INDUSTRIAL STABILITY AND FREEDOM OF CHOICE

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To those of us who are wrapped up in the daily decisional processes of the Labor Board, an occasion such as this stimulates consideration of the broader aspects of Board policy and offers an opportunity to subordinate, for a change, the more technical phases of our work. I suggest that the technical work of the Board can be better understood perhaps in the light of the principles that guide us, and their origin, evolution, and application.

The underlying philosophy that directly affects our discussion today is found in the final paragraph of Section 1 of the Act; it is a statement of policy that appeared in the Wagner Act and remained intact in the 1947 Taft-Hartley Amendments:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. [1]

This general statement of policy indicates that Congress sought to foster and protect the interests of society in the stability that is essential to the effective encouragement of the practice of collective bargaining, and the interest of employees freely to express through a democratic medium their choice of bargaining representative. These objectives are, of course implemented by the statutory provisions. Section 9 provides the legal structure for the holding of representation elections. The charter given the Board is a broad one. The statutory requirement is that the Board have "reasonable cause to believe that a question of representation affecting commerce exists." The Board is authorized to find

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1. 61 Stat. 136 (1947), 29 U.S.C. (1952) §151.

an appropriate "employer unit, craft unit or subdivision thereof." And, majority rule is written into the statute.

Almost immediately after its inception, situations began to arise in which the Board was called upon to decide a question concerning representation where the employer was already in contractual relations with a labor organization. Out of these situations arose the "contract bar" doctrine. Simply stated, it means that a collective bargaining agreement between an employer and a labor organization may preclude an election upon petition of another labor organization or individual for a reasonable period of time. Conversely, employees are entitled to select or change their representatives, if they so desire, at reasonable intervals.

The contract bar policy during its early stages was not formalized in the way we know it today. The first case in which the Board considered the contract as a possible bar was New England Transportation Company.[2] In that case, the IAM and an unaffiliated union were contesting the representation question, and the employer took the position that there could be no question concerning representation because he had individual agreements with the employees. The Board did not pass on the legality of the agreements in question; it held that they did not affect the question concerning representation, and so did not bar a current determination of representatives. It is interesting to note that the Board's decision stated that the "whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives, while at the same time continuing the existing agreements under which the representatives must function."[3] Cited as a basis for this holding, or at least as as a sort of lighthouse in an uncharted sea, was a principle enunciated by the National Mediation Board in its administration of the Railway Labor Act. This dictum was repeated in several other early decisions of our Board.[4] At about this time, the Wisconsin Employment Relations Board in its Report covering the period from April 1937 to November 1938, announced a somewhat different policy, which has a familiar ring:

2. In the Matter of New England Transportation Company, 1 N.L.R.B. 130 (1936).
3. Supra note 2 at 138-39.
4. For example: Black Diamond Steamship Corp., 2 N.L.R.B. 241 (1936); Swayne & Hoyt, Ltd., 2 N.L.R.B. 282 (1936); Heldman-Schild-Lasser, Inc., 11 N.L.R.B. 1289 (1939).

> As a general proposition when a trade agreement is made under normal circumstances with a genuine union chosen by a majority of the employees, no elections should be held during the life of the agreement except to determine what union may bargain for terms and conditions to apply after the expiration of the existing agreement, unless the existing agreement is for such an unreasonably long period of time as in effect to deny to employees their right of self-organization.[5]

As we turn the calendar back to those early years, we see a strikingly different industrial scene. When the Board was first formed there were only three-and-a-half million employees organized into unions. A wide area for organization was in existence. Rival unionism on a formidable scale had not yet made an appreciable impact on the Board, although with the AFL-CIO break, it loomed on the horizon. The availability of untouched territory lessened any desire for poaching on other unions' preserves. Most of the contracts asserted as bars were asserted at the instance of employers who apparently desired the continuation of existing bargaining relationships with favored unions.

How to secure representation without employer interference, rather than how to resolve issues raised by rival unionism, appears to have been the predominant concern of the early Board. Quite frequently, the contracts urged as bars were clearly not valid under the Act. "The Board," wrote Millis and Brown, "had no trouble ordering elections in the face of contracts that had been signed with company-dominated unions or with unions not representing the free choice of a majority of the workers when signed...."[6] In this frame of reference, it is not surprising that that invariably when contracts were asserted as bars from 1936 to 1939, the Board directed elections despite their existence. No wonder William G. Rice, writing in the Michigan Law Review in March 1939,[7] asked: "Are there then any collective contracts, even statutory ones, that do stop the Board?" He did not have to wait for an answer; it had already been given. In January 1939, in The National Sugar Refining Co. case,[8] the Board for the first

5. Annual Report, Wisconsin Employment Relations Board (1938).
6. Millis and Brown, "From the Wagner Act to Taft-Hartley," 155-56 (1950).
7. Rice, "The Legal Significance of Labor Contracts Under the National Labor Relations Act," 37 Mich. L. Rev. 693 at 716 (1939).
8. 10 N.L.R.B. 1410 (1939).

time actually came to grips with the problem and found a contract to be a bar, giving as its reason that it was not to last for more than a year and that one year was not such a long period of time "as to be contrary to the purposes and policies of the Act."[9]

From 1940 to 1945 the basic rules rounding out the contract bar doctrine of the Board were laid down. In erecting the essential framework, the members of the Board apparently had different notions as to where the primary emphasis should be placed. There was, of course, the view that was principally predicated in terms of stable industrial relations; there was also the view that if a "real dispute" over representation existed it was best to direct an election; there was thinking that tended to consider contract bar situations in terms of "commercial contract law."[10] These divergent approaches were in direct descent from earlier and diametrically opposed beliefs:[11] that the freedom of choice protected by the Act made contracts vulnerable to new elections at least annually; that a contract, valid when made, should be a bar throughout its existence regardless of the length of its term;[12] and - with a tangential twist - that employees may shift their allegiance during the term of a contract but that the contract continues in force with the new union simply replacing the old.[13]

Eventually, during this formative period, the Board developed a workable compromise. The compromise was manifestly not the result of purely academic or intellectual processes; it had its roots in the dynamic developments on the industrial scene. There unquestionably was the awareness of the increase from three-and-a-half million union members in 1935 to approximately fifteen-and-a-half million in 1947,[14] and a corresponding increase in contract coverage. During the two post-war years competition increased among rival unions; the Board became more and more concerned with stability and the discouragement of raiding. At the same time, the Board showed a counterbalancing concern that too much emphasis on stability might adversely affect the objective of responsible representation. There was also the consideration that inability

9. Ibid., at 1415.
10. Supra note 6 at 156-57.
11. See discussion in Cox, "Cases on Labor Law" 342-46 (4th ed. 1957).
12. See Triboro Coach Corp. v. New York State Labor Relations Board, 286 N.Y. 314, 36 N.E. (2d) 315 (1941).
13. Kiekhaefer Airo Marine Motor Co., 18 LRRM 1452 (Wisconsin Employment Relations Board), dictum in New England Transportation Company, supra note 27 at 138-39.
14. Handbook of Labor Statistics, U.S. Dept. of Labor, 1950 Ed., 139.

to change the bargaining representative might lead to discontent which would tend to subvert plant stability. Finally, the doctrine originally borrowed from the National Mediation Board of "substituting" labor organizations while continuing the contract in force, appeared to raise more problems than it solved, and was never actually elevated for any appreciable period of time to the stature of a Labor Board policy.

The workable compromise to which I have made reference was stated by the Board in the American Seating Company case.[15]

> One of the problems in this connection arises from the claim that a collective bargaining contract of fixed term should bar a new election during the entire term of such contract. In solving this problem, the Board has had to balance two separate interests: The interest of employees and society in the stability that is essential to the effective encouragement of collective bargaining, and the sometimes conflicting interest of employees in being free to change their representatives at will.

The Board, in that case, went on to explain one of the important policies that is embraced in the contract bar doctrine:

> The purpose of the Board's rule holding a contract of unreasonable duration not a bar to a new determination of representatives is the democratic one of insuring to employees the right at reasonable intervals of reappraising and changing, if they so desire, their union representation. Bargaining representatives are thereby kept responsive to the needs and desires of their constituents; and employees dissatisfied with their representatives know that they will have the opportunity of changing them by peaceful means at an election conducted by an impartial Government agency. Strikes for a change of representatives are thereby reduced and the effects of employee dissatisfaction with their representatives are mitigated.[16]

This should indicate the direction of the Board's thinking; it shows a balancing of interests, not in any abstract sense, but in the light of the every-day realities of the industrial scene.

In the application of the contract bar doctrine, the Board has taken into consideration the evolution of the collective bargaining process. The economic picture is a constantly changing one, and

15. American Seating Company, 106 N.L.R.B. 250 at 253 (1953).
16. Ibid., at 255.

the Board has had to adapt itself to the changes. The Board said in the Reed Roller Bit case,[17]

> For large masses of employees collective bargaining has but recently emerged from a stage of trial and error, during which its techniques and full potentialities were being slowly developed under the encouragement and protection of the Act. To have insisted in the past upon prolonged adherence to a bargaining agent, once chosen, would have been wholly incompatible with this experimental and transitional period. It was especially necessary, therefore, to lay emphasis upon the right of workers to select and change their representatives. Now, however, the emphasis can better be placed elsewhere.[18]

Reconversion from war industry inevitably brought an increase in representation disputes as workers shifted back to peacetime occupations, and rival unionism accentuated the need to strengthen Board policies under which it would accept petitions for new elections. In the interest of stability the Board held that contracts containing automatic renewal clauses should be encouraged, as they tended to avoid a hiatus between successive contracts.[19] On the other hand, the Board developed the "premature extension" doctrine to provide employees with an opportunity to change bargaining representatives, if they wished, at predictable and reasonable intervals.[20] In the words of the Second Circuit, "Any other conclusion would seat the existing representative permanently in the saddle...."[21] One more example of this empirical process might be worthwhile. In Western Electric Company, Inc.,[22] the Board decided that whether or not a contract contained a modification clause, and regardless of its scope if it had one, the parties could renegotiate or modify any of its substantive terms without opening it up to an otherwise prematurely filed petition. This was a change from a prior rule which made a contract vulnerable to a petition if the parties undertook modification of substantive provisions in the absence of a reopening clause or modified provisions beyond the scope of a reopening clause. In making this change, the Board took into consideration a number of factors: the need for increased stability

17. Reed Roller Bit Company, 72 N.L.R.B. 927 (1947).
18. Ibid., at 930.
19. Mill B., Inc., 40 N.L.R.B. 346 (1942).
20. American Steel Foundries, 85 N.L.R.B. 19 (1949).
21. NLRB v. Geraldine Novelty Co., 173 F. (2d) 14 at 17 (2nd Cir. 1949).
22. 94 N.L.R.B. 54 (1951).

in industrial relations; and increasing familiarity of employees with their collective bargaining rights under the Act; and the realities of current collective bargaining.

I refer to these more specific applications of the contract bar doctrine only to indicate how it evolved and to illustrate its adaptability to changing economic conditions; I leave the many rules - and they are liberally sprinkled throughout 121 Board volumes - to the tender mercies of the technicians. I am, at the moment, more concerned with the legal theory on which the doctrine rests.

A collective bargaining agreement in the statutory framework takes on an aspect wholly unknown to the common law.

> Contracts must be understood as having been made not only with reference to existing legislation but also with reference to the possible exercise of any rightful authority of the Government, and no obligation of existing contracts may be invoked to defeat that authority.[23]

This concern manifests itself in the objectives I quoted at the beginning, and forms the cornerstone of the Board's approach. The Act itself is silent on the question whether and under what circumstances an existing contract should operate as a bar. But the courts have recognized it as an established part of the law of labor relations.[24] Judge Learned Hand describes the contract bar rules as having been "as it were, written into the statute."[25] An administrative device early adopted by the Board in the exercise of its discretion as a means of maintaining the stability of the collective bargaining relationship, the contract bar doctrine has proven its worth throughout the years. When in 1947, Congress passed the Taft-Hartley amendments to the Act, it gave its approval to the exercise of this administrative discretion by the Board. The House Conference Report, in commenting on the elimination of a provision which it feared might jeopardize the contract bar doctrine, stated:

> Since the inclusion of such a provision might give rise to an inference that the practice of the Board with respect to conduct-

23. NLRB v. J. I. Case Co., 134 F. (2d) 70 at 72 (7th Cir. 1943), aff'd 321 U.S. 332 (1944).
24. NLRB v. Efco Mfg., Inc., 203 F. (2d) 458 at 459 (1st Cir. 1953); NLRB v. Geraldine Novelty Co., supra note 45 at 17-18; Iob v. Los Angeles Brewing Co., Inc., 183 F. (2d) 398 at 404 (9th Cir. 1950); NLRB v. Grace Company, 184 F. (2d) 126 at 129 (8th Cir. 1950).
25. Fay v. Douds, 172 F. (2d) 720 at 724 (2nd Cir. 1949).

> ing representation elections while collective bargaining agreements are in effect, should not be continued, it is omitted from the conference agreement.[26]

The Senate Report specifically stated that,

> Neither of these amendments [to Section 9 (c)] affects the present Board rules of decisions with respect to dismissal of petitions by reason of . . . an outstanding collective agreement as a bar to an election.[27]

It seems clear then that the contract bar doctrine has received legislative sanction as well as court approval.

Did the enactment of the Taft-Hartley amendments have any impact on the contract bar doctrine? Yes, but only on the extent of more coverage, not on the essential principles involved. The addition of employer petitions and decertification proceedings simply meant the application of these contract bar rules to the new types of proceedings. The Section 9 filing requirements, including non-Communist affidavits, created some problems but not insuperable ones. The provisions of Section 8 (d), defining "collective bargaining" and requiring notices, were taken into consideration by the Board in the De Soto Creamery and Produce Co. case[28] as a guide in handling contracts containing automatic renewal clauses. Perhaps the most significant impact of the 1947 amendments was occasioned by the provisions with respect to union security, but even these were not without prior precedents under analogous circumstances under the Wagner Act. Under general law, contracts which are prohibited by statute or contrary to public policy are illegal, and under the Wagner Act, as interpreted by the Board, clauses which were contrary to the basic policies of the Act would not bar a petition, even though these contracts were otherwise valid and met all the requirements. The Taft-Hartley amendments merely added to the scope of statutory illegalities.

This may be a good point to pause and take stock. From what I have said you will undoubtedly surmise that I am of the opinion that what the Board has done in the area of contract bar is to strike a satisfactory balance between what appear to be conflicting statutory objectives. It is not easy to render judgments in a multitude of complex factual stituations with varying equities. However, I think the record of the Board in this area is good. And if you will

26. House Conf. Rept. No. 510 on H.R. 3020, p. 50.
27. Senate Rept. No. 105 on S. 1126, p. 25.
28. 94 N.L.R.B. 1627 (1951).

permit me the luxury of a testimonial, I like the sentiments expressed by Bernard Cushman in the Michigan Law Review some years back when he wrote of the Board's contract bar doctrine. This is what he said: "The development of a doctrine of administrative stability within the framework of democratic principles has been a conspicuous achievement of the Board in the administration of the Act."[29] I hope we have given him no cause to regret his endorsement.

Because I appear to voice a sense of satisfaction with the Board's theory and practice of contract bar you may well ask: "Why then did the Board recently request briefs and oral argument on contract bar principles on a rather pretentious scale?" The answer is twofold. A dynamic field such as labor relations requires a dynamic approach. To reappraise and re-examine policies in the light of recurring changes in industrial life is to take advantage of the flexibility of the administrative process, a process that has the virtue of ready adaptability. The Board must keep in step with industrial realities. There is another reason. We are now in the middle of our 121st volume of published Board decisions. The very magnitude in numbers of contract bar rulings in those volumes tends by itself to increase the complexity of the doctrine. We hope to achieve some codification and perhaps, if our wishes are realized, a degree of simplification. I cannot give you assurances that we shall succeed, but the aim, you will agree, justifies the effort.

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29. Cushman, "The Duration of Certifications by the National Labor Relations Board and the Doctrine of Administrative Ability," 45 Mich. L. Rev. 1 at 38 (1946).

PANEL DISCUSSION: INDUSTRIAL STABILITY AND FREEDOM OF CHOICE

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2:30 P.M., July 31, 1958

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