A study of labor's right to organize as affected by new deal legislation

Paul Frederick Motzkus

University of Nebraska at Omaha

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A STUDY OF LABOR'S RIGHT TO ORGANIZE
AS AFFECTED BY NEW DEAL LEGISLATION

A Thesis
Presented to
the Faculty of the Department of History
University of Omaha

In Partial Fulfillment
of the Requirements for the Degree
Master of Arts

by
Paul Frederick Notzkus
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The purpose of this thesis is to show how labor's right to organize was affected by the legislation passed during the New Deal period. Chapter I examines the historical development of this problem. Chapters II and III are devoted to a careful analysis of the legislation, the philosophy behind it, and the mechanics of its implementation. The remaining portion of the thesis discusses the effectiveness of the legislation during a decade of operation and the subsequent impact of court interpretation.
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CHAPTER I

A BRIEF HISTORY OF THE LABOR MOVEMENT

The history of the labor movement is long and complex. To trace briefly the history of the movement with all its problems and intricacies would reveal nothing new or significant. Consequently the historical background recorded in this chapter will be confined to only the most significant problems which have faced the American workingman in his attempts at unionization. These problems were, to be more precise, the overcoming of legal and economic obstacles which prevented the laboring man from organizing into trade unions for the purpose of collective bargaining. Historically bona fide labor unions have been organized by men who wanted to improve their working conditions, their pay, or otherwise change their relationship with their employer through the process of collective bargaining. The history of the labor movement has been a study of methods used by unions and the attitudes that society has taken towards these methods as reflected by statutory and common law.

Collective bargaining is not a new concept. Simple forms of it can be found very early in recorded history. In medieval England, town charters and merchant guilds provide excellent examples. The townspeople, through collective contract, secured certain rights from the King. For these
rights, they paid him a sum of money. The most important of these can be found in the doctrine "City air makes free," which simply meant that if a serf resided in a city for a year, he became a free man. In this way, freedom was secured through collective bargaining. Until freedom was obtained, no one could make individual contracts. Historically, then, individual and collective bargaining have been interdependent.¹

The right to organize and bargain collectively has been impinged upon in many ways by government in the United States. Although the President has been the chief executor of law passed by Congress, many governors and mayors had a great deal of influence on public opinion and business in the localities. They could tolerate collective bargaining and encourage it. They held police power and the authority to determine what was or was not peaceful. Police could arrest union members for inciting riot, disturbing the peace, or obstructing traffic. On the other hand, a friendly executive could allow a great deal of freedom to the worker in his union activities.

The courts were probably the most important branch of government so far as the law of collective bargaining was

concerned. Much of the law in this field was not formulated by legislation, but was built by court decision or common law. Even where a statutory law existed, the courts exerted great discretion in their application and interpretation of that law. Statutes in this area were necessarily broad, and general, hence it has actually been the courts' interpretations which have decided whether the law encouraged collective bargaining or discouraged it.²

For many years labor organizations were considered conspiracies in restraint of trade, and therefore illegal. This view naturally made it very nearly impossible to use the collective bargaining process. That was the first great challenge which organized labor had to meet. Labor organizations which used collective bargaining were considered dangerous because they exerted more power than individuals bargaining for themselves. Collective bargaining also meant interference with the free bargaining of individuals, both members and nonmembers of the organization.

In order to thoroughly understand the problem, it must be remembered that the doctrine of conspiracy had broad application, and was not applicable to labor combinations alone. A conspiracy, generally defined, was the combination of two or more persons who scheme to impair the rights of

²Ibid., p. 377.
others or of society. In this category would fall for example, the plot of a group of people who conspire to bring about the conviction of an innocent person or a plot to overthrow an established government. Before conspiracy would be charged, there had to be shown that the group had caused or would cause an injustice to other people or to society. An interesting characteristic of the conspiracy doctrine was that conspirators could be indicted and found guilty before they had committed the act. For example, it was a crime to plot the murder of a person even though the plan was not executed. Another feature of importance about the doctrine was that an action by one person, although legal, could become illegal when carried out by a group. One judge stated it succinctly when he said: "A combination of men is a very serious matter. No man can stand up against a combination; he may successfully defend himself against a single adversary, but when his foes are combined and numerous, he must fall."\(^3\)

American courts in the early nineteenth century placed great emphasis on the fact that labor organizations were considered conspiracies, when taking action to increase their wages, by the English courts. The prosecution urged that English law established a precedent for American courts. In other words, the American courts should be bound by the

\(^3\)People v. Wilzig, 4 N. Y. Crim. 403 (1886).
doctrines and laws of England. It was conceded, however, that workers had the right as individuals to take action to increase their wages. Individual bargaining for higher wages, even individual quitting of work because of dissatisfaction with working conditions, was legal. The charge was that the combining of workers to force higher wages constituted illegal conduct. This doctrine, however, made some sense in England because they had a statute which set a wage limit; hence, when a union tried to use concerted action to increase their wages, they were technically trying to accomplish an illegal objective.

The British view was adopted for the first time by an American court in 1806 in the case of Commonwealth v. Cordwainers. In this case the defendants were charged with the following counts:

(1) The defendants, on the 1st day of November, 1805, with force and arms did combine, conspire, and agree to increase and augment the prices and rates usually paid and allowed to them... and unjustly to exact and procure great sums of money for their work and labor... to the damage, injury and prejudice of the masters employing them...

(2) ... the defendants endeavored to prevent by threats, menaces, and other unlawful means...

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...other workmen and journeymen in their occupation from working except at certain large prices, and rates set by them for their future work, to the great damage and prejudice of others... to the evil example of others, and against the peace and dignity of the Commonwealth of Pennsylvania.  

The judge, in his directions to the jury, backed the prosecution charges but indicated that the verdict would not impair the right of an individual to bargain with his employer. The jury found the defendants guilty as charged, and so for the first time in America the doctrine of conspiracy was accepted by an American court.

Other state courts made similar decisions. During the early decades of the Nineteenth Century, there were nineteen cases (in the States of Connecticut, Maryland, Massachusetts, New York, and Pennsylvania) in which workers' organizations were prosecuted on such conspiracy charges. One of the best known cases of this type was the People v. Fisher.

In most of these cases, penalties, when assessed, were in the form of fines although imprisonment was also provided by law. In passing sentence, the judge usually threatened the more serious penalty for second offenders. The effect was, of course, to discourage union activities.

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7 Ibid., p. 15.

8 People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am D 501.
The argument the employers used in condemning the practice of organizing for the purpose of collective bargaining was classical in character. Control of wages by unions, it was argued, was an unnatural, artificial method of raising the price of work beyond its natural level, and took advantage of the public. It was contended that the increase of wages by union pressure lead to higher prices of commodities. This in turn resulted in reduction of demand for the products causing unemployment in the community. Therefore the effect of the union pressure was to cause injury to the community, damage commerce and trade, and harm the cause of all workers.

The first major concession to organized labor in the United States came in 1842 in the case of Commonwealth v. Hunt. In this case the Massachusetts court convicted seven members of the Boston Journeymen Bootmakers' Society for organizing a strike against an employer who had hired Jeremiah Horne, who was not a member of the society. This was in effect an attempt by the workers to establish a closed shop. The charge against the seven members was one of conspiring together to prevent the employer from pursuing his trade. After hearing the case, the trial judge instructed the jury that the indictment described a course of conduct amounting to criminal conspiracy. This meant that if such acts were proven at the trial, a verdict of guilty would have to follow. The workers were convicted and they appealed their case to the highest court in the State.
Chief Justice Shaw of the Massachusetts Supreme Judicial Court overthrew the lower court ruling. In his decision, Justice Shaw defined conspiracy as follows: "A conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself unlawful, by criminal or unlawful means."\(^9\) Justice Shaw could find no statutes forbidding the raising of wages so he held that there was no conspiracy involved. He also ruled that even a combination which struck to maintain a closed shop was not illegal.\(^10\) This decision has been referred to many times by liberal judges as a precedent for holding that workers have the legal right to combine into trade unions and to bargain collectively, even for the closed shop, with the strike as their tool. By the middle of the Nineteenth Century, American courts had generally abandoned the idea that workers were guilty of criminal conspiracy merely because they combined and struck for higher wages. The decision in Commonwealth v. Hunt was one of the most important in the evolution of union rights in the United States. In discussing this case, Charles Gregory said: "...this decision, issued by perhaps the most able state judge of his time, gave the doctrine of criminal conspiracy a considerable setback... Common law criminal conspiracy has never

\(^{9}\) Commonwealth v. Hunt, 4 Metcalf, 45, Mass. 111 (1842).

\(^{10}\) Ibid.
again played a prominent part in the control of labor unions by American courts..." \(^{11}\)

Another important development in the common law of England was the doctrine of restraint of trade. As in the case of the doctrine of conspiracy, it also became a part of the common law of the United States. The origin of this doctrine was found in the basic idea of common law that certain types of contracts and agreements were illegal if they tended to restrain trade or created a monopoly. It was thought unwise to allow parties to enter into contracts that would prevent free competition. This concept of restraint of trade was not applied, however, to labor organizations until after the passage of the Sherman Anti-Trust Act in 1890.

The Sherman Act was exceedingly simple in statement. The gist of the act appeared in its first two sections, which read, in part, as follows:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor,...

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize

any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor,...\textsuperscript{12}

The federal courts were given the authority to enforce this act, and the Attorney General was empowered to initiate criminal prosecutions or to secure injunctive relief against violations. All persons injured by violations of others were allowed to press civil suits for triple damages against those who violated the act.

Although the two sections quoted above appear to be quite simple and exact, the subsequent problem of court interpretation of the phrases "...in restraint of commerce...," and "...to monopolize any part of the trade or commerce," did not substantiate this assumption. Justice Holmes was said to have thought those two sections so general in their coverage that they amounted to little more than a congressional direction to the federal courts "to do right" by the consuming public in protecting it from big enterprise.\textsuperscript{13}

One of the most heated controversies of that time was whether or not Congress intended the Sherman Act to cover the activities of organized labor. After all, the courts at one time had treated labor unions as restraints of trade. The

\textsuperscript{12}United States Statutes at Large, 51st Congress, Session 1, May 16, 1890.

\textsuperscript{13}Gregory, \textit{op. cit.}, pp. 201-2.
courts themselves, however, had by 1890 come to accept labor unionism as an established social institution and had practically ceased to regard the purely bargaining functions of unions as restraints of trade. In the key sections of the act there was no mention of labor unions. But just as important was the fact that the act did not specifically exclude unions. The question was whether the words "combination" or "person" referred to unions as well as to business enterprises. Much has been written on this controversy. There is evidence to support both arguments. 14 In any event, at the time of its passage few people thought that it applied to labor unions 15 and for the first eighteen years the act was in force it was not applied to them. 16

Shortly after the passage of the act, however, lower courts applied it to labor disputes; by 1900 the American Federation of Labor sought legislation exempting unions from its provisions. 17

A. T. Mason, Organized Labor and the Law (Durham: Duke University Press, 1925). Professor Berman concluded that Congress did not intend to include labor unions within the scope of the legislation while Professor Mason held the opposite opinion.
15 Commons and Andrews, op. cit., p. 385.
17 Commons and Andrews, op. cit., p. 385.
The first case involving labor and the Sherman Act to reach the Supreme Court was the famous Danbury Hatters' case of 1908.\(^{18}\) A nationally affiliated union of hat workers was attempting to organize all the workers of the eighty or more large felt hat manufacturers in the nation. Most of them were already organized. A few manufacturers were strong enough to resist the union and this proved to be quite embarrassing to the union because the non-union plants were able to sell their products at a lower price due to the lower wages paid to their employees. The union was unsuccessful in attempting to organize Loew's Hat Company by local strikes in Danbury, Connecticut. As a result of this failure, the union imposed a nationwide secondary boycott on the company. All members of the American Federation of Labor were urged to stop buying these hats and to stop patronizing shops which sold them. Loew's suffered substantial losses, and under the appropriate provision of the Sherman Act brought civil suit against the individual membership of the union for triple damages and secured a judgment of over a quarter million dollars. The case was appealed to the Supreme Court which sustained the lower court's decision.

It was the opinion of the court that the act "prohibited any combination whatever to secure action that

\(^{18}\text{Loew v. Lawlor, 208 U. S. 274, (1908).}
essentially obstructed the free flow of commerce among the states or restricted the liberty of an individual to engage in business." The court also pointed out that the combination was in that class of restraints of trade which was illegal under common law.

The Danbury Hatters doctrine had serious effects on the labor union movement. The case stimulated additional prosecution of labor unions under the Sherman Law. Since the Supreme Court held that the law applied to unions, employers were endowed with a potent weapon with which to combat trade unions. In addition, the decision established the principle that individual members are responsible for actions of their officers. Justice Holmes, who wrote the opinion of the court, declared that since "members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the plaintiffs' interstate commerce in such circumstances that they knew or ought to have known, and such officers were in the belief that they were acting in the matters within their delegated authority, then such members were jointly liable..." The practical significance of this decision was that the rank and file members as well as the union officers were liable for the payment of the judgment.

19 Ibid.
The Danbury Hatters decision also had the effect of outlawing the secondary boycott since it was this activity by the union which caused the suit. This was a serious loss of power for organized labor at a time when they could ill afford it. Placing unions under the antitrust laws, making the individual union member responsible for damages, outlawing the use of the secondary boycott, all had the effect of drastically weakening union power.

In conjunction with the doctrine of restraint of commerce was the use of the injunction. An injunction is a judicial order commanding a person or persons not to do a particular thing. It was designed primarily for the protection of property. In the 1880's the use of it against labor organizations was established and almost any employer opposing any action by a labor union was able to secure an injunction or a temporary restraining order. Unless the organization or persons wanted to pay contempt fines, they were obliged to obey the order. The injunction placed the labor unions in a unique position for, as Felix Frankfurter wrote:

In labor cases, the injunction cannot preserve the so-called status quo. The situation does not remain in an equilibrium, awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike and resumes them,


free from the interdicted interferences. Moreover, the suspension of the strike activities, even temporarily, may defeat the strike for practical purposes, and foredoom its resumption, even if the injunction is later lifted.23

The injunction was found to be quite an effective device by many employers; all that was necessary to initiate an order was an affidavit swearing that the strike, boycott, or other action being used by the labor organization would result in irreparable damage to property.24 In many cases, this could not be objected to, if, for instance, there had been actual physical damage done to the plant or building, such as windows broken or doors smashed. But many employers claimed and many judges agreed that property was more than this. They claimed the word "property" implied the right to carry on business without interference; in some cases this would rule out the primary boycott, the secondary boycott, and picketing.

All judges did not take this view on property. Oliver Wendell Holmes said:

By calling business property, you make it seem like land.... An established business, no doubt, may have pecuniary value and commonly is protected by law against various unjustified


24Gregory, op. cit., p. 97.
injuries. But you cannot give it definitiveness of contour by calling it a thing. It is a course of conduct and like other conduct, is subject to substantial modification, according to time and circumstance, both in itself and in regard to what shall justify doing it a harm.25

The injunction was also used to enforce the so-called "yellow dog" contracts which many employers forced prospective employees to sign. In the contract was the promise not to join a particular union or perhaps any union whatsoever. These contracts had little legal significance because at that time an employer could discharge any employee for any reason, hence it was used for its psychological effect. The courts also held that such contracts could be used as ground to issue sweeping injunctions against any kind of "persuasion" of workers to join unions. The legal reasoning was that "persuasion" under such circumstances was inducing the worker to break a contract, and this action was a legal wrong against which the employer was entitled to injunctive relief. This reasoning was upheld by the Supreme Court.26

So far, only legal questions have been considered, but actually of more importance than the legal barricades obstructing the employee from exercising his right to organize was the intangible economic weapons held and used by the employer.

25Ibid., p. 98.
The employer had certain rights that were used to thwart labor organizations and which were upheld by law prior to the enactment of the New Deal labor legislation. The rights of employers in dealing with their employees were as follows:

(1) Employers had the right to form employers' associations. This was unquestioned in the courts.\textsuperscript{27} Individual employers could refuse to make trade agreements with unions and through their organizations they could make legally binding agreements to operate under an open shop plan. They were able to bind themselves with penalties not to deal with labor unions, and such penalties were enforceable at law and through injunctions.\textsuperscript{28} In addition to this, it was held by the West Virginia State Courts that unions could not combine to prevent employers from belonging to employers' associations.\textsuperscript{29}

(2) In addition, employers had the right to "lock out" their employees; this right was considered the counterpart of the strike and was not questioned by the courts.\textsuperscript{30}

(3) The right of the employer to operate his plant during a strike was also unquestioned as was his right to police protection. In some states, the law required, however, that in advertising for labor during a strike, the strike had

\textsuperscript{27} Commons and Andrews, \textit{op. cit.}, p. 403
\textsuperscript{28} \textit{Ibid.}, p. 404
\textsuperscript{29} \textit{Ibid.}
\textsuperscript{30} \textit{Ibid.}
to be mentioned. To protect the strike breakers, the employers might hire strike guards. Thus did the employer not only have the right to defeat strikes but to defeat organizational strikes which prevented the growth of labor organizations among their employees.

(4) One of the most effective and most frequently used methods of preventing organization was the right of the employer to discriminate against union workers. He could refuse to hire a union member or even a former member and he could discriminate against him in any number of ways such as work arrangements or pay adjustments. Legislation to restrict the employer from discharging a worker for joining a union was passed in eight states by the turn of the century (Illinois, Kansas, Ohio, Pennsylvania, South Carolina, Indiana, Missouri, and Wisconsin), but in at least six of these states the laws were declared unconstitutional. In 1898 Congress attempted to limit this right as it applied to the railroad workers when it passed the Erdman Act, but this too was declared unconstitutional because it was in violation of the Fifth Amendment. The Supreme Court stated:

...the right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor

\[31\) Ibid.
\[32\) Ibid., p. 405
to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of the employee.\(^\text{33}\)

(5) Since the employers absolute right to dismiss an employee was not denied, the result was the virtual legalization of the black list. Although most states had laws which outlawed the circulation of lists of union members, it was not illegal to act on such information by refusing to hire an individual. The employer's reason for refusing to employ or for discharging an employee could not be questioned in any court.\(^\text{34}\) In actual practice, it was almost impossible to enforce these laws since supplying of such information by former employers upon request of a potential or present employee was considered privileged at law; consequently, if the employee was discharged as a result of this information, he had no legal recourse unless the employer who discharged him would divulge his source of information. The latter, of course, did not occur.

(6) It was also considered the undisputed right of the employer to organize company unions. A company union is one which was organized and run by the employer and was found

\(^{33}\text{Adair v. U. S., 208 U. S. 161 (1908).}\)

\(^{34}\text{Commons and Andrews, op. cit., p. 408.}\)
to be an effective way of preventing the growth of a trade union. A company dominated union or an employee representative plan by its very nature cannot be a successful collective bargaining unit because of the influence which is brought to bear by the employer. Nevertheless, company dominated unions grew very rapidly in the decade following the first World War, and this type of organization proved to be a successful method of slowing down the organization of trade unions.

Therefore there were three main problems facing the labor unions in the first decade of this century. The first was the continued use of the anti-trust acts against them for restraint of trade, as exemplified in the Danbury Hatters Case; the second was the use of the injunction, which included the rigid interpretation of the word "property;" and the third was the economic coercion used by the employers.

The American Federation of Labor considered it imperative to seek legislative relief from such restrictions. Protection of the right to organize, to bargain collectively, to strike, to boycott, and to picket had become a vital concern. The first step in attempting to exert more effective political pressure in support of such aims were made in 1906 when the American Federation of Labor submitted a bill of grievances to the President and to Congress. Two of the most important demands were for exemption of labor unions from the Sherman Act.
and relief from injunctions which were said to represent a judicial use of power properly belonging to the legislature.

Congress ignored labor's appeal, and the bills that the unions tried to introduce were pushed aside. When the American Federation of Labor consequently entered actively into the congressional campaign of 1906, it not only called for the support of all congressional candidates favorable to labor, but where neither party had named a favorable candidate, it recommended the nomination of a trade unionist. Two years later, in 1908, Gompers called upon both party conventions for support. While the Republicans completely ignored the appeal, the Democrats adopted an anti-injunction plank in their platform. Nothing was accomplished in this area for the next six years, although the Democratic House chosen in 1910 gave hope of a more favorable attitude towards labor. An effective eight hour day for workers on public contracts was finally passed, an Industrial Relations Commission was established, and provisions were made for the creation of a Department of Labor designed to promote the workers' welfare. But it was not until the election of 1912 that a real turning point was reached so far as significant labor legislation was concerned.

In President Wilson's inaugural address, he emphasized the need for legislation which would safeguard the workers' lives, improve their working conditions, and provide them
"freedom to act in their own interest."\textsuperscript{35} He denied that such laws could be considered class legislation and claimed that they were in the interest of the whole people.

The results of Wilson's program were quite substantial. He won legislative support for the La Follette Seamen's Act in 1915, which corrected some of the glaring abuses in the employment of sailors. The Adamson Act established an eight-hour day, with time and a half for overtime, for all employees of railways. More controversial, although desired by labor, was the Congressional enactment of a literacy test for all European immigrants which was the first step toward the policy of immigration restriction long demanded by labor. Desirable as this legislation was, labor longed for more, and in 1914 Congress finally passed the Clayton Anti-Trust Act, including within it two sections which labor believed to be relief from the Sherman Act and the injunction.\textsuperscript{36} To labor, this more than fulfilled the Democratic promise of 1912 which stated that "labor organizations and their members should not be regarded as illegal organizations in restraint of trade.\textsuperscript{37}


\textsuperscript{36}Foster Rhea Dulles, Labor in America (New York: Thomas Y. Crowell Company), pp. 197-207.

Specifically, Section 6 of the Clayton Act declared that "the labor of a human being is not a commodity or article of commerce," and that nothing in the anti-trust laws should be construed to forbid the existence of unions, preventing them from "lawfully" carrying out their legitimate objects, or hold them "to be illegal combinations," or "conspiracies in restraint of trade."\(^\text{38}\)

Section 20 outlawed the use of injunctions in all disputes between employers and employees "unless necessary to prevent irreparable injury to property, or to a property right... for which injury there is no adequate remedy at law."\(^\text{39}\) This appeared to free labor from the injunction when engaging in such activities as strikes, the secondary boycott, and picketing.\(^\text{40}\)

Organized labor felt it had won a victory. Samuel Gompers, President of the American Federation of Labor and chief spokesman for labor, referred to the act as "the industrial Magna Charta upon which the working people will rear their construction of industrial freedom."\(^\text{41}\)

\(^{38}\)United States Statutes at Large, 63rd Congress, Session I, May 30, 1914.

\(^{39}\)Ibid.

\(^{40}\)Gregory, op. cit., p. 163

\(^{41}\)Witte, op. cit., p. 68.
If Gompers was over-optimistic, there were others who foresaw the weaknesses of the law. In an editorial in The Nation, it was observed:

Labor unions may not be enjoined from 'lawfully carrying out the legitimate objects therof.' That leaves the whole question undecided, or rather, throws it back to the courts, with their previous decisions as to what may and may not be done lawfully.42

The weakening of Sections 6 and 20 was attained by the Supreme Court decision in the case of Duplex Printing Press Company v. Deering which was finally decided in 1921 after almost six years of litigation in the courts.43

In this case, an international mechanics' union had attempted to unionize a non-union printing press company, the only company in the industry which was not organized. The pressure used by the union was not the strike but the secondary boycott--members of the union refusing to repair or to work on this company's presses where they were installed or to work for anyone who used them.

The Duplex Company in a suit for injunctive relief under the Sherman Act sought to stop this organized pressure. The union relied on Section 20 of the Clayton Act as a defense, arguing that its terms covered this situation. The Supreme

Court ruled that Section 20 applied only in cases where the relationship of employment existed between the company and the union members involved. In other words, the secondary boycott was not legalized and so the injunction could be used.

By pointing out the frequency of use by Congress of the words "lawfully" and "peaceably," the court said that it was the intent of Congress to carry on the old interpretations of the court as to what was peaceful and legal. The courts, however, had proved to have a very narrow view concerning the activities of labor. As an example, in several cases the courts had ruled that there was no such thing as "peaceful" picketing; that is to say, they had declared the very act of picketing to be illegal.\(^{44}\) Another example of the narrow view that the courts took toward labor activities was the interpretation which made the secondary boycott, picketing, and certain strikes illegal because they were interfering with the "property rights" of business.

The net result of the Duplex case was that the Supreme Court through its interpretation placed the whole question of what was "peaceful" or "lawful" activity of labor back into the hands of the courts. The courts, basing their new decisions on the old interpretations of what was "peaceful" or "lawful" could still use the injunction. The activities,

\(^{44}\) Gregery, op. cit., p. 165.
which were presumably made legal in Section 6, were not legal if the court in some previous decision ruled that they were not. The only conclusion which can be drawn, after a close examination of the decision, is that the Clayton Act did not change the law affecting labor unions or their activities in any appreciable way.

A number of later United States Supreme Court decisions completed the destruction of the Clayton Act. For example, in the American Steel Foundaries v. Tri-City Central Trades Council case, the court handed down a rigid definition of peaceful picketing. This definition was not thought fair by labor unions who branded this type of picketing "Pink Tea Picketing."\(^ {45}\)

In the case of Truax v. Corrigan, any hope of legal relief for labor was even more effectively killed. Arizona had passed a law that sought to do away altogether with injunctions in labor disputes, and the Supreme Court in effect declared it unconstitutional. By preventing an employer from obtaining an injunction, it was stated, the State took away his means of securing protection and thereby "deprived him of property without due process of law."\(^ {46}\)

With such encouragement from the courts, employers resorted to injunctions even more frequently than in the days

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before the passage of the Clayton Act. In 1928, the American Federation of Labor submitted a list of 389 injunctions that had been granted by either Federal or State courts in the preceding decade, and this list was incomplete because of a large number that were not recorded in the lower courts. 47

In 1932, just before the advent of the New Deal, the Norris-La Guardia Bill was passed. This act was important for several reasons. First of all, the encouragement of collective bargaining was made a public policy of the Federal Government. It stated that:

Whereas, under prevailing economic conditions, developed with the aid of governmental authority, for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby obtain acceptable terms and conditions of employment, wherefore, although he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self organization, and designation of representatives of his own choosing to negotiate the terms and conditions of employment, and that he should be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organizations or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection... 48

No machinery was provided, however, to prevent employers from interfering with this right, but it was a beginning.

48 United States Statutes at Large, 72nd Congress, Session I, June 1, 1932.
It also greatly limited the use of the injunction and in reality did away with the "yellow dog" contract by making it non-enjoinable in the courts. 49

Congress had as early as 1898 attempted to regulate the use of this kind of contract when it enacted the Erdman Act. This act confined itself to the railroad industry, which was considered within the legitimate jurisdiction of the Federal government because of its interstate character, long before any other. The purpose of this law was to promote interstate commerce. In accomplishing this purpose, procedures were to be established designated to reduce labor conflict in the nation's railroads. Though the law provided for the mediation and arbitration of labor disputes, the concern here is with its provisions which protected the rights of railroad workers to organize and bargain collectively. The Erdman Act in part resulted from the famous Pullman strike of 1894. Fundamentally this strike was caused by the refusal of the Pullman Company to respect the right of workers to bargain collectively. Congress was aware that organization strikes could again interrupt railroad traffic among the states. Such strikes could result from the demand by the railroads that workers live up to "yellow dog" contracts, and the discharge of workers because of union activities. Congress reasoned

49 Commons and Andrews, op. cit., p. 421.
that if these two anti-union practices could be eliminated the necessity for organizational strikes in the railroad industry would be reduced. As a result of these considerations, Section 10 was included which stated that it was a misdemeanor for railroad employers to require employees to sign a "yellow dog" contract or to discharge or threaten to discharge an employee for joining a union.

The Erdman Act suffered a fatal blow from the Supreme Court in 1908. The court found this provision of the Erdman Act to be unconstitutional as an invasion of both personal liberty and the rights of property. A comparable state law was outlawed in the case of Coppage v. Kansas in 1915.

Thus, the third of a century preceding the advent of the New Deal was a period in which a number of ineffectual steps were taken by the government in an effort to help labor achieve an equal bargaining position to that of industry. The Clayton Act attempted to free organized labor from the injunction and the anti-trust laws. Because of the conservative nature of the Supreme Court, this failed. The Erdman Act was designed to free railway employees from the fear of losing their jobs because of union affiliation and this also failed, due to the interpretation of the courts.

51 Coppage v. Kansas, 236 U. S. 1 (1915).
The only hopeful sign subsequent to the New Deal was the passage of the Norris-La Guardia Act which limited the use of the injunction against labor unions and in effect did away with the "yellow dog" contract. Thus upon the dawn of the New Deal, organized labor still had a number of problems to solve. The most pressing of these was the employers use of his economic power to hire, fire, organize company unions, and coerce his employees. These were the problems that Congress would have to solve in the decade of the New Deal.
CHAPTER II

NEW DEAL LEGISLATION

By the time Franklin Roosevelt took office in 1933 it was apparent that the labor movement was not satisfied with the provisions of the Norris-La Guardia Act. While grateful for the progress made by the act, labor felt additional legislation was needed. During the next three years, Congress enacted three pieces of legislation which largely satisfied the demands of organized labor. This legislation included Section 7 (a) of the National Industrial Recovery Act, Public Resolution Number 44, and the National Labor Relations Act.

Organized labor felt that legislation in addition to the Norris-La Guardia Act was needed because of two fundamental problems. The first was most easily understood; there was a surplus of workers as unemployment was at an all time high. The law of supply and demand made it clear that it was an employer's market. If an employee agitated for organization of a union or if he was a union member, any action taken by his union could endanger his job. Secondly, many employers promoted company unions when they feared the danger of a trade union movement within their own company. The company union differed from the bonafide trade union in that it was dominated by the employer who often wrote its constitution or by-laws,
attended its meetings, and paid its expenses. Although the growth of the company union was rapid during this period, its origin was much earlier.

In 1918, the National War Labor Board was created to act in labor management controversies which might interfere with war production. This Board was an agency of voluntary conciliation and arbitration without coercive powers other than the force that its opinion might have on public opinion. The War Labor Conference Board, upon whose recommendation the National War Labor Board was established, had previously indicated that the work of the National War Labor Board should be based on two principles; (1) that the working man should have the right to organize and bargain collectively, and (2) that employers had the duty to refrain from interfering with trade unions or find a suitable substitute measure. The company union became this substitute. The National War Labor Board, however, promptly condemned the use of a company union as a device to avoid the duty of genuine collective bargaining, and in a series of rulings asserted labor's right to be free of such a hindrance, by issuing an official governmental statement of sympathy with labor's right to bargain collectively.

The Board said:

The right of workers to organize in trade unions and to bargain collectively through chosen representatives is recognized and affirmed. The right shall not be denied, abridged, or interfered
with by the employers in any maneuver whatsoever.... Employers should not discharge workers for membership in trade unions nor for legitimate trade union activities.¹

With the close of World War I, governmental interest in this problem faded. Although the company union declined in some quarters, it flourished in others. Employers, realizing that the habit of organization was a force with which they must deal, extended the use of the company union. It was estimated that while in 1919 only 403,765 workers were members of company unions, by the year 1922 the number had increased to 690,000. By 1926 the membership had grown to more than two million wage earners.²

Employers often positively refused to recognize and deal with bonafide trade unions, and utilized the company union to divert any organizational drive. An example of this is seen in an incident which occurred in the Ames Baldwin Wyoming Company in West Virginia in September, 1933, when several employees attempted to organize a union. The union had requested recognition and seniority rights. On June 25, 1934, the power in the plant was discontinued, and all employees were required to attend a meeting called by the president

of the company, Richard Harte. Harte stated that under law he could not recognize unions that did not represent 100 per cent of the employees, and would not recognize them in any event. He set forth the following alternatives to union recognition: (1) shut down the plant, (2) tear down the plant, or (3) move away. He pointed out the benefits provided by company unions, and requested that a vote be taken to indicate whether the workers were for or against the company plan. The men voted with little or no secrecy, and a company official counted the ballots. The exact tabulation was not announced; however, a statement was issued stating that the company plan had attracted eighty per cent of the vote. Consequently, the constitution which had been written by company lawyers was considered ratified by this vote, although no opportunity to vote on its acceptance or rejection had been given. In addition, the constitution made the union a close shop plan. As in many cases when a company union had been organized, substantial wage increases were given, exemplifying the idea that the company union could accomplish what other trade unions could not.

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3 Committee on Labor and Education, Hearings on National Labor Relations Board, United States Senate, 74th Congress, First Session, part 1, p. 170.

4 Ibid., p. 167.
In 1919 the National Association of Manufacturers gave its official endorsement to company unionism in a statement that read in part:

The widening movement for the open shop is stimulated by the extension of plans for industrial representation which are being rapidly introduced not only in manufacturing establishments, but in other industrial organizations. A firm foothold has been obtained by the industrial representation idea. If plans for its adoption are wisely introduced, representation should become the most approved method of dealing with labor.\(^5\)

Organized labor, however, objected to the use of company unions, and were united in their belief that it was not an instrument of collective bargaining, but rather of compromise and conciliation at best and merely represented a method of company domination of workers. In 1919 the American Federation of Labor condemned the company union in the following terms:

In establishing wages, hours, and working conditions in their plant, employers habitually used their great economic power to enforce their will. Therefore, to secure just treatment, the only recourse of the workers is to develop a power equally strong and to confront their employers with it.... In this vital respect, the company union is a complete failure. With hardly a pretense of organization, unaffiliated with other groups of workers in the same industry, destitute

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of funds, and unfitted to use the strike weapon, it is totally unable to force its will....

The company union was not the only method used by business to thwart the development of bonafide unions. Certain economic weapons used in conjunction with propaganda techniques proved to be quite effective. Certain of the more sophisticated industries used what was later called "The Mohawk Valley Formula." This formula became so effective in breaking organizational strikes that it was circulated to the members of the National Association of Manufacturers. Though used for years in more or less complete form, it was not circulated until after 1936. The formula was written by James H. Rand, Jr., President of Remington Rand. He utilized it successfully to defeat attempts of organization in his plant in 1936. After the plant broke a strike in the Ilion, New York, plant of Remington Rand, Mr. Rand boasted: "Two million business men have been looking for a formula like this and business has hoped for, dreamed of, and prayed for such an example...." Although the plan was not invented by Mr. Rand, he certainly formulized, popularized, and published it.

This formula blueprinted a systematic campaign to denounce all union organizers as dangerous agitators, align the community in support of employers in the name of law and order, intimidate strikers by mobilizing the local police to break up meetings, instigate "back to work" movements by secretly organizing "loyal employees," and set up vigilance committees for protection in getting a plant on strike in operation again. The underlying purpose behind the Mohawk Valley Formula was to win public support by branding union leaders as subversive and threatening to remove the affected industry from the community if local business interests stood by and allowed radical agitators to win control over workers otherwise ready and anxious to cooperate with their employers. The formula indicates the cynicism shown by some employers in their efforts to discourage labor organization. It also gives a clearer picture of what the unions faced in their organizational attempts.

Almost every New Deal attempt at recovery had one common theme to increase the purchasing power of the people. The New Deal aimed to promote economic recovery by bolstering the demand for goods. Public works were instituted and, in keeping with the objectives of increasing purchasing power, these projects were financed by government borrowing. An important part of this scheme was the increase of workers' wages. If

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8See Appendix.
wages could be increased, workers would have more money to spend. Increase of spending would stimulate employment and, in turn, promote economic recovery.

These New Deal principles were contained in the National Industrial Recovery Act. The law provided for the regulation of production and prices by groups of business men. The theory underlying the National Industrial Recovery Act was that such control would provide a balance in the economy. Business men in the various industries formed groups for the purpose of production and price control. The group would then create a "code of fair competition." About 550 of these codes were created during the era of the National Industrial Recovery Act. These codes provided for industrial self-government by business men. Production and prices were not to be controlled by the law of supply and demand but through regulations adopted by members of the respective industrial groups. Since such an arrangement was in violation of the anti-trust laws, the National Industrial Recovery Act provided that these statutes were not applicable to participants in these industrial groups. Congress required that every code contain two provisions regarding labor. The first was that every code was required to establish a minimum wage for the workers it covered. This was in keeping with the New Deal desire to increase the purchasing power. The second was that Section 7 (a) be included in each and every code.
Section 7 (a) provided legal protection for the right of workers to organize and bargain collectively. No doubt one reason for Section 7 (a) was the desire of Congress to correct the obvious injustices of the law of labor relations. On the other hand, the economic motive of Section 7 (a) cannot be disregarded. Legal protection of collective bargaining meant stronger unions from the point of view of membership and power. This would mean greater effectiveness in pressure for higher wages. Thus, a strong organized labor movement would serve the basic theory of the New Deal to promote recovery through increasing the purchasing power of the nation.9

Section 7 (a) drew in large part its basic principles and language from the Railway Labor Act of 1926, except that while the Railway Labor Act confined itself to one basic industry which had been considered for some time within the legitimate jurisdiction of the Federal government because of its interstate character, Section 7 (a) was much more inclusive in its scope. The Railway Labor Act was also much more precise in its enforcement provisions and proved to be a much more effective piece of legislation when viewed from the privileged position of hindsight.10


10United States Statutes at Large, Sixty-Ninth Congress, Session I, May 20, 1926.
Three significant provisions were found in Section 7 (a):

(1) Employees should have the right to organize and bargain collectively through representatives of their own choosing, free from interference, restraint, or coercion on the part of their employers;

(2) No one seeking employment should be required to join a company union or to refrain from joining any labor organization of his own choosing; and

(3) Employers should comply with maximum hours, minimum rates of pay, and other conditions of employment approved by the President of the United States. On June 16, 1933, President Roosevelt signed the bill saying:

The law I have just signed was passed to put people back to work,... Workers... are here given a new character of rights long sought and hitherto denied. But they know that the first move expected by the nation is a great cooperation of all employers, by one single mass-action, to improve the case of workers on a scale never attempted in any nation.

Labor boards were created to adjust industrial disputes arising from the provisions of the act. Some were established by the codes of fair competition, such as the National Bituminous Coal Labor Board and the Newspaper Industrial Board.

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11 Ibid., Seventy-Third Congress, Session I, June 16, 1933.
Other boards, brought about by executive order of the President, included the Automobile Labor Board and the National Steel Labor Relations Board. Most important, however, was the National Labor Board created on August 10, 1933, by executive order number 6246. President Roosevelt appointed the following men to sit on the Board: Senator Robert Wagner was appointed Chairman and William Green, Dr. Leo Wolman, John L. Lewis, Walter C. Teagle, Gerard Swope, and Louis Kirstein were the regular members.

This Board was established to promptly settle any labor disputes arising out of Section 7 (a). President Roosevelt explained the need for such an agency as follows:

Soon after the enactment of the National Industrial Recovery Act, it became apparent that some agency would have to be set up to handle the labor disputes which were continually arising under the various codes.... In order to meet that need, I appointed the first National Labor Board.... The function of the Board was to consider, adjust, and settle differences and controversies that might arise through differing interpretations of the labor provisions of the codes.... The Board soon found it necessary to expand its activities, in order to take care of the large number of disputes which were arising under Section 7 (a)....

The Board established twenty regional boards. Each consisted of representatives of labor and industry, with representatives of the public as impartial chairmen to adjust

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14 Ibid.
cases and hold hearings in the regions where the controversies arose. Consequently, cases could be expedited and the parties involved could avoid the necessities of going to Washington.  

The National Labor Board was strengthened by an executive order on December 16, 1933. In explaining what this order intended to do, President Roosevelt said:

The foregoing Order was issued by me, to strengthen the hand of the National Labor Board, which I had appointed on August 5, 1933. There had been several flagrant cases of defiance of the Board by large employers of labor. The foregoing Order gave the Board the right to adjust all industrial disputes... and to compose all conflicts threatening the industrial peace of the country.  

Subsequent executive orders issued on February 1, 1934, and February 23, 1934, (Executive Orders Number 6580 and 6612) approved all previous orders of the Board and gave it authority to hold elections to determine employees' choice of representatives for the purpose of collective bargaining, and to publish the names of the elected representatives. The Board was further authorized to present its findings of violations of Section 7 (a) to the Attorney General's office for action. The only action possible under the law, however, was the removal of the "Blue Eagle" from the offending employer. This

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16 Ibid.  
17 Ibid., pp. 524-25.  
18 Ibid., p. 781.  
19 Ibid.
penalty carried some weight since the Federal government did not do any business with industries not displaying the "Blue Eagle" and asked the public to follow its example. This practice had been followed since President Roosevelt had issued Executive Order Number 6246 on August 10, 1933.20

Section 7 (a) contained many basic defects. There was no provision for enforcement; it failed to specify which anti-union activities were illegal, and company dominated unions were not expressly declared illegal nor were employers required to bargain collectively with freely chosen representatives of their employees. It further failed to forbid discrimination against employees for union activities. The National Labor Board had evolved into an agency which tended to conciliate and arbitrate disputes because it had no clear-cut power to enforce the spirit of Section 7 (a). This was a tragic turn of events since the National Labor Board was quite successful in its early attempts to protect the right of the workers to bargain collectively. A good example of this occurred almost immediately after the Board's creation. It intervened in a bitter hosiery strike in Berks County, Pennsylvania. More than ten thousand workers were involved in this strike and every hosiery mill in the country was shut down.

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20Ibid., Section 109, pp. 318-19.
The National Labor Board settled the strike on the basis of a procedure that became known as the "Reading Formula." This formula provided that: (1) The strike was to be called off; (2) the striking workers were to be reinstated without prejudice or discrimination; (3) an election was to be held under the supervision of the National Labor Board to designate representation for collective bargaining; and (4) representatives chosen in such elections were to be authorized to negotiate with employers with a view to executing agreements concerning wages, hours, and working conditions. In all but eight out of forty-five mills the workers chose the hosiery workers' union as their collective bargaining representatives. After the elections were held, a large number of mill operators first refused to negotiate contracts with the union representatives. The National Labor Board ordered these employers to negotiate and eventually almost every firm complied.\(^2^1\)

The success of the Board in the hosiery industry was repeated in other industries. On the basis of the "Reading Formula," the Board peacefully settled disputes involving hundreds of thousands of workers in the wool, silk, clothing, clothing, clothing.

\(^{21}\)National Recovery Administration, Release Number 285, August 11, 1933.
street railways, and machine shop industries. The high point in the Board's career was in November, 1933. On November 22 and 23, the Board conducted the most extensive elections of its career involving 14,000 coal miners. A special study of the National Labor Board stated that for a time "... it seemed that, thanks to the Board's application of 7 (a), an ideal of industrial democracy was in the process of realization in the field of industrial relations." By the end of the year, however, it was apparent that the National Labor Board could not offer adequate protection to the right of workers to self-organization and collective bargaining.

A series of events operated to weaken the prestige and operating ability of the Board. The first blow was delivered by the Weirton Steel Company and the Budd Manufacturing Company. Neither company would abide by the principle of the "Reading Formula." Stubbornly refusing to allow their workers collective bargaining rights, the corporations refused to permit elections to be held to determine the question of union representation. Despite Board protests, the Weirton Company held an election in which workers merely voted to designate representatives to the company union.

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23 Ibid., p. 102.
By February, 1934, mainly as a result of the failure to settle the Weirton and Budd disputes with the "Reading Formula," the National Labor Board was on the verge of collapse. Many employers had followed the example of Weirton and Budd. Orders of the Board were ignored and its authority was disregarded. Because of the ineffectiveness of the Board, the frequency of organizational strikes sharply increased. Workers were determined to organize their own labor unions. As the National Labor Board could not protect them against anti-union employers, employees resorted to the strike to gain their objectives.\textsuperscript{24} At this point President Roosevelt tried to extend the Board's effectiveness by his executive order granting the Board the additional powers to hold elections and to recommend to the Attorney General's office that the "Blue Eagle" be taken away from the non-operating companies.\textsuperscript{25}

Once again it appeared the Board might function efficiently, but this view appeared short-lived. The intent of the President seemed clear. He had given the Board an additional measure of power and status. The Board had developed the "Reading Formula" on its own. Almost immediately after the February executive orders, employers challenged the "majority principle" laid down by the President in his

\textsuperscript{24}Ibid., pp. 104-105.

\textsuperscript{25}See page 44, note 21.
directive regarding free elections. Employers claimed that this principle would deny non-union workers of their employment rights since the Board held that an employer had to bargain with the majority selected labor unions exclusively. Since the employers had not previously shown such a great concern for the rights of the employee, the conclusion might be drawn that this was simply another method of escaping the obligation to bargain collectively. Obviously, collective bargaining could not be carried on effectively if employers were free to bargain with individual employees. If such were the case, an anti-union employer would find it easy to undermine the union. In spite of this, Hugh Johnson and Donald R. Richberg, the two chief executives of the National Recovery Administration, shared the employers' view. This also proved to be a serious blow to the Board, and promoted confusion in the National Labor Board Policy.

Finally, on May 29, 1934, the Judiciary dealt the Board a fatal blow. A district court refused to order the Weirton Steel Company to permit a representational election which would allow their employees to select a union of their choice. It is little wonder, that after such a ruling, employers and employees alike treated the Board with contempt.

Because of the basic weakness of the law, Senator Wagner introduced a bill, in an effort to rectify these defects,
which became known as the Wagner-Labor Disputes Bill. Because it was jointly sponsored by Senator Wagner of New York and Congressman Connery of Massachusetts, it was sometimes called the Wagner-Connery Bill. The bill was introduced in February of 1934, and hearings on the bill lasted through the winter. When it finally reached the floor of the House and the Senate, it was debated at length. Several amendments were suggested but because of the highly controversial nature of the bill and the time element involved, Congress felt that they would be unable to reach an agreement on the law before adjournment. Congress believed, however, that some kind of action was necessary, and in the place of the Labor Disputes Bill passed Public Resolution Number 44 on June 19, 1934.

The purpose of the Resolution was to provide for the interpretation and enforcement of Section 7 (a). The National Labor Relations Board was created and given the statutory power to hold representational elections and to investigate violations of Section 7 (a). The only difference between the powers of this new Board and the old National Labor Board was that these two powers were derived from Statutory Law rather than Executive Order. Unfortunately, the new Board suffered

26 Congressional Record, Vol. 78, Part 4, p. 3443.
27 United States Statutes at Large, 73rd Congress, Session 2, June 19, 1934.
from the same defects that proved fatal to the National Labor Board; that is, it did not have the power to enforce its own orders. Enforcement depended upon the action of the Compliance Division of the National Recovery Administration or the Department of Justice. In addition, employer anti-union practices supposedly outlawed by Section 7 (a) were not spelled out in the Resolution. This meant that the National Labor Relations Board would have to formulate its own principles and the question of enforcement methods were as vague as before.

Vagueness as to the scope of authority of the National Labor Relations Board and divisions of responsibility for the enforcement of its decisions constituted the two main obstacles to the effective operation of the agency. Employers did not respect its orders. Although the National Recovery Administration did order the removal of the "Blue Eagle" from firms which ignored Board decisions, this technique of enforcement proved to be unsatisfactory. Consumers did not care whether or not a company possessed a "Blue Eagle."

The Department of Justice did not provide adequate enforcement. The Board referred thirty-three cases to the Department; of these only one injunction was sought for enforcement purposes. Sixteen cases were sent back to the Board for lack of evidence. In three cases, the Department overruled the Board and held that no suit was justified.
In the remaining cases, the Department for one reason or another refused to enforce orders of the Board. On May 27, 1935, the United States Supreme Court declared the National Industrial Recovery Act unconstitutional in the famous Schechter case. This decision, considered by many to be one of the most significant court decisions during the New Deal period, stated that Congress had delegated legislative power to the President in an illegal manner. In the majority opinion, the Court said that the National Industrial Recovery Act was unconstitutional:

...insofar as it purports to confer upon the President the authority to adopt and make effective codes of fair competition and impose the same upon members of each industry for which such a code is approved, it is void because of an unconstitutional delegation of legislative power.29

Such a decision outlawed Section 7 (a) along with the remainder of the National Industrial Recovery Act. It made Public Resolution Number 44 meaningless since the resolution was merely created to carry out the provisions of Section 7 (a). It was apparent that new legislation was needed to fill the void created by the decision of the courts.


Even before the Supreme Court had made its decision in the Schechter case, however, it was clear that Section 7 (a) and Public Resolution Number 44 were not fulfilling their purpose. Senator Wagner summed it up in a radio speech on April 21, 1935, as follows:

The virtual collapse of Section 7 (a) is a matter of common knowledge, the cause for this has been that a relatively small number of unfair employers have discriminated against and discharged employees who have exercised their fundamental rights; have set up a masquerade type of union which is really the creature of the employer rather than the representative of the employee, and have taken advantage of the lack of adequate enforcement power behind Section 7 (a)....

As pointed out previously, the basic philosophy of Section 7 (a) and Public Resolution Number 44 was to promote the organization of unions for the purpose of collective bargaining and to stamp out the organization strikes that were so prevalent in the country at that time. The New Deal promoters of this legislation also felt that, as a result, workers would be in a position to demand a fair share of production, thereby eliminating the cause of the existing and future depressions. Failure to accomplish these objectives was evident upon examination of some of the Labor Department statistics. From 1927 to 1931, there were on an average

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763 strikes per year, involving 275,000 strikers and costing 5,665,000 labor work days. In 1933 more than 812,137 workers were out on strike, and in 1934 the number rose to 1,277,344. Forty-six per cent of all strikes in 1934 were caused by organizational disputes. Thirty-one 75 per cent of the cases brought before the National Labor Relations Board involved the same type of dispute.

Failure to aid in establishing industrial peace existed by reason of many weaknesses in this legislation. The National Labor Relations Board established under Public Resolution Number 44 had the power to hear disputes arising out of Section 7 (a) and then order an election to be held. The employer, however, could appeal the case before any such election could take place, thereby postponing any swift decisions by the Board. In reviewing cases wherein a company objected to such an election, any action taken by the court could be delayed for almost a year. The National Labor Relations Board lacked the power to investigate except in connection with an election. It was not given the quasi-judicial power needed to interpret the law and to hand down binding decisions. It was unwise to tie Section 7 (a) to the industrial codes because this did not involve all workers who dealt in interstate

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commerce. Both of the laws were ambiguous. They were interpreted in different ways by the administrators of the law. For example, Hugh Johnson, who headed the National Industrial Recovery Administration, believed that Section 7 (a) did not mean that the majority of the workers could elect a representative to speak for all of the workers. In other words, he recognized the concept of proportional representation. Theoretically, it would then be possible for an employer to deal with several organizations separately, making different agreements with each of them. On the other hand, as Lloyd Garrison, Dean of the University of Wisconsin School of Law, pointed out, the National Labor Relations Board in several cases accepted the principle of majority rule. Another inherent weakness was the inability of the National Labor Relations Board to enforce its decisions. As Senator Wagner stated during a Senate debate:

The present National Labor Relations Board has not been vested with enforcement powers... It is the administration rather than the Board which exercises final discretion in determining whether the "Blue Eagle" shall be removed or whether government contracts shall be cancelled.

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33 Ibid., p. 5.
34 Hearings on National Labor Relations Board, Committee on Education and Labor, United States Senate, 74th Congress, 1st Session, Part 2, p. 127.
The National Labor Relations Board could investigate and make recommendations to the National Industrial Recovery Administration, but any final action rested with the latter.

Many of the disputes did not pass directly to the National Labor Relations Board for hearing. Instead, they were delegated to one of the many conciliatory boards which had been established by law or executive order through the years. There were, at one time, as many as fifteen of these conciliatory boards established to handle problems within a particular industry. Senator Wagner argued that this merely resulted in confusion as to jurisdiction and ultimately ended in conflicting decisions. He described these industrial boards as follows:

Partisan in composition, living in an atmosphere of compromise and conciliation, they are well designed to adjust wages and hear controversies... but they are not suitable for enforcing the provisions of 7 (a).

The greatest weakness of this existing legislation, however, was its inability to prevent an employer from creating a union or organization which he could dominate; i.e., the company union. Section 7 (a) stated:

No employee and no one seeking employment shall be required, as a condition of employment, to join

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36 Ibid., p. 7569.
37 Ibid.
any company union or to refrain from joining, organizing, or assisting a labor union of his choosing.\textsuperscript{38}

However, neither Section 7 (a) nor Public Resolution Number 44 gave the National Labor Relations Board or any other agency the power to prevent employers from ignoring this directive. Neither did it provide for any penalties for failure to comply with this law. In these cases, the Board was powerless to initiate any effective action against an employer. At best, it could merely recommend that the "Blue Eagle" be taken away. Because of the inability to prevent employer domination of unions, the fundamental purpose of this legislation was defeated. William Green, President of the American Federation of Labor, in testifying before the Senate Education and Labor Committee, pointed out that:

> Of the company unions on which we have reports, only eighteen per cent were formed prior to the National Industrial Recovery Act; sixteen per cent of the total were not started until an attempt was made by the employees to form a bonafide labor union. The plan originated directly with an officer of the company in fourteen per cent of the cases, and in fifty-one per cent, the organizers were paid by the company.\textsuperscript{39}

In all cases involving company unions heard before the old National Labor Board, the constitution or by-laws were written

\textsuperscript{38}United States Statutes at Large, Session 1, June 16, 1933.
\textsuperscript{39}Hearings on National Labor Relations Board, Committee on Education and Labor, United States Senate, 74th Congress, 1st Session, Part 1, p. 110.
by the employer or his lawyers. The company financed and organized them. Prime examples were the Firestone Tire and Rubber Company, Goodyear Tire and Rubber Company, and Goodrich Tire and Rubber Company. When complaints were lodged against these companies for ignoring Section 7 (a), the National Labor Relations Board ordered that elections be held. In all instances the companies appealed these decisions to the courts. This method then served the purpose of postponing an election and gave the employer the opportunity to further the cause of the company union.

In many instances, companies hired full-time organizational staffs to come into their plants and convince their employees that a company union was to their advantage. Firestone hired ninety-two men for this purpose, B. F. Goodrich hired one hundred fifty men for the same reason, and Goodyear hired sixty men. Not once was there any suggestion by a witness testifying before the Congressional committee investigating this problem that the provisions outlawing the company union was in any way effective.

On the other hand, this early legislation, though basically ineffective, had some positive results. Immediately following the passage of Section 7 (a), the membership in unions

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40Ibid., p. 111.  
41Ibid.  
42Ibid.  
43Ibid., p. 112.
was encouraged. William Green announced in 1933 that the American Federation of Labor had increased its membership by 1,300,000 as a result of the National Industrial Recovery Act. It also ended legislative antipathy to the "yellow dog" contract, being more effective than the Norris-La Guardia Act in prohibiting execution of such a contract.

The experience of this early legislation emphasized the care needed in drafting labor legislation. Litigation resulting from carelessly phrased sections of Section 7 (a) was extensive in both Federal and State courts. No sooner had the National Industrial Recovery Act and state acts patterned after the same entered the statute books than the courts advanced the theory that strikes, picketing, and boycotts were thereby outlawed. In one case a New Jersey court held that in view of the acts, "strikes are forbidden by the public policy of nation and states..." Since the acts provided for the mediation of disputes, this made resorting to such mediation a necessary prerequisite to engage in any form of labor activity for the enforcement of any demand.

A New Jersey court held this to be true. It was also suggested by some that the National Industrial Recovery Act outlawed National labor unions, but on appeal this view of the lower court was reversed.

The only conclusion that can be drawn from this early New Deal experimentation in labor legislation is that it failed in making any basic change in the collective bargaining process before the Schechter decision had been announced. When the Supreme Court did render a decision on the National Industrial Recovery Act, it emphasized this failure and pointed up the need for new legislation to replace what had been nullified. Senator Wagner's leadership in this field continued and his role in subsequent legislation was significant.

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47 Lichtman v. Leather Workers Industrial Union, 114 N. J. Eq. 596, 169 A 498, 1933.


49 116 N. J. Eq. 146, 172 A 551, 92 ALR 1450, 1934.
CHAPTER III

THE WAGNER ACT

Section 7 (a) of the National Industrial Recovery Act had failed before the Supreme Court declared the act unconstitutional. This was clearly indicated when Senator Wagner introduced the Labor Disputes Bill the previous year. When this bill failed to pass and Public Resolution Number 44 was passed as a substitute, Senator Wagner and his followers were dissatisfied and, consequently, early in the 1935 Congressional session, a new bill was introduced which was basically the same as the rejected Labor Disputes Bill. Senator Wagner was not only instrumental in drafting this new bill, but played a decisive role in steering it through Congress.

The fact that in the decades following the passage of the Wagner Act a close political alliance has grown up between the Democratic Party and labor, plus the lasting importance of the act which was passed at the height of the New Deal period, has left the general impression in the public mind that the act was a key piece of New Deal legislation and that Roosevelt was instrumental in securing its enactment. In fact, there is adequate evidence that Roosevelt himself was never greatly interested in the subject and gave his support only at the last minute. Frances Perkins, who was President Roosevelt's Secretary of Labor throughout his term of office, has said of
the President's relationship to the Wagner Act:

It ought to be on record that the President
did not take part in developing the National
Labor Relations Act and, in fact, was hardly
consulted about it. It was not a part of the
President's program. It did not particularly
appeal to him when it was described to him.
All of the credit for it belongs to Wagner.¹

Raymond Moley, at that time still a member in good
standing of Roosevelt's Brain Trust, substantiates Secretary
Perkins' appraisal. He went further and explained Roosevelt's
last-minute adoption of the act on the grounds that the
President "needed the influence and votes of Wagner on so many
pieces of legislation and partly because of the invalidation
of the National Industrial Recovery Act."²

Secretary Perkins, herself, did not play a significant
role in the drafting of the act. When she appeared before the
Senate Committee on Education and Labor, she addressed herself
to only one problem; that was whether the Board should be a
part of the Labor Department or become an independent agency.
She was quite mild in her expressions but stated that she felt
the Board should be a part of her department.³ All in all,

¹Frances Perkins, The Roosevelt I Know (New York: Viking
Press, 1946), p. 239.

²Raymond Moley, After Seven Years (New York: Harper and
Brothers, 1939), p. 304.

³Hearings on National Labor Relations Board, Committee
on Education and Labor, United States Senate, 74th Congress,
1st Session, Part 1, p. 65.
it was strikingly evident upon examination of the hearings that administration spokesmen played a very minor role in the whole proceeding. It should be said for Roosevelt, however, that when he finally gave his support to the legislation, he was not swayed by industry pressure to change his position.

After May 27, 1935, the date the Schechter decision was handed down, the legislative pace quickened. Senator Wagner was extremely anxious for speedy passage of his bill. House and Senate hearings on the measure were intensified, for the members of these committees were well aware that with the destruction of Section 7 (a), the collective bargaining question had been set back three full years. It was apparent that industrial peace could not be established in the absence of a law which would effectively establish the collective bargaining process.

Stimulating Congress was the powerful voice of organized labor channeled through the American Federation of Labor. The campaign which it conducted was vigorous and unceasing. Organized labor had tasted and enjoyed the fruits of a national protective legislative program. Section 7 (a), despite its shortcomings, served to whet the appetite of organized labor for a truly effective labor law. Labor leaders were aware of the tremendous benefits that the union movement would acquire from an adequate law protecting the right of the worker to self-organize and bargain collectively. Mass meetings were
held to urge the passage of the bill. Organized labor made crystal clear the character of its future program. It threatened to work for the defeat of each and every senator or representative who opposed the law. Senator Wagner was even more vigorous in his activities on behalf of his bill than ever before.

Convinced that the previous legislation had been a failure, and that this indicated a crucial need for his bill, he stated in April of 1935:

Thus the American battle for industrial liberty has been waged upon the issue whether workers shall be free to associate together if that is their desire. The first great victory was won when, after seven years of frustration, Congress passed the Norris-La Guardia Act. But the elation of the friends of freedom was short-lived. Devious devices were used to defeat the objective of the Act. Even without the 'yellow dog' contract the unfair employer could discharge and discriminate against workers if they violated any dictate of his will. As a remedy, the famous Section 7 (a) was passed, forbidding any interference with the right of workers to organize for purposes of mutual advancement. The virtual collapse of Section 7 (a) is a matter of common knowledge. The curse of this has been that a relatively small number of unfair employers have discriminated against and discharged employees who exercised their fundamental rights; have set up a masquerade type of union which is really the creature of the employer rather than the representative of the employee, and have taken advantage of the lack of adequate enforcement power beyond Section 7 (a).

4Congressional Record, Vol. 79, Part 6, p. 6184.
Support of the bill by the general public appeared obvious, if one could gauge by the subsequent congressional vote in favor of it. The press, however, was definitely not universal in its acceptance of the bill. Although such magazines as the New Republic, Literary Digest, and Nation came out in favor of the bill, many other magazines and newspapers opposed it. An example of favorable commentary on the bill was an editorial in The Nation which said in part:

The most important provision of the Bill goes to the heart of the present difficulty in that it proposes an independent labor board with exclusive and definite authority... to interpret and enforce the laws dealing with collective bargaining.  

An editorial in the New York Times noted that this bill was unfair and biased in favor of labor.  

Various religious groups announced their approval of the bill. The Right Reverend Monseigneur John A. Ryan, Director of the Social Action Department of the National Catholic Welfare Conference, sent a statement to Congress endorsing the bill, as did Rabbi Sidney E. Goldstein, Chairman of the Social Science Justice Commission, Central Conference of American Rabbis. Rabbi Goldstein said:

The history of labor in America and in other countries proved that the workers can advance

5 Editorial in The Nation, March 6, 1935.

their own welfare only to the degree that they acquire power to bargain collectively through organization of forces. In this economic crisis it is more necessary than ever to protect and preserve the rights of labor to organize and to direct its own destiny.\footnote{Congressional Record, Vol. 79, Part 7, p. 7680.}

The statement of policy which was contained in Section 1 of the National Labor Relations Act revealed a dual objective. The first was to promote industrial peace by encouraging and directing collective bargaining. The second was to equalize bargaining power between employers and employees by removing restraints upon the right of employees to organize. To accomplish this dual objective, the act provided for two distinct types of proceedings. The first defined certain activities engaged in by employers as "unfair labor practices" and prohibited the employers from engaging in them. The second contained provisions for setting up the machinery whereby representatives of employees could be designated for the purpose of bargaining collectively.

The act provided for a three-member board which had the power to authorize rules and regulations necessary for carrying out provisions of the act. The Board would be appointed for a five year term by the President with the advice and consent of the Senate. Each member would receive a salary of $10,000 a year. The Board was not empowered to engage in conciliation,
mediation, or arbitration. The Board was given the additional power of moving to the scene of its inquiry, and subpoenaing records needed for its investigation.  

Section 7, which was probably the heart of the act, provided that employees should have the right to self-organization. The right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining was also asserted.

The act set forth five unfair labor practices which, if committed by an employer, subjected him to certain sanctions contained in the act. These five unfair labor practices were: (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the act; (2) to dominate or to interfere with the formation or administration of any labor organization or to give financial aid or other support to it, except that the employer might allow his employee to meet with him during working hours without loss of time or pay, subject to the Board's rules and regulations; (3) to encourage or discourage membership in any labor organization, by discrimination in regard to the hiring or firing of his employees, or any other condition of employment;

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⁸United States Statutes at Large, 74th Congress, Session 1, July 16, 1935.
(It was provided that the employer could enter into a closed shop agreement with a labor organization if the labor organization was the proper representative of the employees, and the organization was not a company dominated union); (4) to discharge or otherwise discriminate against an employee because he had filed charges or given testimony under the act; (5) to refuse to bargain collectively with the proper representatives of his employees.\(^9\) It should be borne in mind that the unfair labor practices were limited to those found in Section 8. The act was specific in its terms. Neither the Board nor the courts could prohibit any practices which they thought were unfair; only those listed in Section 8 could be considered illegal practices. The Senate Committee on Education and Labor said in its report: "These unfair labor practices are supported by wealth of precedent in prior Federal law."\(^10\) The following may be listed as examples: The Railway Labor Act of 1926, The Norris-La Guardia Act, and the 1933 Amendment to the Bankruptcy Act.

It is apparent upon close examination of the unfair labor practices that determination of the proper bargaining representative of employees was important under the act for

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\(^9\)Ibid.

\(^10\)Hearings on National Labor Relations Board, Committee on Education and Labor, United States Senate, 74th Congress, 1st Session, Part 2, p. 8.
two reasons. The first was to determine the validity of closed shop agreements entered into under Section 8 (3) of the act. The law did not make closed shop agreements illegal; however, it did not encourage them either. While it allowed unions to negotiate such an agreement if it was legally permissible to do so in the state, the act did prevent the negotiation of the closed shop if the negotiating agency did not live up to the provisions of the law.\(^{11}\) This was to prevent the company dominated union from securing a closed shop agreement. The second reason was that it fastened on the employer the obligation to bargain collectively as directed in Section 8 (5) of the act. This section made it an unfair labor practice for an employer to refuse to bargain collectively with his employees or their representatives. An agreement did not have to be reached, however, but a bonafide effort had to be attempted.\(^{12}\) What this actually meant was the Board would have to determine whether the employer was making a genuine effort or not. An employer by simply sitting down at a table and saying "nothing doing" was not fulfilling his obligations; he had to show good faith by offering a proposal, and willingly accepting counter proposals for study. Evidence of an inflexible attitude indicated bad faith.\(^{13}\)

\(^{11}\)Ibid., p. 12.  
\(^{12}\)Ibid.  
\(^{13}\)Ibid.
If there was any doubt as to which union, of several claiming unions, was the majority union suited to represent the workers, the National Labor Relations Board had the power to hold an election. The winner was then certified as the union which properly represented all of the workers in that particular unit for purposes of collective bargaining. In this way the act endorsed the principle of majority rule. The question of whether or not majority rule was to be promoted in the act was hotly contested in hearings before the Senate Committee on Education and Labor. Every witness appearing in favor of the act made it quite clear that the principle of majority rule was necessary if the act was to work. It was pointed out that one of the main weaknesses of Section 7 (a) was the interpretation made by Hugh Johnson allowing proportional representation. Charlton Ogburn, appearing for the American Federation of Labor, insisted that in order to give unions an equal bargaining position it was imperative to accept the concept of majority rule. In pointing out what he considered to be the evils of proportional representation, Mr. Ogburn said: "Rival groups of workers stimulated into jealousies and bitterness can never present a united front. That is why employers are so solicitous of the right of the minority to be represented."\(^{14}\)

\(^{14}\)Hearings on National Labor Relations Board, Committee on Education and Labor, United States Senate, 74th Congress 1st Session, p. 151.
Appearing in opposition to the act, Walter Harnischfeger of the National Association of Manufacturers, said that he opposed the concept of majority representation "because it deprives the minority... of their freedom of action in matters of bargaining." In defense of the act, the Senate Committee explained: "... the majority cannot make an agreement more beneficial to them than to the minority or non-members of the union." The committee also pointed out that when the majority made a contract it applied to everyone in the unit; that only an organization which was constructed for the purpose of collective bargaining could bargain for all. The act did preserve the right of the individual employees or groups of employees to present grievances to their employer and, as the committee pointed out, the National War Labor Board under the Railway Labor Act had established a precedent for the principle of majority rule.

If there was a question as to which union of several claiming unions represented the appropriate bargaining unit, the Board was given the power to select the appropriate unit and an election would be held to determine if the majority of

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15Hearings on National Labor Relations Board, Committee on Education and Labor, Report to Accompany Bill, United States Senate, 74th Congress, 1st Session, p. 239.
16Ibid., p. 13
17Ibid., pp. 13-14.
18Ibid., p. 126.
the workers within the selected unit favored the union. If they did, the employer was expected to bargain with the representative of that unit. Thereby Congress gave to the National Labor Relations Board broad discretionary authority in determining whether a union should represent an employer unit, a craft unit, a plant unit, or a subdivision thereof. This was patterned after Section 2 of the 1934 Amendment to the Railway Labor Act and was vigorously objected to by the employer groups on the grounds that it would give the Board the power to favor one union as opposed to another. It was feared that the Board would favor the unions affiliated with the American Federation of Labor over unions organized on the company level. Congressman Rich of Pennsylvania, an opponent of the bill, reasoned:

The Wagner Act will work in the interest of only a small minority of workers represented by professional labor leaders, will promote industrial strife, will bring about epidemic of labor disputes... will in practice tend to make a closed shop of every plant and to make every employee carry a union card if he is to earn a living.19

At the time all labor leaders appeared to favor this section of the act. It was possible that at some future date one American Federation of Labor union might find itself pitted against another in a National Labor Relations Board

election, but if this occurred it was reasonable to suppose that the government would take the position that the question of which union should compete for votes was a matter for internal union decision. This was in fact the position that the Board later took. In the summer of 1936 the Board was asked to conduct an election in which two American Federation of Labor unions were rivals. The Board declined, pointing out that this was in essence a jurisdictional dispute which ought to be settled by the American Federation of Labor itself. A different question came up in 1937, however, when the National Labor Relations Board was requested to intervene in a dispute involving the Congress of Industrial Organizations and the American Federation of Labor. This time the Board did intervene on the ground that there was no apparent body to which the question could be referred.\footnote{Archibald Cox and John T. Dunlop, "Regulations of Collective Bargaining by the National Labor Relations Board," *Harvard Law Review*, vol. 63, (1950), p. 389.} Thereafter the Board found itself plagued with cases in which the American Federation of Labor and the Congress of Industrial Organizations were contending parties.

Congress gave the Board adequate power to stop unfair labor practices. Section 10 of the act authorized the Board, after determining that one had committed an unfair labor practice, to issue cease and desist orders. They could then take
other affirmative action including reinstatement of employees with or without back pay. The issuance of such an order had to be preceded by the service of a complaint with a notice of hearing and the person complained of was given the right to answer to the charge. A hearing was then held before the Board or agent of the Board and, in the event compliance with the Board's orders was not secured, then the Board was authorized to apply to a Federal Circuit Court of Appeals for enforcement of the order. The aggrieved party could appeal the decision of the Board to the Circuit Court of Appeals. It is important to note that an appeal to the Court by the aggrieved party did not stop the order of the Board from being enforced. This was insisted upon because under Section 7 (a) the courts were used by employers as a means of delaying action.

The Board was given the power of subpoena in Section 11 of the act with authority to apply to any Federal District Court for enforcement. In the event of failure to obey a subpoena, contempt proceedings could be brought to bear on the offending party. Willful interference with a Board member or its representative or agents was criminally punishable.

The act contained two so-called limitations. The first preserved the right to strike. The second provided for a separability clause. This meant that if one section of the act were to be held unconstitutional, the other sections would
not be affected. This has proved to be of no importance in view of the fact that the act has been held constitutional in its entirety. 21

Three basic principles can be found in the act. The first was employee self-organization unrestrained by employer interference coupled with acceptance in good faith by the employer of the practice of collective bargaining. As a result of this first principle, it may be said that the purpose of the act was to encourage labor organization. The second principle was that of majority representation, while the third was a remedial principle involving prompt administrative machinery for enforcement of the provisions of the act in preference to criminal penalties. The procedure adopted in this act was patterned after the Federal Trade Commission Act.

The National Labor Relations Act was viewed in many quarters as a kind of emergency legislation which was highly distasteful, and as a result bitter opposition sprang up against it. The reasons for hostilities to the act must be understood in the light of the legal and constitutional background against which it was passed. There is no doubt that it was a serious break with the past. While it claimed merely

21 A complete discussion of the constitutionality of the act can be found in Chapter 4 of this thesis.
to confer upon labor the right to self-organization and the choice of representatives for the purpose of collective bargaining, and appeared upon first glance to be an innocuous restatement of Federal Judicial and Statutory Law, the provisions of the act went much further. One important feature of the act was its recognition for the first time in Federal labor legislative history of a social interest in labor organization. This was the underlying theory of the unfair labor practices declared by the act. Employers were forbidden to dominate, restrain, or interfere with labor organizations engaged in self-organization because such self-organization and the resulting collective bargaining was to such a social good as to make unlawful any interference with its development.

Many of the unfair practices listed in the act had been for years considered legal and legitimate rights of the employer. Even though a similar act had been passed previously in the form of the Railway Labor Act of 1926, this was restricted to a public utility which has long been considered a proper reason for limitations upon labor's rights and employers' privileges.

It was also a new concept to impose upon the employer the duty to bargain in good faith with the employees' representatives. The law prior to the enactment of the National Labor Relations Act was stated in *Hunt v. Simonds* in the following way: "It is obviously the right of every citizen to
deal or refuse to deal with any other citizen and no person has ever thought himself entitled to complain in a Court of Justice of a refusal to deal with him."²²

There were many additional reasons for the hostilities towards the act. It was another example of the extension of the power of the Executive Department. It was one more administrative board added to what appeared to be an ever-increasing number of boards and bureaus. It regulated business enterprise. Both the Interstate Commerce Commission and the Federal Trade Commission met with similar opposition because of their regulatory nature. One leading authority on labor law stated their case when he said:

Government agencies are hardly popular when they control and command; hence government agencies which control and command are even more rarely popular, and a new government agency which controls and commands in situations so surcharged with emotion as have been those committed to the National Labor Relations Board would be a latter-day miracle if it were popular with all whom its operations affect. The National Labor Relations Board was not such a miracle.²³

Another reason for the unpopularity of the act was its alleged one-sidedness. It provided for unfair labor practices committed by employers without also providing for employee unfair labor practices. Walter Harnischfeger, testifying for

²²Hunt v. Simonds, 19 Mo. 583 (1854).

the National Association of Manufacturers, said that the unfair labor practices were "... arbitrary, ill-advised, and utterly lacking in mutuality... and should, if unfair, be prohibited for labor as well as for business." 24

Pointing out that the compulsions of the bill could run against management, attorney Walter Gordon Merritt, appearing for the League of Industrial Rights, argued strenuously that if management was going to be required to bargain with the elected representative of its employees, the least the government could do was to require certain minimum standards of the union. Merritt cited various cases from his New York experience to prove that unions "... like all other human institutions," engage in wrong doings and that it would be wrong to force companies to bargain with such unions. By way of "extreme illustration," he pointed out the possibility that a company might have to bargain with a Communistic organization, and although he observed this was an "absurd" example, he used it to make the point that the bill should have some provisions to protect the employer from this kind of situation. 25

A first step in understanding the reasoning of the "one-sidedness" argument comes with the recognition that

24Hearings on National Labor Relations Board, Committee on Education and Labor, United States Senate, 74th Congress, 1st Session, p. 238.

25Ibid., pp. 309-34.
one-sided legislation was not new in American history. A classic example of this type of legislation was the tariff. The bitter battles which an Agricultural South and an Industrial North fought over this issue in our early history are legendary. Moreover, the argument that infant industry encouraged and protected by the tariff, should be asked to abide by certain standards of working conditions or wages were not even considered. There were other examples of legislation which were beneficial to one group at the expense of another. The explanation as to why this occurs is that in every case legislators have had objectives which they were trying to achieve. Balanced legislation may appear to be more fair, but it may at the same time be less effective in achieving the desired objective.

Basic to an understanding of the one-sidedness of the Wagner Act lies in the conclusion by its backers that a more balanced approach would fail to achieve their objective. This showed up quite clearly in the debates on the Tydings Amendment when the bill was finally up for passage. Section 7 of the bill read:

Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through the representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.26

26United States Statutes at Large, 74th Congress, Session 1, July 16, 1935.
Senator Tydings proposed that the phrase "free from coercion or intimidation from any source" be added to this section. In support of his amendment he argued that if employees were given the right to organize they ought to be free from interference not only by the employer but from any source. This amendment was, of course, aimed at the organizational activities engaged in by the American Federation of Labor. This argument had a strong appeal to many senators who did not fully understand the implication of such an amendment. The sponsors of the bill resisted the amendment successfully with the argument that it was exactly what industry opponents of the bill wished. Senator Wagner reasoned that the courts could not be trusted to interpret the word "coercion" when applied to labor organizations. He said:

But how has the word "coercion" as among employees been interpreted by the courts? The use of pickets, mere persuasion without any force, threats, or intimidation, has been deemed coercion; and employees simply trying to persuade their fellow workers to join a particular organization have been charged with coercion.

The fear that the Tydings amendment would destroy the purpose of the bill drove the proponents of the bill on to overcome the efforts to amend it. Huey Long expressed this view during the debate when he said:

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28 Ibid., p. 7654.
The Senator Tydings knows that we have been trying to get laborers the right to organize for quite a while, and we never have been able to draft a law yet which has not been whittled down. By interpretation, the laws have always been cut down. Does not the Senator think we can take a chance for once in our lives for a little while? If the Senator from New York can draft an act that will protect labor, he will be the only man who has ever been able to do it. Nobody else has ever been able to do it with the court interpretations. I do not believe we ought to whittle away the bill and not take a chance.29

Backers of the bill also argued that the contention the bill was unfair because it was one-sided regarding the unfair labor practices was invalid because the Common Law and Statutory Law of the several states and Federal government were then adequate to deal with unlawful activities carried on by labor. It was further argued that the establishment of employee unfair labor practices would impede the enforcement machinery set up by the act. The Committee report which accompanied the National Labor Relations bill upon its reference to the United States Senate answered the argument in this way:

The only result of introducing proposals of this sort into the bill, in the opinion of the committee, would be to overwhelm the Board in every case with counter-charges and recriminations that would prevent it from doing the task that needs to be done. There is hardly a labor controversy in which during the heat of excitement statements are not made on both sides which, in the hands of hostile or unsympathetic courts, might be construed to come under

29Ibid., p. 7655.
the common-law definition of fraud, which in some states extends even to misstatements innocently made, but without reasonable investigation. And if the Board should decide to dismiss such charges, its order of dismissal would be subject to review in the Federal Courts. Proposals such as these under discussion are not new. They were suggested when Section 7 (a) of the National Industrial Recovery Act was up for discussion, and when the 1934 Amendments to the Railway Labor Act were before Congress. In neither instance did they command the support of Congress.30

The Committee report was very specific in answering the argument put forth by various employer groups that if the employer could not influence or coerce the employees in their organization activities or the choice of their representatives then the same thing should be forbidden to employees or labor organizations. The Committee's answer to this was:

The corresponding right of employers is that they should be free to organize without the interference on the part of the employees; no showing has been made that this right of employers to organize needs federal protection as against employees.31

It should be understood, however, that employers did not ask for protection to organize themselves. They wanted to prevent the unions from interfering with their employees. The Committee continued by saying: "To say that employees and labor organizations should be no more active than employers in the

30Hearings on National Labor Relations Board, Committee on Education and Labor, Report to Accompany Bill, United States Senate, 74th Congress, 1st Session, p. 15.

31Ibid., p. 17.
organization of employees is untenable; this would defeat the very objects of the bill."

Somewhere in the testimony of almost every industry representative during the course of the hearings on the proposed law was the thesis that a major defect of the bill was its premise that the relationship between employer and employee was one of conflict rather than cooperation. This view was directly related to the fact that the existing company unions would largely be abolished and industry was not ready to admit that these unions were largely company dominated, or that outside unions could come in without disrupting the whole economy. To the industrialist, a strong national union movement was something to be feared. This point of view was aptly stated in a resolution passed by the Cleveland, Ohio, Chamber of Commerce, which read in part:

The friendly and cooperative relationship existing between thousands of employers and their employees - existing to so large an extent that such relationships are the rule and not the exception - should not be subjected to demoralization by professional labor agitators whose primary objective is to foment antagonism, with a view to an organized power, socially, politically, and economically dangerous to the American Commonwealth.33

32 Ibid., p. 17.
33 Hearings on a National Labor Board, Committee on Education and Labor, United States Senate, 73rd Congress, 2nd Session, Part 1, p. 638.
Some employers were much more moderate in their opinion. Henry Dennison of the Dennison Manufacturing Company, who had served as an industry member of the National Labor Board, was such an employer. While conceding that many independent unions were in fact company dominated, Mr. Dennison said:

But my firm conviction is that under today's conditions, this evil will be short-lived, whereas the evils of forcing the growth of outside unions beyond the rate at which capable leaders can be discovered and can gain experience will last a generation. In few, if any, plans can a hog-tied company union survive more than a year or two; they will either evolve into true and independent employee representation or blow up and reform into stiff and often antagonistic unions controlled from without. But a sufficient number of new unions unskillfully lead - and union membership is one of the most highly skilled of the arts - will lead to enough fool trouble, bitter strife, and bloodshed to set the whole country blindly against unionism.  

If industry saw dangers in the proposed legislation, the Communist oriented trade union Unity League did not. Its spokesman, William F. Dunne, said:

We are against this bill just as we were against 7 (a), and for practically the same reasons - because it is intended to be used as another will-o'-the-wisp to dance before the eyes of the working class while the employers and official labor leaders in the National Recovery Act machinery, thinking of "national recovery" in terms of "all the people," which means the capitalist class, which means mainly the big employers, trick them further into the swamp of starvation wages and permanent mass unemployment.  

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34 Ibid., p. 403.  
Summarizing objections to the act based on the "class conflicts argument, Congressman Eaton stated during debate:

This and all similar legislation rests upon the absurd proposition that all business men are dishonest and unfair, and all employees are incapable of self-determination or self-government. It places the relation of employer and employee upon a permanent and unalterable war basis. It rests upon the false assumption that the interests of employer and employee are by their intrinsic nature absolutely irreconcilable.... It puts the employer in a criminal class, subject to fine and imprisonment for a list of new crimes fastened upon him under legal processes as unjust and unfair as they certainly will turn out to be unconstitutional.36

Those who were favorably disposed to the legislation answered the "class conflict" argument by reasoning that a free independent union would put employees and employers on an equal footing, thereby promoting mutual respect. They also said that a national union was an economic necessity in modern circumstances. Senator Wagner said:

Under modern industrial conditions problems of wages and hours are regional or even national in scope. More important, only representatives who are not subservient to the employer with whom they deal can act freely in the interest of the workers. Simple common sense tells us that a man does not possess this freedom when he bargains with those who control his source of livelihood... collective bargaining becomes a mockery when the spokesman of the employees is the marionette of the employer.37

37Ibid., Part 7, pp. 7569-70.
The generality of some of the sections contained in the bill were also a source of hostility. In Section 8 (1) there was reference to "interference, restraint, and coercion" without giving any definition of the precise meaning of these terms. The Board later gave the words the widest interpretation including within the ban of that section what it called "subtle forms of coercion." This, of course, was exactly what the opponents of the bill feared. Again, the Board was given no guide lines in connection with the selection of an appropriate bargaining unit under Section 9 (b) of the bill by which to determine that unit. In the eyes of the enemies of the bill, this gave the Board too much arbitrary power, allowing a Board unfriendly to industry to choose an undesirable unit.

Probably the most argumentative section of the bill was Section 8 (5). This section imposed upon the employer the duty to bargain in good faith collectively with the representatives of his employees. Because these terms were not properly defined and appeared to be ambiguous, it caused uncertainty and, consequently, animosity among those who were required to conform to the Act.

Another source of antagonism to the bill was Section 2 (3) which stated that "a striking employee" should not lose

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his status as an employee because of engaging in a strike. Although labor unions had been hoping for such a status for years, the law up to this time gave little support to this contention. A strike was generally held to terminate the employment relationship. Under Section 2 (3) of the National Labor Relations Act, on the other hand, the term "employee" was defined so as to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment..." As a result, the employer was obliged by the act to reinstate without discrimination striking employees and, where the strike was the result of an unfair labor practice, to discharge employees hired to replace the strikers and to reinstate the strikers upon termination of the strike. One who was obligated to bargain in good faith with those who impaired his business, or who was under obligation to reinstate striking employees, could not be expected to be friendly to legislation which imposed such obligations.

Some of the major objections to the act were on constitutional grounds. In spite of the fact that the Supreme Court


subsequently found the act to be clearly constitutional, it is important to examine the objections. There were seven main objections: First, it was argued the act was lacking in due process of law because it failed to accord proper procedural safeguards against arbitrary administrative power and it compelled the employer to bargain against his will. It also forced reinstatement of striking employees without discriminating against those more actively engaged in strikes or other union activities. Secondly, it was asserted the act involved undue delegation of legislative power; that is to say, Congress gave too much discretionary and interpretive power to the National Labor Relations Board, and by so doing was delegating legislative power.

The third objection was that the act was an invasion of the power reserved to the states by the Tenth Amendment to the Federal Constitution. However the Senate Committee on Labor and Education felt they had the authority to protect full freedom of organization and to prevent employer domination of employee organizations because they were trying to promote industrial peace which in turn promoted the free flow of commerce among the several states. They justified their claim by citing a case involving the Railway Labor Act of 1926.

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The case involved a railroad brotherhood which brought suit to restrain the company from interfering with the rights of the employees to self-organization and designation of representatives in violation of the Railway Labor Act of 1926. The Supreme Court compelled the company to: (1) completely disestablish its company union, (2) reinstate the Brotherhood, which was the recognized representative chosen by the majority of employees before the company began its interference, (3) restore to service and to certain privileges employees who have been discharged for activities on behalf of the Brotherhood.42

The fact that jurisdictional strikes or any strikes burdened the flow of interstate commerce had been recognized by the courts in several well-known cases.43 Chief Justice Taft said in the Coronado case, "If Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision or restraint."44

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This idea was also found in several other cases.\(^45\)

The fourth objection was that the act interfered with the right of jury trial in violation of the Seventh Amendment to the Federal Constitution, insofar as it permitted the award of back pay by an administrative agency.

The fifth and sixth objections were that the act interfered with the freedom of the press and freedom of speech, both violations of the First Amendment to the Federal Constitution.

The seventh and last objection was the broad definition given to the words "labor dispute." This rendered the act unconstitutional even assuming the act to be a valid congressional power in interstate commerce. All of the above objections were made several times by lawyers representing the various employer groups.\(^46\)

Even before the passage of the act on September 5, 1935, the National Lawyers' Committee of the American Liberty League, an employer organization, declared the law unconstitutional so far as they were concerned.\(^47\) In the opinion of the


\(^{46}\) Hearings on National Labor Relations Board, Committee on Education and Labor, United States Senate, 74th Congress, 1st Session, Part 2, pp. 238-349.

\(^{47}\) National Labor Relations Board, First Annual Report, 1936, p. 46.
Board, this did much to undermine the effectiveness of the law in its early days. The Board Stated:

During its first months, and before the Board had opportunity even to announce its procedures, an incident occurred which was to simulate injunction suits against the Board, and even to provide a sample brief for those wishing to attack the act. This was the publication by the National Lawyers' Committee of the American Liberty League, on September 5, 1935, of a printed assault on the constitutionality of the act. This document, widely publicized and distributed throughout the country immediately upon its issuance, did not present the argument in an impartial manner for the use of the attorneys. It was not a review of the cases which might be urged for and against the statute. It was not a brief in any case in court nor was it an opinion for any client involved in any case pending. Under the circumstances it can be regarded only as a deliberate and concentrated effort by a large group of well-known lawyers to undermine public confidence in the statute, to discourage compliance with it, to assist attorneys generally in attacks on the statute, and perhaps to influence the courts. 48

The National Labor Relations Act was drafted to apply only to disputes concerning industries which affected inter-state commerce. This was done for the obvious reason that Congress had jurisdiction only in this area and would not have any jurisdiction involving intrastate commerce. Section 2 (6) provided the following definition of the term "commerce:"

The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any territory of the United States and any state or other territory, or between any foreign country and any State, Territory, or the District

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48 Ibid., p. 47.
of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.49

Section 2 (7) of the act defines "affecting commerce" as follows:

The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.50

It can be seen by the above provisions that the act contains no precise definition of the scope of interstate commerce. This was later recognized by the Supreme Court in National Labor Relations Board v. Jones and Laughlin Steel Corporation where the Court said:

Whether or not a particular activity does affect commerce in such a close and intimate fashion as to be subject to Federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise.51

Section 2 (1) provides that the term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees in bankruptcy, or

49 United States Statutes at Large, 74th Congress, Section 1, July 16, 1935.
50 Ibid.
receivers." Section 2 (2) provides that "the term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States or any State or political subdivision thereof, or any person subject to the Railway Act, as amended from time to time, or any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." It is significant to note that Congress included the word "association" in its definition of the term "person." The Board has held subsequently that an employer also includes employers' associations when the associations have authority over the labor policies and problems of the member employers.  

Section 2 (3) of the act provides that the term "employee" includes any employee, that is, not limited to the employees of a particular employer. The report of the Senate Committee on Education and Labor set forth its reason for refusing to limit the term "employee" to the employees of a particular employer, as follows:

Under modern conditions employees at times organize along craft or industrial lines and form labor organizations that extend beyond the limits

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52 United States Statutes at Large, 74th Congress, Session 1, July 16, 1935.
of a single employer unit. These organizations at times make agreements or bargain collectively with employers or with an association of employers. Through such business dealings, employees are at times brought into an economic relationship with employers who are not their employers.54

The definition did not include any individual employed as a farm laborer or as a domestic servant of any family.55

It is important to remember that striking employees retained their status as employees under the act in two situations: first, where they struck in connection with a "current" labor dispute; secondly, where the strike was the result of an unfair labor practice.

Section 2 (4) of the act provided that the term "representative" included any individual or labor organization.56

In other words, the representative did not have to be an employee. An outside union might be chosen.

The National Labor Relations Act was passed and signed by President Roosevelt on July 5, 1935. It was called the "Wagner-Connery Act" or more commonly, the "Wagner Act."57

54Hearings on National Labor Relations Board, Committee on Education and Labor, Report to Accompany Bill, United States Senate, 74th Congress, 1st Session, p. 302.

55United States Statutes at Large, 74th Congress, Session 1, July 16, 1935.

56Ibid.

President Roosevelt's message on signing the bill echoed the hopes for all who worked for its passage. He said:

...this Act defines, as a part of our substantive law, the right of self-organization of employees in industry for the purpose of collective bargaining, and provides methods by which the Government can safeguard that legal right. It establishes a National Labor Relations Board to hear and determine cases in which it is charged that this legal right is abridged or denied, and to hold fair elections to ascertain who are the chosen representatives of employees. A better relationship between labor and management is the high purpose of this Act. By assuring the employees the right of collective bargaining, it fosters the development of employment control on a sound and equitable basis. By providing an orderly procedure for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. By preventing practices which tend to destroy the independence of labor, it seeks, for every worker within its scope, that freedom of choice and action which is justly his.58.

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CHAPTER IV

THE WAGNER ACT IN THE COURTS

The belief that the National Labor Relations Act was unconstitutional did much to discourage adherence to the law. Advised by their lawyers that the Supreme Court would most certainly invalidate it as going beyond the powers of Congress over interstate commerce, on which its provisions were based, anti-union employers did not hesitate to violate the law and instituted scores of injunctions to prevent the National Labor Relations Board from enforcing it.

The constitutionality of the Wagner Act was still undetermined as a new wave of unrest rose in the industrial world. By 1937, strikes rose to a peak even higher than that of 1934. They totaled 4,720 and almost two million workers were involved. Auto workers at General Motors organized a dramatic sit-down strike. On April 12, 1937, the Supreme Court finally acted. In a series of decisions, of which the most important was that rendered in the case of National Labor Relations Board v. Jones and Laughlin Steel Company, the law was sustained. In this case, Chief Justice Hughes stated in


the five-to-four decision, "Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents."^3

In the fight to prevent passage of the Wagner Act, the opposition listed seven constitutional objections. In due time, each objection was tested by the Supreme Court.

One of the leading arguments involved the question of whether the act failed to provide for safeguard against arbitrary administrative procedure and was, therefore, in violation of "due process of law." This question was settled when the Supreme Court, in the Jones and Laughlin Steel Company case, said:

There must be complaint, notice, and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court. All questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation.^

^3Ibid.

^4See Chapter III, pages 86-88.

The argument that the act violated the due process clause by directing an employer to bargain with his employees against his will was also found lacking. The Court said:

The Act does not compel agreements between employers and employees. It does not compel any agreement whatsoever. It does not prevent the employer from refusing to make a collective contract and hiring individuals on whatever terms the employer may by unilateral action determine. 6

The Court in the same decision also overturned the argument that due process of law was ignored by the act because it arbitrarily interfered with the employer's right to hire and fire. The Court said:

The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not under cover of that right intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. 7

The contention that the act involved undue delegation of legislative power was answered by the Court in the Jones and Laughlin Steel Corporation case simply with the words: "The Act establishes standards to which the Board must conform." 8

The Court did not explain the nature of the standards which the act establishes, but it is clear from a reading of the act that the Board is given no discretion in determining the

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6 Ibid.  
7 Ibid.  
8 Ibid.
existence or non-existence of wrongs other than those set
down in the act. Specifically the jurisdiction of the Board
is limited to the prevention of the unfair labor practices
listed in the act, and to the certification of representation
for the purpose of collective bargaining.

The Seventh Amendment to the Federal Constitution pro­
vides that "in suits of common law, where the value and contro­
versy shall exceed twenty dollars, the right of trial by jury
shall be preserved." Section 10 (c) of the act gives to the
Board the power to order reinstatement of an employee and also
the power to direct the employer to pay the wages for the
unemployment caused by wrongful discharge. In the case of
Jones and Laughlin Steel Corporation, the plaintiff claimed
this was unconstitutional because it deprived the employer the
right to trial by jury. The Court answered the contention in
a twofold fashion: First, it was pointed out that the Seventh
Amendment did not apply to cases arising out of proceedings
unknown to common law. Secondly, it was stated that "the
amendment is inapplicable to a case where recovery of money
damages is an incident to equitable relief... either analogy
could suffice to take Section 10 (c) of the Act out of the
vice of the Seventh Amendment." 9

The Tenth Amendment to the Federal Constitution
reserves all powers not specifically granted to the Federal

9Ibid.
Government to the States. The contention was raised in the Jones and Laughlin case that the entire act was invalid because it invaded the States' right to regulate local industry. The Court, however, pointed to Sections 2 (6) and 2 (7) of the act, the first of which defined "commerce" and the second of which defined "affecting commerce." The jurisdiction of the act is limited to the prevention of unfair labor practices affecting interstate commerce, and congressional jurisdiction over interstate commerce was an unquestioned constitutional Federal power. It was also pointed out that if the Board involved itself in a dispute not affecting interstate commerce, the industry had remedy in the courts. 10

It had been argued by the opponents of the bill that a firm engaged in simple manufacture was not engaged in interstate commerce even if it bought its materials from firms in other states and consequently sold its finished product in other states. In a discussion of the Jones and Laughlin case, Professor Magruder pointed out that the company was organized on a broad and national scale; it was impossible for the Court not to consider it involved in interstate commerce. 11

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10 Ibid.

The Court observed:

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?¹²

This interpretation would lead one to believe that all business engaged in, that is, any type of buying or selling across state lines was subject to regulation. This was not the case. It is a matter of Court judgment as to whether the case involves a serious effect on interstate commerce. Professor Magruder explains:

... the mere fact that a small concern obtains most of its raw materials from extrastate sources and sells most of its products to extrastate customers might not be enough, as in the case of a little factory manufacturing some unique but insignificant gadget. A strike in such a factory might not be regarded as of "such urgent national concern" as to justify the application of Federal regulation to production and activity intrastate in character when separately considered.¹³

In the case of Jones and Laughlin Steel Company, a somewhat hazy point of law was raised. The argument ran as follows: The plaintiff conceded Congress' right to regulate interstate commerce when Congress attempted to remove actual

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¹³ Magruder, loc. cit.
obstruction to the channels of interstate commerce. But the use of Congressional power over interstate commerce as a means of regulating labor relations constituted the employment of a legitimate Congressional power for the purpose of exercising another power not belonging to Congress. In this case, the Court briefly stated that the act dealt with interstate commerce and was a legitimate power of Congress. In a later case, the Court made itself clear on this point when it said:

If industrial strife due to unfair labor practices actually brought about such a catastrophe, we suppose that no one would question the authority of the Federal government to intervene in order to facilitate the settlement of the dispute and the resumption of the essential service to interstate and foreign commerce. But it cannot be maintained that the exertion of federal power must await the disruption of that commerce. Congress was entitled to provide reasonable preventive measures, and that was the object of the National Labor Relations Act. In this case, the Associated Press fired one of its rewrite men for union activity. The contention of the

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Associated Press was that the National Labor Relations Board had no jurisdiction in the case because they had the protection of the First Amendment. The Court exploded the exaggerated notion which the Press had on this point by saying: "The publisher of a newspaper has no special immunity from the application of general laws."\(^{17}\) The Court felt that the guarantee of freedom of the press has to do with liberty of the publisher "to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication."\(^{18}\) As Professor Magruder said of this case: "The Constitution of the United States has not guaranteed to publishers the right to discharge an employee, even an editorial employee, because he has joined or been active in a labor organization."\(^{19}\)

By 1938, a new contention was raised for the first time. Because the act obligated the employer to reinstate striking employees without discriminating against them, it was in violation of the due process of law clause where such obligation was sought to be fastened upon an employer guilty of no unfair labor practice prior to the calling of the strike.

The Court held in the case of National Labor Relations Board v. MacKay Radio and Telegraph Company that the guarantee

\(^{17}\)Ibid. \(^{18}\)Ibid. \(^{19}\)Magruder, op. cit., p. 1100-01.
of due process was not violated, since under the act striking employees retain their status as employees in the case where the strike is called as a result of an unfair labor practice by an employer, and also in the case where the strike is connected with a current labor dispute, even though not caused by any unfair labor practice by the employer.

The respondent insists... that the relation of employer and employee ceased at the inception of the strike. The plain meaning of the Act is that if men strike in connection with a current labor dispute, their action is not to be construed as a renunciation of the employment relation and they remain employees for the remedial purposes specified in the Act. We have held that, in the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife.20

The Board's order, therefore, was sustained and required the reinstallment of the discharged employees.

The last constitutional question was whether the act was unconstitutional because it interfered with the employer's right to state his views on the subject of unions; hence a violation of the First Amendment guaranteeing freedom of speech. No challenge has been made that the act itself was unconstitutional for this reason. The question has been raised as to whether the Board's interpretation was constitutional. In at least one case the Board's interpretation was overruled

on this ground by the Circuit Court of Appeals. The fact that the act was found constitutionally acceptable in almost every way is apparent upon the close examination of the Supreme Court's opinion in the Jones and Laughlin Steel Company case. Professor Ludwig Teller said the act "was held constitutional outstandingly in the case of National Labor Relations Board v. Jones and Laughlin Steel Corporation..."
CHAPTER V

COLLECTIVE BARGAINING - A FACT

In order to appreciate the accomplishments and the constantly expanding scope of the National Labor Relations Act, it is necessary to examine some of the more important interpretations of the act, made by the National Labor Relations Board in its daily application of the law. Section 8 declared the following to be unfair labor practices: (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it...; (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...¹

The first paragraph of Section 8, which prohibits any restraint, coercion, or interference with the right of self-organization, was broad enough to embrace all other paragraphs of the section. An employer could not do anything to hinder or interfere with the right of his employees to organize. Neither he nor his agents could use violence against union

¹United States Statutes at Large, 74th Congress, Session 1, July 16, 1935.
members. This was most clearly established in a 1939 case before the National Labor Relations Board.  

An employer could not employ spies to report to him on union activities. It was also determined that a threat by an employer to shut down a plant or to move it to another location in order to discourage organizational activities was a violation of Section 8 (1).  

The Board has held that in some instances the employer must permit union agents to enter upon his property in order to contact his employees, and he could not prohibit union solicitation upon his property outside of working hours. A wage increase given by an employer to his employees was considered to be an unfair labor practice if there was any evidence to indicate that his purpose might have been to discourage organizational activities.  

It was established that an employer was not permitted to engage in bribery to influence the attitude of his employees toward a union or to coerce union officials. For example, it

2Dow Chemical Company, 13 N. L. R. B. 993 (1939).  
4Triplett Electrical Instrument Company, 5 N. L. R. B. 635 (1938).  
5Seas Shipping Company, 4 N. L. R. B. 757 (1938).  
was found to be an unfair labor practice for an employer to offer vacations with pay to employees who promised that in a representational election they would vote against any outside union. Another employer was found to have violated the law by offering a union representative a good position "... at a high salary provided he would desert the union."\(^8\)

Section 8 (1) of the act, as it was applied by the Board, actually tended to limit the employer from making any comments about a union. Hence the employer claimed his freedom of speech was infringed upon. However it was limited only to the extent that he could not use this freedom to coerce his employees regarding union activities.\(^9\) The Board has said that the effect of an employer's statements concerning a union is to be determined "... by an evaluation of the natural consequences of such statements made not by one equal to another, but by an employer to those dependent upon it for their continued employment and livelihood."\(^{10}\) The type of language used also had a bearing on whether or not the employer was in violation of the act. For example, the employer could not use

\(^7\)McNeely and Price Company, 6 N. L. R. B. 800 (1937).

\(^8\)Carlisle Lumber Company, 2 N. L. R. B. 248 (1936).

\(^9\)See Chapter IV, page 102.

\(^{10}\)Yale and Towne Manufacturing Company, 17 N. L. R. B. 69 (1939).
such phrases as "cut throat" in describing a union. Further, an employer was not permitted to tell his employees that the union could do nothing to improve their conditions of employment. The Board also decided that any statement of employer preference for one of two rival unions was an act of coercion. The Board has even held that an admittedly correct statement about the employees' rights under the National Labor Relations Act was a violation of Section 1.

The Supreme Court has held that for any statement of an employer to constitute a violation of the act, coercion must be evident either in the language used or in some of the surrounding circumstances. In the case of the Virginia Electric and Power Company, the employer had posted a bulletin, stating that it had been free from union organization for fifteen years. It went on to say: "The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the Company." It added that no law required him to join

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11 Jones and Laughlin Steel Corp., 1 N. L. R. B. 503 (1936)
13 Continental Box Company, 19 N. L. R. B. 860 (1940).
any union. Concerning this bulletin, the Board said: "We find that by posting the Bulletin the respondent interfered with, restrained, and coerced his employees." But the Supreme Court held in an opinion written by Justice Murphy that the employer had the right to express his views on any side in an industrial controversy provided that no coercion was involved. He said:

If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. Therefore, where the language used is not of itself coercive, the coercion can be inferred from the surrounding circumstances, but the Board must make a determination as to whether or not coercion has been exerted either through utterances made by the employer or for other reasons. In the Virginia Power Company case, the Court found that the utterances were not of themselves coercive, and since the Board did not relate them to their background, it found the act had not been violated. After this decision of the Supreme Court, the Board re-tried the case. In its second opinion it found that the

16 Ibid.
Bulletin previously mentioned, when considered along with certain anti-union activities of the Virginia Power Company and several discriminatory discharges, constituted coercion and therefore violated the law.\(^{18}\) This decision was upheld by the Supreme Court which said: "While the Bulletin of April 26 and the speeches of May 24 are still stressed, they are considered not in isolation but as a part of a pattern of events adding up to domination, interference, and coercion.\(^{19}\) Decisions such as the one discussed above have limited significance, since the Board is generally able to find the existence of coercion by considering employer statements in connection with his other actions.

The second provision of Section 8 prohibits interference by an employer with the formation and administration of unions. The Board has said: "The formation and administration of labor organizations are the concern of the employees and not of the employers."\(^{20}\) Thus it was designed as a prohibition against the establishment of company dominated unions.

The classic case involving the application of this section is that of the International Harvester Company. In this instance


the employer had established an industrial council plan, where representatives of the workers selected by members of the employees' association met with representatives of management to consider conditions of employment. The program was initiated by the employer, who financed both the industrial council and the employees' association. The company urged all new employees to join the association. The council could not make a decision contrary to the wishes of the management. This organization was, of course, found to be in violation of the act. 21

Several years later the Board decided that it was a violation of Section 8 (2) for an employee to be discharged because of his unwillingness to join an unaffiliated union. 22 This was for the obvious reason that a local unaffiliated union is much easier for an employer to dominate, and by simply encouraging such a union, in effect is tending to dominate it.

An employer was forbidden to give any positive assistance to a labor organization; he was prohibited from drafting its constitution or from giving it any financial assistance. 23

21 International Harvester Company, 2 N. L. R. B. 310, 348 (1936).
22 Titan Metal Manufacturing Company, 5 N. L. R. B. 577, 582 (1938).
Thus the employer is prohibited from paying the wages of an employee who spends most of his time organizing a union. The obvious reason for this is to prevent the employer from dominating the actions of the union through influence brought to bear on the union organizer.

The Board considered it to be immaterial that all the members of the company dominated union joined it of their own free will. Even though all the members joined the union without any form of coercion or bribery, the attempted domination was found to be illegal and the union disestablished. The act appears at first glance to prohibit only actual domination of a union by the employer, but the Board has interpreted this provision to constitute a prohibition against all attempted interference with a right to organize.

Section 8(3) prohibits employers from discouraging or encouraging union membership by discriminating against union members. That is, an employer in hiring workers and in fixing the terms and tenure of employment, is forbidden to discriminate against an employee because he is a union member. A person discharged because of union affiliation could be reinstated by order of the Board with back pay. Likewise, a refusal to hire a person because of union membership entitled that person

to a position with a discriminating employer with back pay from the time of refusal to hire. 26

The Board has decided that if several union leaders are the only employees discharged at a given time, an inference could be drawn that the dismissals were discriminatory. 27 The same inference could be made if only employees active in the formation of a union were discharged at a given time. 28 The Board also decided an employee could not be discharged if the employer alleged that he dismissed the employee because of union activity and for other legitimate causes. If at any time the employer had given evidence of opposition to unions, the Board would conclude the dismissal was due to union activity, even though other good reasons for the discharge existed, and there was no direct evidence that the action was taken because of the employee's participation in union activities. 29 The Supreme Court later held this practice of the Board to be improper. 30 If a discriminatory charge was alleged by the Board, however, and some evidence of union opposition had been presented, the employer then had the burden of

27 Arcadia Hosiery Company, 12 N. L. R. B. 467 (1939).
proving that the discharge was not a consequence of union activities. 31

Board decisions involving Section 8 (3) made it quite difficult for an employer to discipline his workmen who refused to obey orders. Employees could not be forced to take a job formerly held by a union official who had been discharged. This refusal to work was considered to be a union activity, and to discharge a worker for refusal to work in such an instance constituted discrimination against the employees because of their union membership. 32 Employees could not be discharged for threatening to strike to secure the discharge of an unpopular foreman. 33

An employer could be easily injured by inter-union warfare carried on by workers in his plant. For example, in a plant with two conflicting unions it would be a violation of Section 8 (3) for the employer to discharge members of a union involved in a jurisdictional strike in order to end the strike, even if the members of the other union continued to work. 34

32 Niles Fire Brick Company, 30 N. L. R. B. 426 (1941).
The problem of jurisdictional strikes caused by rival unionism was a very real problem to some employers. If the act created a problem for the employer, however, it can be observed by close study of the National Labor Relations Board decisions that the act was doing an efficient job of solving the union problem of employer interference in organizational attempts by employees. If any conclusion can be drawn from a study of the Board decisions, it is that the Board tended to interpret the act very broadly and became more effective in enforcing the principles of the act than even the drafters of the law could have anticipated.

An indication of the activity of the National Labor Relations Board can be gained by examination of the following statistics. During the period from 1936 to 1947, the Wagner Act years, the National Labor Relations Board was called upon to determine representatives for collective bargaining in 36,969 cases. Labor unions won lawful bargaining rights in 30,110 instances, and workers voted for "no union" in 6,859 cases. Slightly more than nine million workers were eligible to vote in representational elections. Of this total, 7,677,135 workers, 84 per cent, actually cast ballots. Votes cast for labor unions amounted to 6,145,834 and votes against unions numbered 1,531,301. These figures indicate the act

was successful in establishing an orderly manner for the selection of bargaining representatives. The law substituted the ballot box for industrial warfare. Workers in free elections were given the opportunity of selecting or rejecting the process of collective bargaining. The act established the principle of representative democracy in the nation's industrial life.

The number of organizational strikes that took place following the passage of the act is one standard to evaluate the results of the National Labor Relations Act. Approximately fifty per cent of all strikes which occurred during the 1934-36 period resulted from organizational disputes. These strikes involved about forty-three per cent of the workers who engaged in all strikes during this period. In comparison, in 1942, the first full year of World War II, organizational controversies caused only 31.2 per cent of all strikes. In subsequent war years, the organizational strike was even of less importance. In 1943 organizational disputes resulted in 15.7 per cent of all work stoppages; in 1944 they caused 16.3 per cent of all strikes; and in 1945 organizational disputes caused 20.5 per cent of all work stoppages. From the point of view of the number of workers engaged in strikes during the war years (1942-1945), work stoppages carried out

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for organizational purposes involved about 18.5 per cent of all workers engaged in strikes during this period.\textsuperscript{37} In the light of the organizational strike experience during the 1934-1936 period, it seems likely that in the absence of the effective operation of the National Labor Relations Act, organizational strikes would have been of greater comparative importance during World War II.

A comparison of the frequency of organizational strikes which took place during World War I with those which occurred in World War II might further indicate the extent to which the National Labor Relations Act succeeded in decreasing such work stoppages in the World War II years. During World War I, when there existed no agency similar to the National Labor Relations Board, it was reported that 314 strikes were caused by employers' refusal to recognize unions in 1917, and 221 such strikes took place in 1918. Expressed in a different way, recognitional strikes caused approximately 7 per cent of all the strikes in 1917 and about 6.5 per cent in 1918. On the other hand, in 1942, the first full year of World War II, only 169 recognitional strikes occurred and they accounted for only 5.6 per cent of all 1942 strikes.\textsuperscript{38}

The success of the act in decreasing the number of organizational strikes cannot be denied. The trend during

\textsuperscript{37}\textit{Ibid.}, Vol. 56, p. 973.  \textsuperscript{38}\textit{Ibid.}
World War II removed all doubt on the issue. Some people, however, contended that the act, though decreasing the number of organizational strikes, stimulated strikes for such non-organizational issues as wages, hours, pensions, vacations, and the like. Their argument ran along the following lines. Under the protection of the National Labor Relations Act, union membership increased, the union movement expanded into new areas, and union bargaining strength sharply increased. These circumstances increased the number of strikes for work and wage improvements. Unions became a much more powerful influence in our society and could make more demands, and strike to achieve these demands. Hence the act did not promote industrial peace. This argument, when closely analyzed, does not prove the act to be defective in any way. The act was not intended to do away with all types of strikes. It was enacted to reduce the number of organizational strikes and to encourage the growth of labor organizations for the purpose of collective bargaining. This it admittedly did. It is not fair to evaluate the National Labor Relations Act on the basis of the number of overall strikes arising during its operation. The only valid basis for evaluating its contribution to industrial peace is in the area of organizational strikes.

It is quite clear that the National Labor Relations Act did stimulate the growth of labor unions, which, it must be remembered, was one of the purposes of the act. Union
membership increased from four million in 1935 to about sixteen million in 1947.\textsuperscript{39} Under the protection of the act, the Congress of Industrial Organizations was able to organize the mass production industries on an industry-wide basis. The American Federation of Labor likewise undertook extensive organizational activities. Obviously, the Wagner Act accomplished its objectives of promoting collective bargaining. One might draw this conclusion from the many objections raised to the act, and the extreme hostility to the act exhibited by the enemies of trade unionism. One may disagree as to whether or not a large or small union movement is good or bad for society, the fact remains that during the period of the act labor unions grew in size and in power.

Other results of the National Labor Relations Act are possibly of greater significance. The act operated to increase the number of effective collective bargaining agreements. In 1946 the number of collective bargaining contracts in the nation totaled well over 50,000. In addition, during each year these contracts were re-written and re-signed in whole or in part. This was an increase of over 100 per cent in less than a ten year period.\textsuperscript{40} These figures indicate that industrial peace and not industrial warfare was the result of the collective bargaining process. By far the vast majority of

\textsuperscript{39}Ibid. \hspace{1cm} \textsuperscript{40}Ibid.
labor contracts were negotiated and signed without resort to the strike. Critics who found fault with the act for having given labor unions the ability to organize themselves and thereby achieving the economic power to strike in order to enforce their demands, either must choose to weaken the union, thereby making it impossible to strike, or must find some other methods of settling the dispute, such as governmental intervention or compulsory arbitration. This is still one of the thorny problems of our society.

It is noteworthy that the act stimulated such a great growth in the number of collective bargaining agreements. Moreover, it should be kept in mind that these contracts, once executed, provide the basis for peaceful and industrial relations for many years. Perhaps the biggest hurdle to industrial peace is the negotiation of the first collective bargaining contract between a particular union and company.

There is some reason to believe that the attitude of employers towards collective bargaining became more favorable during the National Labor Relations Act years. Some employers, of course, were forced into the collective bargaining process against their will. Many of them may not have found the experience as terrible as they might have expected it to be. Contacts with the unions, their leaders, and their techniques undoubtedly influenced some employers to change their point of view on the issue. In any event, the general attitude
of employers since the passage of the National Labor Relations Act have tended to be more broad-minded concerning union activities. Employers have come to recognize that unions in their collective bargaining process are here to stay, and that it is not an evil change, but actually quite a healthy one. The prevailing attitude of the more liberal employer today seems to be that bargaining between management and labor on an equal power basis is a desirable method of determining the share which each element of our society should have of total production.
CHAPTER VI

SUMMARY AND CONCLUSION

The American workingman's right to organize and bargain collectively was disputed for well over a century. In the early 19th Century, the courts, both state and federal, used the old conspiracy doctrine holding that the labor groups were in restraint of trade. In mid-century, in the case of Commonwealth v. Hunt, the use of this doctrine was immediately halted when a Massachusetts judge decided that a conspiracy could not be "criminal" unless the conspirators were plotting an illegal act. Within a few years the use of this doctrine to discourage union organization all but disappeared.

Again the courts posed a threat to the union movement. The courts decided under common law that certain kinds of contracts and agreements were illegal because they tended to restrain trade and create a monopoly. In conjunction with this concept, the Sherman Anti-Trust Act of 1890 was used to discourage union organization and activity.

An attempt was made in 1914 to exclude labor organizations from the anti-trust laws and exempt them from the court injunction used to prohibit certain union activities. However, because of conservative court decisions, this attempt failed.
The Norris-La Guardia Act, a forerunner of the New Deal legislation in this field, was the first significant advance made by labor. The use of the injunction was limited and the "yellow dog" contract was made unenforceable.

In an attempt to provide further aid to labor organizations, Senator Wagner and his followers passed certain experimental legislation in the form of the National Industrial Recovery Act and Public Resolution Number 44. This was thwarted both by the Supreme Court and the general unwillingness of the business community to abide by the legislation.

The National Labor Relations Act was the culmination of the gradual development of a favorable national policy towards collective bargaining. Along with the Norris-La Guardia Act and Section 7(a) of the National Industrial Recovery Act, the law served to encourage the expansion of the collective bargaining process and industrial unionism. Whereas the Norris-La Guardia Act prohibited the courts from taking sides in labor disputes, the National Labor Relations Act denied employers the opportunity to utilize their superior economic strength to contain and to destroy unionism. The fact that both acts succeeded is evidenced in the remarkable gains made by organized labor during the 1932-1947 period. Basically, the standard of evaluation of these two acts rests upon the merits of the collective bargaining process. Those
who feel that a strong labor movement, not a weak one, serves the public interest will find much to praise in these laws. Conversely, those who feel a weak, inept movement is in the interest of society will find much to criticize in these laws. Suffice to say that these laws had a tremendous influence on the balance between labor and management, and also, in a more indirect way, on the general economic structure of the nation.

Labor unions are the collective bargaining agencies. The process of collective bargaining does not exist apart from the trade union. Weakening of the union movement in the collective bargaining area would diminish the scope and intensity of the collective bargaining process. Both the Norris-La Guardia Act and the National Labor Relations Act rested upon the fundamental proposition that legal support was imperative for the effective operation of trade unionism and collective bargaining. The direction of public sentiment has been one of approval of the collective bargaining process from the earliest conspiracy case of 1806 to the enactment of the National Labor Relations Act. When the courts in early times frustrated the development and functioning of unionism, the legislative branch, sensitive to public opinion, took corrective action. When the courts again interfered with the activities of labor by diluting the legislation through interpretive methods, the legislatures, again because of public
sentiment, remedied the situation by legislative action. The public, through its legislature, showed its approval of the collective bargaining process with the passage of the Norris-La Guardia Act, Section 7 (a), and the National Labor Relations Act. These laws represented society's desire to establish a legal framework which would be conducive to the collective bargaining process.

Indeed, the growth of trade unionism and collective bargaining between the 1932-1946 period, along with the achievement of respectability by unions, was nothing short of being a cataclysmic change.
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MOHAWK VALLEY FORMULA

First: When a strike is threatened, label the union leaders as "agitators" to discredit them with the public and their own followers. In the plant, conduct a forced balloting under the direction of foremen in an attempt to ascertain the strength of the union and to make possible misrepresentation of the strikes as a small minority imposing their will upon the majority. At the same time, disseminate propaganda by means of press releases, advertisements, and the activities of "missionaries," such propaganda falsely stating the issues involved in the strike so that the strikers appear to be making arbitrary demands, and the real issues, such as the employer's refusal to bargain collectively, are obscured. Concurrently with these moves, by exerting economic pressure through threats to move the plant, align the influential members of the community into a cohesive group opposed to the strike. Include in this group, usually designated a "citizens committee," representatives of the bankers, real-estate owners, and business men, i.e., those most sensitive to any threat of removal of the plant because of its effect upon property values and purchasing power flowing from payrolls.

Second: When the strike is called, raise high the banner of "law and order," thereby causing the community to mass legal and police weapons against a wholly imagined violence and to forget that those of its members who are employees have equal rights with the other members of the community.

Third: Call a "mass meeting" of the citizens to co-ordinate public sentiment against the strike and to strengthen the power of the citizens' committee, which organization, thus supported, will both aid the employer in exerting pressure upon the local authorities and itself sponsor vigilante activities.

Fourth: Bring about the formation of a large armed police force to intimidate the strikers and to exert a psychological effect upon the citizens. This force is built up by utilizing local police, state police, if the governor cooperates, vigilantes, and special deputies, the deputies being chosen if possible from
other neighborhoods, so that there will be no personal relationships to induce sympathy for the strikers. Coach the deputies and vigilantes on the law of unlawful assembly, inciting to riot, disorderly conduct, etc., so that, unhampered by any thought that the strikers may also possess some rights, they will be ready and anxious to use their newly acquired authority to the limit.

Fifth: And perhaps most important, heighten the demoralizing effect of the above measures—all designed to convince the strikers that their cause is hopeless—by a "back-to-work" movement, operated by a puppet association of so-called "loyal employees" secretly organized by the employer. Have this association wage a publicity campaign in its own name and co-ordinate such campaign with the work of the "missionaries" circulating among the strikers and visiting their homes. This "back-to-work" movement has these results: It causes the public to believe that the strikers are in the minority and that most of the employees desire to return to work, thereby winning sympathy for the employer and an endorsement of his activities to such an extent that the public is willing to pay the huge costs, direct or indirect, resulting from the heavy forces of police. This "back-to-work" movement also enables the employer, when the plant is later opened, to operate it with strike-breakers if necessary and to continue to refuse to bargain collectively with the strikers. In addition, the "back-to-work" movement also enables the employer to keep a constant check on the strength of the union through the number of applications received from the employees ready to break ranks and return to work, such number being kept a secret from the public and the other employees so that the doubts and fears created by such secrecy will in turn induce still others to make applications.

Sixth: When a sufficient number of applications are on hand, fix a date for an opening of the plant through the device of having such opening requested by the "back-to-work" association. Together with the citizens' committee, prepare for such opening by making provision for a peak army of police, by roping off the areas surrounding the plant, by securing arms and ammunition, etc. The purpose of the "opening" of
the plant is three-fold; to see if enough employees are ready to return to work; to induce still others to return as a result of the demoralizing effect produced by the opening of the plant and the return of some of their number; and lastly, even if the maneuver fails to induce a sufficient number of persons to return, to persuade the public through pictures and news releases that the opening was nevertheless successful.

Seventh: Stage the "opening" theatrically, throwing open the gates at the propitious moment and having the employees march into the plant grounds in a massed group protected by squads of armed police so as to give to the opening a dramatic and exaggerated quality and thus heighten its demoralizing effect. Along with the "opening" provide a spectacle--speeches, flag-raising, and praises for the employees, citizens, and local authorities, so that, their vanity touched, they will feel responsible for the continued success of the scheme and will increase their efforts to induce additional employees to return to work.

Eighth: Capitalize on the demoralization of the strikers by continuing the show of police force and the pressure of the citizens' committee, both to insure that those employees who have returned will continue at work and to force the remaining strikers to capitulate. If necessary, turn the locality into a war-like camp through the declaration of a state of emergency tantamount to martial law and barricade it from the outside world so that nothing may interfere with the successful conclusion of the "formula," thereby driving home to the union leaders the futility of further efforts to hold their ranks intact.

Ninth: Close the publicity barrage, which day by day during the entire period has increased the demoralization worked by all of these measures, on the theme that the plant is in full operation and that the strikers were merely a minority attempting to interfere with the "right to work," thus inducing the public to place a moral stamp of approval upon the above measures. With this, the campaign is over--the employer has broken the strike.