

LAW AND CONTEMPORARY PROBLEMS

VOLUME V

SPRING, 1938

NUMBER 2

FOREWORD

WITH AN INTRODUCTORY NOTE ON THE NATIONAL LABOR RELATIONS ACT
AND ITS ADMINISTRATION

I

Occasionally, in a foreword to a symposium published in this quarterly, it has seemed appropriate to explain the significance of the problem posed for consideration and to develop the reasons leading to its selection. But for a symposium appearing at this time on the subject of collective bargaining under the Wagner Act, such an explanation would be supererogatory. The only function which a foreword to this symposium can usefully fulfill is to indicate, in broad outline, the scope of the issue.

Although, for a thorough comprehension of the purposes of the National Labor Relations Act—popularly known by the name of its Senatorial sponsor, Senator Robert A. Wagner of New York State—a familiarity with those activities of the federal government directed toward the establishment of harmonious relations between employer and employee antedating the passage of this act would be essential, an adequate presentation of their history and of the legal problems^s that they raised would have encroached seriously on the space available to the immediate subject matter of the symposium. Moreover, a number of works have been published in which this background is depicted in detail. Accordingly, its consideration has been relegated to a brief section of the introductory note appended to this foreword. That note also sets forth, in summary outline, the provisions of the Act, the administrative machinery established under it, and the work accomplished by the Board in its first twenty-eight months of existence, and concludes^s with a brief discussion of the constitutional issues raised by the Act, which have been considered in decisions of the United States Supreme Court.

The three articles following this note deal with three principal types of problems encountered by the Board in its administration of the Act. The first of these discusses in detail the procedure and principles followed by the Board in determining employee representatives for collective bargaining purposes, a jurisdiction which involves the determination of the preliminary problem of the "appropriate unit" of representation. It is this question which has placed the Board in the storm center of the struggle between the American Federation of Labor and the Committee for Industrial Organization. The second of this group of articles surveys the questions raised in the enforcement of the Act's prohibition against "unfair labor practices" interfering with

the free exercise of the employees' right of self-organization. The third article considers the duty imposed by the Act on the employer to bargain collectively with the employee representatives.

The adoption of the Wagner Act has led, as is well known, not only to a marked extension in unionization but also to the execution of a large number of collective labor agreements. A group of four articles deals with some of the principal problems arising out of these developments. Any agreement establishing rules to govern so complex a relationship as that of employer and employee in modern industrial life is almost surely destined to give rise to dispute as to its meaning and application. Accordingly, it becomes important to determine what machinery is provided in the agreement itself for the adjustment of such disputes. While provision for such machinery has long characterized agreements of this sort, the recent vast extension in their number has made it of interest to ascertain how this problem is being handled under the new agreements. Such is the purpose of the first article in this group. However adequate the machinery provided for dispute adjustment, it may be anticipated that occasions will occur when either it fails to function or its judgments are ignored. The second of these articles briefly surveys the somewhat limited body of law developed by the courts which have been called upon to give judicial enforcement to collective agreements and then proceeds to consider the possibility of establishing extra-judicial agencies to enforce them, concluding with the proposal of a plan to this end. The third article of this group depicts the procedure through which union determinations of policy and action are arrived at, a little-known subject of obvious importance to an understanding of the operation of the collective bargaining process. The fourth article deals succinctly with the adjustments in personnel policies which the Wagner Act and the developments following upon it are requiring of employers.

Opposition to the Act has, in recent months, taken form in a growing demand for its amendment, principally directed toward placing duties on employees and their organizations.¹ So various have been the proposals of amendment that the consideration of all has seemed impracticable. Instead, an article is presented stating the case for a representative group of such proposed amendments. This is succeeded by a note containing an excerpt from an address by Chairman Madden of the National Labor Relations Board in which he states what is believed to be the basic objection to most proposals for amendment on the part of those who object to the imposition of duties on labor under the Act.

So frequently has British procedure in the handling of industrial disputes been referred to as a model worthy of emulation in this country that the concluding article of the symposium is devoted to a portrayal of the evolution of British policy and practice in this field during the past century.

¹ An important exception is a bill recently introduced by Senator Wagner which, if enacted, would strongly reinforce the sanctions of the Act. The bill (S. 3390) provides that government contractors and sub-contractors (including recipients of loans and grants from the federal government) shall agree to comply with all rulings and certifications of the NLRB. A like bill (H. R. 9745) has been introduced in the House by Representative Healey.

II

The National Labor Relations Act of July 5, 1935, derives principally from three sources in the experience of the federal government as intervenor in industrial disputes, although, it need scarcely be added, these do not constitute its only ventures in this field.² The first of the three was the work of the National War Labor Board, active from April 1918 until August 1919. This board had for its chief purpose the settlement "by mediation or conciliation" of labor controversies in necessary war industries. The contribution of this board most significant in this context was its adoption of the policy of forbidding employer interference with the right of employees to organize and bargain collectively and employer discrimination against employees engaging in lawful union activities.

The second important source in experience basic to the Wagner Act was that derived under the Railway Labor Act of 1926 and the amendments thereto adopted in 1934. The 1926 Act, in turn the outgrowth of earlier legislation that had not functioned satisfactorily, provided an elaborate machinery of boards for mediation, arbitration, and fact-finding in disputes between railroads and their employees. This act gave federal legislative sanction to the right of employees to bargain collectively free from interference, influence, or coercion. Inquiry in 1933 by the Federal Coordinator of Transportation revealed that, despite this legislation, company unions had been fostered on a large scale by the railroads. Under the Emergency Transportation Act of 1933 and under the 1934 amendments to the Railway Labor Act designed to implement collective bargaining and to suppress the company union, the movement for self-organization among railroad employees was given great impetus. Of special pertinence to the Wagner Act was the development of a system of elections for the purpose of determining employee representatives under the supervision of the National Mediation Board (the analogue in the railroad field to the present National Labor Relations Board).

The third and most important precursor of the present law is, of course, the famous Section 7(a) of the National Industrial Recovery Act. That section required that codes of fair competition, established under the NIRA, should contain the following conditions:

"(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;

"(2) That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; . . ."

² For a succinct statement of the legislative background of the Wagner Act, see NLRB, *FIRST ANNUAL REPORT* (1936) 1-8. See also TWENTIETH CENTURY FUND, INC., *LABOR AND THE GOVERNMENT* (1935); LORWIN AND WUBNIG, *LABOR RELATIONS BOARDS* (1935).

No attempt at complete documentation will be made in this note.

As will be recalled, in the summer of 1933 the process of codification was anticipated by the President's Re-employment Agreement which included the conditions quoted above. The need for some agency to handle labor controversies under this agreement and under the codes led to the creation by President Roosevelt on August 5, 1933, of the National Labor Board, comprising representatives of labor and industry, with Senator Wagner acting as impartial chairman. Although special boards for certain industries were created either under their codes or by executive order, the National Labor Board took jurisdiction of alleged violations of Section 7(a) in all other industries. Operating through 20 regional boards, comparable in structure to the National Board, it was successful in settling or averting over 1600 strikes, although handicapped by the informal character of its authority, inadequately defined relationships with the NRA and with the special boards, the lack of any direct sanction for its recommendations, and the notorious ambiguities of Section 7(a). The Board frequently utilized the device of elections to determine employee representatives and, through its decisions involving this and other problems incident to the establishment of free collective bargaining, broke ground for the boards succeeding it.

The successor to the National Labor Board was the first National Labor Relations Board, established by the President under authority of Public Resolution No. 44, approved on June 19, 1934. This resolution was adopted to give legislative basis to the activities which the National Labor Board had been pursuing under executive order. The new Board's jurisdiction was based on Section 7(a) of the National Industrial Recovery Act and hence when that statute was extinguished by the Supreme Court in May, 1935, the Board's activities were terminated. In the meantime, however, it had carried forward the work of its predecessor, although subject to many of the same handicaps. This board developed still further the employee election device, conducting elections in 579 employee units in its eleven months of activity.

At the time of the adoption of the joint resolution authorizing this board, there had been pending in Congress a bill introduced by Senator Wagner, substantially along the lines of the present Wagner Act. This bill was reintroduced by him in the Senate on February 21, 1935, and in the House by Representative Connery on February 28. After a legislative consideration indicated in the footnote below,³ the bill was approved by both houses on June 27, 1935 and signed by the President on July 5.

³ Hearings were held before the Senate Committee on Education and Labor on March 11-14, March 15-19, and March 21-April 2; and before the House Committee on Labor on March 13, 14, 19, 20, 28, and April 3-4. On May 2, 1935, the bill was reported by the Senate Committee, with minor amendments. SEN. REP. No. 573, 74th Cong., 1st Sess. After debate, it was passed by the Senate on May 16, 1935, without amendment, by a vote of 63 to 12. 79 CONG. REC. 7846-7855, 7858, 7877, 7848-7960, 7967-7980 (1935). The bill was reported by the House Committee on Labor on May 21, 1935. H. R. REP. No. 972. It was thereafter recommitted, and subsequently reported with further amendments on June 10, 1935. H. R. REP. No. 1147. The bill was extensively debated on the House floor and passed with amendments on June 19, 1935, without a record vote. 79 CONG. REC. 10057-10092, 10094-10111. After conference, the bill was approved by both houses on June 27, 1935, 79 CONG. REC. 10668, 10704-10705; CONF. REP. No. 1371. (Information taken from NLRB, FIRST ANNUAL REPORT (1936) 9.)

III

The structure of the National Labor Relations Act, unlike that of most of the important enactments of the New Deal, is relatively simple. The substantive objective of its draftsmen was to provide a direct legislative prohibition of the practices which had been attacked, through the medium of codes of fair competition, by Section 7(a) of the NIRA. The procedure adopted to sanction this prohibition was the same as that provided in the Federal Trade Commission Act and a number of subsequent regulatory statutes: the creation of a quasi-judicial body, empowered to investigate charges, to institute proceedings against offenders, to hold hearings therein, and to issue orders enforceable only by application to the courts.

The Act contains sixteen sections. Section 1 is a preamble, declaring the experiential basis and the policy of the Act; Section 2 contains definitions; Sections 3, 4, and 5 provide for the creation of the National Labor Relations Board, its personnel, and its administrative machinery; and Section 6 gives the Board rule-making power. Section 7 declares the right of employees to self-organization and collective bargaining; and Section 8 defines as "unfair labor practices" certain acts by employers calculated to impair the rights granted to employees by Section 7. Section 9 deals with the determination of employee representatives for collective bargaining purposes. Section 10 prescribes the procedure to be followed by the Board when violations of Section 8 are charged and provides for judicial enforcement and review of the Board's orders. Section 11 confers investigatory powers on the Board. Section 12 subjects to fine or imprisonment persons impeding the Board in the exercise of its functions. Section 13 declares that nothing in the Act shall be construed to interfere with the right to strike. Sections 14, 15, and 16 contain customary formal clauses providing for conflicting legislation, separability of unconstitutional provisions, and the title of the Act. In the succeeding paragraphs a brief commentary will be made on the principal sections listed above.

Section 1. The first three paragraphs of this section recite the experience leading to the enactment of the statute. The denial by employers of the right of employees to organize and the refusal to bargain collectively with them is said to lead to strikes and other forms of industrial discord which burden or obstruct commerce by impairing the functioning of its instrumentalities, by affecting the flow or prices of raw materials or processed goods in commerce, or by diminishing purchasing power for goods flowing in commerce. The inequality in bargaining power between the unorganized employee and the corporate employer is said to burden and affect the flow of commerce and to accentuate business depressions. The protection by law of the right to organize and bargain collectively is stated to have been proved by experience to remove sources of industrial strife, encourage the friendly settlement of disputes, and restore equality of bargaining power. Following these recitals, the policy of the United States is declared to be the elimination or mitigation of obstructions to the free flow of commerce by encouraging collective bargaining and assuring to workers

"full freedom of association, self-organization, and designation of representatives of their own choosing" for collective bargaining purposes.

Section 2. Of the eleven terms⁴ defined for the purposes of the Act in this section, only those which in substance define the scope of the Act will be noted here. The definition of "employer" excludes the United States, states and their political subdivisions, employers subject to the Railway Labor Act, and labor organizations (except as to their own employees). "Employee" is defined to include persons whose work has ceased because of a labor dispute or unfair labor practice and to exclude agricultural laborers, domestic servants, and persons employed by their parents or spouses. "Commerce" is defined to mean interstate or foreign "trade, traffic, commerce, transportation or communication"; "affecting commerce," to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute" having such result.

Section 3. The National Labor Relations Board created by this section is composed of three members, appointed by the President for terms of five years (two of the original appointees having terms of one and three years, respectively). The chairman is designated by the President. Board members may be removed by the President, upon notice and hearing, for "neglect of duty or malfeasance in office" only.

Sections 7 and 8. These sections together comprise the substantive core of the Act, all other provisions being designed to implement them. Section 7, as has been seen, declares the right of employees to self-organization and to bargain collectively through representatives of their own choosing, language which echoes that of Section 7(a) of the NIRA. But whereas Section 7(a) declared the right of employees in general terms, Section 8, in its definition of unfair labor practices, gives specification to the duties of employers. Five unfair practices are set forth, the first being a catch-all forbidding employers "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." The second forbids domination or interference with the formation or administration of any labor organization or the contribution of support to it. The third forbids discrimination as to terms, tenure or conditions of employment "to encourage or discourage membership in any labor organization." Since this provision would preclude closed shop agreements, a proviso excepts from its operation such agreements when not made with an employer-dominated labor organization. The fourth practice proscribed by the Act is the discharge of, or discrimination against, an employee for having filed charges or testified under the Act. The fifth practice, refusal to bargain collectively with the employee representatives, unlike the preceding provisions, places an affirmative duty on the employer. It should be noted that the duty is to bargain, not to agree. The uncertainties encountered in the administration of Section 7(a) of the NIRA with respect to the identification of the employee representative having pointed the need for

⁴ The terms defined in the Act but not discussed in the text are: "person," "representatives," "labor organization," "unfair labor practice," "labor dispute," "National Labor Relations Board," "old Board."

machinery for this purpose, provision is made for such in Section 9, to which Section 8(5) is made expressly subject.

Section 9. Paragraph (a) of this section adopts the principle of "majority rule" by providing that the representatives chosen for collective bargaining purposes by the majority of the employees "in a unit appropriate for such purpose, shall be the exclusive representatives of all the employees in such unit."⁵ Paragraph (b) imposes on the Board the duty of determining whether the appropriate unit shall be "the employer unit, craft unit, plant unit, or sub-divisions thereof." Paragraph (c) authorizes the Board to investigate any controversy "affecting commerce" concerning representation and to certify the representatives designated or selected. In so doing, it is empowered to "take a secret ballot of employees, or utilize any other suitable method."

Section 10. This section sets forth the procedure to be followed by the Board in the prevention of unfair labor practices "affecting commerce." Paragraph (a) declares the Board's power to be exclusive. Paragraph (b) authorizes the Board to institute proceedings by complaint against any person charged with having engaged in unfair labor practices. Provision is made for the holding of a hearing before the Board or a designated agent on the charges. In such proceedings "the rules of evidence prevailing in courts of law or equity shall not be controlling." Paragraph (c) provides that if the Board is of the opinion that the person complained of is guilty of an unfair labor practice it "shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees, with or without back pay, as will effectuate the policies" of the Act.

Violation of the Board's order itself carries no penalty, but paragraph (e) empowers the Board to petition any United States Circuit Court of Appeals having jurisdiction for the enforcement of its order. The court's action shall be based on the record of the proceeding before the Board, and the "findings of the Board as to the facts, if supported by evidence, shall be conclusive." However, leave may be obtained to introduce additional evidence where reasonable grounds for failure to introduce it in the hearing before the Board can be shown.

Paragraph (f) authorizes "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought" to obtain a review in the Circuit Court of Appeals having jurisdiction. Paragraph (i) provides that petitions filed under the Act shall be heard "expeditiously," if possible within ten days.

Section 11. This section implements the Board's investigatory powers by granting it power to issue subpoenas to witnesses and for the production of evidence and also provides for the administration of oaths. The Board may resort to the federal district courts for orders requiring obedience to its subpoenas.

⁵ A proviso declares, "That any individual employee or group of employees shall have the right at any time to present grievances to their employer."

IV

The principal office of the National Labor Relations Board is fixed in Washington by Section 5 of the Act, but the Board has taken advantage of authority conferred upon it by Section 4(a) to continue a system of regional offices which had been in existence under the old Board. There are now twenty-two such offices, each headed by a full-time "regional director." The regional director, under the supervision of the Washington office, is in charge of "labor relations work, investigating charges of commission of unfair labor practices and petitions for certification of representatives, attempting to secure compliance with the law without formal procedure, issuing complaints, or refusing to issue complaints, upon the recommendation of the regional attorney, setting dates for hearing and arranging for the holding of hearings, and holding elections as agent of the Board."⁶

Upon the filing of a charge with the regional director that an employer has engaged in an unfair labor practice, he undertakes a thorough preliminary investigation of the charge (which is not made public at this stage of the proceedings). If the charge seems to him unfounded he will refuse to issue a complaint (an action subject to Board review). Where the charge seems sustained by evidence, the director attempts to secure voluntary compliance by the employer. Where this fails, he issues a formal complaint, giving notice of hearing before one of the trial examiners. The respondent may file an answer to the complaint and any interested person or labor organization may intervene. The hearings are public, witnesses being examined under oath. The Board is represented by counsel, usually the regional attorney, upon whom rests the responsibility of proving the allegations of the complaint. The trial examiner may examine any witness and call witnesses himself. Although, as has been seen, the Board is not bound by legal rules of evidence, the Board has declared that its policy is not to disregard these rules wholly but to apply them liberally.⁷ Oral arguments and written briefs are permitted.

Following the hearing, the trial examiner is required to file an "intermediate report" which is served on the parties. This report contains the examiner's findings of fact and his recommendations as to the disposition of the case. Any party may file exceptions to the report with the Board. After the report is filed and the time (ten days) for filing exceptions has expired, the Board will either decide the matter on the record (or after the filing of briefs or oral argument) or may order the taking of further evidence. The Board occasionally permits, in important cases, the filing of charges directly with it and sometimes transfers a proceeding for hearing before the Board itself.

Proceedings for the determination of representatives for collective bargaining purposes under Section 9 are instituted by the filing of a petition with the regional director for investigation of a controversy concerning representation. The regional

⁶NLRB, FIRST ANNUAL REPORT (1936) 16. My description of the Board's organization and procedure represents a condensation of a fuller statement appearing in this Report at pp. 14-28.

⁷*Id.* at 23.

director makes a preliminary investigation of the allegations of the petition and recommends to the Board whether a proceeding should be instituted. If the Board believes that a proceeding is called for it directs the regional director to conduct a formal investigation and provide for a hearing. In these proceedings the Board's counsel does not act as prosecutor, merely introducing evidence to sustain the jurisdiction of the Board. The facts on the issue of representation must be developed by the rival claimants. The substantive problems raised under this section and the procedure adopted for the determination of representatives by election or otherwise are discussed in Professor Rice's article on "The Determination of Employee Representatives."

V

In its first two *Annual Reports*, the Board has presented detailed analyses of the business coming before it. These reports are supplemented by a monthly press release, showing the cases handled the preceding month and cumulating the figures for the entire period of the Board's activity. From a release of March 1, 1938, carrying the totals forward to February 1, 1938 from the Fall of 1935 when the Board began activity (a 28 months' period) the following data are taken:

	<i>No. of Cases</i>	<i>Workers Involved</i>
Cases received	11,861	3,133,322
Cases closed	8,614	1,770,709
By agreement of both parties	4,833	1,089,098
By dismissal	1,305	165,081
By withdrawal	2,032	393,526
By order to cease and desist, compliance before order, certifications or refusal to certify, transfer to other agencies, etc	444	123,004
Cases pending	3,247	1,352,513

Of the cases handled, 1,372 were strike cases involving 244,275 workers, and, of these, 1,060 were settled. 173,308 workers were reinstated after strikes and lock-outs. The Board's action averted 505 threatened strikes, involving 127,286 workers. 8,342 workers were reinstated after discriminatory discharge. 1,000 elections by secret ballot were held under Board supervision in which 360,228 valid ballots were cast. All but 88 of these elections were conducted in the 10 months' period following the validation of the Act by the Supreme Court on April 12, 1937. A total of 3,684 election petitions, joined in by 1,364,701 workers, have been received by the Board.

The unfair labor practices enumerated in Section 8 which have afforded the most grist for the Board's mill have been the third (discrimination against employees for union activity) producing 3,799 cases, and the fifth (refusal to bargain collectively) producing 2,683 cases. In all cases involving unfair labor practices, the Board includes in its complaint a charge of violation of the catch-all prohibition contained in Section 8(1), but in relatively few cases is this the sole allegation.

The rate of new business, though diminishing, remains high. The cases received during the last four months for which releases have been obtained number as follows: October, 1,063; November, 915; December, 684; January, 682.

VI

The articles devoted to problems arising in the interpretation and application of the Act are concerned only to a limited degree with the antecedent questions of the constitutional scope and bases of the powers it confers. The Supreme Court decisions relating to these questions have already been accorded such exhaustive consideration in legal periodical literature that only the brief treatment which follows has been provided in this symposium, since a detailed study would have been possible only at the sacrifice of matter which has not been accorded such thorough discussion elsewhere.

At the inception of the Board's activities it was met with a barrage of suits in the federal district courts to restrain proceedings under the Act. Most of these suits were dismissed by the district courts, and those injunctions which were granted were reversed by all except the Circuit Court of Appeals for the First Circuit. The question of the power to enjoin the conduct of Board proceedings was finally determined in *Myers v. Bethlehem Shipbuilding Corp., Ltd.*,⁸ holding constitutional the statutory grant of exclusive jurisdiction to the Board, subject only to judicial review after the administrative procedure had been followed.

Before this decision was reached, however, five cases⁹ had been decided by the Supreme Court (dividing five to four in all but one case¹⁰) upholding the validity of the Board's orders. The three chief lines of attack on their constitutionality were the following:¹¹ (1) that the Act's substantive requirements deprive the employer of liberty of contract without due process of law in violation of the Fifth Amendment; (2) that its procedural provisions are also violative of that amendment; and (3) that the application of the Act to manufacturing industries is unwarranted by the commerce clause which affords the constitutional basis for the Act.

The contention that the employer was arbitrarily deprived of liberty of contract was answered by the assertion of the right of employees to organize for the redress of grievances and the promotion of labor agreements and the conclusion that "re-

⁸ 58 Sup. Ct. 459, decided Jan. 31, 1938, by a unanimous court.

⁹ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *NLRB v. Fruehauf Trailer Co.*, *id.* 49; *NLRB v. Friedman-Harry Marks Clothing Co.*, *id.* 58 (to which is appended the dissent from the decision in all three cases); *Associated Press v. NLRB*, *id.* 103; *Washington, Virginia & Maryland Coach Co. v. NLRB*, *id.* 142.

¹⁰ The decision in the *Coach Co.* case, *supra* note 9, was unanimous. Not only was there no substantial commerce issue raised in this case, but the justices dissenting in the other cases seemed content to permit restraints on the liberty of contract of public carriers which they deemed improper in the case of private industry, although in their dissent on this point, 301 U. S. at 101-103, they relied on *Adair v. U. S.*, 208 U. S. 161 (1908) (federal act penalizing discharge by interstate carrier for union membership invalid).

¹¹ In *Associated Press v. NLRB*, *supra* note 9, it was urged that the application of the Act operated to abridge the freedom of the press guaranteed by the First Amendment. The decision that it did not evoke a vehement dissent. The Board's order in *NLRB v. Jones & Laughlin Steel Corp.*, *supra* note 9, that employees be reinstated with back pay was attacked as a deprivation of the right to trial by jury guaranteed by the Seventh Amendment. This contention was dismissed on the ground that the Amendment applied only to actions at common law and not to statutory causes.

straint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious."¹² It was pointed out that the Act does not compel agreements between employers and employees¹³ nor "interfere with the normal right of the employer to select its employees or to discharge them," limiting only the power of the employer to intimidate or coerce its employees "under cover of that right."¹⁴ The contention that the Act is one-sided was dismissed on the ground that it related not to Congressional power but to Congressional policy.¹⁵

The attack on procedural provisions of the Act was accorded scant attention. They were found not "to offend constitutional requirements governing the creation and action of administrative bodies"¹⁶ and to provide adequate opportunity to secure judicial protection against arbitrary action in accordance with well-settled rules applicable to administrative agencies.¹⁷

By far the most difficult problem posed by the Act was the extent of the Board's jurisdiction under the statutory grant of power to prevent unfair labor practices "affecting commerce." Section 1, in describing the evils which the Act was designed to combat, sought to establish, by its emphasis upon obstructions to the "flow" of materials "from" and "into" the channels of interstate and foreign commerce, that protection to such commerce required the curbing of industrial strife in industries receiving and supplying those materials. Obviously the work of the Board would have been of little significance had its jurisdiction been strictly confined to disputes occurring among workers themselves engaged in commerce, especially in view of the already-existing Railway Labor Board. However, to extend the Board's jurisdiction beyond this limited group required acceptance by the Supreme Court of the proposition that labor disputes in manufacturing industries bore so direct a relation to interstate commerce as to justify the application of this measure to prevent them.

Precedent, as usual, was Janus-faced. Favorable to the Board's contention were such decisions as the *Coronado Coal Co.* cases,¹⁸ applying the Sherman Act to labor union activities in the coal mining industry; *Stafford v. Wallace*,¹⁹ sustaining the Packers and Stockyards Act; *Chicago Board of Trade v. Olsen*,²⁰ sustaining the Grain Futures Act; and the *The Shreveport Case*,²¹ validating federal regulation of intrastate railroad rates found to affect interstate rates. Opposed to the Board's contention were the oft-distinguished *Knight Co.*²² case, denying the applicability of the Sherman Act to manufacturing industries; the *Schechter* case,²³ holding NRA regulation of trade practices in the New York poultry trade beyond the scope of the commerce power; and especially the formidable *Carter Coal Co.*²⁴ case, reaching a like result as to regulation of hours and wages under the Bituminous Coal Conservation Act of 1935.

¹² NLRB v. Jones & Laughlin Steel Corp., 301 U. S. at 44.

¹³ *Id.* at 45.

¹⁴ *Id.* at 45-46.

¹⁵ *Id.* at 46.

¹⁶ *Ibid.*

¹⁷ *Id.* at 47.

¹⁸ United Mine Workers v. Coronado Coal Co., 259 U. S. 344 (1922); Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 (1925).

¹⁹ 258 U. S. 495 (1922).

²⁰ 262 U. S. 1 (1923).

²¹ 234 U. S. 342 (1914).

²² U. S. v. E. C. Knight Co., 156 U. S. 1 (1895).

²³ Schechter Corp. v. U. S., 295 U. S. 495 (1935).

²⁴ Carter v. Carter Coal Co., 298 U. S. 238 (1936).

Of the five NLRB cases first reaching the Supreme Court, two presented no real problem under the commerce clause, since one involved the Associated Press, engaged in the business of interstate communication, and the other an interstate bus line. Of the other three cases, one involved the Jones & Laughlin Steel Corporation, a large and vertically integrated steel producer, employing over half a million men, including 10,000 in the plant where the dispute arose; a second involved the Fruehauf Trailer Co., the largest trailer manufacturer in the United States, which sold over 80% of its products outside the state of manufacture; and the third, the Friedman-Harry Marks Clothing Co., a men's clothing manufacturer employing 800 men and doing a \$2,000,000 business, obtaining most of its materials and shipping most of its products interstate.

The divergence of opinion in the Court was sharpest on the commerce clause issue. The majority view was developed in the *Jones & Laughlin* case, the other cases being decided on its authority without discussion beyond a recital of the findings of the Board. The Court, in an opinion by the Chief Justice, refused to confine Congressional power to those "transactions which can be deemed to be an essential part of a 'flow' of interstate and foreign commerce"²⁵ and thus liberated the problem from the restrictions which too literal adherence to that metaphor would have imposed. Instead, it stated the test to be whether activities, though "intrastate in character when separately considered," had "such close and substantial relations to interstate commerce that their control is essential or appropriate to protect that commerce from burdens or obstructions."²⁶ Turning to the facts of the case under consideration, it found that the stoppage of the Steel Corporation's "manufacturing operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities it is idle to say that the effect would be indirect or remote. It is obvious that the effect would be immediate and might be catastrophic."²⁷

The dissenters, selecting the *Clothing Co.* case, on which to base their argument, observed the inconsequential place of the company in its industry and the extended chain of events necessary before the dispute in which the Board was called to intervene would affect the volume of goods moving in interstate commerce, and concluded by asserting that "a more remote and indirect interference with interstate commerce or a more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine."²⁸

How "close and substantial" must be the effect upon interstate commerce of a particular action to bring it within the scope of federal power is left by the Court to be determined as the individual case arises. But as the Board, in its *Second Annual Report*, pointed out, "it is clear from these decisions that neither size, interstate ramifications, relative portion in the industry, character of commodity produced, nor number of men employed, is a controlling factor."²⁹

²⁵ NLRB v. Jones & Laughlin Steel Corp., 301 U. S. at 36.

²⁶ *Id.* at 37.

²⁷ *Id.* at 41.

²⁸ NLRB v. Friedman-Harry Marks Clothing Co., 301 U. S. at 97.

²⁹ NLRB, SECOND ANNUAL REPORT (1937) 56.

Since this statement, another Supreme Court decision has dealt with the jurisdictional problem: *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*,³⁰ decided March 28, 1938. The Packing Co. was ordered by the Board to cease and desist from certain unfair labor practices and to reinstate certain discharged employees with back pay. The Board secured an affirmance of its order by the Circuit Court of Appeals for the Ninth Circuit, one judge dissenting, and this judgment was affirmed in turn by the Supreme Court. The bulk of the company's "pack" was comprised of products grown in California and only 37% was shipped in interstate and foreign commerce. The Court held without merit, "in view of the interstate commerce actually carried on by petitioner," a distinction based on the fact that here there was no continuous flow of interstate commerce through the state. The Court insisted that it had not abandoned the requirement that a "direct and substantial relation to interstate commerce" be shown "to justify federal intervention for its protection" but stated that "the criterion is necessarily one of degree and must be so defined" even though "this does not satisfy those who seek for mathematical or rigid formulas." It found justification for its decision in the immediate disruption of interstate trade resulting from the strike called upon the discharge of petitioner's employees for union activities.

Justices Butler and McReynolds, the remaining two of the four dissenters in the earlier cases, dissented once more in an opinion by the former, plaintively—and vainly—calling upon the majority for a "statement as to whether it meant to overrule the Carter case."

The decisions of the Supreme Court on the jurisdictional issue have provided the Board sea-room aplenty, though they afforded no fixed points for it to steer by. For its hearings, the Board has been careful to provide substantial evidence as to the character of the business done by the respondents, being aided in this task by the work of its Division of Economic Research which prepares evidence indicating jurisdiction in border-line cases.³¹ Few cases in which the Board has asserted jurisdiction seem more vulnerable to attack on jurisdictional grounds than the *Santa Cruz* case. Yet the fact that the Board in that and comparable cases has intervened in the affairs of industries handling a large volume of intrastate business promises to give rise to a serious jurisdictional problem as the number of states adopting acts similar to the Wagner Act increases.³² There is now pending before the Wisconsin Supreme Court a case in which the jurisdiction of the Wisconsin Labor Relations Board has been questioned as to an industry doing both intra- and interstate business.³³ Whatever the result of that case, administrative cooperation between the national and state boards would seem essential to the efficient functioning of a comprehensive system of regulation.

D. F. C.

³⁰ Reported in 2 LABOR REL. REP., April 4, 1938, p. 156.

³¹ For a description of the functions of this division, see NLRB, SECOND ANNUAL REPORT (1937) 41-47.

³² Such acts have been passed in Utah, Wisconsin, New York, Massachusetts and Pennsylvania.

³³ Wis. LRB v. Fred Rueping Leather Co. The decision of the lower court upholding jurisdiction is reported in 1 LABOR REL. REP. 322 (1937).