhound cases—there was a meeting of the union which was not secret and the manager walked in disguising himself only by putting on a driver's hat. He did not even wear a false mustache. That was held to be improper. In another case, the employer hired a stenographer to take down what was said at an outdoor meeting where any passerby could attend and hear what was said. That was held to be a violation of the Act. In a recent case, the Circuit Court of Appeals reversed the Board on a finding that the employer was guilty of espionage by listening to employees who came in to tell him what had taken place. An employer should be extremely cautious to quarantine himself from any questionable information about union activities.

If organization is begun, he can not move the plant, or threaten to do so, and may even get into trouble if he raises wages, if it be found that his purpose was to defeat the organization. He should also take care about such statements as he makes to the public or to the employees. The rule of the Board with regard to statements by employers has raised a storm of controversy. I think in all fairness it should be said that the Board has never gone farther than to decide that utterances by the employer will be considered as important factors in deciding whether or not there has been a violation of the act. The theory of the Board is fairly obvious. It is that there is such a disproportionate power between the employer and the employees, that a mere expression of opinion by the employer will be considered a command by the men. I am by no means persuaded that the Board's apprehension on that subject is at all justified by the facts. Manifestly they must hold a very low opinion of the intelligence of the average American workmen to conceive that employees can be so easily dominated; nevertheless that is the view of the Board and the law of the land until reversed. The types of statements which the Board has found to be unlawful are those in general opposition to unions, those in opposition to a particular union, those

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in preference of one union over another union, those unfairly summarizing the Wagner Act, and those unfairly attacking the activities of the Board under the Act.

It is no defense that the declarations of the employer are true. In the *Pacific Greyhound* case\(^3\) the employer said he did not understand why bus drivers wanted to join a railroad brotherhood because the interest of the brotherhoods was with the railroads and opposed to the bus lines. That was assumed to be true; but it was held to be improper. In the *National Electric Products*\(^4\) case the employer pointed out that if the men joined the C. I. O., then the A. F. of L. would boycott the products of the company. This was also true, but was also held to be improper. So the employer should be very circumspect about any observations which he makes on the merits of any labor organization. He should even beware of giving advice to the men as to what are their rights under the Act. To be safe he should not give any advice at all, even though his advice is correct.

Now let us suppose there is a strike. What are the employer’s obligations under the Act? The strikers are still his employees and as such he owes them all of the duties specified by law. He cannot replace them until he has made every effort to settle his differences with them. In the *Fansteel* case\(^5\) the Supreme Court held that he can discharge workers who are guilty of a sitdown strike. The Board has generally held that any strikers who have been convicted of violence can be discharged. If there has been no conviction, but the employer seeks to prove to the Board the fact of violence, he will find that the Board is very strict in its requirements of proof. Thus, even though there is violence, the employer must be cautious about any discharge.

In connection with strikes there have been many cases where the employer has been found guilty because of the performance

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\(^4\) III. Decisions and orders of the National Labor Relations Board 475.

of what would appear to be innocuous acts—calling in the police, calling in state mediation agencies, or calling in a citizens' committee to mediate in a back-to-work movement. I have criticized the Board, and do now, for finding employers guilty on a showing of very feeble connections between the activity of a citizens' committee and the activities of the company. Hasty presumptions are often drawn on the assumption that a citizens' committee would not be concerned in a back-to-work movement unless the employer stimulated them to be active. There is no doubt but that an employer might use a controlled citizens' committee to try to defeat organization, and if he does so, that is a violation of the Act. The employer must be cautious, even with good intentions, because the Board will quickly find a connection, and sometimes upon evidence of which some of us might not approve.

Now, suppose an independent union is formed in the plant—when is it lawful and when can it be recognized? Independent unions are as proper as any other; it is the choice of the men that counts; but the Board is very quick to find employer domination and support. The Board makes no distinction between domination and support. Each is treated as being equally bad. I differ from them on that. I think domination is very much worse than support, but the Board has definitely laid down the rule.

It has been held that any support given to an independent union is unlawful, even though the union itself does services for the employer in return for the support. In the *Calco Chemical* case, the parties had adopted what was called the "Hamilton Plan." It was named after the lawyer who invented the idea. The employer paid the independent union for the publication of a house organ, for taking care of its sick benefits, and its unemployment benefits. The Board found that the independent union was company-supported and unlawful under the Act.

There are many factors in the organization of the independent union itself which the Board will regard in determining whether or not it is in effect *bona fide*. Does it include persons with power to hire and fire? If so, it is certainly to
be under suspicion. Is the consent of the management required for any act of the independent union? If so, that would be fatal. Is there adequate provision in the union constitution for meetings? If not, it is not regarded as genuine. Is there a sufficient provision for dues to set up an actual working organization? If not, it will certainly be regarded with suspicion. Is there the requirement that only employees of the plant can act as officers and negotiate for the union? If so, that of itself would probably disqualify it. Any substantial departure from the accepted practices of trade unionism would, I think, cause the organization to be suspected, although it might not be fatal. However, even if the employer disapproves of an independent union, even if he would prefer that his men join an AFL or CIO affiliate, nevertheless if the independent union actually represents the men, it is his duty to recognize it as the collective bargaining agent.

Now, from the obligations of the Wagner Act compared with the provisions of the Norris-LaGuardia Act, the employer gets into what, in my opinion, is an almost hopeless box. Suppose an independent union is formed and the employer is required to recognize it, and then a national union, in an attempt to organize the plant, pickets it to put pressure on the employer to put pressure on the men to join the national union. Now, if he yields to the picket line and puts pressure on the employees to join the national union, he has violated the Wagner Act. If he does not yield to the picket line, then, under the Norris-LaGuardia Act and the decisions of the Supreme Court, cannot get an injunction or restraining order against the picketing. This particular difficulty is now on the way up through the courts in the *Donnelly Garment Company* case.\(^6\)

Now, suppose that two rival organizations come and each demand that it be recognized as the sole agent for collective bargaining. The employer must not prefer one over the other under any set of circumstances; and the steps that may be significant are:

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\(^6\) *Donnelly Garment Workers Union v. International Ladies Garment Workers' Union*, 99 F. (2d) 309.
First, the right to meet on company property; if that right is granted to one union, it must be granted to the other.

Second, organizing on company time; if that privilege is granted to one union, it must be granted to the other.

Third, the use of company bulletin boards; if that privilege is granted to one union, it must be granted to the other.

These are the factors that appear most often in the cases where it was found that employers discriminated in favor of one union over another. Mr. Fahy discussed the rule which permits the employer to file a petition for certification. I think it is a good rule. The only thing I can criticize is that it was adopted two years too late. To what extent it will be used remains to be seen, but it does open up a solution to what otherwise was a very difficult problem for employers on many an occasion.

Suppose the employer is asked to bargain collectively. What is his obligation under the law? Before he is required to bargain collectively, two conditions must occur. First, there must be some formal demand upon him and an oral request or casual inquiry is not sufficient; second, the demand must be by a union which represents a majority of the employees in a unit appropriate for collective bargaining.

What is bargaining collectively? The Board has been unable to lay down any precise criteria. They say, and properly so, that it is a matter of good faith. In bargaining the employer does not have the right to challenge the authority of the particular officers who come to him. That ruling surprised me. I thought the Board was going to rule the other way, because the Board refuses to certify the authority of particular officers of a union, and if the employer demands to see their authority, he may be violating the Wagner Act. The Board takes the attitude that who represents the union is the business of the union and not of the employer.

It does seem to me if you are dealing by compulsion with a group, the employer should have the right to check into the question of the authority of those persons who actually do business with him. I do not lay that down as a flat rule.
all cases where the rule has thus far been involved, it is only one among other factors, but it is one to look out for.

The one objective criterion which the Board most frequently uses in determining whether or not bargaining has been done, is whether the employer made a counter offer. I think if I were an employer, I would regard it as a game of chess, where short of a checkmate the man who fails to respond to the other man's move, loses at the game. As long as the employer keeps pouring back counter offers, he is in pretty good shape; and the Board says, very properly, that collective bargaining means more than saying "yes" or "no." It means trying to get together in trying to settle differences.

One other matter of which our clients should certainly be warned is that if an employer in negotiations refuses to grant an increase on the ground of inability to pay, then if he fails to support that claim by making available financial statistics to sustain it, he is refusing to bargain collectively.

Whether or not a written contract is required in collective bargaining is another subject which has caused its full share of controversy. The position of the Board, as I understand it, is that if the employer flatly refuses to enter into an agreement, even though an understanding is arrived at, then he has not bargained collectively. The Board is entering upon a tangency somewhat outside the boundaries of its authority on that rule. It has always been my conception that it is the duty of the Board to help the men organize, and to get the parties started bargaining collectively; but from there on, the boys are on their own. What the bargain is, is none of the business of the Board. Whether or not the contract should be integrated in writing is a matter which is a perfectly proper subject of negotiation. A man might be perfectly willing to enter into an agreement in writing if he gets certain concessions. However, I am somewhat persuaded that it is a tempest in a teapot, because I think ninety-nine times out of a hundred, it is much to the advantage of the employer to enter into written agreements.

The Board has sustained its rule by the argument that it is good practice to enter into written agreements, and that it is
quite the universal practice. It is a good practice, but I feel that is the business of the employer. So far as it being the universal practice is concerned, it is not the universal practice out in my bailiwick. I would say fifty per cent of the collective bargaining is carried on without there ever being a stroke of writing to a piece of paper. Of the remainder, most of the contracts are not legal instruments at all, but merely memo-
rando which are not enforceable in court. As a matter of fact, this informality usually to be found in the industries where collective bargaining gets along the best.

Now, what should an employer be careful about in hiring and firing? I think the Board has been subject to a great deal of unfair criticism as to its methods on this point. The Board has said that a man can be fired because of inefficiency; a man can be fired because he is contumaceous to his employer; a man can be fired because he has red hair, or for no reason at all; but he cannot be fired for union activity. There was an instance recently where the Board found that a man had been fired because of temperamental incompatibility between him and the employer. This was held to be proper.

One case amused me. A man worked in a plant twelve years, and he was discharged on the morning after he was elected president of his union the night before. The reason he was discharged was because he spat and missed the spit-
toon. They took testimony and discovered that the expectancy of his expectoration was no less than the mean average of the accuracy of any man in the shop. The Board properly set aside the discharge.

The rule as to discrimination on the basis of union activity applies not only to firing; it applies to promotion, lay-offs, reinstatements. Any change in the relationship of the em-
ployee and employer which is based on union activities is improper. Those problems are always difficult. I have faced them as an arbitrator, and no one who has not dealt with them has any notion of the labor pains that are imposed upon the trier of the fact, when he attempts to decide whether Bill Jones was fired for an infraction of a minor rule or for a union activity.
What should an employer do to protect himself against the charge of discharge for union activity? Of course, the best way to protect oneself against the charge is not to fire people for union activity. But, assuming that he might be suspected of this, how should he protect himself in advance?

A charge of general inefficiency, as Mr. Fahy said this morning, is not sufficient. The employer must be prepared with particular reasons and concrete and objective evidence. If the employe is to be discharged for doing improper work, taking samples of the work would be wise. If he is to be discharged for violation of a rule, it must be certain that the rule was known, was properly published, and that the seriousness of the rule was known and properly published; another factor is whether he has been previously warned as to how serious was the offense. How was he treated in comparison with the way other men were treated for the same offense? But I think the most practical protection, if you are going to fire a man and you think you may be challenged, would be to call in the union representative and share the responsibility with him. He may try to dodge it if he can; but get him in there and tell him what you are going to do and make him assume the responsibility of making his complaint then. The process of collective bargaining does not end with the agreement. Collective bargaining continues from day to day and from week to week.

Now, let us take another case. Suppose that your client has discovered that a charge has been filed against him and the Board is making an investigation of him. If he is like a great many clients I have met, the first thing that happens to him when he finds that a charge has been filed against him is that he goes into an intellectual tail-spin. And you will have to console him. When a charge is filed the Board has a right to come in and investigate it, to find out whether the Board has jurisdiction and whether a violation has been committed. In my opinion, when a charge is made, the attorney can do his best work before the complaint is issued.

Now, did you listen to those statistics which Mr. Fahy gave this morning? Only about one out of twenty cases in which a
charge has been filed does actually go to a hearing. Usually the Board will not proceed and issue a complaint on the charge unless the Board representatives are satisfied that the Board has jurisdiction; that there has been a violation of the Act; that it can be proved; and that the matter cannot be compromised. But if the case proceeds this far and it actually goes to a hearing, the chances are overwhelming that there will be a conviction. I base this statement purely upon a statistical analysis of the record of the Board.

Whether or not the Board's policy in this matter is proper I am not here to debate; but because of it I do suggest that the attorney's best work can be done when the employer first learns that a charge has been filed against him and before a complaint has been issued. He may take the matter up with the investigators for the Board or with the regional director. It is certainly appropriate to go into the Board's regional office and talk over the problem in a friendly manner.

If the complaint is filed, and you are going to go to a hearing, it would be my suggestion that it is most important to watch the record with your eye on appeal. The Board is somewhat informal in its general approach but it can be very strict and very technical. Make your objections early and continue them at every instance and occasion. Then repeat them in your exceptions to the trial examiner's intermediate report. At the hearing it is quite customary to enter into two stipulations: the first, that the respondents can be deemed to have taken an exception to every adverse ruling; the second, that any objection made by any respondent shall be for the benefit of all respondents. But the stipulation as to the taking of exceptions does not preclude the necessity for the taking of exceptions after the intermediate report.

The hearing is like any other except that evidence not admissible in courts of law is frequently received. The Board has been severely criticized for the admission of some policies on admissibility. Lately the tendency is to become increasingly strict, and the last time I was before a trial examiner, about three weeks ago, he was as strict as is the Superior Court in the City and County of San Francisco. The Board recently
reversed a trial examiner for the admission of newspaper reports which were accepted to prove the facts stated in the reports.

Those who are not familiar with the work of the Board are sometimes surprised at the degree to which background evidence is admitted in order to show the intentions and policy of the respondent. Frequently the Board gets way off the reservation and gives a retroactive enforcement of the Act. In the *Bethlehem Steel* case, which involved acts committed in 1937, they started with a speech by Charles M. Schwab made in 1910. Twenty-seven years is too much. In another case they even took cognizance of the bad reputation of the attorney who appeared before the Board. That is going to be right hard on some of us.

The Board applies a double standard as to the admission of confidential records. A union will not be required to produce its confidential records, and confidential records are deemed to be those which disclose the membership of the union. Yet the Board holds that an employer can be compelled to produce anything he has. You should be warned about that.

You may be surprised sometimes at the “weight of the evidence” rules which the Board will apply. I find that the Board frequently draws hasty inferences where it is a question of convicting an employer, and is not nearly so quick to draw the inferences where it is a question of misconduct on the part of the union. I think that is not any deliberate unfairness; it arises from a too zealous effort to enforce the law against all comers. I recall one case where a union petition was circulated in a “mysterious manner”; so of course the employer did it. In another case, pickets were discharged because the president of the company got hit over the head with a baseball bat while going through the picket line. Yet he could not definitely identify the culprits by his own recollection. So the Board found no specific evidence to connect the pickets with the baseball bat, and would not draw any presumption. Of course, those are isolated cases, and extreme examples.

You are entitled to the full right of cross-examination.
There have been occasions when the trial examiners seem to have denied it. The Board was reversed in the *Montgomery-Ward* case on this ground. Yet it is no mean compliment to the Board that this is the only one of all the cases which have gone to the Circuit Court of Appeals in which the Board has been reversed because of unfairness in the hearing. The opinion in that case merits your examination. It is set forth in the decision the manner in which counsel protected his record and he did it very well.

Irrespective of the decisions of the Circuit Court of Appeals each person must decide for himself whether or not trial examiners are fair in the conduct of Board hearings. In the first case in which I was engaged I became seriously aggrieved at the conduct of the trial examiner in excluding evidence; and I protested to the Board. Apparently the Board agreed with me, for we were granted another hearing. The last matter in which I participated was conducted by a trial examiner who was one of the finest gentlemen I have met. He ruled against me on everything I tried to put in. Of course, this was wrong. All rulings against me are wrong. But he allowed every latitude to make a record, and went out of his way to be sure that my offers of proof were full and complete. Trial examiners are accumulating experience. It is my observation that the quality of their work has greatly improved. So far as I am concerned I have no complaint to make of them and I think it is shortsightedness in the extreme for counsel to approach a trial examiner in an antagonistic manner and to tell him at the outset they know they will not get a fair hearing.

There have been many proposals to separate the administrative and judicial functions of the Board. This change would affect only one out of twenty of the Board’s cases. I believe that the possibilities of collusion between the regional attorneys and trial examiners have been overestimated. The examiners come from Washington and are constantly on tour. The regional attorneys, who put in the cases for the Board, are purely local. I apprehend that between them there is less

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contact than between the average District Judge and the average United States Attorney under the Department of Justice.

If you are going to argue the case orally to the trial examiner, you must ask special permission. After the submission of the case, the next step is for the trial examiner to make his intermediate report. Here he suggests proposed findings and makes his recommendations as to what should be the order of the Board. Here is where you get your first inkling as to the bad news. Your next step is to file exceptions to the intermediate report, and that is the fulcrum for all future proceedings which may be had in the matter. Any objection that you have that is not repeated in the exceptions to the rulings of the trial examiner is waived; and of all the steps in the proceeding this is the one that must be taken the most carefully.

Then comes the Decision and Order of the Board. It may follow the recommendations of the Examiner or the order may entirely reverse the recommendations of the trial examiner.

There are two provisions which are commonly inserted in the order to which I think objection can properly be made. One is that of posting notices that the employer will cease and desist in interfering with the organization of the men. In at least four cases the Circuit Courts of Appeal have reversed the Board as to this requirement upon the ground that it obliges the employer to admit his guilt, which is improper. Some other decisions have taken the opposite view, but if you feel so disposed there is the possibility of making an objection.

Another objection which I think should be made to the form of order used by the Board, arises from the practice of incorporating into the orders the general sections of the Act. If an employer is found guilty of discharging an employee for union activity, he may be directed to reinstate the man with back pay; and then the order will probably direct the respondent to cease and desist from interfering in any manner with, restraining or coercing its employees in their right to bargain collectively.

Now, the vice of this general clause is that if the order is later enforced by the Circuit Court of Appeals, and if at any
time thereafter the employer is accused of violating the Act, his case will not go through the ordinary procedure of charge, complaint, hearing, intermediate report and decision by the Board. Instead of that, he will be brought up to the Circuit Court of Appeals on contempt. For what the Board has done is to incorporate in virtually all of its orders the provisions of Section 8 (1) of the Act. The Board thus puts itself in the position of enforcing the statute by contempt and not by the process established by the Wagner Act itself. And the punishment for contempt may be serious.

All of this is very anomalous. For years the labor unions have complained of injunctions granted by the Courts because they were so general that the unions were being governed by contempt. Now the National Labor Relations Board is doing exactly the same thing. To the best of my knowledge this objection has been made only once in any Circuit Court. That was the National Motor Bearing case in the Ninth Circuit. The opinion of the Court affirmed the order with a very strong dissenting opinion by Judge Haney.

After the order of the Board, whether the matter goes up to the Circuit Court of Appeals on petition by the Board for affirmance of the order, or on a petition for review by the respondent, makes no difference at all. The problems are the same. The issues are the same. The matter is treated by the Circuit Court of Appeals similarly to that of a matter in equity at first instance. The respondent may not make his objections by brief. He must file an answer or other appropriate pleading. When the Circuit Court of Appeals affirms the order, if it does, then for the first time it becomes a binding judicial act. For, as Mr. Fahy said this morning, until that time it is merely similar to an interlocutory decree.

Now, what shall we say of this whole scheme? The Wagner Act was adopted four years and some weeks ago, with the avowed purpose and confident promise that it would substantially mitigate the public inconvenience brought about by disputes over recognition of unions for collective bargaining. It

8 V. Decisions and orders of the National Labor Relations Board 409.
is within the truth to say that there has been no startling and spectacular decrease in industrial disputes. From this I would not necessarily conclude that the Act has failed or that the law has been improperly administered. I say, frankly, I do not know what to conclude. I think it is extremely improbable that the Wagner Act will be repealed. There have been a good many proposals made for amendment and from most of them I find myself in disagreement. There are a good many which aim to revise the scheme for the purpose of legislating fairness into the Board. But I know of no statutory amendment that can legislate fairness into a body if it does not exist there otherwise. The AFL has proposed to increase the Board from three to five members. If three are not fair, would five be more fair? It has been proposed to set up qualifications for trial examiners. My own experience has been that the quality of the work of the trial examiners has been improved. I do not know any way to legislate competence into trial examiners any more than to legislate fairness into the Board.

Another suggested change is to set time limits within which the Board must decide its cases. That seems impractical. We have a time limit out in California and a rule which says the judge can not draw his salary until a case is decided. I received a decision the other day in a case that had been pending for two years. How the judge drew his salary during that time, I do not know. Time limits are of no particular utility.

I do anticipate there will be amendments to the Wagner Act. There will be changes in the whole law of industrial relations. It has been suggested, for example, that the Wagner Act should provide substantive regulations for the conduct of businesses of unions; that is, to regulate their elections, to regulate strike votes, to regulate the manner of the conduct of their business. I am by no means sure that this is a proper basis of amendment of the Wagner Act. Within the next ten or fifteen years, there is going to be regulation of labor unions. The more intelligent labor leaders themselves know that this is true. I should hate to see it tried by ancillary amendment to the Wagner Act, because it involves problems beyond the scope of it.
Various employer organizations have asked Congress to extend the Wagner Act to give the Board authority to outlaw interference and coercion by the unions. Such a proposal has an obvious plausibility. To it, however, there are at least two serious objections. Under conditions as they now are, if we should place upon the Labor Board the duty of regulating the conduct of unions with regard to interference, we would involve the Board in so much constabulary duty that the whole machinery would bog down through sheer bewildering unworkability. Furthermore, I have profound objection to the use of the word "coercion" in any definition of the legal duties of labor. The history of the term is such that it is quite meaningless. What is "coercion"? To hit a man over the head with a piece of lead pipe is undoubtedly coercion. To threaten to do so is also. Mass picketing is generally held to be coercive; but what is mass picketing—two at an entrance, or three, or five, or ten, or twenty? Is it coercion for the pickets to sing hymns? One court in Pennsylvania found it so. Some skeptical soul inquired what hymns were sung and learned that as the non-striking workers entered the plant the pickets made it a practice to sing "Nearer My God to Thee." The five-finger salute is improper in California. A Connecticut Court has said that it was coercive to give "threatening looks." In New York it is proper to call a non-striker a "scab" but not a "dirty rat." That is not all. The law is that a picket line may be coercive if it is non-peaceful, and also it may be coercive if it is for an unlawful purpose. Yet there is no agreement as to what is a lawful purpose. A picket line to organize a plant is coercive in New Jersey; it is not in New York; and in California I am not sure. To picket for a closed shop agreement is unlawful in Maine and Massachusetts; it is not coercive in New York unless the closed shop would be unduly monopolistic—whatever that means; and in California no one can know what the rule is until the appellate courts pass upon three cases now pending.

So, you see, the word "coercion" literally means nothing because it means too much. Its use is not intellectual economy; it raises more questions than it answers. You cannot say with
precision to what acts in human experience it definitely relates. It is a linguistic blank. It should be excluded from any statutory amendment.

There is a modification of this idea which has possibilities. We might adopt an amendment providing that any union guilty of violence or intimidation would be ineligible for certification, and no employer should be found guilty of a violation of the Act in refusing to bargain collectively with a union which makes a habit of these practices. I believe this principle is sound. Under the Wagner Act the strong arm of the government has been extended to assist employees in organizing and bargaining collectively. There is no inconsistency, even with the present theory of the Act, in extending that assistance with some discrimination and in saying that we will not give governmental aid to unions which adopt the "goon squad" policy to promote their interests. Indeed, the use of the "goon squad" is not collective bargaining at all. It is merely collective action. It should be no disfavor to the unions to provide that we will encourage those unions which do obey the law, but we will not assist those which do not. The idea does not contemplate that the Board shall restrain the use of violence; nor does it forbid an employer dealing with a union which does so. We would have to distinguish between the deliberate use of the "goon squad," on the one hand, and temporary and spontaneous outbursts of fighting on the picket lines or employer provoked violence on the other hand. The distinction will not be easy to specify in a statute, and in actual practice borderline cases may be difficult to decide; but these cases will be no more difficult to decide than questions which now confront the Board—such as the subjective state of mind of an employer who may be trying to bargain collectively or merely going through the motions. So far as I know there are not pending now any amendments exactly like this, but I believe one could be put in workable form. To it, in my opinion, no labor leader whose intentions are honest could have any reasonable objection. I say that the idea is sound; but whether it should be adopted right now or await more experience in this type of regulation, I am none too sure.
An amendment still more mild in its effect would provide that the Board may protect the unions which it certifies from interference from any source. It is now the law that when a union is certified as the collective bargaining agent, if the employer refuses to recognize the certificate he is guilty of a violation of the law, but if a rival union interferes by establishing a picket line that is all right. Jurisdictional disputes are completely inexcusable manifestations of union activity. They did not originate with the breakway of the C. I. O. and they will survive any rejoinder with the A. F. of L. It is no help to labor for the Board to certify a union and then to have the processes of collective bargaining interrupted through the avarice of a rival and disgruntled organization.

Above all these things, we shall have to give serious thought to some fundamental considerations governing the relationship of employer and employee in this field of collective bargaining. What is a collective bargaining agreement? When you make an agreement with the union, with whom do you make it? Is it with the union as a unit? Or is it with the union as agent for your employees? Or is it with the union or its officers as agent for all of the members of the union? To the best of my knowledge, there are five or perhaps six prevailing theories that have been adopted by the different courts.

The Wagner Act undoubtedly contemplates the theory that the union or its officers make the agreement for the men in the particular plant. Now some of the AFL proposals seem to indicate that they would like it that the agreement should be made with the local union as a unit in itself, as an artificial person, if you will, like a corporation. I think that position has a great deal of merit in it and it should be seriously considered, but not as an amendment to the Wagner Act. For that goes down to the very basis of the common law of collective bargaining. It involves questions far beyond the proper scope of the Wagner Act.

There is another problem which I think is most serious, and that is how we can provide for prompt and effectual enforcement of collective bargaining agreements. My own experience has been that one of the principal sources of dissatisfaction
between employer and employee is the petty disputes that arise in connection with the carrying out of the agreements after they are made. The real causes of the worst friction are not differences of opinion over wages. It would be a great help if we had some method of getting prompt and effectual enforcement of collective agreements at the instance of either party. Just how that should be done, I am not sure. I think a suit for damage is an inadequate remedy. Action in equity is too complicated. Arbitration is not sufficient because the arbitrator has no power of sanction. I have sometimes wondered if it would not be prudent to consider setting up a complete set of Labor Courts such as they have in nearly every civilized country in the world. Whether that should be done by expanding the Labor Board or whether it should be done by the Federal Government at all, or by the states, are problems that I have not yet resolved in my own mind. It is not something to be done quickly. Progress is a slow and tiresome process. It never comes galloping in all covered with foam.
The employer was not permitted, under the rules of the Board, to ask for an election until recently, but the rule now provides that the employer may invoke the representation or election machinery of the Board if he can truthfully allege that a question or controversy affecting commerce—this is a formal allegation—has arisen concerning the representation of employees. It is important in seeking an election that two or more labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the unit or units alleged to be appropriate. In other words, where the employer is caught in the middle, between two labor organizations, each of which is seeking recognition and claiming to represent the union, an election is usually held.

The employer in such a situation is permitted to file a petition with the Board under the same circumstances that the employees are. The Board is not required to hold an election pursuant to the employer's petition; neither is it required to do so pursuant to a labor organization's petition. Employees now have the same right to have an election or determination of the question, concerning representation, where two or more labor organizations are involved, that the employer has.

If the employer is confronted with only one labor organization, and that organization claims a majority membership of employees, the employer cannot demand an election or determination of representation. If the employer is, in good faith, in doubt of the majority, and is willing to resolve that doubt with the union under so reasonable a method as an audit of the cards, checking of cards, or consent election, and is not using his doubt as an excuse to evade the matter, it is likely that the Board would not hold the refusal to bargain under

*The discussion was in the form of questions from the audience and answers by Mr. Fahy and Mr. Littler. Lack of space requires that we give a synopsis of this discussion rather than a verbatim report.—Ed.*

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such circumstances as a violation of the Act—even though it should develop that the labor organization had a majority.

When such a question arises it is advisable to consult with the Regional Office, and very likely the union, if it has a majority, will assist in getting that question solved in a manner that will satisfy the employer.

In the Remington-Rand case\(^1\) the Court found that the refusal to deal with the union was not because the employer doubted the lack of majority, but because the employer was determined, even if the union did have a majority, that he would not recognize the union as it was entitled to be recognized.

In case there are two unions competing for representation, and the loser, after a called election, calls a strike, there is nothing the Board can do to remedy the situation. The statute expressly reserves unimpaired the right to strike, and the Board has no power to prevent the losing union from striking. Where the procedure of settling the question has been gone through with, and has been settled, it seems that the losing union should abide by the result of the election. But the Board at the present time has no authority to prevent such a strike.

Employees have the right, in fact it is safeguarded by statute, to organize voluntarily and designate any representatives they want—without influence of employer or outside labor organizations. Such an organization could ask for an election, but there must be no employer influence in such an undertaking. The statute prohibits the employer from taking part in any such movement. Before the Board will hold an election for a company union it first disposes of the charge, if there is one, that the organization is company-dominated.

The Supreme Court has held\(^2\) that the Board has the power to require the company to dissolve a company union as a collective bargaining agency, and that although a majority of the employees voted in favor of the company union, such a union could not be a proper bargaining agency. In a number of cases

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\(^1\) National Labor Relations Board v. Remington-Rand, 94 F. (2d) 862.

the Circuit Courts followed the rule of dissolving a company-dominated union—upholding in each case a Board order. Last spring, however, in the *Newport News Dry Dock* case, the Fourth Circuit, struck out that part of the Board's ruling requiring the company-dominated union to be dissolved. The opinion was written by Judge Parker, and it is possible that it will be reversed by the Supreme Court, and that the Greyhound precedent set by the latter court followed.

The companies that have collected dues from organizations that were found to be company-dominated have been required to repay to the men the dues collected or withheld. Those who have unusual labor problems should avail themselves of their opportunity to discuss the matter with the Regional Office.

A closed shop is not valid under the statute unless it is made by contract with a majority of the employees. It is valid for an employer to make a closed shop agreement with a majority of his employees, but he must not do anything to influence or coerce the union after or before the agreement is signed.

In the *Globe Cotton Mills* case, decided last March 30, the Court defined collective bargaining as follows:

> "We believe there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and assign certain purpose to find a basis of agreement, touching wages and hours and conditions of labor, which shall stand as a mutual guarantee of conduct, and as a guide for the adjustment of grievances."

And in the *Consolidated Edison* case, in discussing the purpose of the act, the Court said:

> "The act contemplates the making of contracts with labor organizations; that is the manifest objective in providing for collective bargaining."

The employer has a perfect right to discuss hours and wages and conditions of employment, provided he does not go into

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influencing the men as to whether or not they join a union. Wages and hours and working conditions, terms of employment, are certainly not a forbidden field, but are subjects which may properly be discussed. The employer must not exert influence which he has as an employer, in the field of employment, in discussing organizations with his employees. He must leave the men with a free choice. However, he has the right to discuss terms of employment. If employees of the company, from foreman to straw boss, attempt to exert any influence on the workers, the position of the employer is jeopardized. Supervisory employees exert an influence over the men, in that they submit ratings, and make recommendations. The employer should take care that none of his foremen or persons associated with the management advise the general employees.

As to the rights the minority group has in a plant that has voted to go to one union or another—they may submit grievances and no more. The minority workmen are in the position of a Democrat in a Republican district.

It is uniform practice for the Labor Board or its regional office to notify an employer that a charge has been filed against him. The employer is not notified at this point as to the nature of the charge for several reasons; the employer is protected from adverse publicity; the charge may be wholly unfounded; the Board wishes to discuss the merits of the charge before the complaint issues, and to obtain the employer's version of events.

The policy of the Labor Board during the last eighteen months has been to treat employer and union alike in the search for evidence. During the first few years of the statute the subpoena was used more freely against the employer, but this has been curbed and there have been no complaints in the last few months.

If an organizer attempts to unionize a factory which is opposed to the incoming union the employer should petition the Labor Board to hold an election.

The Labor Board is perfectly willing to take stipulations as to methods of running a business but it usually requires
evidence to prove jurisdictional factors. This is done for purposes of the record. When the men get out from under the influence of the company-dominated union they may form their own bargaining agency, but it must be free of the influence of the old organization. The new organization has the burden of proving that domination no longer exists. In the Telephone case the Board found that the reformed organization was free of the influence of the employer and the proceedings were dismissed.

The employer may make and enforce the rule that all organizational activities must be carried on after hours and off the premises of the company. There has only been one exception to this general rule, and that was in a lumber mill case. The company owned an entire town, including the homes in which the men lived. The Board felt that the rule that no union activities should be carried on in the town, which was all company property, was too rigid.

When a labor organizer comes to a factory his usual mode of procedure is to tell the men that he will secure for them a new and better contract. Under these circumstances the men usually “sound out” the management to see whether or not this is possible. It is proper for the employer to state to the men that the terms under which they are working will not be changed. Where there is a contract made with the majority, the Board will not in itself go in and disturb the situation on the petition of a union who claims a majority pending the lapse of a reasonable period of time, which the Board regards as not less than a year. It was pointed out earlier that the Board has no authority to prevent the organization claiming a majority from calling a strike even though an election has just been held.

Frequently after a contract has been signed the union organizer misrepresents the contract to the men, saying that a lot more has been accomplished by its terms than actually is the case. It would not be proper in these circumstances to send copies of the contract to the employees. The Board feels that if collective bargaining is to be effective the management must deal through the organization’s representatives, and that
it is an unfair practice to run around these selected representatives to go directly to the employees.

This seems inconsistent with the policy set up by the Board which requires the company involved in a labor dispute to remove a selected representative that union leaders refuse to bargain with. A company may be required under Section 8, (5), to remove a foreman on the demand of the union. The question usually arises because the union refuses to bargain as long as a certain individual has the position of a foreman. The removal of a foreman is a proper subject for a labor dispute.

In the situation where the employer concludes an agreement with the union for one year, and is approached, when production lines are crowded, for the next year's contract, he may generally refuse to bargain with the union. It is difficult to answer the question categorically, but under normal conditions a refusal to bargain would not be a violation of the Act.

The employer who is asked to allow Community Chest solicitors and similar groups to contact employees during hours frequently raises the question whether the act is violated if the same soliciting privilege is refused organizers. The Board has not had occasion to rule on the question, but counsel for the Board advised an employer that the Act would not be violated by refusing the privilege.
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