THE NATIONAL LABOR RELATIONS ACT AND THE COLLECTIVE AGREEMENT

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The subject allotted me today is, as noted on the program, "The National Labor Relations Act and The Collective Agreement." It is, as anyone even modestly acquainted with the N.L.R.B. story will agree, an eminently fitting subject for a Board official to discuss. But after serving for a little more than a year as General Counsel for the Board, I am sure I will not be misunderstood by the group of distinguished experts gathered here if I suggest that an even more fitting subject might be "The National Labor Relations Act and Collective Disagreement."

Indeed, in addressing myself to the programmed subject I have had some difficulty in divorcing my thoughts from the wide collection of individuals and groups who seem to have no difficulty at all in disagreeing about what the law is on any number of questions under this Act--let alone what the law should be.

But all of this, really, is quite in point with our actual subject of discussion, because if there is any area in which there is at least potential collective disagreement, it is the area of the collective agreement. This is so, in part perhaps, because the Board has not been called upon to develop the law with respect to the collective agreement in any substantial detail. And this in turn is so, I believe, because the collective agreement, up to this point in our pursuit of the elusive truth, has been but a single element in the vast array of matters with which the Board has had to deal.

There is, it seems to me, an element of the paradoxical in this. That is, if the ultimate focus of the Act is upon a wholesomely stable industrial peace, the penultimate focus is certainly upon the collective agreement. As the late Judge Parker has observed,[1] the collective agreement not only reduces "to writing settlements of past differences," but provides:

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1. NLRB v. Highland Park Mfg. Co., 110 F. (2d) 632 at 638 (4th Cir. 1940).

> a statement of principles and rules for the orderly government of the employer-employee relationship in the future. The trade agreement thus becomes . . . the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted.

Thus the collective agreement is the practical goal upon which the Act, and those who have a hand in its administration, have their sights trained. At the same time, from the earliest Wagner Act days the accepted view has been that the statute and the Board actually have little or nothing to do with the collective agreement--once it is made. The traditional role of the Board has been, in the main, to lead the parties to the bargaining water, but to stay with them at the shoreline only long enough to see that they drink in good faith--or, if you will, to guide them through the wilderness of industrial anarchy, but not to pursue them very far into the promised land of peace and quiet under contract.

Thus, from the beginning, the Board has been able to take the position that it was not its lot to "police" collective bargaining agreements. Accordingly, the Board has regularly dismissed refusal to bargain charges predicated solely on a party's alleged breach of the agreement.[2] And Congress has been of much the same mind; for, in amending the Wagner Act, Congress specifically rejected a proposal which would have made it an unfair labor practice for a party "to violate the terms of a collective bargaining agreement or an agreement to submit a labor dispute to arbitration." Instead, by Section 301 of the Labor Management Relations Act, it seems to have left the redress of these matters to the courts.[3]

But, as most of us here have lived long enough to learn, the facts of life are not always quite what they should be. And the traditional notion that the Board has nothing to do with collective agreements seems to have evolved into something more in the nature of a fiction than a fact.

For instance, a provision frequently found in collective bargaining contracts, particularly in the motor carrier industry, is

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2. See F. S. Elam Shoe Co., Inc., 13 N.L.R.B. 92 at 99-100 (1939); Carroll's Transfer Co., 56 N.L.R.B. 935 at 939 (1944); United Telephone Company of the West, 112 N.L.R.B. 779 at 781-82 (1955).
3. Leg. Hist. of the Labor Management Relations Act, 1947 (Gov't Print. Off., 1948) at 545-46.

the so-called "hot cargo" clause. This provision purports to exempt the employees from handling goods designated as "unfair" by their union representatives. The Labor Act does not, in terms, prohibit an employer and a union from agreeing to such a clause. However, Section 8(b)(4)(A) of the Act makes it an unfair labor practice for a union to induce or encourage employees to engage in a strike or other work stoppage for the purpose of forcing their employer to cease doing business with some other person. Suppose a union seeks to enforce the "hot cargo" clause of its contract with the employer by appealing to the employees whom it represents not to handle "unfair" goods which have arrived at the dock where they work. Does the contract clause privilege the union's action, and thus furnish a defense to conduct otherwise violative of Section 8(b)(4)(A)?

To answer this question, theBoard of course had to intrude a bit into the relationship the parties had established in their collective agreement. After some preliminary doubts the Board determined that the answer to the question was "No." And, as you are all aware, the Supreme Court has recently agreed.[4] Finding that Congress, in Section 8(b)(4)(A) intended to afford the employer "a freedom of choice at the time the question whether to boycott or not arises in a concrete situation," the Court concluded that such "a choice, free from the prohibited pressures... must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into between the parties." Accordingly, "inducements of employees that are prohibited under Section 8(b)(4)(A) in the absence of a hot cargo provision are likewise prohibited when there is such a provision."[5] However, the Court noted that the employer could voluntarily observe the "hot cargo" clause without violating the Act, and that "in some totally different context not now before the Court," the clause might "still have legal radiations affecting the relations between the parties."[6]

The principle that private contracts must yield when contrary to public policy is, of course, not new. The more interesting aspect of the "hot cargo" decision, I would say, is that it shows that Congress need not go the whole way when it finds it advisable

4. Local 1976, United Brotherhood of Carpenters and Joiners of America (AFL), v. NLRB, 357 U.S. 93 (1957).
5. Ibid., at 106.
6. Ibid., at 108.

to impair a private agreement in the public interest--it need not invalidate the contract in full—, but may displace it only in part. Congress clearly had the power to flatly outlaw "hot cargo" clauses as such, as it did with closed-shop contracts in the proviso to Section 8(a)(3) of the Act. But as the Supreme Court pointed out, "the Taft-Hartley Act was to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests."[7] Accordingly, Congress apparently decided to leave the union free to persuade an employer voluntarily to accede to a boycott demand, but prohibited any effort to coerce the employer's decision through work stoppages on the part of his employees. Adhering to the line which Congress thus drew, leads to the conclusion--which might otherwise seem anomalous--that a "hot cargo" provision itself is not invalid, but attempts to enforce it through the employees are barred by the Act.

And so, in a "hot cargo" situation, the Board is permitted to cast something larger than a shadow upon the parties' full enjoyment of their contractual arrangement, putting to one side the task of dealing with whatever "legal radiations" may thereafter appear.

Another instance of the interplay between the collective agreement and the Labor Act appears in the situation where the Board directs an election despite the existence of a contract which is currently alive. Suppose, for example, that an employer negotiates a five-year contract with Union A, and two years later Union B petitions the Board for a representation election. The Board, after balancing the Act's policy of maintaining stability against its policy of affording employees full freedom in their choice of a bargaining representative, directs an election though the contract with Union A still has three years to run. Suppose, further, that Union B wins the election and is certified. What effect do the outstanding contract and the new bargaining relationship have upon each other?

The Board has held that the bargaining obligation imposed by Section 8(a)(5) of the Act requires the employer, upon request, to negotiate immediately with the newly certified union for a new con-

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7. Ibid., at 99-100.

tract.[8] That is, the old contract does not furnish the employer with a no-bargaining grace period until its expiration date. For, as the Board has explained: "There is little point in selecting a new bargaining representative which is unable to negotiate new terms and conditions of employment for an extended period of time."[9]

But, even if the employer must immediately bargain about a new contract, is the old contract binding on the newly certified agent for the interim period until the new agreement has been worked out? This question has not as yet been answered by the Board, but has been involved in private litigation.[10] The resolution of this problem, as is so often true under the Labor Act, requires an accommodation between competing statutory policies--the policy of maintaining stability and that of according full status to a newly certified bargaining agent.

This situation gives rise to a number of interesting questions. Suppose, for instance, that the old contract has a no-strike clause. If the old contract were binding on the new bargaining agent during negotiations for a new contract, presumably he would not be able to strike during this period. This would make for stability. At the same time, however, it would substantially reduce the new agent's bargaining power with respect to a new contract. For it is generally accepted that the right to strike is an essential component of free collective bargaining.[11] Suppose, further, that the old contract provides for a wage increase. Here, the new bargaining agent would gain from a holding that he is bound by that contract. For, if the contract terminated with his certification, this would also appear to end the employer's legal obligation to put the increase into effect. But can we pick and choose which provisions of the old contract remain in effect and which do not, or should it be a case of all or none? Does the answer lie in jungle law...Gresham's law...or Board law?

At this point, I am reminded of the ancient saying that, "It

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8. American Seating Co., 106 N.L.R.B. 250 (1953).
9. Ibid., at 255.
10. See Kennametal, Inc. v. U.A.W., 42 LRRM 2064 (W.D. Pa.); Modine Mfg. Co. v. I.A.M., 216 F. (2d) 326 (6th Cir. 1954).
11. See the statement of Senator Taft at 83 Cong. Rec. 3835 (1947), quoted in Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Wisconsin Employment Relations Board, 340 U.S. 383 at 395 n. 21.

is not every question that deserves an answer."[12] The only reason I am reminded of it is that in my present position I have not infrequently felt that the old saying should be amended to read: "It is not every question that has an answer." As one wag put it, "We have a problem for every solution." Perhaps the most we should do with the questions I have just posed is, in the words of Mr. Justice Frankfurter, to leave them to the "process of litigating elucidation."[13]

In the "hot cargo" situation we have seen that the parties--faced with the problem of living, not in a law library, but in a world of realities--undertook to arrange their affairs by contract, only to learn that Congress had anticipated them and had arranged their affairs for them by law. In short, the Board and the courts have said to the parties, or at least to the unions, "You can't get away with it--by contract." I should like to discuss now, for a moment, a contrasting situation in which the Board, according to some, seems to be saying, "You can get away with it--by contract."

This concerns Section 8(b)(4)(D) of the Act. That section, as you know, illegalizes strikes or work stoppages for the purpose of forcing an employer to assign particular work to one group of employees rather than to another group of employees. By virtue of Section 10(k), a charge alleging a violation of 8(b)(4)(D) is handled somewhat differently from other unfair labor practice charges. The issuance of an unfair labor practice complaint may be deferred pending an effort to adjust the underlying jurisdictional dispute. Thus, Section 10(k) provides that, when an 8(b)(4)(D) charge is filed, the Board shall proceed "to hear and determine the dispute out of which such unfair labor practice shall have arisen," unless the parties have "agreed upon methods for the voluntary adjustment" of the dispute. Section 10(k) further provides that, upon "compliance by the parties, to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute," the 8(b)(4)(D) charge shall be dismissed. If on the other hand, the Section 10(k) procedures fail to settle the jurisdictional dispute, an unfair labor practice complaint is issued based on the 8(b)(4)(D) charge, and an appropriate remedial order is sought.

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12. Publius Syrus, 42 B.C.
13. International Association of Machinists v. Gonzales, 356 U.S. 617 at 619 (1958).

In determining a jurisdictional dispute under Section 10 (k), the Board is often faced with the contention, advanced by the striking union, that it is entitled to the work under the terms of its collective agreement with the employer. In these circumstances, if the contract is otherwise valid and does in fact cover the work in question, the Board will follow the terms of the contract and hold that the striking union is entitled to the work. The Board has explained its reason for doing so as follows:[14]

> The Board is persuaded that to fail to hold as controlling . . . the contractual preemption of the work in dispute would be to encourage disregard for observance of binding obligations under collective-bargaining agreements and invite the very jurisdictional disputes Section 8 (b) (4)(D) is intended to prevent.

The collective agreement may play a part in the resolution of jurisdictional disputes in still another way. It may provide for a determination of such disputes by an arbitrator or, as in the building and construction industry, by a Joint Board. In this event, since Section 10(k) specifically provides for voluntary methods of adjusting jurisdictional disputes, the Board will require that the dispute be determined under this procedure rather than through the Board. Accordingly, should the parties fail to resort to the contract method resolving the dispute, or, having resorted, fail to comply with the award thereunder, the Board will not make a Section 10(k) determination of its own. Instead, the unfair labor practice proceeding will be immediately resumed, with the issurance of an 8(b)(4)(D) complaint. As the Board has noted:[15]

> To construe the Act so that a party dissatisfied with the agreed method can have an alternative tribunal - this Board - either redetermine an adverse decision or pass upon the matter in advance of an expected adverse decision, is to frustrate the Congressional purpose of placing initial reliance upon voluntary agreements to settle jurisdictional strife. For . . . this construction "would condone and sanction . . . breach of the agreement, and would tend to discourage and render worthless the making of such agreements. . . ."

14. National Association of Broadcast Engineers (N.B.C.), 105 N.L.R.B. 355 at 364 (1953).
15. Wood Wire and Metal Lathers, Local Union No. 2 (Acoustical Contractors Ass'n of Cleveland), 119 N.L.R.B. No. 166 (1958), 41 LRRM 1293 at 1298.

Jurisdictional disputes, however, are not the only situations giving rise to an unfair labor practice which is affected by contract procedures. A typical provision in many collective bargaining agreements is a promise by the employer that he will not restrain or coerce employees, or discriminate against them, because of union membership or activity. This promise, which covers substantially the same ground as Section 8 (a) (1) and (3) of the Labor Act, is usually coupled with a provision for the submission of questions arising under the contract to arbitration.

Suppose that, under such a contract, an employee is discharged and he claims that the reason was union membership. The arbitrator, however, rules that the discharge was for cause. The employee, dissatisfied with the arbitrator's ruling, files an 8 (a) (3) charge with the Board. What will the Board do?

Section 10 (a) of the Act provides that the Board's power to remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Accordingly, purely as a matter of legal power the Board could disregard the arbitrator's decision and proceed to determine the question de novo.[16] However, the Board, in recognition of "the desirable objective of encouraging the voluntary settlement of labor disputes," will ordinarily accept the arbitrator's decision as dispositive of the matter, and dismiss such a case.[17]

But the Board will do so, only where it is satisfied that the proceedings before the arbitrator "have been fair and regular, all parties had agreed to be bound, and the decision of the [arbitrator] is not clearly repugnant to the purposes and policies of the Act."[18] Should any of these conditions be lacking, the Board will not defer to the arbitrator's decision, and will proceed to determine the unfair labor practice question itself and prescribe whatever remedy it may deem appropriate.[19]

In this way, the Board gives effect to the salutary objective of encouraging voluntary settlement of labor disputes, without at the same time relinquishing its paramount obligation to administer and effectuate the policies of the Act. Whether the Board

16. See NLRB v. Walt Disney Productions, 146 F. (2d) 44 (9th Cir. 1944), cert. den., 324 U.S. 877.
17. Spielberg Manufacturing Co., 112 N.L.R.B. 1080 at 1082 (1955).
18. Ibid., at 1082.
19. See The New Britain Machine Company, 116 N.L.R.B. 645 (1956); Wertheimer Stores Corp., 107 N.L.R.B. 1434 (1954).

can continue to succeed in this regard, however, may well depend upon the conclusions reached respecting the scope of the jurisdiction conferred upon the courts under Section 301 of the Labor Management Relations Act -- a question which, although bruited about for more than ten years, is just entering the litigation arena.[20]

Stated more concretely, the problem is this: As I indicated at the outset, Section 301 confers upon the courts jurisdiction to redress breaches of a collective bargaining agreement. The Supreme Court has recently held that, in the exercise of this jurisdiction, the courts are empowered to decree specific performance of an agreement to arbitrate.[21] But where the contract question also involves unfair labor practice conduct, does this jurisdiction empower the courts to provide a remedy different from, and in conflict with, one which the Board would provide for the same conduct? For example, does Section 301 empower a court specifically to enforce an arbitration award which the Board had found to be contrary to the policies of the National Labor Relations Act, and thus had decreed contrary relief? If it does, the court, under Section 301, may well be in a position where it could impair the effectiveness of the Board unfair labor practice decisions, and diminish the heretofore exclusive nature of the Board's jurisdiction.

With this speculation, I will conclude my effort to give you a bird's-eye view of the National Labor Relations Act and the collective agreement. I am afraid that I have left you with more questions than I have answered. Whether I have failed to answer them for reasons of policy, politics, or prudence - or simply because I do not know the precise or final answer - I will leave to you. However, since we are told that questions are a prelude to understanding, I hope that the ones which I have raised may, in some small measure, contribute to that desirable result.

> Men never know exactly what is right;
> So caught between a promise and a doubt,
> They first make windows to let in the light,
> And then make curtains to shut it out.[22]

20. See United Electrical, Radio and Machine Workers of America v. Worthington Corporation, 236 F. (2d) 364 (1st Cir. 1956); United Electrical, Radio and Machine Workers of America v. General Electric Company, 231 F. (2d) 259 (D.C. Cir. 1956); Textile Workers Union of America, CIO v. Arista Mills, 193 F. (2d) 529 (4th Cir. 1951).
21. Textile Workers Union of America, CIO v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).
22. Author unknown.

THE LAW OF THE COLLECTIVE AGREEMENT

Chairman: Robert G. Howlett
Grand Rapids, Michigan, former Chairman, Section of Labor Relations Law, State Bar of Michigan

Speaker: Charles O. Gregory
Professor of Law, University of Virginia

2:30 P.M., August 1, 1958

CHARLES O. GREGORY