

IN OPPOSITION TO "EQUALIZING" AMENDMENTS TO THE WAGNER ACT: AN EXCERPT FROM AN ADDRESS BY CHAIRMAN MADDEN OF THE NATIONAL LABOR RELATIONS BOARD

EDITOR'S NOTE: Proposals that the National Labor Relations Act be amended have been numerous and varied. The preceding article, *Amending the Wagner Act: The Problem from the Manufacturer's Viewpoint*, by John C. Gall, Counsel, and R. S. Smethurst, Associate Counsel, of the National Association of Manufacturers, presents the case for certain proposals which are not only representative but have enlisted important support among those dissatisfied with the Act in its present form. Many of the labor practices against which proposals for amendments to the Act are directed are admitted to be improper. It is as to the need for, and the desirability of, the sanctions contained in the proposals for amendment that disagreement is acute. Indeed, it is argued that the adoption of such sanctions would result in defeating the purposes of the Act. Since this issue seems to be the dominant one and since the case in opposition to the imposition of the proposed sanctions has been forcefully stated by one whose views are of special consequence in the field, Chairman J. Warren Madden of the National Labor Relations Board, it has been thought sufficient, in lieu of an article opposing in detail the various proposals for amendment,¹ to set forth the statement by Chairman Madden with respect to "equalizing" amendments² made in his address to the annual convention of the American Federation of Labor at Denver, Colorado, October 5, 1937.³ The excerpt⁴ follows:

An attempt has been made to create the public impression that the law is heavily over-balanced in favor of labor and against the employer, and that fairness requires that it should be equalized. When it is remembered that American law, in the real sense, consists of all the federal, state, and city law which is applicable to a given situation, this statement becomes ludicrous.

Tens of thousands of union men engaged in strikes have been arrested and punished for miscellaneous crimes, at least a dozen in number, which may arise out of such strife.

¹For a recent and comprehensive, critical discussion, see Rosenfarb, *Proposed Amendments to the National Labor Relations Act* (March, 1938) 1 NAT. LAWYERS GUILD Q. 105.

²It should be noted that Chairman Madden's address antedated the specific proposals discussed in the preceding article. The principal proposals for amendment then before the public were those contained in S. 2172, 75th Cong., 1st Sess. (1937), introduced by Senator Vandenberg, defining various practices by labor, including the coercion of fellow-employees, as "unfair labor practices" under Section 8.

³The address is reprinted in 1 LABOR REL. REP., Oct. 11, 1937, p. 145.

⁴*Id.* at pp. 147-148.

Let us assume that they were all guilty, and well deserved the punishment which they received. Let us further assume that all of those who have been killed and wounded by police and militia in industrial strife have been necessarily sacrificed by those officers in the proper performance of their duty. The fact would still remain that the entire force of the penal law is spent upon the heads of labor, and none of it whatever upon the heads of employers, no matter how provocative and illegal their actions may be, and no matter how inevitably those actions may have led to the strife which ensued.

To equalize the law would require that the police first inquire who caused this strife, and if they conclude that the employer caused it, they should back the police wagon up to his office and push him in, lock him up in a dirty jail and charge him with vagrancy or being a suspicious person, set his bail or fine so high that he could not meet it, and leave him. Do those who prate of equality really want equality?

If they do, but are shocked at the very thought of applying the rough and ready tactics which the law applies to labor, to employers who violate the law, the law might be equalized in the other direction. All this swift and severe punishment which the law visits upon labor might be abandoned in favor of the mild and considerate provisions which the National Labor Relations Act applies to employers.

This would mean that if Picket, a union man on strike, violated the law, the employer would file a charge in our Regional Office, perhaps some hundreds of miles away. Our office would write a letter or telephone politely to Picket and ask him for his side of the story. An investigator would go out as soon as convenient and attempt to ascertain the true facts. If the investigation indicated that the employer's charge against Picket was apparently well founded and if Picket indicated that he was unwilling to bring himself into compliance with the law, a formal complaint would be issued against Picket, giving him not less than five days' notice that a hearing would be held before a Trial Examiner to be sent from Washington.

The hearing would proceed, and in due time the Trial Examiner would make an intermediate report. If he thought Picket had violated the law, he would recommend that Picket "cease and desist" from further violations and post a notice that he would sin no more. If Picket followed this recommendation, that would be the end of the proceeding.

If, however, Picket was recalcitrant, the entire record of the hearing would be forwarded to the Board in Washington, which, after studying it, might make an order similar to the Trial Examiner's recommendation. This order would be served upon Picket with a request that he inform the Board, within a specified reasonable time what steps he had taken to comply with the Board's order. If Picket expressly or by silence gave the Board to understand that he didn't intend to comply with the Board's order at all, then the Board would file a petition in the United States Circuit Court of Appeals, and have the record printed and file briefs and make oral arguments when the Picket case had its turn on the docket. The three judges of that Court would deliberate, and if they concluded that the Board's order was supported by evidence and well founded in law, they would enter a decree that Picket should comply with the Board's order. Then, after all these months, Picket would for the first time face the alternative of obeying the law or going to jail.

Are those who clamor for equality really willing to remove the numerous legal burdens which labor carries alone, and which do not touch employers, if in return labor is subjected to the provisions of the National Labor Relations Act? Of course not. They would be unwilling to remove one ounce of the legal load which labor carries. They want merely to add to that load. And yet they speak of equality.

What I have said relates also to the frequently suggested proposal that the National Labor Relations Act be amended to forbid "coercion from any source." This sounds

plausible and equitable. In the discussion of this proposal it should first be remembered that coercion exercised by working men upon each other which is objected to by those who would amend this law takes the form of force or threat of force which is already a crime everywhere and which is universally punished as such.

If it is claimed that city, county, and state police and courts do not in fact adequately detect and punish these crimes, and that therefore the Federal Government should step in, the proponent of such a course must be ready to face certain serious implications. First, the federal criminal laws must be amended to make these crimes federal crimes if committed in the course of industrial strife. Next, if the Federal Government is to assume this responsibility it must recruit and maintain an enormous police force throughout the country, ready for the sudden occurrence of industrial conflict, and with authority to displace state, county, and local police when such conflict occurs. The responsibility cannot be assumed unless power be given to meet it.

No proponent of the "coercion from any source" amendment has suggested that a federal police establishment be thus created. Neither would they be willing that the mild remedy now used to prevent coercion by employers be applied to a working man who coerces his fellow worker, if that remedy were to displace the legal burdens which labor now bears. Some of them offer instead the naive suggestion, that if a labor union or its members have violated this law, the union should be disqualified from functioning as a collective bargaining agency and should forfeit its right under the National Labor Relations Act.

Since the purpose and reason for existence of a union is that it may bargain collectively for its members, this would in effect be a death sentence. If this doctrine were applied equally to both sides of these conflicts, it would follow that if an employer, whose business is the making of automobiles, should violate the labor law, his penalty should be that he shouldn't make any more automobiles, or at least that he shouldn't hire any more labor for the making of automobiles. There is no more reason why a labor union chosen by employees should, for its violation of law, be disqualified from dealing with an employer, than why an employer should, for his violation of law, be disqualified from dealing with labor.

This proposal simply will not do. To impose a death sentence on one party who is already subject to numerous legal penalties, in order to counterbalance a mild "cease and desist" order limited to specific illegal practices, on the other party, cannot be justified by an argument for equality.

The plain truth of the matter is that industrial conflict always has presented and always will present a delicate and difficult problem of policing. Whether this policing be done by federal, state, county, or city police, there will always be controversy as to whether the responsible authorities have not been, on the one hand too brutal and severe or, on the other hand, too lax and tolerant. Once the battle is joined the community is at the mercy of the judgment, good or bad, of the authorities which have the policing in their charge. The only real hope is to prevent this strife from occurring, by removing its causes. The National Labor Relations Act was passed for that purpose and shows much promise of preventing a considerable number of such conflicts. To do this, it has placed mild restraints upon employers. Labor should be vigilant that this fact should not be used as a pretext for adding to the already heavy legal burdens of labor.