THE LABOR RELATIONS ACTS-THEIR EFFECT ON INDUSTRIAL WARFARE

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A NEW phase in legal control of employment relations was inaugurated with the passage of the National Labor Relations Act¹ (hereinafter called NLRA or Wagner Act) on July 5, 1935. The act created a National Labor Relations Board (NLRB) which was empowered to achieve certain limited objectives and to resolve certain critical issues in the relations of employers and employees. Briefly, the purpose of the act was to secure to employees a freedom to organize and a right to collective bargaining. The procedure of the board was superimposed on a large body of statutory and decisional law, which the act was intended only to supplement and at certain limited points to modify. Quite emphatically the act does not, and was not intended to, overturn or change in wholesale fashion the previous state of labor law. Only on certain issues arising between employer and employee does the NLRA intrude itself.

The Wagner Act was not contrived in response to a need suddenly and newly felt in the domain of labor relations. As early as the wartime years of 1917 to 1919, tendencies towards the principles of freedom of organization and the right to collective bargaining are discerned. During the "back to normalcy" days of President Harding, government sponsorship of these principles was withdrawn, and they were largely forgotten. But in 1926 the Railway Labor Act² was passed, and four years later Texas & N. O. R. R. v. Brotherhood of Railway & Steamship Clerks³ was decided. That decision sustained contempt proceedings compelling the defendant railway to cease interfering with, in-

fluencing or coercing the clerical employees in the matter of their organization and designation of representatives, to disestablish a company-dominated union as bargaining representative, to reinstate the plaintiff union as bargaining representative and to reemploy certain discharged employees. This decision was a harbinger of things to come.

In 1933 the NIRA was enacted and with it the highly significant section 7(a). The National Labor Board (NLB), and the first National Labor Relations Board (old NLRB) following it, each produced a volume of decisions interpreting and applying section 7(a). With the unhappy demise of the NIRA on May 27, 1935, the decisions of the latter board came to an end. A little more than a month later Congress passed the NLRA, which confirmed and revitalized the principles developed by the earlier boards.

The purposes and mechanism of the NLRA have recommended themselves to the wisdom of five state legislatures. The state labor relations acts are modelled along lines similar to, if not identical with,

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5 15 U. S. C. (1935), § 707(a): "Every Code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing or assisting a labor organization of his own choosing. . . ."
6 Appointed Aug. 5, 1933. Because of the informality of the method of its creation the legal status of the NLB was in some doubt until the issuance of Executive Orders 6511 (Dec. 16, 1933), 6580 (Feb. 1, 1934) (elections by board approved) and 6612-A (Feb. 23, 1934) continuing and clarifying its powers and duties.
7 Created by Executive Order 6763 of June 29, 1934, which was issued pursuant to Public Resolution No. 44 of the 73rd Congress. 48 Stat. L. 1183 (1934).
LORWIN and WUBNIG, LABOR RELATIONS BOARDS (1935), contains a full account of the origins, development and effectiveness of the earlier labor boards.
11 The Utah act varies not at all from the national act. The Massachusetts law
the federal law. In the succeeding discussion the Wagner Act will be in the foreground and its sections continually referred to; it will be understood, however, that the analysis and comment is equally applicable to the state acts unless otherwise stated.

The new rights and privileges of labor are derived from sections 7, 8 and 9 of the Wagner Act. These sections have two aspects: section 7 and subsections (1), (2) and (3) of section 8 insure to the employees a freedom to organize; sections 8 (5) and 9 secure to the workmen's organization a right to recognition and collective bargaining. Freedom to organize is sought to be achieved by making it an unfair labor practice for an employer to foster or dominate a labor organization, to discriminate against employees because of their union activity or to do any other acts interfering with the rights of self-organization. As to the second aspect, the employer is declared guilty of unfair labor practice if he refuses to bargain collectively with the representatives chosen by a majority of employees in an appropriate unit. To remedy the effects of unfair labor practices the board is given important powers, which it has exercised with such vigor as to make it a storm center of current political controversy.

This article is addressed to the query whether the labor relations acts have any effect on the ends and means of labor warfare. During the hey-day of the NIRA, decisions may be found which indicated that industrial warfare for the objects within the regulatory power of the code authorities was unlawful. Strikes and picketing were enjoined where carried on for higher wages and hours, objects which were thought properly to be for code authorities to adjust. Those decisions were of dubious soundness, but they suggest an argument which may be advanced under the labor relations acts. The NIRA was of broader scope than the NLRA in assuming to prescribe terms and conditions of the employment relation, and an interpretation forbidding strikes for purposes which were subject to adjustment under the codes would in effect have outlawed strikes entirely. The NLRA does not assume to decide what the terms of a collective agreement shall be and only on specific issues—discrimination, refusal to bargain collectively, etc.—varies in making the sit-down strike an unfair labor practice ($8A$) and the Pennsylvania law in its definition of "labor organization" [$3 (f)$]. The New York and Wisconsin laws are more variously worded, and their differences from the federal act will be referred to where pertinent.

does it afford adequate relief. Hence a curtailment of the right to strike on these issues would be less drastic than in the cases mentioned above.

If unfair labor practices are adequately curbed and the consequences remedied through the labor relations acts, is not a strike against such practices unnecessary? And if unnecessary, should it not be regarded as unlawful as needlessly obstructing the channels of commerce? If it is not advisable to regard the strike or other warfare as unlawful, may the orders of the labor relations board be so designed as to discourage hostilities? Similar questions may be asked where a labor group wages industrial warfare for collective bargaining privileges. This issue is one which may be adjudicated by the labor relations board, and belligerent tactics are unnecessary. A different type of situation is presented when a minority group demands bargaining privileges of an employer who is dealing with representatives duly elected by the majority. The purpose of the minority takes on the hue of illegality. Should its warfare be enjoined?

These questions will be further particularized and appraised against the wider background of statutory and common law. The plan here followed will be to set forth the unfair labor practices and other issues given to the labor relations board to resolve. Then the orders which follow upon decisions and determinations will be examined with an eye to the effect upon them of a current or past strike. Finally, the case of warfare between employee groups will be investigated. What purposes and methods are left to a minority group after the majority has organized? Throughout all the discussion the anti-injunction laws will play a leading role and will call for extended analysis.

**Issues Determinable by the Labor Relations Boards**

Section 7 of the Wagner Act[^18] is a statement of principles that:

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

In section 8 it is made an unfair labor practice for an employer

> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[^14]


[^14]: In addition to subsections corresponding to NLRA, § 8(1), the Wisconsin and New York acts (cited note 10, supra) have subsections [§ 111.08(6) and § 704-1 respectively] making spying and surveillance of employees an unfair labor practice.
“(2) To dominate or interfere with the formation or administra-
tion of any labor organization or contribute financial or other
support to it. . . .

“(3) By discrimination in regard to hire or tenure of employ-
ment or any term or condition of employment to encourage or dis-
courage membership in any labor organization; [15] Provided,
That nothing in this Act . . . shall preclude an employer from
making an agreement with a labor organization (not established,
maintained, or assisted by any action defined in this Act as an
unfair labor practice) to require as a condition of employment
membership therein, if such labor organization is the representa-
tive of the employees as provided in section 9(a), in the appropri-
ate collective bargaining unit covered by such agreement when
made.

“(4) . . . [16]

“(5) To refuse to bargain collectively with the representa-
tives of his employees, subject to the provisions of Section 9(a).” [17]

Tying in with section 8(5) is section 9(a):

“Representatives designated or selected for the purposes of
collective bargaining by the majority of the employees in a unit
appropriate for such purposes, shall be the exclusive representa-
tives of all the employees in such unit for the purposes of collec-
tive bargaining in respect to rates of pay, wages, hours of employ-
ment, or other conditions of employment. . . .”

In section 9(c) the issue of representation is provided for in the
declaration that

“Whenever a question affecting commerce arises concerning
the representation of employees, the Board may investigate such
controversy and certify to the parties, in writing, the name or
names of the representatives that have been designated or selected.”

In such investigation, use of a secret ballot may be made.

Before a finding that section 8(5) has been violated can be made

blacklisting an unfair labor practice and in § 704-4 forbids the yellow dog contract
and compelling a would-be employee to join a company-dominated union. These sub-
sections are in addition to § 704-5 which corresponds to § 8(3) of the Wagner Act.

The Wisconsin law (cited note 10, supra) in addition to § 111.08(3) which cor-
responds to the discrimination subsection of the NLRA, has a subsection, § 111.08 (7),
declaring blacklisting an unfair labor practice.

[16] Discrimination against an employee because he has filed charges or given
testimony under the act is made an unfair labor practice by this subsection.

[17] The New York act (cited note 10, supra) in addition makes it an unfair labor
practice to refuse to discuss grievances with representatives of employees. § 704-7.
and before certification pursuant to section 9(c) can issue, the board must determine that the unit in which the union claims a majority is appropriate. Section 9(b) directs the board to

"decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

Labor difficulties occasioned by unfair labor practice may be resolved by the institution of complaint proceedings. Charges may be filed by an employee or labor organization, and if they seem reasonably grounded, a complaint will issue. After evidence is taken before an examiner, findings will be made by the NLRB and appropriate orders issued. The remedy is governed by section 10(c), which states that

"the Board shall . . . issue and cause to be served on such person [the employer] an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order."

The object of the board's orders may be succinctly described as the bringing about of the state of affairs which would have obtained had not the unfair labor practices occurred.

18 The unit has been restricted in extent to one employer, and fears that the unit might cut across the plants of several employers have been unfounded. See 79 Cong. Rec. 10298-10299 (1935); McAfee, "The Wagner Labor Act—A New Deal in Labor Relations," 23 A. B. A. J. 523 (1937).

The New York act (§ 705-2) uses the language, "employer unit, craft unit, plant unit or any other unit." The expression in the Wisconsin act is similar [§ 111.09(2)]. Full citation of statutes in note 10, supra.

19 NLRA, § 10(b): "Whenever it is charged that any person has engaged in or is engaging in such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue . . . a complaint. . . ." N.L.R.B. RULES AND REGULATIONS, Series I as amended, art. II, § 1 (1936), permits "any person or labor organization" to bring a charge. See further art. II, § 37.

The Wisconsin act and rules and regulations are more precise in using the language "any employee or labor organization." Wis. Stat. (1937), § 111.10(2); Wis. L.R.B. RULES AND REGULATIONS, art. II, § 1; CCH LABOR LAW SERVICE, § 13,102.

20 The New York act has a more complete enumeration of possible courses of action on the part of the board after a finding of unfair labor practice. N. Y. Labor Law, § 706-3. But the NLRB has assumed all of them.
To be distinguished from the complaint proceeding, which is directed at the elimination and remedy of unfair labor practices, is the petition for investigation and certification. It may be filed by an employee or his representative. A single labor organization may be involved, in which case the employer may be challenging the fact of representation of a majority or the appropriateness of the unit in which the petitioning organization claims a majority. Or the employer may simply be unwilling to undertake bargaining unless the representative is certified by the board, thereby a “question affecting commerce arises concerning the representation of employees.” Frequently there appear conflicting claims of two (or more) unions to the right of representation of employees in a unit. Either or both may file

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21 Section 9(c) of the NLRA, quoted at p. 1241, supra. N.L.R.B. RULES AND REGULATIONS, Series I as amended, art. III, § 1 (1936): “A petition requesting the Board to investigate and certify under Section 9 (c) of the Act . . . may be filed by any employee or any person or labor organization acting on his behalf . . . .” Ibid., art. III, § 10: “Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may—(a) permit a petition requesting an investigation and certification to be filed with it . . . (b) upon its own motion conduct, or direct any member, Regional Director, or other agent or agency to conduct an investigation under Section 9 (c) of the Act . . . .” These sections of the act and of the Rules and Regulations indicate that the NLRB could, if it chose, call an election on its own motion or on request of an employer. But cf. “The reason for the exclusion of employers is that the Board felt that employers might otherwise take advantage of the Board’s power to investigate under conditions which would frustrate rather than effectuate true collective bargaining.” N.L.R.B. FIRST ANNUAL REPORT 26 (1936).

Section 705-3 of the New York act (cited note 10, supra) states that the board “shall” investigate on petition of an employee or his representative and that it “may” investigate on allegations of an employer or his representative. Section 705-4 goes on “Provided, that no election shall be directed by the board solely because of the request of an employer or of employees prompted thereto by their employer . . . .” The New York Rules and Regulations permit a petition to be filed by “any employee or any person or labor organization acting on his behalf or by an employer” (art. III, § 1) and prescribe the form of petition by the employer (art. III, § 3). To a recent date no election has been called on the lone petition of an employer because of the proviso to § 705-4. 1 LABOR RELATIONS REPORTER 499 (1938) (hereafter cited as L. R. R.).


petitions, and a comparison of membership lists or an election by secret ballot will settle the issue. Coercion of employees by employee groups is relevant with respect to the desirability of holding an election. In all elections the employees are afforded the choice of voting "against" the only representative appearing on the ballot, or for "neither" if two (or more) labor organizations are competing.

The critical points at which employment relations may become strained and which are remediable through the procedures of the labor relations acts have been enumerated. There remains the task of delineating more sharply these remediable issues. The unfair labor practices of discrimination, interference with and domination of labor organizations, and other activities undermining the tenets of section 7 of the NLRA call for application of the statute to a multitude of varying fact situations. No attempt will be made to chart the course of that application. Suffice it to say that the NLRB has drawn within the scope of the act every conceivable activity and machination of the employer designed to thwart or impede the right to organize. So far as the issue of who is entitled to the right of representation depends on appropriateness of unit and the fact of majority support, no further elaboration is called for. In the right to collective bargaining, however, a problem in interpretation is encountered. What did Congress (and the legislatures) intend to be the bounds of this right as a matter of substantive law? In order to understand more fully the issue whether or not the duty to bargain collectively has been satisfied—an issue entrusted for decision to the labor relations boards and which therefore theoretically is done with the necessity of strike to resolve it,—certain decisions explaining the nature of the right to collective bargaining must be examined. The inquiry will be pursued beyond the point at which the right to collective bargaining is realized. Space will be devoted to the contract resulting from collective bargaining, and its applicability to a new majority group emerging from the employee body.

28 N. L. R. B. SECOND ANNUAL REPORT 58-79 (1937), catalogs many of these activities.
29 Factors entering into the appropriateness of a unit are discussed in 12 Wis. L. REV. 367 (1937); N. L. R. B. SECOND ANNUAL REPORT 122 et seq. (1937).
THE RIGHT TO RECOGNITION AND COLLECTIVE BARGAINING

The right to collective bargaining secured by section 8(5) of the Wagner Act is a new right unknown to the common law. It implies a right of recognition of an organization or person as representing the employee group. At common law the labor group might strive for these privileges, but assuredly the employer was not obliged to yield. In fact, it appears that in some jurisdictions injunction might be had against labor activities directed to the end of securing recognition of a union as bargaining representative of the employees. The purpose was unlawful as an unwarranted infringement of the employer’s right to deal with his men individually. To be contrasted with this attitude are the words of Chief Justice Hughes with respect to the NLRA:

“The provisions of section 9(a) that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute. . . . We said [in Virginian Ry. v. System Federation] that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the Government, the injunction against the Company’s entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was ‘designed only to prevent collective bargaining with anyone purporting to represent employees’ other other the representatives they had selected. It was taken ‘to prohibit the negotiation of labor contracts generally applicable to employees’ in the described unit with any other representative than the one so chosen, ‘but not as precluding such individual contracts’ as the company might ‘elect to make directly with individual employees.’ We think this construction also applies to section 9(a) of the National Labor Relations Act.

“The Act does not compel agreements between employer and employees. It does not compel any agreement whatever. 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.’

80 OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS, §§ 294, 295, 615 (1927).
81 300 U. S. 515, 57 S. Ct. 592 (1937).
The principle of majority rule stated in the Chief Justice's opinion was first established in the celebrated Houde case and was the starting point of much contention. But it now seems clear that any other rule of representation, such as proportional representation or representation of minorities, leads only to dissension and is impracticable.

The NLRB has definitely advanced beyond the Chief Justice's conception of the duty to bargain collectively. Close reading of the paragraphs quoted seems to indicate, although not without ambiguity, that if the employer negotiates generally, he must do so with the majority representatives exclusively, but that the employer may choose to bargain only individually. Under the board's interpretation the minimum threshold is not reached except there be a willingness to enter into a collective agreement. The employer may not, in opposition to the majority's demands for a collective contract, hold out for the privilege of bargaining individually with his employees. This privilege could be granted by the representatives of the majority, but in effect the concession would be a decision not to bargain collectively. Further, if and when terms and conditions of employment are agreed to, the duty to bargain collectively includes and requires a willingness to incorporate them into a binding agreement. "The term collective bargaining denotes in common usage, as well as in legal terminology, negotiations looking toward a collective agreement" if and when terms are settled upon. It is not sufficient for the employer to agree to demands and to make publication of that fact but without entering into any agreement with the union representing the majority concerning those demands. Such concessions partake of the nature of gratuitous grants revocable at pleasure; they do not have the elements of

33 1 Old N. L. R. B. 35 (1934).
duration and liability which are characteristic of contract. By implication they are in derogation of the right and capacity of a representative of the majority to enter into contract—the proper end of collective bargaining—and are damaging to the representative's prestige. While many collective agreements are subject to termination and negotiations for modification on notice of a certain time, still they are enforceable in many jurisdictions and represent a stability of tenure and terms; manifestly they more fully round out the right to collective bargaining than do concessions which are that and nothing more.

Whether a refusal to put the contract in writing is a violation of section 8 (5) should be determined by the reasonableness of that requirement in making its terms definite and certain. Generally, a writing is not requisite to the validity and enforceability of a collective contract. But where the terms are long and involved and are to be binding for a substantial period, it has been squarely held that a refusal to set them down in writing is violative of the duty to bargain collectively. If collective bargaining looks to agreements, it looks to those whose terms can be proved. If a statute requires a writing for enforceability, it should be a condition to the full satisfaction of the duty to bargain collectively.

There is a view prevailing in some courts that a collective contract is unenforceable either because it is a mere "gentlemen's agreement" establishing a usage or because an unincorporated union has no standing in court as plaintiff. In such jurisdictions what is the effect of an order of the board that a written, "binding" agreement be entered into if and when terms are settled upon? Two answers are possible. The law in the jurisdiction may continue unmodified, and the written, "binding" agreement remains unenforceable. Such an answer reduces the benefit of the order to a psychological and moral one. This is not to say that the benefit is insubstantial; a "gentlemen's agreement" in the form of a


42 A contract lasting for a greater period than one year might fall within the statute of frauds.

written contract recognizes the union as bargaining representative of the men, is certain in the terms of the usage or custom established, and lends itself to the sanctions of public opinion. A second answer is to say that the federal law and NLRB orders have brought into being contractual rights and duties which must be assimilated and enforced by the local common law. In effect, the common law of the state may be changed with respect to collective agreements between employees and employers subject to the act. This answer is fraught with far-reaching possibilities. The possibilities may not eventuate because the recent trend of the courts is to recognize as valid, and to enforce, collective agreements.44

Before the duty to come to a binding agreement, oral or written, attaches, the terms thereof must be settled upon. As to them the employer and the majority representatives are left to their own devices. But the employer's reply to demands may not be a bare refusal unaccompanied by explanation or attempt to compose differences. The board has repeatedly said that the employer must in good faith sit down with the representatives and negotiate—setting forth reasons and arguments upon which its asseverations of inability to meet demands are based.45 The good faith requirement having been met by the employer in his negotiations, the issue, if not settled, will be decided in a contest of strength. Behind the demands of the labor representatives is the threat of strike and industrial warfare; on the side of the obdurate employer is his power to withhold employment. In this area there are immense possibilities of conflict—conflict which the labor relations law is not intended or drawn to touch. The issues susceptible to decision and order by the labor relations board are narrow in comparison with the fields of controversy in which a contest of strength is the only ultimate mode of solution.

There is some color to the complaint that section 8 (5) tends to unilateral compulsory agreement.46 The proposition is that on demand the employer must make some concessions in order to show a bona fide attempt to bargain collectively, while the labor group is free to reject all concessions, to insist on full satisfaction of demands, and to back up that insistence with a strike. It has been said that, "If A is compelled to negotiate with B and must contract, but B is not only free

44 See articles cited note 43, supra.
from compulsion but is expressly informed that he is at liberty to reject any proposal of A, that which A does in pursuance of the compulsion cannot properly be called bargaining. A has lost his freedom of contract.” This argument does not accurately picture the employer’s situation. He is required to make no concession at all if he makes a bona fide attempt in negotiation to show why he is unable or unwilling to accede to demands. Possibly this is the meaning of Chief Justice Hughes’ dictum that the act “does not compel any agreement whatever.” Good faith bargaining frequently resulted in an impasse and strike before the labor relations acts were passed. Such occurrences now are no more unilateral compulsory arbitration than they were then. Likewise, the argument that the closed shop is inevitable under the NLRA is based on the mistaken assumption that some concession must be made on demand for it. The labor board has not presumed in any case to say where the merits are on this issue, and after negotiations fail the ultimate settlement must come from a contest of strength.

No doubt there are matters in which labor cannot be said to have a legitimate interest, and to them the right to collective bargaining will not extend. Also, there would seem, on principle, to be no duty to bargain collectively with respect to an illegal term or condition. Could an employer enter into contract giving to the majority group terms preferring it as against the minority? Or would the employer be violating section 8 (3) of the NLRA in so doing? The House Committee Report on the NLRA says:

“Since the agreement made will apply to all, the minority group and individual workers are given all the advantages of united action. And they are given added protection in various respects. ... Second, agreements more favorable to the majority than to the minority are impossible, for under section 8(3) any discrimination is outlawed which tends to ‘encourage or discourage membership in any labor organization.’ ...”

On the other hand, the proviso to section 8(3) permits a closed shop agreement with a majority group, thus very effectively discriminating against the minority group. The express authorization (except as

48 See 4 UNiv. CHI. L. REV. 97 (1936).
50 “Any [collective bargaining] agreement reached in conformity with this decision must apply alike to all employees of the company.” Matter of The Denver Tramway Corp., 1 N. L. B. 64 (1933).
prohibited by state law) of the closed shop contract, with its absolute exclusion of non-members from employment, might be said to permit discriminative contractual terms, which likewise aim at discouragement of any attempt to remain outside the majority group. However, the conclusion must be that the closed shop in favor of the majority group is the only form of discrimination saved by the proviso to section 8(3).

When a collective contract on behalf of all the employees without discrimination has been entered into, may individuals or minority groups negotiate for special agreements? If such agreements are foreclosed, industrial warfare to compel them may well be held unlawful as being contrary to the purposes of the NLRA, and injunction may issue. Attention will therefore be turned to the extent to which minority groups and individual employees may contract. If restrictions are found, consideration of the duration of the collective bargaining agreement during which they are operative will be pertinent.

The initial proposition is that the employer is under no duty to bargain collectively with a minority representative, and this is true if no labor group has attained majority status or the majority of the employees are unorganized. The employer may voluntarily enter into a collective agreement with a minority, but that privilege is qualified. If no majority group is organized, the agreement must extend its benefits to all. Otherwise, the employer lays himself open to the charge of having violated section 8(3). If a majority group is organized, again the agreement may not prefer the minority in its terms. Further, the development seems likely that where a majority organization assumes to bargain collectively, a minority group cannot bargain collectively or enter into contract with the employer concerning any subject; to do so would be to impugn the representative character of the majority organization and to violate section 8(5). The Chief Justice's remarks in the *Laughlin* case indicate that in bargaining

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62 The contract with the minority organization may have a fatal defect from its inception if the organization is company-dominated or is independent but fostered and encouraged by the employer. In either case on complaint the contract may be dissolved and decreed of no effect. Consolidated Edison Co. v. National Labor Relations Board, (C. C. A. 2d, 1938) 95 F. (2d) 390 (independent union); Matter of The Jacobs Bros. Co., Inc., 5 N. L. R. B., No. 87 (1938) (company union); Matter of Titan Metal Mfg. Co., 5 N. L. R. B., No. 81 (1938) (company union). In cases of this type, no majority group has been organized, or if it has, it has no contract.

collectively the employer is under a duty to deal with the representative of the majority and none other. It is conceivable that a minority group would be permitted to bargain collectively with respect to a subject not embraced in the majority union’s contract or with respect to special circumstances or conditions in which the minority works. But the benefits from such collective bargaining must not work discrimination in favor of the minority group.

Nothing in the Wagner Act prevents individual employees from having special contractual arrangements improving the terms of the collective agreement. But employees so favored may not be selected in such a manner as to discriminate between union and nonunion men. The collective contract will probably set a standard below which the individual contract may not fall. 54

A perplexing problem is posed when a contract has been negotiated with a union representing a majority and subsequently the bulk of the employees change their affiliation to another organization. Does the contract continue or must the employer enter into new collective bargaining negotiations? If the contract had been entered into with a union cultivated by unfair labor practice, the new majority group would seem clearly to be entitled to collective bargaining privileges. This follows from the relief which would have been afforded on complaint against the employer. If the organization was company-dominated, recognition of it would be ordered withdrawn, its representative character disestablished and its contract rendered of no effect. 55 On an election of representatives it would be denied space on the ballot. 56

54 This development is evident in suits by individual employees on the basis of the collective contract. The so-called “normative” aspect of the collective agreement has yet to be elaborated into its fuller implications. For modern tendencies, see Anderson, “Collective Bargaining Agreements,” 15 Ore. L. Rev. 229 (1936). For an exposition of the German development of the “normative” feature of collective agreements before the Hitler regime, see Fuchs, “Collective Agreements in German Law,” 15 St. Louis L. Rev. 1 (1929).


The New York act (Labor Law, § 705-6) and the Wisconsin act [Stat. (1937), § 111.09(3)] expressly deny a company-dominated union a place on the ballot.
independent union fostered and encouraged by the employer to another organization's detriment would be treated somewhat differently. Its contract might be nullified.\textsuperscript{57} But usually the holding of an election, after a lapse of time sufficient for the effects of the unfair labor practice to be dissipated, is deemed adequate remedy.\textsuperscript{58} The independent union unfairly encouraged by the employer is put on the ballot,\textsuperscript{59} and if it loses to another union its contract is of no effect.\textsuperscript{60} Where a bona fide union had a majority before the commission of unfair labor practices—whether by dominating a company union or encouraging unduly another independent union or otherwise—the order on complaint will compel the employer to bargain collectively with it even though there may be doubts as to its present majority status.\textsuperscript{61} In such manner only will the condition of affairs obtaining before the commission of unfair labor practices be re-established.

Assuming that the contract of the majority representative is not vitiated by any of the above-mentioned considerations, what happens if during its life the employees by a majority change their loyalties? In \textit{Matter of Hubinger Company}\textsuperscript{62} an association had been certified as representative of the employees in 1935. A collective contract was entered into which was to last until January 1, 1938. Half a year before the date of its termination a union called a strike for exclusive bargaining privileges. In the election which followed, the union was certified as representative of the majority. Nothing was said about the effect of the new certification on the contract previously negotiated. The question suggested in these facts is whether or not the employer was under a duty to enter into collective bargaining negotiations immedi-

\textsuperscript{57} Consolidated Edison Co. v. National Labor Relations Board, (C. C. A. 2d, 1938) 95 F. (2d) 390.
\textsuperscript{62} 4 N. L. R. B., No. 31 (1937).
ately, with a view to reaching an agreement which should change and abrogate the terms of the old contract.

In Matter of M. & M. Wood Working Company 63 a closed shop contract was negotiated with an A. F. of L. local. Subsequently an overwhelming majority of the employees decided to affiliate with the C. I. O. and organized a new union. The men did so and purported to adopt the contract previously negotiated. Later a small group of the employees reorganized the A. F. of L. local. The employer, pursuant to the original closed shop contract, discharged all his employees who had changed their affiliation from the A. F. of L. to the C. I. O., and the board found this a violation of section 8 (3). It rested its conclusion on the view that the contract was made with the local union and not with the national organization. The statement of affiliation in the contract was but descriptive. The local union was held to have gone out of existence in the mode prescribed by the A. F. of L. charter, and thereupon the contract expired and furnished no justification for the discharges. But the board intimates another ground for the decision:

"We are of the opinion that either . . . [the C. I. O. union] succeeded to the rights of [the old A.F. of L. union] under the contract, in which case only membership in the . . . [former] was required, or, . . . [the old union] being extinct, the contract provision was no longer in force." 64

Elsewhere in the opinion the board explicitly disclaims deciding the status of a valid contract where the majority of members of the local with which the contract was made withdraw and join another union. Opposed to the holding of the case is the reasoning of a federal decision 65 involving the same parties. There the employer sought injunction against picketing by the C. I. O. local. It was denied because the requirements of the Norris-LaGuardia Act were not met, but the court declared unequivocally that the employer was within his rights in discharging the C. I. O. men. The contract was considered as existing with an A. F. of L. union.

Courts in general would probably be inclined to adopt the views expressed by the federal court. 66 In Pennsylvania the labor relations board was declared in error in deciding that the respondent was guilty

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63 6 N. L. R. B., No. 55 (1938).
64 Ibid., at p. 11.
66 See 1 L. R. R. 647 (1938).
of unfair labor practice in firing its employees, all of whom had des­
serted the A. F. of L. union, with whom it had a closed shop contract,
for the C. I. O. On the other hand, cases are appearing which look
behind the union veil and declare that a labor organization is but repre­
sentative of a body of employees who are the real parties in interest.

Strong doubt may be expressed whether the NLRB will adhere
to the doctrine that a collective bargaining contract belongs to an
entity, the union, apart from the men. The theory of the Wagner
Act is that representatives selected by a majority bargain on behalf of
a collectivity, all the men, and analogies drawn from the principal-
agent situation suggest themselves. A contract fairly entered into by
the bargaining agent should be binding on the employees as well as the
employer. Therefore, on a change of bargaining agent by a shift in the
allegiance of the majority of men, the contract should continue, valid
and enduring. To be read into the contract is the name of the new
representative instead of the old. That employees realize that the
agreements entered into by their former representatives should in fair­
ness to the employer subsist is illustrated by cases in which employees
petition for election of new representatives to bargain for a new con­
tract after the present one expires. More difficulty is occasioned by a
closed shop provision in the contract negotiated by the old representa­
tive. Consistent with this analysis, it should subsist, but with the new
organization or employee group the beneficiary of its terms. Or perhaps
the provision might be said to be impliedly dependent on the con­
tinuance of the old representative and to have been annulled by the
emergence of a new majority group.

If certification had a definite period of duration, that fact might
reinforce the validity of a contract entered into by certified repre­

67 Pennsylvania Labor Relations Board v. Red Star Shoe Repairing Co., Inc.,
to decree dismissed 2 L. R. R. 387 (1938).
68 Cassetana v. Filling Station Operators Union, (Cal. Super. Ct.) 1 L. R. R. 516
(1938), is a case indicating that employees should be allowed to change their
affiliations without losing the benefit of contracts negotiated in their behalf. There the
court held that the majority of employees who had been discharged in accordance
with a closed shop agreement with an A. F. of L. union because they had joined the
C. I. O. could not be restrained from picketing for their "wrongful" dismissal.

See also World Trading Corp. v. Kolchin, (Sup. Ct.) 2 N. Y. S. (2d) 195
(1938). Recently the NLRB and staff called a conference to discuss with C. I. O. and
A. F. of L. officials the problem arising when employees shift their loyalties: 1 L. R. R.
551 (1938).
69 Matter of Novelty Slipper Company, 5 N. L. R. B., No. 40 (1938); Matter of
Des Moines Steel Co., 6 N. L. R. B., No. 80 (1938).
sentatives who later lose their majority following. While a certification
at the hands of the NLRB has no definite duration, the rules and
regulations of the New York board give it effect during a period of
one year in the absence of special circumstances. Whether such a rule
limits a certified organization in the time for which it may contract, or
whether it may contract for a longer time only conditionally, or
whether the contract for a longer period if entered into fairly will bind
its successor, are questions which must be left for future decision. The
last alternative seems the correct one in the light of the analysis above.

THE RIGHT TO STRIKE SAVED

Section 13 of the NLRA states that “Nothing in this Act shall be
construed so as to interfere with or impede or diminish in any way
the right to strike.” Even without this reservation the chances are
exceedingly remote that the right to strike for the advancement of
labor’s interest in higher wages, shorter hours or improved working
conditions could have been construed out of existence. The act pro­
vides no way of resolving the merits of a demand for higher wages
(or other more advantageous terms) after bona fide negotiations fail,
and to construe out of existence the right to strike would be to deprive
the employee group of all effective pressure in securing its demand.
However, the act does resolve certain issues. If it is charged that the
employer has interfered with organizational activities, process of the
board affords a remedy. If the fact of representing a majority of
workers in an appropriate unit is denied, the board can determine the
issue. If it is charged that the employer has not fully satisfied the duty
to bargain collectively with the majority representatives, the board
will decide and make proper order. As to each of these issues there
is plausibility in an argument that a strike on their account is unnec­
essary and outlawed. Wherefore section 13 has its raison d’être. The

labor relations cases applying this rule are discussed in 1 L. R. R. 555 (1938). See 51
Harv. L. Rev. 520 (1938).

71 The New York act adds “or [to] engage in other lawful, concerted activities.”
N. Y. Labor Law, § 713. The Wisconsin statute adds “or to deprive any party to a
labor dispute as defined in this chapter and in [the anti-injunction law] of the rights,
benefits and protection of . . . [the anti-injunction act].” Wis. Stat. (1937), § 111.17.
Reinforcing the New York section is § 706–5: “The board shall not require as
a condition of taking action or issuing any order under this article, that employees on
strike or engaged in any other lawful, concerted activity shall discontinue such strike
or such activity.”
right to strike on all of these issues is saved so far as the Wagner Act is concerned. 72

If section 13 is not sufficient to safeguard the right to strike, the Norris-LaGuardia Act 73 may be called into play to prevent equitable process issuing against the strike or other forms of industrial warfare. Fourteen states, including all five of those having labor relations acts, have enacted anti-injunction laws. 74 In plan they are all substantially similar, and the federal act may be examined as typical.

Section 7 of the Norris-LaGuardia Act withdraws jurisdiction from the federal courts to issue injunctions, except on stringent conditions, "in any case involving or growing out of a labor dispute." Section 13(a) of the act declares that:

"A case shall be held to involve or to grow out of a labor dispute [I] when the case involves persons who [i] are engaged in the same industry, trade, craft, or occupation; [ii] or have direct or indirect interests therein; [iii] or who are employees of the same employer; [iv] or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) . . . ; (3) between one or more employers or associations of employees and one or more employees or associations of employees; [II] or when the case involves any conflicting or competing interests in a 'labor dispute' . . . of 'persons participating or interested' therein . . . ."

By section 13(b) a person or association is one "participating or interested" in a labor dispute

"[I] if relief is sought against him or it, and [2] if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, [2ii] or has a direct or indirect interest therein, [2iii] or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

Read into section 13(a) and (b) is the definition of "labor dispute" found in section 13(c). The term, says section 13(c),

"includes any controversy concerning [i] terms or conditions of employment, or [ii] concerning the association or representation of persons... [in collective bargaining], regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Cursory reading of these definitions will convince one that practically every case of controversy between an employee organization and employer brought into federal court is subject to the anti-injunction law. If the Norris-LaGuardia Act is applicable and all conditions to the attaching of jurisdiction are satisfied, then section 4 prohibits restraint being imposed on striking, boycotting, peaceful picketing, peacefully inducing customers not to patronize plaintiff, and peacefully inducing persons not to work for plaintiff. The net effect of the act is that the injunction is hard to get, and when obtained, is considerably circumscribed as to persons and acts restrained. No wonder, then, that a plaintiff will attempt to locate his dispute outside the definitions of the act. If he is successful in so doing, the court will fall back on common-law doctrine, which is more sympathetic to the employer than the policy of recent labor statutes.

Two artifices have been utilized to escape the all-embracing definitions of the anti-injunction laws. In the first place, interpretation of the definitions in the acts, particularly that of "labor dispute," has been employed; but this tendency in the federal decisions has been checked by the Supreme Court of the United States. In the second
place, if the object of the industrial warfare is illegal, the immunities of the acts may be withdrawn. The court thereby reads into the definition of "labor dispute" a requirement that it be for a lawful purpose. Earlier the bargaining of a majority group for terms preferring it as against a minority group (otherwise than by closed shop) was adverted to as resulting in a violation of section 8(3) of the NLRA on the part of the employer. And this would seem to be true if the employer were coerced into such preferential terms by threat of strike. Could the employer enjoin the proposed strike as being for a purpose forbidden by the Wagner Act? Section 13 of that act forbids its construction in such a way as to "interfere with or impede or diminish in any way the right to strike." The employer's argument would construe a duty not to ask or strike for preferential terms, and section 13 seems applicable. But it is arguable that the right to strike is saved with respect to the primary issues settled by the NLRB, and that the act would be inconsistent with itself in allowing labor warfare for purposes contrary to its own mandate. If the force of section 13 is escaped, the Norris-LaGuardia Act remains a seemingly impregnable barrier to injunctive relief. The parties concerned meet the definitional requirements of the matter following the brackets and parentheses [I], [i] or [ii], and (i) in section 13(a); or [II] in section 13(a) and [I], [2i] or [2ii] in section 13(b). As to section 13(c), the dispute in the case put is concerned with terms and conditions of employment. But the purpose being in the face of NLRA, section 8(3), is illegal, and the dispute may possibly be excepted from the language of the Norris-LaGuardia Act on that account. Of course, the Norris-LaGuardia Act says nothing of illegality of purposes, but the phenomenon of judicial reading in of exceptions to plain language is not unheard of in Anglo-American jurisprudence. The plight of the employer in this case, if no injunction issues, is not as harsh as it may appear at first glance. As a practical matter, the type of preferential


78 Scavenger Service Corp. v. Courtney, (C. C. A. 7th, 1936) 85 F. (2d) 825; Falciglia v. Gallagher, 164 Misc. 838, 299 N. Y. S. 890 (1937); and see cases cited note 77, supra.

treatment which is invariably struck for by a majority group is the closed shop; and that, so far as the Wagner Act is concerned, is a legal purpose.

**The Orders of the Labor Relations Boards as Affected by Strike**

Petitions for investigation and certification of representatives are often filed after a strike for collective bargaining privileges has been instituted. Such strike may be called by the only union claiming such privileges, or rival unions may be waging industrial warfare, and one or more may file petitions. The fact of the strike or threat of strike is one reason for a finding that a “question affecting commerce” has arisen concerning representation of employees, thus calling into play the board's powers of investigation. Often the strike call is rescinded pending the outcome of the election. But hostilities need not cease, and they often continue up to and during the hearing, if not during the election itself. The order of the board for election has been framed similarly whether or not there is a strike past or current. Thus, the order of the board has often been totally without effect in discouraging strikes on the issue of majority representation in an appropriate unit. As a matter of fact, strikes have been called on this issue after proceedings have been commenced.

After the investigation proceeding has been completed, industrial warfare may not end. If a representative is certified, the opposing organization may nevertheless continue hostilities. The complex problems of minority rights and privileges put in their appearance here,

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85 This statement does not necessarily carry with it an indictment of the board. By far the majority of labor cases brought before the regional directors are adjusted without formal proceedings. See N. L. R. B. SECOND ANNUAL REPORT 20, 25 (1937).

but their discussion will be postponed. If no representative is chosen, the organizations revert to the positions they were in before proceedings were started. There seems to be nothing in the act to prevent organizations which are in a minority from waging industrial warfare for representative privileges and other objectives proper at common law where no majority representative has been certified.

If no certification proceedings have ever been commenced, in the interest of industrial peace an organization claiming exclusive bargaining privileges should resort to the procedures of the labor relations acts. But there seems to be no duty to do so, and the right to strike on this issue seems to be saved by section 13 of the NLRA. If there is no objection to an admitted minority group striking for collective bargaining privileges where no majority representative has been certified, groups which claim majority without recourse to the labor relations acts would seem to be able to do likewise.

Contrary reasoning may be found in *Charles Cushman Co. v. Mackesy.*\(^87\) There what was found by the Maine court to be a minority union was restrained from striking and picketing for exclusive representation and the closed shop largely on the basis that until the NLRB was resorted to the defendants had no cause to wage industrial warfare. Said the court:

"[The striking union] . . . should have proceeded in the usual and regular and peaceful method provided under the Wagner Act to be certain that they had a majority of the employees in each plant before going to the manufacturers and be ready to demonstrate to the manufacturers that they did have that right before calling a strike."\(^88\)

The decision is discountenanced in an NLRB decision\(^89\) which certifies the "minority" union and asserts that strikes are not outlawed even though the procedures under the Wagner Act are not resorted to or exhausted. What the Maine court did was to deduce from the act a duty not to strike on issues determinable under it—something which appears expressly negatived in section 13.

From the employer's standpoint there is good reason to restrain rival organizations, each claiming a majority, from waging industrial warfare until the procedures of the labor relations act are utilized. Their utilization may well resolve the conflict; if one organization is

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\(^88\) Ibid., at p. 16,968.
certified, the other is in the minority and, as will presently be seen, may be subject to injunction if it persists in its warfare. A good deal of criticism has been directed against the NLRB for denying to the employer the privilege of petitioning for determination of representatives, especially in this type of case.90 He is bedevilled by conflicting claims of majority, and withal no organization may be willing to risk an election.91 The argument for restraint is weaker where one union claims a majority but neglects to petition for investigation; even if it did so and was found to be in the minority, assuming there is no majority representative, nothing in the Wagner Act would proscribe its carrying on labor warfare for bargaining privileges.

As to the demand of organizations for representative privileges without petition to the labor relations board for investigation, the observation should be made that prior certification is not necessary to the affixing of the duty to bargain collectively. On frequent occasions an employer has been found guilty of violation of section 8(5) even though the union was not previously certified.92 From such decisions it appears that a conscientious employer might find himself in the dilemma of doubting whether a representative is the choice of a majority in an appropriate unit and being subject to the sanctions of the act if he is mistaken.93 However, in all such decisions other unfair labor practices have been involved, and the employer was held reasonably bound to know the employees' choice. If complaint issued on the ground of section 8(5) where the employer doubted reasonably the union's representative status and no other unfair labor practice and no strike were involved, he would be subject only to an order to bargain collectively if he were wrong.94 But in such situations the order would be unfortunate as tending to brand the employer as unfair and unenlightened in his labor relations. It is well that when the only question between the employer and a labor organization relates to the

90 See McAfee, "The Wagner Labor Act—A New Deal in Labor Relations," 23 A. B. A. J. 523 (1937), for a criticism on the score that the unwillingness to allow the employer to file a petition leaves him an innocent party in the midst of C. I. O.—A. F. of L. conflict. For the board's position, see note 21, supra.


facts of majority representation and appropriateness of unit, the issue is settled by petition, although if the employer is wrong he has been technically guilty of violating section 8(5). In many cases arising on petition the employer has merely refused to bargain collectively with a union until it is certified. 95

To this point the conclusion has been that the fact of strikes, past or current, has had an indifferent effect on the form of the labor board's order for election and determination of representatives. The orders issuing on a finding of unfair labor practice, however, vary depending on whether a strike has been called. That variation will have, and has had, repercussions on the means of industrial warfare used by both employer and employees.

Strikers will be reinstated if the strike has been a consequence in whole or in part of a violation of section 8(1), 96 (2), 97 (3), 98 (5) or any combination thereof. 100 Persons newly hired after the strike must be discharged to make way for the strikers. 101 If insufficient places are available because of diminished business, they are placed on a preferential list. 102 The NLRB could have pursued its course in this type of case by ordering the employer to cease and desist its unfair labor practice and stopping short at that. In such a way strikes for the cause of unfair labor practice would have been discouraged. But the board

95 Matter of Aluminum Company of America, 6 N. L. R. B., No. 68 (1938); Matter of McKell Coal & Coke Co., 4 N. L. R. B., No. 70 (1937); cases cited note 24, supra.
97 Matter of Todd Shipyards Corp., 5 N. L. R. B., No. 9 (1938).
101 Matter of Biles-Coleman Lumber Co., 4 N. L. R. B., No. 86 (1937); Matter of Colten, 6 N. L. R. B., No. 54 (1938); cases cited note 99, supra.
102 Cases cited note 101, supra.
has realized that unfair labor practices try the tempers of the men
and are a primary cause of industrial warfare. Hence, the strike is
deemed "a remedy parallel with recourse to the Labor Board," and
"its use, when unsuccessful, but in a controversy where the men are
right, ought not therefore to be prejudicial to them." The board
deems it proper affirmative action to restore the condition of affairs
before the commission of unfair labor practices by reinstating the
strikers.

There have been no intimations in any court decision that the
employees should be obliged to bide their time and to pursue their
remedy before the labor relations board on the occurrence of an unfair
labor practice. The issue of unfair labor practice is for the board to
decide; but, as earlier indicated, section 13 of the Wagner Act seems
to preclude a construction of it so that strike on that issue should be
forbidden.

Although the NLRB will reinstate strikers for the cause of unfair
labor practice, it does not condone unlawful methods of industrial war­
fare. The rule has been frequently stated that strikers guilty of vio­
lence will not be restored to their positions. But many of the decisions
in which the rule is stated are cases in which reason is found for not
applying the rule rigorously. The NLRB has been tolerant of sit­
down strikers, trespassers and persons guilty of minor breaches of the
peace. The board has noted that the employer is not blameless, through
his commission of unfair labor practices leading to the strike and
through other kinds of provocation. Apart from felonious conduct and
serious breaches of the peace, activities incident to labor warfare which
may not observe the politer amenities do not bar a striker from rein­
statement. It should be kept in mind, however, that in the courts of
the jurisdiction wherein the conflict occurs the labor relations acts will
be no defense to restraint against activities which were unlawful before
they were enacted. So far as the methods of industrial warfare are
concerned, their unlawfulness or lawfulness seems unaffected by the
acts. Injunction will issue to oust sit-down strikers even though the

94 F. (2d) 862 at 871.
104 Matter of Kentucky Firebrick Co., 3 N. L. R. B., No. 46 (1937); Matter of
105 Matter of Stackpole Carbon Co., 6 N. L. R. B., No. 36 (1938); Matter of
Fansteel Metallurgical Corp., 5 N. L. R. B., No. 124 (1938); Matter of The Louis­
ville Refining Co., 4 N. L. R. B., No. 110 (1938); Matter of Biles-Coleman Lumber
strike be occasioned by unfair labor practice. The argument that the NLRA sets up new standards of cleanliness which must be met by plaintiff-employer before equity will lend its aid has been advanced but has fallen on deaf ears.

In the allowance of back pay as an incident of reinstatement, a distinction is regularly drawn between persons discharged discriminatorily and persons striking because of discrimination. Persons discharged as a result of violation of section 8(3) of the NLRA are reinstated and are given back pay from the time of discharge. Deducted from the amount of back pay are any sums made in other employment in the interim between discharge and reinstatement. Persons striking because some of the employees have been discriminatorily discharged are reinstated but without back pay. The difference in treatment of persons discriminatorily discharged and persons striking because of the discriminatory discharge is founded in sound reason. To allow back pay would be to encourage strikes the moment a violation of section 8(3) occurred. The same may be said if back pay were allowed strikers who struck on account of any of the other unfair labor practices. Further, the loss of wages suffered by the strikers is a result of their own voluntary act, whereas the loss of wages by employees discriminatorily discharged is involuntarily incurred. The rule is a salutary one and encourages a settlement of the issue of discrimination by complaint before the labor relations board.

Sometimes in order to discourage organizational activity the employer locks out his workers and closes down the plant. Such con-

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110 Cases cited note 98, supra.
duct is classified as a violation of section 8(3), and all the employees are reinstated with back pay. 111 This order is a drastic one and has cost certain employers thousands of dollars. But it is warranted as remedying a loss of wages caused by the employer alone through a course of conduct which seriously undermines the rights secured to employees by the NLRA.

If no unfair labor practice is found to have been committed, strikers will not be reinstated and no relief is given.112 But if the NLRB has been unable to find the relatively specific unfair labor practices itemized in section 8(2), (3) or (5), the broader scope of section 8(1) may be applicable to a miscellany of activities on the employer's part. The board may so decide and find that the strike was caused at least in part thereby; whereupon the strikers must be reinstated.113 Section 8(1) is a catch-all whereby the board can assume jurisdiction and exercise its orders with respect to strikers in such a way as to adjust labor disputes in which the employer has acted unfairly. It should be noted, too, that if a strike has been called for representative privileges and the employer manifests an unwillingness to rehire the strikers, it is advisable for employees to institute complaint proceedings under section 8(5) rather than to petition for certification only. Under the former procedure reinstatement of strikers may be ordered but not under the latter.

Even where the strike was in its inception not caused by any unfair labor practice, the board may later in its history have cause to acquire jurisdiction and to restore the strikers to their positions. Such possibility eventuates when, after the strike, the employer refuses to bargain collectively. Section 8(5) requires the employer "to bargain collectively with the representatives of his employees," and in section 2(3) the term "employee" is defined 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. . . ."


Hence the duty to bargain collectively subsists after the strike is called, whether it is occasioned by unfair labor practice or by any "labor dispute." "Labor dispute" is defined in section 2(9) in almost exactly the same terms as in section 13(c) of the Norris-LaGuardia Act. In Matter of M. H. Birge & Sons Company114 a strike was called because wage terms could not be agreed upon. Subsequently the respondent violated section 8(5) by failing to bargain collectively with representatives of the strikers. The strikers were ordered reinstated to positions which had been filled since the date of violation of section 8(5). Chairman Madden’s dissent was grounded not in opposition to the rule laid down or the form of order but in the view that the duty to bargain collectively had terminated. His opinion was that the duty had terminated because the employer had started up business anew with another force of employees. The development may well be that the duty to bargain collectively with a striking union will end when the plant has been wholly re-staffed with new men and the strike was not caused or prolonged by unfair labor practice. The strike is lost, and the duty to bargain collectively is with the new employees.

The theory of the H. M. Birge case is that the strike was begun through no fault which might be attributed to the employer, but that it was prolonged through the respondent’s fault.115 From the date that violation of section 8(5) first occurred, the employer will not be heard to say that the dispute would not have been resolved in collective bargaining negotiations. Hence, from that date new employees must yield their places to the old.

Suppose that striking employees subsequent to a violation of section 8(5) ask for and are denied reinstatement. In addition to reinstatement, is there a chance of obtaining back pay? The question is answered in the case of Black Diamond Steamship Corporation v. National Labor Relations Board.116 A strike had been called for reasons other than unfair labor practice. During its course on December 11, 1936, the striking union was certified as representative of the employees. On December 14 the respondent employer refused to bargain collectively, and on December 31 the strikers demanded and were refused reinstatement. Complaint proceedings were brought, and the board ordered

114 1 N. L. R. B. 731 (1936).
116 (C. C. A. 2d, 1938) 94 F. (2d) 875.
reinstatement of employees to their old positions, discharging any new men hired after December 14. Further, the refusal to reinstate was a discrimination discouraging union organization, and back pay from December 31 was ordered to be given the employees asking for their positions on that date.\footnote{117}

\textit{National Labor Relations Board v. Carlisle Lumber Co.} is a similar case, but with the retroactivity of the Wagner Act introduced into the picture. The employer purported to discharge his striking employees on June 25, 1935. July 8, 1935, three days after the passage of the Wagner Act, it refused to bargain collectively with the representatives of the majority of the employees. Reinstatement of the strikers to their positions, dismissing employees newly hired after July 8, 1935, was ordered, and if there were insufficient positions, the rest were to be placed on a preferential hiring list. On July 29, 1935, the employer had offered reinstatement to the strikers on condition they renounce all affiliation with labor organizations, and a large number of strikers returned to work. Those who did not were granted back pay from July 29, 1935, because the offer of reinstatement was conditioned unlawfully, need not therefore have been accepted, and operated as a discrimination against those who stood on their organizational rights. A number of decisions hold similarly to the \textit{Carlisle} case that a strike called before the enactment of the NLRA did not cut off the employment relation so as to free the employer of the duty to bargain collectively with the "employees" after its passage while the strike was still current.\footnote{119}

In the \textit{Carlisle} case discrimination was found after violation of section 8(5) in an offer of reinstatement conditioned on the surrender of organizational privileges, and back pay was given those not accepting these terms. In the \textit{Black Diamond Steamship Company} case a refusal of a request by strikers for reinstatement after section 8(5) had been violated was deemed violative of section 8(3), and back pay from the date of refusal was given. Suppose in the latter type of case the strikers condition their request on being granted collective bargaining privileges to which they are entitled. Such a case is \textit{Matter of... \footnote{117 Accord: \textit{Matter of American Mfg. Co.,} 5 N. L. R. B., No. 67 (1938). \footnote{118 (C. C. A. 9th, 1937) 94 F. (2d) 138. \footnote{119 Matter of Standard Lime \\& Stone Co., 5 N. L. R. B., No. 15 (1938); \textit{Matter of Jeffery-Dewitt Insulator Co.,} 1 N. L. R. B. 618 (1936), affd. in \textit{Jeffery-Dewitt Insulator Co. v. National Labor Relations Board,} (C. C. A. 4th, 1937) 91 F. (2d) 134; \textit{Matter of Columbian Enameling \\& Stamping Co., Inc.,} 1 N. L. R. B. 181 (1936).}
Fansteel Metallurgical Corporation. The board reasoned:

"It might be argued that since the Union was demanding as a condition to reinstatement only something to which they were entitled under the Act—recognition and collective bargaining—the respondent in illegally refusing this demand should be considered as discriminatorily refusing to reinstate the strikers. We do not take this view. So long as the employees were unwilling to return to work under the conditions existing at the time the strike was called, however just the grounds on which their position was based, it cannot be said that the respondent was refusing to reinstate them."

If the rationale behind these particular orders is that if the employer is responsible for loss of wages he should be compelled to give back pay, difficulty is met in trying to square the Carlisle and Fansteel cases. Probably the latter decision is to be preferred, as saying that strikers in order to get back pay must be willing to go back to work under the old conditions and to put their trust in the processes of the board to remedy the unfair labor practices. In the Carlisle case the men given back pay voluntarily forewent the opportunity of making wages. The case may be distinguished from the Fansteel case in that the employer took affirmative steps in conditioning its offer to exclude employees having an organizational bent. Moreover, the employer’s course of conduct in the Carlisle case probably was more reprehensible than that in the Fansteel case.

National Labor Relations Board v. Columbian Enameling & Stamping Co., Inc., presents the case of a strike before the passage of the NLRA and in breach of collective agreement. A violation of section 8(5) occurred after enactment of the law, and the board ordered collective bargaining and reinstatement of the strikers, dismissing employees newly hired after the date of violation of section 8(5). The circuit court reversed the order, saying that the strikers were estopped to claim the benefits of the act as "employees" because their strike was in breach of agreement. The decision is unsatisfactory, as the court seems to have erred in its construction of the contract making the strike a breach thereof. Moreover, the agreement was terminable on thirty days’ notice, and that had been given months before the strike. However, the case raises an interesting point. Is there incumbent upon the

120 5 N. L. R. B., No. 124 (1938).
121 Ibid. at p. 16.
employer a duty to bargain collectively after a strike in breach of a collective contract has been called? In a court unhampered by anti-injunction law, restraint might issue against calling a strike by way of specific performance. The employer would seem to be able to insist on his contractual rights, but the duty to bargain collectively might compel him to negotiate concerning modification or addition of terms. If there is such a duty, it would seem unaffected by prior strike, even though in violation of contractual terms. For remedy of the latter, the employer would have to seek redress in the courts. Because one of the objects of the NLRA is the collective bargaining contract, there may be some policy behind raising an estoppel against employees striking in breach of it. But such a doctrine would be a judicial product and not one derived from statutory language.

Participants in a labor dispute may heed certain words of counsel which seem justified in the light of the decisions examined above. On one side the employer should be advised that if he is winning a strike on an issue of wages, hours or other term of contract, he should not fail to meet the requirements of collective bargaining up to the time he has fully manned his plant with new employees. If he fails in this regard, the strike will thereupon be deemed one prolonged by a violation of section 8(5), and strikers will be reinstated to positions thereafter filled by new employees. That is the moral of the Black Diamond

123 See Oakes, Organized Labor and Industrial Conflicts, § 212 (1927).
123a In National Labor Relations Board v. The Sands Mfg. Co., (C. C. A., 6th) 2 L. R. R. 383 (1938), a shut down was occasioned by a union's (MESA) refusal to permit respondent to hire new men in the machine shop while there were MESA men still laid off in other departments. The collective contract was ambiguous as to whether the seniority rights of a laid off employee were to prevail within his department only or throughout the plant. Thereafter the employer entered into agreement with another union (IAM) and on Sept. 3, 1935, opened up the plant with employees who were members of the IAM only. On the following day a refusal to bargain collectively with the MESA occurred. The Board ordered the respondent to bargain collectively with the MESA and to reinstate with back pay 48 MESA men who were discriminated against on Sept. 3 when only IAM men were re-hired. The board was of the opinion that the MESA was correct in its construction of the contract but that even if the MESA were in the wrong and had breached the agreement, the MESA men remained “employees” and were entitled, by virtue of their majority status, to bargaining privileges. The Circuit Court of Appeals refused to enforce the order of the board on the ground that the MESA had breached its contract giving cause to the employer to declare the collective agreement at end. The estoppel doctrine was not utilized, but the theory seemed to be that a strike in breach of a collective agreement or conduct in breach of a collective agreement leading to a lay-off terminates the employment relation utterly so that the strikers (or men laid off) can secure no benefits from the NLRA as “employees.”
Steamship Company and Carlisle cases. The union, on the other side, should be advised that if it has struck because of an unfair labor practice, a request for reinstatement subsequently refused will render the employer liable, for back pay from the time of refusal, to the employees requesting reinstatement. That, too, is the moral of the Black Diamond Steamship Company and Carlisle cases.

The orders of the NLRB with respect to striking and discharged employees in unfair labor practice cases have followed a consistent outline. When their character becomes more generally known in the different circumstances which arise in labor cases, they will tend to cut down on the number of cases of abrupt termination of the employment relation. Strikers will understand that they will lose out on wages and that perhaps the process of the board is the wisest way to eliminate unfair labor practices. Employers will understand that it is expensive to lock out employees in order to discourage organizational activities, to discriminate against union employees, and to refuse to take back strikers who are willing to abandon a strike and to secure a remedy for unfair labor practice from the board.

The Minority Problem

This section will be devoted to the problem arising when a union representing a minority, or none, of the workers in an appropriate unit wages industrial warfare against the majority group in that unit. A division will be made between cases in which the majority group is organized and where it is not.

Illustrative of the situation in which a minority union wages industrial warfare against an organized majority group is the case of Oberman & Co. v. United Garment Workers of America. Members of a C.I.O. organization petitioned for an election in plaintiff corporation's factory with the view to determining the representatives of the employees for the purposes of collective bargaining. An employee association, a union the members of which were restricted to employees of the corporation, received a majority of votes and was certified by the NLRB as bargaining representative. Nevertheless, the C. I. O. union called a strike, demanding sole bargaining privileges and a closed shop. Picketing, violence and intimidation were alleged, as a result of which plaintiff's factory had to shut down. Plaintiff was held entitled to a restraining order.

This decision squarely presents the situation wherein a minority

group is waging industrial warfare for the purpose of effecting results contrary to the Wagner Act and its administration. In the first place, the demand for sole bargaining privileges was in the teeth of a certification by the NLRB of another organization as exclusive bargaining agent. In the second place, the demand for a closed shop if granted would lead to a clear violation of the NLRA, section 8(3), since the proviso thereto permits a closed shop agreement only with majority representatives. On two scores the purposes of the industrial warfare seem to be illegal. And if the common-law labor cases are read rightly, the rule is that any collective activity which is carried on for an unlawful purpose and upon which equitable process may be laid will be restrained. But serious obstacles to injunctive relief are met in the Norris-LaGuardia Act and in section 13 of the Wagner Act.

The court rested its argument chiefly on section 10(h) of the Wagner Act. The whole of section 10 is given over to procedural matters. Preceding subsection (h) are subsections (e) and (f), providing respectively for petition to the circuit court of appeals to enforce the board's orders and for petition by a person aggrieved for review by the circuit court of a final order of the board. Subsection (g) states that proceedings under (e) and (f) shall not operate as a stay of the board's order unless specifically so ordered by the court. In this context, then, one reads section 10(h):

"When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by . . . [the Norris-LaGuardia Act]."

The court's argument proceeds as follows:

"It will be observed from this that the Congress made the Norris-LaGuardia Act inapplicable to situations such as are here presented. It cannot be successfully argued that the Congress did not contemplate a restraining order or an injunction by a District Judge, for the reason that section 160 [§10] particularly contemplates that reviews shall be by the Circuit Court of Appeals. The District Court, therefore, was regarded as having jurisdiction in controversies like the one here presented. The regional director certified the names of those who had been selected for bargaining

125 Oakes, Organized Labor and Industrial Conflicts, § 262 et seq. (1927).
126 The Utah and Wisconsin acts omit this subsection.
purposes. The statute does not clothe the National Labor Relations Board with power to enforce such order. It was doubtless the thought of the Congress that, where the National Labor Relations Board had exhausted its power, the court could then possess the jurisdiction to make effective the work of the National Labor Relations Board.”

The court’s remarks are not convincing. Section 10(h) is referable only to decrees of a circuit court of appeals issued during or after appeal from the NLRB’s decisions and orders; or during or after proceedings brought by the board to enforce its orders. It is a precaution preventing the setting up of the Norris-LaGuardia Act as a defense to orders or decrees issued by a circuit court of appeals after passing upon the decision and orders of the board. The subsection is inapplicable here, and the implications drawn from it in this case are unfounded.

A more pertinent provision is section 13 of the Wagner Act, which is not mentioned in the opinion. Strictly speaking, the right to strike was not involved because, apparently, restraint was not asked against the strike. A combination of parlous times and plenitude of labor made that relief unnecessary. However, the decision in effect deduces from the act a right in the employer to bargain collectively with the representatives of the majority free from interference on the part of the minority group. The court’s logic would impel one to the conclusion that the minority union could have been enjoined from calling a strike. If a minority union may not strike for the purpose of securing exclusive representative privileges or for a closed shop agreement, where before the NLRA was passed it could have done so, to that extent the right to strike is diminished and the mandate of section 13 contravened.

The Norris-LaGuardia Act was the most formidable bar to injunction. The controversy and parties concerned in the Oberman case came within the definitions in the Norris-LaGuardia Act without much doubt or difficulty. The court, however, commented on the fact that the
NLRA was passed three years after the federal anti-injunction law and covers in part some of the subject matter of the latter act. The court therefore concluded that activities which were directed to ends opposed to the administration of the NLRA could not be intended to be protected from injunction. In a word, the immunities of the anti-injunction law were only to be afforded in "labor disputes" waged for a lawful purpose. The court also indulged in a bit of verbal legerdemain. It suggested that the demands of defendants raised the question as to which labor organization had a majority so as to be entitled to collective bargaining privileges and to enter into a closed shop contract. But that question had been decided by election and certification. Ergo, there could be no basis for, and there was no, "labor dispute." Since the court felt no statutory inhibitions on its equitable powers, it fell back on the common law. The purpose being unlawful, picketing was enjoined. Notice should be taken that had plaintiff's action been tried in the Missouri state court, injunction might have issued with less difficulty. Missouri has passed no anti-injunction law, and if a Missouri court were willing to deduce from the Wagner Act a duty incumbent on the minority group similar to that imposed in the Oberman case, it would be unhindered in issuing an injunction. In the Oberman case if the action had been started in a Missouri state court, diversity of citizenship was a fact which would have been sufficient cause to permit removal to the federal court. But even if diversity of citizenship did not appear, because a federal question was presented, the case could have been removed to a federal court on petition of the defendant union. Of course, a jurisdictional amount was involved.

Would an injunction issue to prevent a minority from waging labor warfare to gain recognition and bargaining privileges for all where the majority has a contract but has not been certified and no proceedings therefor are pending? Such a case is Lund v. Woodenware Workers Union,\(^{131}\) and the question was answered in the negative. The opinion inclines to the view that the right of a minority to strike is saved by section 13 of the Wagner Act and that contracts with the majority are not protected from assault by minority groups.\(^{132}\) The

\(^{131}\) (D. C. Minn. 1937) 19 F. Supp. 607.

\(^{132}\) "... the right that the plaintiff seeks to enforce is not created, either expressly or impliedly, by the federal statute in question, but by this proceeding he seeks to read into the act certain rights on behalf of the employer to proceed in a court of equity, which Congress studiously refrained from giving to the employer.
Oberman opinion successfully distinguishes the *Lund* case and refers to the following remarks in the *Lund* opinion:

"we would have the anomalous situation of the courts endeavoring to determine whether or not the unit which is formed by the majority of the employees is appropriate for the purposes of collective bargaining, when it is clearly evident that Congress intended that all such questions should be determined by the Labor Board and not by the courts. . . . Whether or not the court would be justified in taking jurisdiction after the NLRB has assumed jurisdiction and has approved a contract entered into between the employer and the majority of the employees, the court does not now determine. Suffice it to say that, in absence of a clear intention on the part of Congress to clothe the federal courts with jurisdiction over contracts entered into between an employer and the majority of the employees affecting labor conditions, this court should not proceed to determine this controversy."

A meritorious point is made here that, until the labor board has certified a majority union, a court should not attempt to protect contracts from the onslaughts of the minority group; in so doing it would be passing upon questions of appropriateness of unit and eligibility of an organization to be a representative which are more properly passed upon by the board. On the other hand, there are many decisions of the NLRB which find a violation of section 8(5) even though there has been no prior certification of the majority group. If the majority status of a labor organization is so clear as to warrant a finding of violation of section 8(5) without prior certification, its contract is a proper subject of protection. Assuming for the moment the desirability of injunction against minority groups, lack of certification should not preclude its issuance where the majority representation is clear.

Suppose that the facts of the *Lund* case are varied to the extent that

... If any relief were to be granted under the complaint, the court would be legislating in a field where Congress failed to take action. Further . . . there is no provision in the Wagner Act which makes it illegal for a minority to strike and to seek thereby to obtain sufficient strength so as to become the sole bargaining agency." *Lund* v. Woodenware Workers Union, (D. C. Minn. 1937) 19 F. Supp. 607 at 611.


134 Cases cited note 92, supra.
a proceeding for certification was pending when the minority group struck. In *Cupples Co. v. American Federation of Labor* 135 seventy-five per cent of the employees belonged to an association which had an exclusive bargaining agreement with the plaintiff employer. Two minority unions filed charges and petitioned for an investigation of the question of representation. A time for hearing was set, but defendants decided not to await the outcome of the investigation and struck for sole bargaining privileges. A picket line was established, and threats and intimidation alleged. Injunction was denied on two grounds. First, assuming plaintiff had a right to determination and certification by the NLRB and that attempts to deprive it thereof would be enjoinable under ordinary rules of equity, the Norris-LaGuardia Act prevents the grant of injunction. The controversy was a labor dispute within the meaning of the anti-injunction law. Second, while the plaintiff had a right to bargain collectively with the majority representatives alone, that right does not become complete and subject of protection until certification by the labor relations board.

"plaintiff has the legal right, conferred by the Wagner Act, to deal exclusively with the agency found by the National Labor Relations Board to represent the majority of its employees, after that fact has been determined by that Board. Whether plaintiff has the right to enforce noninterference with its desire to have the National Labor Relations Board hear and determine the question referred to is another matter. . . .

"Plaintiff has a right conferred by the Wagner Act to insist upon noninterference in its compliance with the mandate of that act to the effect that it shall deal with the agency representing the majority of its employees when that agency has been properly ascertained and determined, and with that agency alone." 136

The court suggests the distinction made in the *Lund* case between the situations where the majority group is certified and where it is not.

To date, there are two decisions indicating that an employer has a right to bargain collectively with a certified majority free from the constraints of industrial warfare to do otherwise: the *Oberman* case in a square holding and the *Cupples* case by dicta. The reasoning of the *Oberman* decision has been commented upon here with some acerbity because the pertinent statutes seem robbed of their true effect. A "labor dispute" is no less so because its end is unlawful or opposed to a decision

136 Ibid. at pp. 897, 899.
or certification of the labor relations board. The anti-injunction laws hint at no such exception of controversy from the meaning of the term. But this is not to say that the policy of the Oberman case may not be wise. The employer may lay claim to some of the benefits which were heralded to be forthcoming from the NLRA. After certification, in the interests of continuity of business and stability in industrial relations the minority might well be restrained from carrying on any activity, such as picketing, injurious to the employer in order to gain representative privileges. On the other side of the picture is the consideration that if injunction is available in situations like that presented in the Oberman case, certification may become a means of "freezing" the representation status of the employees. The injunction may deprive the minority organization of the use of what may be the only really effective methods of recruiting new members.

The Wisconsin legislature was impressed, apparently, with the desirability of preserving to the minority groups the right to wage industrial warfare for any of the purposes permitted at common law, even though these objects might conflict with the labor relations act. The Wisconsin labor relations act omits section 10(h) of the NLRA, is explicit to the effect that it shall not "deprive any party to a labor dispute . . . of the rights, benefits and protection of . . . [the anti-injunction act]," and provides:

"Nothing herein shall prohibit any employe or minority or majority group of employes, from declaring a labor dispute to exist respecting a controversy over representation, and such employe or minority or majority group of the employes shall have the benefit and protection of . . . [the anti-injunction statutes]."

The policy of these provisions is to preserve to all labor factions the right to use the means of industrial warfare lawful under the anti-injunction act in order to gain ascendancy even though an organization may have been certified.

139 Wis. Stat. (1937), § 111.09(1).
140 Nathan P. Feinsinger and William Gorham Rice, Jr., counsel with the Wisconsin Labor Board, in a Bulletin of the University of Wisconsin, The Wisconsin Labor Relations Act (1937), express the opinion that the right of minorities to strike against arrangements between the majority groups and the employer is preserved.

In the *Oberman* case one of the purposes of the strike and picketing was the closed shop. Such purpose on the part of a minority group, whether the majority group is organized or not, if achieved, would cause the employer to violate section 8(3) of the NLRA. This would be true whether petition proceedings had never been commenced, or were pending, or had resulted in the certification of the majority group. Hence, under the ruling of the *Oberman* case, injunction would issue in all these cases. Where sole bargaining privileges are demanded by the minority groups, the same or different results are indicated, depending on whether investigation proceedings have never been started (*Lund* case), are pending (*Cupples* case), or have resulted in certification (*Oberman* case).

Suppose the minority group wages industrial warfare for better terms and conditions for itself as against a majority group. The argument for injunction would follow the line described above with respect to the demand for closed shop. But suppose the minority demands better terms for all. Violation of section 8(3) is not now an end product of the minority's efforts. The employer may contend that he is obliged to bargain exclusively with the majority representatives and that to yield to the minority would be to recognize it and to bargain with it for all. If this is a valid argument and the majority is certified, under the *Oberman* case injunction would issue. But the purpose of improving the terms of a collective agreement may be held not inconsistent with the majority's bargaining prerogatives. Earlier discussion brought to light the fact that an employer did not satisfy the duty to bargain collectively by merely making concessions where he is unwilling to enter into a binding agreement with respect to them. The minority's labor activities may be deemed directed to the end of mere concessions to be added to the collective agreement and not to acquiring for itself collective bargaining privileges. Such concessions granted to all, and efforts expended to gain them might be held not to impugn the representative character of the majority organization. Of course, their effect may be to secure to the minority organization new adherents. Not to be lost sight of is the anti-injunction law, the requirements of which would have to be met or else avoided as in the *Oberman* case.

Completing the outline of purposes which may be affected by the labor relations acts and for which industrial warfare by a minority may be waged is retaliation for the commission of unfair labor practices. An earlier analysis led to the conclusion that the strike and other means

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141 See p. 1246, supra, and cases cited in note 39.
of warfare for this cause are not outlawed by the labor relations acts, whether the aggrieved group is in the majority or minority or is an outside group. In the latter two instances a majority group may or may not be organized. Nor, in all these instances, does it seem to make any difference whether complaint proceedings have been commenced or not. Even after decision and order, the aggrieved group does not seem obliged to cease its industrial warfare if not fully satisfied. As a practical matter, though, the decision and order does terminate a strike if it is caused by unfair labor practices.

An easier case for the federal court writing the Oberman decision would have been presented if an outside organization had waged industrial warfare to be recognized as sole bargaining representative or to secure a collective bargaining contract. The public prints in the last year have carried full accounts of the predicament of the employer who in good faith bargains with a majority group only to be harassed by outside groups which picket, boycott and apply secondary boycott. Some instances follow.

In San Francisco, the Teamsters Union (A. F. of L.) picketed the waterfront and refused to handle goods (secondary boycott) which had gone through the hands of warehousemen belonging to the International Longshoremen's and Warehousemen's Union (C. I. O.). The latter union had organized all the warehousemen concerned; in fact it appears that the NLRB refused to hold an election, saying that it was the only union in the field and that it had been authorized by a majority to speak for all. The industrial warfare carried on by the Teamsters may be ascribed to motives of retaliation for warfare by the C. I. O. and to the purpose of getting the warehousemen into the Teamsters' Union.\footnote{142}{1 L. R. R. 114 (1937).}

In the Pacific Northwest, the Teamsters and Carpenters' unions refused to handle lumber products produced by lumber mill employees who had deserted the A. F. of L. to join the C. I. O. fold. Picketing caused a large number of lumber mills near Portland, Oregon, to close down.\footnote{143}{1 L. R. R. 34 (1937).}

Ships manned with C. I. O. seamen were readily unloaded in San Francisco where the longshoremen were affiliated with the same organization. But in Tacoma, Washington, the A. F. of L. longshoremen prevented unloading.\footnote{144}{2 L. R. R. 268 (1938).}
Another type of situation which may well arise is that in which friction occurs between one unit in a plant which has been organized by one union and a second unit which has been organized by a second union. The first unit may refuse to work upon products coming from the second unit, or it may strike, boycott and picket in an effort to dislodge the rival organization from the second unit. Mr. Edwin S. Smith of the NLRB may have had this type of case in mind when he felt constrained to dissent in certain cases where he thought the labor body was being divided into too many units.\footnote{Matter of Worthington Pump & Machinery Corp., 4 N. L. R. B., No. 61 (1937); Matter of Combustion Engineering Co., Inc., 5 N. L. R. B., No. 61 (1938); Matter of Allis-Chalmers Mfg. Co., 4 N. L. R. B., No. 24 (1937); Matter of Schick Dry Shaver Co., 4 N. L. R. B., No. 35 (1937).} A similar type of situation is one in which the workers in one plant refuse to work on products received from another plant which is unionized by a hostile organization.

Much unwarranted criticism has been heaped upon the board for its seeming impotence to deal with such situations. Governor Martin of Oregon was particularly indignant at the board for failing to effect an end to the picketing and secondary boycott which had closed seven of the lumber mills in and around Portland. He called an election on his own initiative and affirmed the previous certification of the board that the C. I. O. was the exclusive representative of all the workers in those mills. The conflict did not thereupon abate. The warfare was a result of the struggle between the A. F. of L. and the C. I. O., two national organizations, and the functions of the board were finished when it certified the representative of the men in the mills. What happens after certification in the way of industrial warfare is, under the act, none of the NLRB's business.\footnote{See remarks of Senator Steiwer (Republican, of Oregon), reported in 1 L. R. R. 522 (1938).} What remedy can be had from the courts?\footnote{The possibility of relief under the anti-trust laws will not be discussed. See Apex Hosiery Co. v. Leader, (C. C. A. 3d, 1937) 90 F. (2d) 155, reversing (D. C. Pa. 1937) 20 F. Supp. 138, for a case declaring that one of the effects of upholding the NLRA was to expand the sphere in which the anti-trust laws operate and to make industrial warfare more susceptible to restraint under those laws. The Norris-LaGuardia Act was not mentioned.}

In all these cases a union is waging industrial warfare in order to gain collective bargaining privileges for itself and to disestablish a majority union within a unit wherein the warring union has no members. At the common law the general rule was that an outside union to which none of the employees belonged had no interest to picket and otherwise to wage industrial warfare in order to unionize the men, and
injunction would issue.\textsuperscript{148} The same may be said if the outside union were attempting to displace a union to which the men already belonged.\textsuperscript{149} Under the anti-injunction laws the definite weight of authority is that a union need have no members in the proximate relationship of employer and employee in order to claim the immunities accorded by those laws.\textsuperscript{150} But the \textit{Oberman} decision points the way to injunction by construction of the labor relations acts if the majority union is certified to be the exclusive representative of employees in an appropriate unit.\textsuperscript{151} Injunction would follow more easily than under the facts of the \textit{Oberman} case because it would be directed against an "outside intermeddler." If certification proceedings were pending or had never been commenced, the \textit{Cupple} and \textit{Lund} cases indicate that no injunction should issue. But the fact of "intermeddling" by an outside group might impel a court to issue injunction under some theory such as that advanced in the \textit{Oberman} case.


\textsuperscript{151} But cf. the dissenting opinion in Donnelly Garment Co. v. International Ladies' Garment Workers Union, (D. C. Mo. 1937) 21 F. Supp. 807 at 828, which suggests that a strict reading of §§ 8(5) and 9(a) of the NLRA makes the representatives selected by a majority of employees in a unit exclusive bargaining agents with respect to wages, hours and conditions of employment but not with respect to questions of representation: "While the Labor Relations Act implicitly prohibits an employer bargaining with others than chosen representatives of a majority of the employees 'in respect of the rates of pay, wages, hours of employment, or other conditions of employment' [citing the \textit{Laughlin} case], most clearly it does not prohibit negotiations between an employer and a national or international union concerning organization of the employer's employees by that union and the ultimate representation of the employees by the union."
Where the outside group includes in its demands a closed shop contract, an *a fortiori* case is made for injunction if the *Oberman* case is followed.\(^{152}\) The purpose would be calculated to cause the employer to violate section 8(3), and its illegality would be independent of whether the majority organization in the unit is certified or not. If it is uncertified, the conclusion is unaffected by whether investigation proceedings are started or not.

An outside union might wage labor warfare against an employer simply to better conditions and terms because the low level thereof undermines conditions and terms elsewhere. This situation is comparable to that in which a minority union wages industrial warfare for better terms for all. The demand may be deemed to conflict with the majority's exclusive bargaining prerogatives and tend to compel the employer to violate section 8(5). In such case, under the *Oberman* rule restraint might issue. The answer to this argument might be that the outside union wants merely to improve the contract of the majority organization and not to detract from its representative status or its bargaining privileges. Further, to allow injunction in this case would be to disregard the anti-injunction law (if the court is subject to one). However, it might issue on the ground that the dispute is outside the anti-injunction law as being for a purpose which impliedly contradicts the majority's exclusive right to collective bargaining.

The realm of conjecture is explored in speculating on the right of minority groups and outside groups to wage industrial warfare against the majority group which remains unorganized. Still, some definite conclusions may be drawn, and they serve to round out a more complete picture of the manifold fact situations which may develop out of the labor relations and anti-injunction acts.

After a labor relations board dismisses a petition for certification on the ground that a majority is in favor of no union, may a minority group or an outside organization wage industrial warfare to gain exclusive bargaining privileges? Such dismissal cannot be said to give to the employer a *right* or *duty* not to bargain collectively with any group. The case is similar to that in which certification proceedings are pending or have never been instituted. Nothing in the labor rela-

\(^{152}\) See *Laufer v. E. G. Shinner & Co.*, (C. C. A. 7th, 1936) 82 F. (2d) 68, reversed in (U. S. 1938) 58 S. Ct. 578. The Circuit Court of Appeals in granting injunction said, 82 F. (2d) at 72, "it would amount to a violation of both the federal and state [Wisconsin] law if appellee complied with appellants' demands, for under those laws the employer is specifically enjoined from influencing his employees in their choice of a union or their representative."
tions acts forbids picketing on the issue of representative privileges where no majority group is organized, and section 13 of the NLRA expressly saves the right to strike. Perhaps industrial warfare by the minority or outside group where no majority group is organized is consistent with the policy of the act in promoting organization of the employees. There is a possible argument that the majority, by indicating their desire to remain unorganized, have a right to no representatives bargaining for all. Then the right would be correlative to a duty on the employer not to bargain collectively with any representative for all, and he might get injunction against efforts by a minority or outside group to extract from him that privilege. The anti-injunction law might be avoided by declaring the purpose of the minority or outside union inconsistent with a right and duty deduced from the labor relations act. The case of injunction against an organization having no employees as members is easier than that of injunction against a minority group, because to the former may be applied the appellation "intermeddling outsider." As to these different cases, doubt may be expressed that the finespun reasoning necessary to deduce a right in the employer will be pursued by the courts in order to find cause for issuing an injunction.

At any rate, a minority group may strike and picket for collective bargaining for itself. But if terms better than those given the majority are demanded, the purpose is contrary to the NLRA, section 8(3). The same is true if a closed shop contract is the object of industrial warfare by a minority or outside group. Such illegal purposes may place the dispute outside the definition found in the anti-injunction act, as is suggested in the Oberman case. A demand by the minority or outside union for better terms for all meets no objection except in so far as it implies a bid for collective bargaining privileges on behalf of all the employees. Such an implication would render the analysis of the preceding paragraph applicable.

No pretension is made that every possible case of industrial warfare in which rights and duties under the NLRA may arise has been can-

153 Apex Hosiery Co. v. Leader, (C. C. A. 3d, 1937) 90 F. (2d) 155, reversing (D. C. Pa. 1937) 20 F. Supp. 138, appears to present this fact situation. Injunction was granted under the anti-trust laws and dicta uttered to the effect that if any of labor's rights are denied or other labor trouble occurs, the procedures under the Wagner Act should be resorted to.

vassed. Generally speaking, consideration has been given to strikes and other industrial warfare which is carried on over an issue determinable under the labor relations acts. Notice has been taken of the orders of the NLRB and the effect upon them of strikes. And the suggestion has been made that as the nature of the orders become better known they will have a reciprocal effect on the calling of strikes. Finally, attention has been focussed on purposes and circumstances which may render industrial warfare of a majority, minority, or outside group inconsistent with rights and duties deduced from the labor relations acts.

The central question is whether some of this industrial warfare is not superfluous or positively unlawful. The primary purpose of the labor relations acts is to secure to labor a freedom to organize and a right to bargain collectively. To that purpose one can subscribe heartily. But when it is achieved or is on a fair way to being achieved by relief from unfair labor practices, industrial warfare comes closer to being unmitigated economic waste. Stronger terms may be used when the warfare is for an end which is inconsistent with certification or other mechanism of the board whereby the aforementioned purpose is secured. If the jurisdiction of the court is limited by an anti-injunction act, it will have difficulty in finding itself able to issue a restraint in these situations. The Oberman case points the way, however. The desideratum of industrial peace in all disputes, the issues of which are adequately settled by the labor relations board or the purposes of which are inconsistent with the labor relations act or its administration, is to be weighed against the desirability of preserving intact the rights and privileges inuring to labor groups before the act was passed.

The opinion may be ventured that industrial warfare in most courts will remain unaffected by the labor relations acts, the Oberman case to the contrary notwithstanding. The preservation of the right to strike and the anti-injunction acts are too peremptory to allow a different conclusion. If the cases which must inevitably arise sustain this opinion, to establish a different policy will require amendment of the anti-injunction or labor relations acts.