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Comment

COMMENT

COMMENT—LABOR LAW—THE NATIONAL LABOR RELATIONS ACT—COLLECTIVE BARGAINING.—

I

HISTORICAL BACKGROUND 1935-1947

Until almost 1850 trade unions were commonly held by the courts to be criminal conspiracies in restraint of trade. The following century witnessed a gradual development of labor legislation and court decisions that raised the unions from illegal organizations to a position of unquestioned strength. Probably the most important modern piece of labor legislation in the United States was the National Labor Relations Act of 1935,[1] which guaranteed workers the right to organize and bargain collectively with management through representatives of their own choice. Known as the Wagner Act, it was passed by Congress in an effort to stabilize industry and balance the expanding powers of labor and corporate management. Its defined objective was "to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce"[2] and to create a National Labor Relations Board which would serve as a mediator in labor disputes. The Act was controversial from its very inception and led to a wave of litigation attacking its constitutionality and construction. The courts defended its validity by virtue of the Commerce Clause[3] of the United States Constitution.[4] Management labeled the Act as abusive of due process in that it denied the employer the right to hire and discharge employees at will, but the courts held otherwise,[5] claiming that the administrative machinery set up by the Act affords both labor and management fair and reasonable opportunities to be heard, present evidence, and have arbitrary administrative action reviewed.[6]

The Supreme Court[7] of the United States emphasized that the Act purports to reach only what may be deemed to burden or obstruct interstate or foreign commerce and is constitutional only as it operates within that sphere of authority. When applied to a Missouri Company that did not affect interstate commerce the Act was held invalid.[8]

The Supreme Court[9] declared it a means of protecting the rights of employees under modern economic conditions, enacted in order to provide

1 49 STAT. 449, 29 U. S. C. 151 (1935).

2 *Ibid.*

3 U. S. CONST., Article 1, § 8.

4 Precision Casting Co. v. Balora, 13 F. Supp. 877 (D. C. N. Y. 1936), *aff'd,* 85 F. 2d 15 (2d Cir. 1936).

5 N. L. R. B. v. Washington, Virginia and Maryland Coach Co., 85 F. 2d 990 (4th Cir. 1936), *aff'd,* 301 U. S. 142, 57 S. Ct. 648, 81 L. Ed. 965 (1936).

6 See note 3, *supra.*

7 N. L. R. B. v. Jones & Loughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

8 Stout v. Pratt, 12 F. Supp. 864 (D. C. Md. 1935) 85 F. 2d 172 (8th Cir. 1935).

9 Consolidated Edison Co. of N. Y. v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126 (1938).

reasonable measures to prevent the disruption of interstate and foreign commerce caused by industrial strife. It held,[10] that in order to accomplish that purpose, the National Labor Relations Board can exercise its power of injunction before actual industrial strife materializes to obstruct that commerce.

The federal courts viewed the Act as being highly remedial in character and held, therefore, that it should be favored with a broad and liberal construction.[11] They justified their position by pointing out that where Congress, with full knowledge of court decisions based on a broad and liberal construction of the chapter, had declined to amend it, the court was warranted in presuming that it had been efficaciously construed, in accordance with congressional intent.[12]

II

Historical Background (1947-1958)

The Wagner Act, however, had not successfully met the challenge of the crippling effect of strikes and labor-management discord on industry and commerce. In order to "provide additional facilities for the mediation of labor disputes affecting commerce [and] equalize legal responsibilities of labor organizations,"[13] the 80th Congress amended the 1935 statute by the Labor Management Relations Act of 1947,[14] better known as the Taft-Hartley Act. Like its predecessor, the Wagner Act, the 1947 amendment was highly controversial and its effectiveness equally as questionable.

Even in its formative stages, it created sharp disagreement between the Senate and House of Representative as to substance and structure but was finally passed by both houses after a compromise version was presented by a Committee of Conference. It was vetoed by President Truman, who returned it to Congress without his signature, stating that: "Its provisions would cause more strikes, not fewer. It would contribute neither to industrial peace nor to economic stability and progress. It would be a dangerous stride in the direction of a totally managed economy. It contains seeds of discord which would plague the nation for years to come."[15]

Construing the 1947 amendment, the Supreme Court[16] declared that it was designed to remove obstructions to the free flow of commerce caused by strikes and other forms of industrial unrest, which Congress found were attributable to the inequality of bargaining powers between unorganized employees and their employers. In reply to the challenge that the amended Act permitted the National Labor Relations Board to exercise increasingly powerful and dangerous authority in regulating labor disputes, the Supreme

[10] N. L. R. B. v. Bradford Dyeing Assn., 310 U. S. 318, 60 S. Ct. 918, 84 L. Ed. 1226 (1940).

[11] Jeffery-DeWitt Insulator Co. v. N. L. R. B., 91 F. 2d 134 (4th Cir. 1937).

[12] Tyne Co. v. N. L. R. B., 125 F. 2d 832 (7th Cir. 1942).

[13] H. R. Rep. No. 510, 80th Cong., 1st Sess. 135 (1947).

[14] 61 Stat. 136 (1947), 29 U. S. C. § 141 (1952).

[15] See note 13, *supra*, at 1851.

[16] American Communications Assn., C. I. O. v. Douds, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 95 (1950).

Court held[17] that the chapter contemplates cooperation between the Board and the Court of Appeals and where the Board acts within its designated sphere, the Court is required to grant enforcement of its order.

The amended Act has been severely criticized in that it fails to provide an adequate standard for determining the jurisdiction of the Board, its terms are vague and it is an unconstitutional delegation of legislative power. The courts,[18] however, have defended its validity but have failed to enunciate a construction that would eliminate continued controversy and litigation due to vagueness of terms. The scope and statutory definition of mandatory *collective bargaining* has remained uncertain and particularly troublesome.

III

COLLECTIVE BARGAINING AS DEFINED BY STATUTE

The National Labor Relations Act of 1935 provided "that representatives delegated 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 representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours or *other conditions of employment.*"[19] (Emphasis supplied.) This provision has remained substantially the same in the 1947 amendment.[20] The original act did not attempt to define *collective bargaining* nor did it qualify the scope of *conditions of employment.*

As recommended by the Committee of Conference,[21] which favored the proposed Senate Amendment, rather than the House Bill, the Act of 1947 states that: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."[22]

The House Bill, however, went far beyond the Senate Amendment to provide a more specific definition of *collective bargaining.* Although rejected by the Committee of Conference and never included in the final version of the Act, it might, if adopted, well have avoided much of the confusion regarding the statutory term *collective bargaining* as construed by the Labor Board and the courts in the years to come. The House Bill distinctly provided that neither party was required to discuss any matter other than those

[17] N. L. R. B. v. Warren Co., 350 U. S. 107, 76 S. Ct. 185, 100 L. Ed. 96.

[18] Brown v. Roofers and Waterproofers Union, Local 40, 86 F. Supp. 50 (5th Cir. 1949).

[19] See note 1, *supra,* § 9 (a), 29 U. S. C. § 159 (a).

[20] § 9 (a), National Labor Relations Management Act 1947, 61 STAT. 143, 29 U. S. C. § 159 (a).

[21] See note 13, *supra* at 1135.

[22] 61 STAT. 142 § 8 (d) (1947), 29 U. S. C. § 158 (d) (1952).

set out as being under the scope of compulsory bargaining, namely, *wages, hours and conditions of employment.*[23] Furthermore, it required "that the employees, themselves, in a *secret ballot,* vote on the question of whether to accept the employer's last offer of settlement and made it a violation of the duty to bargain to call a strike or lockout unless upon such ballot a majority of the employees eligible to vote were in favor of such rejection."[24] The Committee of Conference, comparing the House Bill with the Senate Amendment concluded that while the Senate Amendment "did not prescribe a purely objective test of what constituted collective bargaining, as did the House Bill . . . [it] . . . had, to a very substantial extent, the same effect . . ."[25] The Committee's conclusion, however, has proved to be grossly inaccurate.

Although the Declaration of Policy of the House Bill indicated that it was their intention that "the employees themselves . . . [shall have] . . . a direct voice in the bargaining arrangements with the employers,"[26] history has proved that this intention was considerably negated by deletion of the *ballot clause.*

Special provisions were made, however, for prescribed procedure in the event of national emergencies, applicable to strikes or lockouts that would effect an *entire* industry engaged in trade, commerce, transportation, transmission, or communications among the several states.[27] Under such circumstances, the 1947 amendment, as adopted, provides that the appropriate district court may enjoin the strike or lockout if it would imperil national health and safety. Although neither labor nor management is under a duty to accept, either in whole or in part, any proposal of settlement, it provides that if no agreement has been reached at the end of a sixty-day period, a report is to be submitted to the President. Within the succeeding fifteen days, a *secret ballot* is to be taken of the employees of each employer involved in the dispute as to whether they desired to accept the final offer made by the employer. Upon certification of the results of the balloting, the injunction shall be discharged but no strike shall ensue until after this seventy-five day "cooling off" period.

Thus, aside from national emergencies, in which case a *secret ballot* must be held by the employees before a strike or lockout will be permitted, the Act does not prescribe a standard method of procedure to be followed in other instances of collective bargaining. Although it imposes on labor and management alike, a duty to bargain in good faith with respect to wages, hours, and other *conditions of employment,* the Act does not define the scope of those conditions, but has delegated the construction thereof to the National Labor Relations Board and the federal courts.

23 See note 13, *supra* at 1139.
24 *Id.* at 1140.
25 *Ibid.*
26 *Id.* at 1136.
27 61 STAT. §§ 206-210 (National Emergencies) (1947), 12 U. S. C. 1148, 1148a, 7 U. S. C. 619, 7 U. S. C. 6081, 12 U. S. C. 1463, 12 U. S. C. 1016, 12 U. S. C. 1705, 1737, 12 U. S. C. 1148b, 1148c, 50 App. U. S. C. 1101, 15 U. S. C. 601 (1952).

IV

COLLECTIVE BARGAINING AS CONSTRUED BY THE COURTS

The Supreme Court, in the case of *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*,[28] was called upon to decide whether certain clauses, requested by an employer in negotiations for a labor-management contract, fell within the scope of mandatory *collective bargaining*. Despite the fact that a pre-strike *secret ballot* is mandatory in the case of national emergencies and was required procedure in the original House Bill, it held that *neither* a recognition clause substituting an uncertified International Union[29] as the employee's agent for collective bargaining, nor a *ballot clause*, calling for a pre-strike secret vote of the employees as to the employer's last offer, deals with "wages, hours, and other terms and conditions of employment," thus, not proper subjects of *collective bargaining*. It found, therefore, that the employer's insistance upon bargaining for *either* clause amounted to a violation of the statute.[30]

While the scope of the term *conditions of employment* has never been specifically ascertained, it has been held by the federal courts that proper subjects of *collective bargaining* concerning which an employer was bound to bargain in good faith included union proposals for seniority and promotions based thereon, pay for overtime, holidays and paid vacations and a bonus system of remuneration.[31] A group insurance program,[32] a checkoff proposal by the union,[33] an employee's stock purchase plan,[34] seniority provisions and bulletin board use,[35] a retirement pension plan[36] and a Christmas bonus[37] were all held *conditions of employment* within the Act subject to mandatory *collective bargaining*. An employer has even been permitted to insist upon bargaining for a contract with the union that would permit the employer to do business at a profit or to liquidate or move the factory to another location.[38] Conversely, where an employer persisted in his demand for the inclusion of a provision giving super-seniority to employees who had worked during a strike, he was found guilty of refusing to bargain.[39] Similarly, it was held that an employer is guilty of violating the Act when he refused to bargain unless the union accepts the provision that all employees of the company, whether or not they belong to the union, shall be given the right to be notified and to attend union meetings in order

[28] N. L. R. B. v. Wooster Division of Borg-Warner Corp., 356 U. S. 342, 78 S. Ct. 718, 2 L. Ed. 2d 823 (1958).

[29] United Automobile, Aircraft and Agricultural Implement Workers of America (U. A. W.-A. F. L.-C. I. O.).

[30] § 8 (d), 61 STAT. 142 (1947), 29 U. S. C. § 158 (d) (1952).

[31] N. L. R. B. v. Century Cement Mfg. Co., 208 F. 2d 84 (2nd Cir. 1953).

[32] W. W. Crose & Co. v. N. L. R. B., 174 F. 2d 875 (1st Cir. 1949).

[33] N. L. R. B. v. Reed & Prince Mfg. Co., 205 F. 2d 131 (1st Cir. 1953).

[34] Richfield Oil Corp. v. N. L. R. B., 231 F. 2d 717 (D. C. C. 1956).

[35] N. L. R. B. v. Proof Co., 242 F. 2d 560 (7th Cir. 1957).

[36] Inland Steel Co. v. N. L. R. B., 170 F. 2d 247 (7th Cir. 1948).

[37] N. L. R. B. v. Niles Bement-Pond Co., 199 F. 2d 713 (2d Cir. 1952).

[38] N. L. R. B. v. Lion Shoe Co., 97 F. 2d 448 (1st Cir. 1938).

[39] Olin Mathieson Chemical Corp. v. N. L. R. B., 232 F. 2d 158 (4th Cir. 1956).

to vote on all matters within the scope of collective bargaining and that no decision of the union as bargaining agent shall be determined except upon a majority vote of all employees who attend such a meeting.[40]

The Supreme Court's holding in the *Borg-Warner Case,*[41] concerning the *recognition clause* is no surprise. It is consistent with decisions of earlier cases,[42] and affirms the opinion of the Court of Appeals[43] where the case was tried. Mr. Justice Burton, speaking for a unanimous court, stated that: "The statute requires the company to bargain with the certified representative of the employees. It is an invasion of that duty to insist that the certified agent not be a party to the collective bargaining contract. The Act does not prohibit the voluntary addition of a party, but that does not authorize the employer to exclude the certified representative from the contract."[44] Regarding the *ballot clause,* however, the court was in sharp conflict.[45] On this issue, it reversed the holding of the lower court[46] and was contrary to the decision of the Federal Court of Appeals in the case of *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.,*[47] rendered in 1954. In the *Allis-Chalmers Case,* the company insisted upon a *ballot clause* which provided that: "If a new agreement cannot be reached within . . . [a prescribed thirty day period] . . . the union shall have the right to conduct a strike provided a majority of the employees in the bargaining unit shall have voted in favor thereof in a secret ballot referendum."[48] Considering whether such a clause was proper subject for mandatory *collective bargaining,* the court stated: "We are aware of no case, decided either by the Labor Board or the courts, where the precise question here presented has been decided."[49] The Court concurred with the summation of the trial examiner as follows: "Despite almost two decades of judicial interpretation and substantial Congressional amendments of the original Act, the scope of bargaining rights and obligations has not yet been so clearly delineated that we can say with certainty what solution will ultimately become settled law. The phrase 'conditions of employment', for example, has not yet acquired precise definition. Similarly unprecise is the line between what is basic statutory policy, which must prevail; and what is merely a statutory privilege which may be subordinated."[50]

The Board, in the *Allis-Chalmers Case,* found that the company's

[40] N. L. R. B. v. Corsicana Cotton Mills, 178 F. 2d 344 (5th Cir. 1949).

[41] See note 28, *supra.*

[42] N. L. R. B. v. Lunder Shoe Corp., 211 F. 2d 284 (1st Cir. 1954). Potlatch Forests Inc. v. Inter. Woodworkers of America, 108 F. Supp. 906 (D. Idaho, N. D. 1951), *aff'd,* 200 F. 2d 700 (8th Cir. 1951). Kearney v. Trecker Corp., 237 F. 2d 416 (7th Cir. 1957).

[43] 236 F. 2d 898 (6th Cir. 1956).

[44] 356 U. S. at 350, 78 S. Ct. at 723, 2 L. Ed. 2d at 829.

[45] Mr. Justice Frankfurter, Mr. Justice Harlen, Mr. Justice Clark and Mr. Justice Whittaker dissent.

[46] See note 43, *supra.*

[47] 213 F. 2d 374 (7th Cir. 1954).

[48] *Id.* at 377.

[49] *Ibid.*

[50] *Ibid.*

insistence upon the pre-strike *ballot clause* was violative of the Labor Management Relations Act in that it dictates to the employees and their chosen bargaining representative the mechanics to be utilized in determining whether to go out on strike, it does not lie within the scope of *terms and conditions of employment* and, therefore, is outside the area of compulsory bargaining. The court, however, held otherwise, stating that: "Whether a proposal in controversy comes within the purview of the statutory language which defines the matters concerning which the parties are entitled to bargain depends upon the facts in each case."[51] The company is not without statutory authority, said the court, "to bargain to the limit for a contract provision which would permit all employees [union as well as non-union members] to have a voice in the determination of matters included in the instant proposals."[52]

The Sixth Circuit Federal Court of Appeals, trying the *Borg-Warner Case,* followed the decision of the Court of Appeals of the 7th Circuit, in the *Allis-Chalmers Case,* and pointed out that: "The bargaining area of the Act has no well defined boundaries, the phrase 'conditions of employment' has not acquired a hardened and precise meaning. Management and labor are now required to bargain collectively about issues which formerly were not considered as proper issues for inclusion in the usual collective bargaining agreement."[53] Reviewing the judicial history of the Act, the court described the area of compulsory bargaining as a constantly expanding one, and concluded, that a pre-strike *ballot clause* fell within the scope of mandatory collective bargaining.

On appeal to the Supreme Court, Mr. Justice Harlan, writing for the minority, agreed with the holding of the lower court. He expressed the fear that the majority decision might open the door to an intrusion by the Board into the substantive aspects of the bargaining process which goes beyond anything contemplated by the National Labor Relations Act or suggested in the court's prior decisions under it. It was the contention of the minority, that the legislature did not intend that the Board should have the power to prevent good faith bargaining as to *any* subject not violative of the provision or policies of the Wagner and Taft-Hartley Acts. On the contrary, they maintained, it was the congressional intent, by virtue of the amendment to the Wagner Act, to restrict the National Labor Relations Board from regulating the substantive scope of the bargaining process in so far as lawful demands by the parties are concerned and to insure that both labor and management would have the greatest degree of freedom in their negotiations.

Mr. Justice Burton, expressing the majority view, held that the *ballot clause* relates only to procedure to be followed by the employees, among themselves, before their representatives may call a strike or refuse a final offer. It settles no *term or condition of employment* and is, therefore, not within the statutory provision of mandatory *collective bargaining!* Pointing

[51] *Id.* at 380.
[52] *Id.* at 381.
[53] See note 43, *supra* at 903.

out that while a *no strike* clause prohibits the employees from striking during the life of the contract and regulates relations between the employer and employees, the *ballot clause,* on the other hand, deals only with relations between the employees and the union and would substantially modify the collective bargaining system provided for in the statute by weakening the independence of the representative chosen by the employees. The court maintains, that although it is lawful to insist upon matters within the scope of mandatory bargaining, it is unlawful to insist upon bargaining for matters *other* than "wages, hours, and other terms and conditions of employment."

Thus, reversing a long line of judicial opinions enunciating a broad and liberal construction of the Act, the Supreme Court, in the current decision has limited mandatory *collective bargaining* to subjects strictly within the three areas referred to in the statute. Although a pre-strike *secret ballot* by employees is not unlawful in itself, and was originally intended by the House of Representatives, as an objective test of good faith *collective bargaining,* the Law, as construed by the Supreme Court in their most recent decision, holds an employer guilty of unfair labor practice for insisting on such a clause.

Labor unions were originally legalized, as a matter of public policy, in order to alleviate the economic status of the worker, to provide him with new found rights and privileges. Its very excuse for being was to effectively express the voice of the individual employees. The Wagner Act was intended to protect and further expand those rights and privileges, to give the employee additional strength in bargaining with his employer. The 1947 amendment was passed as a counter measure to a wave of strikes that threatened to paralyze the nation's economy. Yet, this decision denies an employer the right to insist that his employees decide for themselves, by *secret ballot,* whether to accept his last offer before going on strike. Thus, it gives the last word and, therefore, the greater right and privilege, not to the employee, but, ironically, to the labor union. S. D. G.