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The Regulation of Labor Unions

Theodore J. St. Antoine*

This year completes exactly a half century in the federalization and codification of American labor law. Before that the regulation of both the internal affairs and external relations of labor organizations was left largely to the individual states, usually through the application of common or nonstatutory law by the courts. One major exception was the railroad industry, whose patent importance to interstate commerce made it an acceptable subject for federal legislation like the Railway Labor Act. In addition, the U.S. Supreme Court read the “restraint of trade” prohibitions of the federal antitrust laws as encompassing certain union boycotts and other organizational activities, thus exposing them to the risk of federal remedies, including the dreaded injunction. Labor injunctions were often issued “ex parte” without a hearing and were highly effective in breaking strikes or work stoppages.

With these latter qualifications, however, state law predominated prior to the 1930s. At the outset, in the early nineteenth century, efforts by working people to band together and withhold their services from employers in order to better their wages and working conditions were commonly condemned as criminal conspiracies. By midcentury the focus shifted from criminal to civil liability. An ends-means test was enunciated: concerted employee activity was a civil conspiracy if it had an illegal objective or employed illegal means. The intentional infliction of economic injury was a prima facie tort and could only be justified by some legitimate purpose. This gave the common law judges, most of whom hailed from the propertied classes, considerable leeway to indulge their own social philosophies in assessing the objectives of organized workers. Meanwhile, the law initially paid little heed to the internal arrangements of labor unions, treating them much like social clubs. Nonetheless, by the 1930s the more venturesome state courts were beginning to use contract, property, and even tort theories to afford

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union members a measure of protection against arbitrary action on the part of their organization.5

Symptomatic of the unpredictable, sometimes inadvertent, development of federal labor policy was the way the Norris-La Guardia Act6 ushered in the modern era of American labor law in 1932. Norris-La Guardia was not so much a piece of regulation as of deregulation. Its primary aim was to get the federal judiciary out of the business of enjoining strikes. The immediate effect was to remove federal controls as factors in the nation's labor disputes, apart from the rail industry. This anachronistic invocation of laissez-faire could hardly endure. Barely three years later, partly in response to growing industrial unrest that had been exacerbated by the Great Depression and partly in response to an increasing recognition of workers' claims to broader social justice, Congress passed the National Labor Relations (Wagner) Act,7 the first comprehensive federal regulation of the relations between American employers and unions. Even so, it would be almost another twenty-five years before Congress would essay a similar comprehensive regulation of internal union affairs, the principal subject of this paper.

In 1957 a special committee of the U.S. Senate began a two-year investigation and exposure of corrupt practices and abuses of democratic procedures in a relatively few (essentially five) American labor organizations. A senatorial consensus soon emerged that a need existed for federal legislation covering three specific areas, viz., reporting and disclosure of union procedures and finances, safeguards for fair elections of union officers, and regulation of so-called "trusteeships," whereby national organizations suspend the autonomy of constituent local bodies and take over their supervision. The rationale for the emphasis on reporting and disclosure was the "goldfish bowl" concept, the notion that if union members were kept adequately informed about their organizations, they themselves could remedy most abuses that might occur. Labor relations philosophies in the United States are sufficiently divisive, however, and union-management attitudes sufficiently hostile, that consensus has rarely been the engine behind major new labor legislation, and 1958-59 proved no exception. Although a bill duly tailored to the three particular areas outlined above easily passed the Senate, it died in the House of Representatives. Then the battle began in earnest.

A conservative coalition of Republicans and Southern Democrats seized the occasion to press for wide-ranging provisions that would enhance union "democracy" and at the same time might impair the operational effectiveness of labor organizations. Archibald

Cox, then the country's premier labor law scholar, commented caustically:

"Business groups showed no genuine interest in reform. Spokesmen for such groups . . . beat the drums in an effort to swell the public outcry against the abuses revealed at the [Senate] hearings in order to obtain support for laws which would strengthen the bargaining power of management in relation to labor organizations."  

Ultimately the conservatives triumphed, and the product was the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, the first broadly inclusive federal statute dealing with the internal framework and procedures of labor unions. Yet irony has been piled upon irony. Not only is this wellspring of union members' rights the construct in considerable part of employer lobbyists bent on weakening labor organizations; in the two decades since being enacted, Landrum-Griffin's internal controls have done much to advance the cause of participatory democracy within unions while doing little if any damage to the structure of the labor movement. And perceptive management representatives have lived to rue the day they helped empower feisty rank-and-filers to speak up and reject the "responsible" collective bargaining settlements negotiated by their unions' leadership.

Before a more detailed, if necessarily abbreviated, survey is undertaken of the law governing labor organizations in the United States, several points need to be underscored. First, despite its sweep, the Landrum-Griffin Act is not the whole story concerning the regulation of internal union affairs. Unlike the National Labor Relations Act, which generally "preempts" or displaces state law dealing with the relations between unions and private employers involved in interstate commerce, Landrum-Griffin expressly provides that, except in certain instances, state rules and remedies remain applicable to union relationships with members. Thus, a state may treat a union constitution as a contract between the organization and a member, and grant the member relief parallel to or even greater than that available under the federal statute. Second, Landrum-Griffin is not the sole source of a member's rights under federal law against his union. For example, Title VII of the Civil Rights Act of 1964 protects a worker against discrimination in either employment or union status because of race, sex, religion, or national origin. Finally, American labor law is remarkably parochial. It has been almost unaffected by international agencies, treaties, or resolutions, or by legal developments abroad. For good or ill, it is a distinctive system that tends to mirror the classless, individualistic,

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combative, and decentralized employment environment from which it springs.\textsuperscript{11}

I. UNIONS' LEGAL STATUS AND MEMBERSHIP POLICIES

A. General

Under the common law applicable in most states, labor unions are classified as voluntary, unincorporated associations like fraternities or social clubs. Except for the rare organization that becomes incorporated, there are no formal prerequisites for formation or dissolution. Furthermore, under the traditional view, unincorporated labor unions have no separate legal identity apart from their members, and therefore may neither sue nor be sued in their common names. All this was changed for purposes of federal law by the Labor Management Relations (Taft-Hartley) Act in 1947,\textsuperscript{12} which authorized suits by and against unions on labor contracts and thereby confirmed the federal concept of a labor organization as a juridical entity. State law remains controlling, however, with regard to a union's holding of property, its execution of ordinary commercial contracts, and even many of its relationships with members under its own constitution and bylaws.

B. Right of Admission

There is no general common law or statutory right to gain admission to a labor organization, even one that has been federally certified as the exclusive bargaining representative of all the employees in a particular plant or shop. Indeed, the Taft-Hartley Act explicitly preserved the power of unions to prescribe their own rules concerning the acquisition or retention of membership. Federal civil rights legislation, however, now forbids a labor organization to exclude or expel a person from membership on such specific grounds as race, sex, religion, national origin, or age.\textsuperscript{13}

C. Compulsory Unionism

In order to control access to jobs and maximize membership, unions in the past sought "closed shop" arrangements with employers. These agreements required employees to join a union and pay dues and fees to it before they could get a job. In 1947 the Taft-Hartley Act outlawed the closed shop but permitted the "union shop," which requires union membership only after a certain grace period, ordinarily 30 days from the beginning of employment.

Despite the usual "preemption" principle with respect to federal law governing union-management relations, section 14(b) of Taft-


Hartley expressly authorizes the states to prohibit union security arrangements allowable under the federal statute. Twenty states, mostly in the South and West, have adopted such so-called "right-to-work" laws. Organized labor has tried repeatedly, without success, to secure the repeal of 14(b). The federal Railway Labor Act takes the opposite course, and overrides state right-to-work laws in the railroad and airline industries.

In 1947 section 14(b) may have been a legislative compromise that was necessary to establish, as a matter of federal law, that a union was entitled to seek agreements preventing "free riders"—persons who reap the benefits of collective bargaining without paying their fair share of the costs. It is difficult, however, to discern a principled basis for retaining 14(b). A national union negotiating a national contract should not, even theoretically, have to impose the total financial burden on those employees who do not reside in a right-to-work state. "Open shops," where some employees support the union and others do not, inevitably sow dissension and bitterness among the workers. And there are no longer any grounds for the "moral" argument that a person should not be compelled to become a member of any organization as a condition of employment, or be forced to contribute to political causes in which he does not believe. The U.S. Supreme Court has declared that under a union security arrangement an employee need not actually assume the status or obligations of union membership. The only enforceable duty is the payment of dues and fees, and even there all that can be demanded is the pro rata cost of collective bargaining, not the expenses of the union's political or social activities.\(^\text{14}\)

**II. Members' Civil Liberties**

To the extent a union's constitution and bylaws spell out the substantive and procedural rights of members within their organization, those rights are generally enforceable in state courts as a matter of common law contract. With the adoption of the federal Landrum-Griffin Act in 1959, however, a substantially different concept was introduced as the basis of members' institutional protections. After an impassioned plea on the floor of the Senate by Senator McClellan, chairman of the special committee that investigated labor corruption in the late '50s, the Senate accepted without prior committee endorsement an amendment explicitly providing a "Bill of Rights" for union members. In what is now Title I of Landrum-Griffin, the emphasis is not upon members' contract or property rights, but upon the analogy to the rights of citizens in a political democracy, protected by constitutional guarantees. The underlying philosophy was that labor organizations are of such great public importance that federal legislation is essential to ensure union members the exercise of basic liberties in the democratic pro-

cess—a far cry indeed from the notion that a labor organization is a private voluntary association like a social club.

The "Bill of Rights" has one section guaranteeing union members generally an "equal right" to nominate candidates, vote in union elections, attend membership meetings, and participate in deliberations on union business. Title I then goes on to delineate certain more specific rights to free speech, procedural due process, and the like. Unlike many other provisions of Landrum-Griffin, which are subject to suits by the Secretary of Labor or to criminal sanctions, Title I is largely enforceable by a private civil action brought by the aggrieved member in federal district court. That distinction could be rationalized on the ground the "Bill of Rights" deals with peculiarly personal protections while the titles covering such items as reports, elections, and "trusteeships" are more concerned with institutional safeguards. It is likely, however, that more pragmatic factors account for the difference in the enforcement mechanisms. Some legislators wanted the Secretary of Labor to serve as a "sieve" to protect unions against frivolous charges, while others wanted to ensure direct access by individuals to the courts. Still others were undoubtedly influenced by their view of whether or not it was desirable to provide free government legal assistance to members pursuing claims against their union.

A. Free Speech and Assembly

Title I of Landrum-Griffin guarantees union members the right to "meet and assemble freely" and to "express any views," subject to the usual parliamentary rules governing the conduct of union meetings. In a decision bitterly protested by union spokesmen, but almost surely in line with the congressional design, a federal court of appeals held that the "free speech" section prevented a union from disciplining a member who libeled a local officer by wrongly accusing him of theft.15 The officer's recourse was to the civil courts.

Landrum-Griffin's free speech protections are subject to a proviso enabling a union to enforce a member's "responsibility . . . toward the organization as an institution" and his duty not to interfere with the union's "performance of its legal or contractual obligations." That presumably covers such activities as advocacy of a union "schism" or secessionist movement or of a "wildcat" or illegal strike. The courts have been wary, however, about allowing labor organizations much latitude under the proviso. For example, a union could not expel a member for publicly urging the nonpayment of union assessments, which the member mistakenly but reasonably believed were imposed in violation of law.16

B. Right to Sue

An ancient tradition in the American labor movement holds that intraunion quarrels should be settled "within the family." Thus, most union constitutions forbade members from suing the organization until they had first exhausted all available internal remedies. In some cases that might take several years, which was plainly unreasonable. Landrum-Griffin prohibited union limits on a member's right to sue or file administrative charges, with the proviso that a member "may be required to exhaust reasonable [intraunion] hearing procedures (but not to exceed a four-month lapse of time)" before going against his organization.

It is a measure of the judiciary's solicitude for preserving membership rights against union impairment that the courts have read the right-to-sue section as forbidding any union limitation whatsoever on members' suits or administrative charges. Probably in defiance of legislative intent, the exhaustion proviso has been interpreted as merely authorizing the courts to require a member to exhaust intraunion remedies but not as authorizing any such union constitutional requirement.\(^{17}\) Union discipline of a member for filing suit without first pursuing internal relief for even four months would accordingly be a violation of the statute.

C. Procedural Due Process

In a provision that essentially parallels the common law of a number of states, Title I of Landrum-Griffin requires that before a union member may be disciplined (except for a dues default), he must be served with written specific charges, given a reasonable time to prepare his defense, and afforded a full and fair hearing. The guarantee of a "full and fair hearing" includes the right to confront and cross-examine opposing witnesses and the right to trial before an unbiased tribunal. But bias must be established through a showing of improper motives, that is, specific prejudice. It is not enough that a union, like many an administrative agency, combines the prosecutorial and adjudicatory functions, for example, by having the organization's president file the charges and then participate in the trial body.\(^{18}\)Ordinarily an accused in a union proceeding is not entitled to be represented by legal counsel.

The U.S. Supreme Court has held that Landrum-Griffin's procedural safeguards do not authorize a court to determine the scope of substantive offenses for which a union may discipline its members.\(^{19}\) Furthermore, a federal court may only inquire whether there was "some evidence" to support a union's finding of guilt and may

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not undertake a full-scale review of the record and an assessment of the witnesses' credibility. On both these points it is possible that state courts will apply stricter standards. The U.S. Supreme Court was evidently affected by its reading of the "congressional intent to allow unions to govern their own affairs."

D. Union Discipline Under the NLRA

The National Labor Relations Act, as originally enacted as the Wagner Act and as subsequently amended by the Taft-Hartley Act, contains no general regulation of internal union affairs and touches upon them only tangentially in its restrictions on union security. The theory was that the NLRA only protected workers in their status as employees and not in their status as union members. Eventually, however, certain exceptions crept in. It became recognized as forbidden "restraint or coercion" under the NLRA for a union to penalize a member in a way that is directly inconsistent with declared congressional labor policy. An example would be fining or expelling a member for filing unfair labor practice charges with the National Labor Relations Board, the federal agency that administers the NLRA. In such instances it is immaterial that the discipline is purely internal and does not affect the member's job in any way.

On the other hand, outside this uniquely sensitive area of agency access, the NLRA leaves unions a free hand in most internal matters, including member discipline. A union may fine or expel members for working during a strike called against their employer, or for receiving pay for production exceeding a set ceiling, and the union may seek to enforce the fines in such cases through legal action. Moreover, the NLRB is not authorized to test union fines for the reasonableness of their amount; this is a question for the states to resolve under contract principles.

There is one important qualification to the hands-off rule regarding NLRA regulation of internal union discipline. If an employee never joins a union (and even under a union security agreement, as we have indicated, he need not assume formal membership), or if he resigns in a timely fashion, he is free of all membership obligations except possibly dues payments. A union would then commit an unfair labor practice if it attempted to fine such a nonmember for strikebreaking or similar activity.

At this point even an American labor specialist may find his head awhirl over all these distinctions. But there is a thread through the thicket. Rigorous logic would confine NLRA coverage to union conduct adversely affecting a person in his employment sta-

tus, for example, getting the employer to discharge him. Yet the logic crumbles, and courts permit the Labor Board to intervene, if union activity impinges too far on core public policies, such as guaranteeing untrammeled employee access to federal agencies or protecting nonmembers against internal union sanctions.

III. UNION ADMINISTRATION

In reporting out the bill that became the Landrum-Griffin Act, the Senate Labor Committee declared in 1959: “In providing remedies for existing evils the Senate should be careful neither to undermine self-government within the labor movement nor to weaken unions in their role as the bargaining representative of employees.”24 In keeping with this philosophy, as mentioned earlier, the initial approach was to deal primarily with three defined trouble spots, reporting and disclosure, elections, and trusteeships or parent-local relations. Although Landrum-Griffin was much enlarged before final passage, these provisions remain central features of the Act.

A. Reporting and Disclosure

About twenty states require labor unions to register or file organizational and financial reports. In addition, the tremendous growth of welfare and pension funds during and after World War II, coupled with legislative investigations revealing loose practices in their administration, led several states to enact laws setting standards for such funds and requiring reporting and disclosure.

Today the most important regulatory and reporting measures in these areas are two federal laws, the Employee Retirement Income Security Act of 197425 and of course the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959. The former provides elaborate safeguards for all employee benefit plans maintained by employers and unions in interstate commerce. Pensions, for example, must meet minimum vesting, benefit accrual, and funding requirements. Stiff fiduciary obligations are imposed on all plan trustees and administrators. Enforcement is through civil suit by a plan participant or beneficiary or by the Secretary of Labor. Criminal sanctions apply to willful violations.

Title II of the Landrum-Griffin Act prescribes five different types of reports: (1) union organizational reports; (2) union financial reports; (3) “conflict of interest” reports by union officers and employers; (4) employer reports on such matters as payments to union representatives and payments to influence employees in the exercise of their collective rights; and (5) reports by labor relations consultants on their “persuader” or “informant” activities concerning employees. Information contained in union organizational and financial reports must be made available to the members of the

union. The reporting obligations are subject to criminal sanctions and to a civil suit by the Secretary of Labor for an injunction or other appropriate remedy.

The practical results of all this paperwork and regulatory zeal probably have to be described as mixed. Shoddy pension plans have been driven out and marginal ones spruced up. At the same time, mountains of reports gather dust in government warehouses, effectively concealed from public view by inadequate indices. The fullest exploitation of these new statutory tools demands unusually vigilant and determined union members.

B. Trusteeships

The constitutions of most national unions provide that if there is financial malpractice or a denial of democratic process in a constituent local, the parent may suspend the subordinate body's autonomy and impose a "trusteeship," a form of superintending control. Prior to Landrum-Griffin, a handful of nationals was found to have established trusteeships for the purpose of "milking" local treasuries or improperly controlling votes. Title III of the Act prescribes the conditions under which trusteeships may be created, requires reporting and disclosure, prohibits voting by the trustee union's delegates unless they are democratically elected, and forbids the transfer of the local's funds to the supervisory body. The Secretary of Labor has reported flatly that Title III "has been effective in correcting the malpractices disclosed" in trusteeships.26

C. Election of Officers

Title IV of the Landrum-Griffin Act regulates the election of officers by local and national unions. There must be a secret ballot vote of the membership or alternatively, in the case of a national union, a vote at a convention of delegates who themselves have been chosen by secret ballot. In secret ballot elections each member "in good standing" is entitled to one vote. Elections at the national level must be held at least every five years and elections at the local level at least every three years. Safeguards are also provided for nominating candidates, inspecting membership lists, distributing campaign literature, and having observers at the polls and at the counting of the ballots.

The most litigated section of Title IV provides that all members in good standing are eligible to be candidates for union office, subject only to "reasonable qualifications uniformly imposed." Many unions prescribe attendance requirements—for example, that a candidate for local office must have attended at least one-half of the regular meetings of the local during the three years preceding the

election. Is such a qualification designed to ensure that candidates will be active and well-versed in a union's affairs, or is it designed to deter dissidents and benefit incumbents? The Secretary of Labor, apparently supported at least in principle by the U.S. Supreme Court, seems to apply a pragmatic test to these eligibility questions. If a particular rule disqualifies all but a small percentage of the union's membership (perhaps more than two-thirds), it will be presumed invalid.27

After an election has been conducted, the Secretary of Labor has exclusive authority to challenge it in a federal court action. But prior to an election, Title IV expressly recognizes existing state rights and remedies under a union's own constitution and bylaws. Suits by the Secretary of Labor, the U.S. Supreme Court has held, are generally limited to grounds about which an aggrieved member has previously complained to the union.28 This requirement of prior exhaustion of intraunion remedies is "designed to harmonize the need to eliminate election abuses with a desire to avoid unnecessary governmental intervention."

The major deficiency of Title IV is that, in states not having adequate preelection safeguards of their own, it does not fully protect candidates or would-be candidates when they need protection the most, that is, just before an election. It is then that any disputes over a candidate's qualifications or campaign tactics are most appropriately resolved. The proponents of Title IV's oddly bifurcated enforcement procedures undoubtedly had the best interests of organized labor at heart. They wanted to minimize the likelihood of delayed elections and the consequent disruption of a union's administration. Nonetheless, in the more progressive states at least, that likelihood is already present, along with the possibility of substantive decisions in conflict with federal policy. A more unified and consistent federal enforcement procedure would probably better serve the interests of both the candidates and their organization.

D. Officers' Fiduciary Duties

Landrum-Griffin's Title V makes union officials fiduciaries in relation to their organization and its membership. They have an obligation, enforceable by any member's civil suit for damages and an accounting, to hold the union's "money and property solely for the benefit of the organization and its members."

The fiduciary provision is a protean enactment, capable of being infused with almost any meaning a court decides upon. One federal circuit has taken the narrower view, emphasizing the specific reference to "money and property," and insisting this "is not a catch-all provision under which union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them."29 But

other circuits have held that the fiduciary standard is applicable to all exercises of an official's constitutional power and is not confined to the handling of money and property.\(^{30}\)

The more restricted reading of the fiduciary section is probably closer to the original congressional intention. It may also comport better with the goal of ensuring a continuation of effective union leadership, and of not frightening off aspiring young men and women who might be unwilling to subject themselves to personal financial liability for mere errors in administrative judgment. Yet the fiduciary provision will remain a tantalizing temptation to any federal court confronted with an egregious example of official misconduct and unable to find another handy statutory hook on which to hand a judicial remedy.

**IV. UNION-MANAGEMENT RELATIONS**

A paper of this short length necessarily becomes an exercise in precis writing when it attempts any description of the complex federal law regulating labor and management's relationships in the United States. Nonetheless, our commission calls for some discussion of the rules governing a union's organizational and collective bargaining activities, and so a few terse headnotes may be in order.

Apart from the railroad and airline industries, which are covered by the federal Railway Labor Act, union-employer dealings in most other industries affecting interstate commerce are controlled by the National Labor Relations Act (NLRA). This was originally adopted as the Wagner Act in 1935 and subsequently amended by the Labor Management Relations (Taft-Hartley) Act in 1947 and the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act in 1959. The NLRA does not apply to certain types of employees, such as agricultural workers, domestic servants, and supervisors. In addition, state and municipal employees are covered by state law and federal employees are covered by the separate Federal Service Labor Management and Employee Relations Law.\(^{31}\)

Section 7 of the National Labor Relations Act (NLRA) guarantees employees "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 other concerted activities for . . . mutual aid or protection." Employees are also entitled "to refrain from any or all such activities." The Act differs the most from the labor laws of other industrial nations in the elaborate (perhaps overly elaborate) rules and mechanisms that have been established to implement these employees rights and certain other specified interests of employers and the general public.

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A. Organization and Representation of Employees

Under the NLRA it is an "unfair labor practice" for either employers or unions to coerce employees physically or discriminate against them on the job because they do or do not wish to join a union, engage in a peaceful strike or work stoppage, or exercise other organizational rights. Although an employer is forbidden to discharge peaceful strikers, it may replace them permanently in order to carry on its business.

The Act creates the National Labor Relations Board (NLRB) to administer the unfair labor practice provisions of the statute and to resolve disputes concerning the representation of employees. The Board's decisions are not self-enforcing, however, and are subject to review by the federal courts of appeals and in special cases by the U.S. Supreme Court.

The NLRB conducts secret ballot elections to determine whether a majority of the employees in a particular plant or shop desire to be represented by a union. During the election campaign, both employer and union may freely express their views about unionization to the employees, but neither may resort to threats or bribes. Empirical studies have suggested that the Labor Board overestimates the importance of employee fear, supposedly engendered by the parties' speeches and other communications, as a factor in the outcome of elections.\(^\text{32}\)

If the union wins the election, the NLRB will certify it as the exclusive bargaining representative of all the employees in the unit, both supporters and nonsupporters. Employment terms negotiated by the union will supersede any individual contracts of hire.\(^\text{33}\) This union power of "exclusive representation" is of course one of the most distinctive characteristics of the American industrial system. It is an awesome power, which the U.S. Supreme Court has found necessary to counterbalance by imposing on majority unions a correlative "duty of fair representation." The latter obligates the union to represent all unit employees, dissenters and adherents alike, "honestly and in good faith and without invidious discrimination or arbitrary conduct."\(^\text{34}\)

A union is generally entitled to "picket," or patrol with signs reading, "Nonunion," "Unfair," or the like, for up to 30 days at the place of business of an employer it is trying to organize. To picket longer for organizing purposes, the union must file for a NLRB election. If the union then loses the election, it is forbidden to resume its organizational picketing for a year. These seemingly arbitrary rules are an example of a congressional effort to balance a union's interest in the opportunity to persuade and pressure a nonunion

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\(^{32}\) E.g., J. Getman, S. Goldberg & J. Herman, Union Representation Elections: Law and Reality 144-150 (1976).

\(^{33}\) J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

employer and its employees against their interest in being free of such disruptive activity when a majority of the workers do not want union representation.

A favorite economic weapon of American unions, much less employed in Europe, is the so-called "secondary boycott." For example, if a union has an immediate or primary dispute with Ace Manufacturer, it may try to bring pressure to bear on Ace by asking the employees of Black Retailer, a neutral or "secondary" party, to strike Black to force Black to cease handling Ace products. The Taft-Hartley and Landrum-Griffin amendments to the NLRA drastically restricted the use of the secondary boycott. Although Congress apparently acted out of a sense of moral outrage over the plight of the hapless neutral in these situations, there is evidence the actual extent of employer injury and union need in boycott cases differs markedly from industry to industry, and called for a much more discriminating legislative judgment than a sweeping prohibition.35

B. Collective Bargaining

An employer and a union representing its employees have a mutual obligation under the NLRA to bargain with each other in "good faith" over "wages, hours, and other terms and conditions of employment." The prescribed mandatory subjects include compensation in almost every conceivable form as well as working conditions in the plant or shop, but not "managerial prerogatives" or internal union matters. The parties have a duty to make reasonable efforts to accommodate differences and reach common ground, but ultimately they have no obligation to enter a contract. That is in keeping with the fundamental plank of federal labor policy that unions and management should resolve their own disputes through voluntary collective bargaining and not through the government's imposition of a solution. Even so, apparently no other Western country attempts to enforce anything like the "good faith" standard and to define so meticulously the subjects about which the parties must, or need not, negotiate.

As a matter of practice rather than law, most collective bargaining agreements in the United States differ significantly from their counterparts elsewhere in that they set the exact terms of employment for a particular plant or company, instead of installing a "floor" for a whole industry.

If a labor dispute becomes serious enough to "imperil the national health or safety," the Taft-Hartley Act authorizes the President to initiate proceedings to secure an 80-day federal injunction against any strike or lockout. This procedure was followed about three dozen times in the years after 1947 but it has now fallen into

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disuse. The reality may be that in today's world a genuine national
emergency dispute is more a political than a legal problem.

C. Contract Enforcement

About 95 percent of the major American labor contracts provide
for a grievance procedure capped by arbitration. In the grievance
process the union and the employer seek a voluntary settlement of
any dispute over the meaning or application of the agreement. If
the parties fail they may invoke arbitration, which is typically a re-
feral of the issue to an impartial third party for a final and binding
determination.

Nearly all union-employer contract disputes are resolved during
the grievance process. The vast majority of the rest are handled
routinely through arbitration. In the relatively rare instances when
a party resists arbitration or refuses to comply with an arbitration
award, section 301 of the Taft-Hartley Act authorizes an enforc-
ment suit in federal district court. According to the U.S. Supreme
Court, arbitration is a preferred method of dispute settlement, and
doubts are to be resolved in favor of enforcing an arbitration agree-
ment or award. The policy of promoting arbitration is so pro-
nounced that if a union strikes over an arbitrable grievance, an
employer may have the strike enjoined under section 301, despite
the usual Norris-La Guardia Act prohibition of strike injunctions by
the federal courts.

V. CONCLUSION

Proportionately, the numerical strength of organized labor in
the United States has never amounted to more than half of that in
most countries of Western Europe. Today, American union mem-
bership has dipped below 20 percent of the total labor force. The
continuing shift from the blue-collar to the white-collar sectors of
employment is probably the principal cause of the recent decline.
Yet more pervasive reasons must be sought for the traditional reluc-
tance of many American workers to organize. The very character of
American society and the environment of the work place—the lack
of fixed class lines; the individualism, enterprising spirit, resistance
to organizational discipline, and even combativeness of both em-
ployers and employees; and the multiplicity and decentralization of
institutions in a sprawling subcontinent—are all part of the
explanation.

It is also entirely possible that our federal laws regulating labor-

36. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steel-
workers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enter-
management relations have tipped the balance of power in the use of organizing and bargaining weapons too far against the unions. Thus it may not be wholly coincidental that the relative growth of organized labor in the private sector came to a halt almost simultaneously with the passage of the Taft-Hartley Act in 1947. Nonetheless, it has become practically an article of faith for most American labor scholars that at least the laws covering internal union affairs and guaranteeing individual membership rights have served a noble purpose. As one of the wisest contemporary observers of the labor scene has commented: "None except a democratic union . . . can achieve the idealistic aspirations which justify labor organizations." 39