THE NATIONAL LABOR RELATIONS ACT AND THE TRANSPORTATION INDUSTRY

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and

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I am aware of no other instance in the history of this country in which a statute of first rate importance has so completely fulfilled the objectives of those who promoted its enactment.

Judge J. Warren Madden[1]

I. *Introduction*

Senator Robert Wagner's famous bill, which in 1935 became the National Labor Relations Act, was born in controversy. The sober prophet Walter Lippmann forecast: "If the bill were passed, it could not be made to work. . . . It is preposterous to put such a burden upon mortal men."[2]

Some attacked the bill as "a new drive against the working class and its living standards, preparation for imperialist war, and a step toward fascism."[3] Others attacked it as an "inquisition"—"a condition of dread, terrorism and frightfulness" which would force employers to "flee the country."[4]

Thirty-three years and tens of thousands of N.L.R.B. decisions have intervened since these frenetic claims were made. While one still hears occasional, dissenting voices, the clear judgment of recent history is that the Labor Act, with its periodic amendments and its constantly refined administration, has neither brought American workers under

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1.Madden, *The Origin and Early History of the National Labor Relations Board*, 29 Geo. Wash. L. Rev. 234, 250 (1960).

2.New York Herald Tribune, March 28, 1935, p. 21, col. 1.

3.Testimony of William F. Dunne, Hearings before the Senate Committee on Education and Labor, 73d Cong., 2d Sess. (1934), 1 Legis. Hist. of N.L.R.A. 1030.

4.Testimony of Gus W. Dyer, Hearings before the Senate Committee on Education and Labor, 73d Cong., 2d Sess. (1934), 1 Legis. Hist. of N.L.R.A. 940.

the heel of fascism nor terrorized their employers. Most objective observers believe, on the contrary, that the policies of the law are both fair and workable; that the law has proven its lasting value to the industrial community by its rational response to major economic vicissitudes of more than three decades; and that the experience of this law is a dynamic and democratic example of social problem-solving which may be relevant to troublesome confrontations today in urban ghettos and on college campuses.

The importance of the transportation industry and of peaceful and stable labor-management relations there can hardly be exaggerated. Millions of employees and thousands of businesses are directly involved. In addition, breakdowns in this industry can have a damaging impact on urban consumers' access to food, on the supply lines of raw materials for manufacturing, on the delivery and distribution of finished goods and on the transit of people on all manner of business and personal missions.

As the transportation industry looms large in the economic life of the nation, it also furnishes a substantial part of the business of the National Labor Relations Board.

2. *History, Policies and Administration of the Labor Act.*

a. *The Social Setting.*

By the end of the Nineteenth Century the industrial revolution in America was transforming the outward face of the land as well as the internal makeup of society. Farm families began a gradual exodus to the cities where they joined an urban population of wage earners who increasingly found employment in corporate-owned mills, factories, stores and offices. Millions of foreign-born workers were entering the mainstream of American life, usually at the lowest occupational and wage levels.

This new urban-industrial environment was in many ways an impersonal and discontented one. The worker and his family no longer lived in the familiar, homogeneous community, which we romanticize in recalling small town life of the Nineteenth Century; they were now likely to live in a working class neighborhood or a foreign language ghetto in a big city. The employer was no longer an individual entrepreneur who knew and shared the daily work experience with his employees; the new employer was an impersonal business corporation whose affairs were directed by a hierarchy of professional managers, supervisors and foremen. The place of work was no longer a small

workshop which employed a few craftsmen and laborers, but a sprawling industrial enterprise with a number of factories employing hundreds or even thousands of workers.

The character of work itself was changing for the average employee, as the efficient technology of mass production made traditional craft skills obsolete in some industries; men "began to lose the pride of accomplishment which characterized the ancient artisanship."[5] It seemed to some that the modern worker had become an appendage of his machine, for refinements in the production process reduced the human contribution to simple, repetitive functions, a phenomenon parodied in Charlie Chaplin's famous movie of the 1920's, *Modern Times*.

In response to these emerging conditions workers sought protection, security and a measure of personal participation in shaping their working lives by organizing into labor unions. Labor organizations, which had come earlier to industrialized Europe, were not new to America, but with few exceptions they had not played a major role in the fast-growing mass production industries.

Fearing that unions would intrude on the traditional authority of management and would threaten production and profits, many employers resisted the demands for recognition and participation. The radical politics of some union leaders even induced fears of revolution. Both sides believed deeply that their views were morally and economically right; determination met determination. "Money and power were commonly at stake, but other things, too: a sense of self-respect, a feeling that life is less arbitrary, more generous or predictable."[6]

In the rail transportation industry, which had a long and bitter history of national labor disputes, Congress intervened in 1926 with the Railway Act,[7] highly regarded when first enacted as a model for all industries. But in other industries the sharp conflict over basic interests and values remained; strikes, slowdowns, group discharges, lockouts, black-listing, and espionage, sometimes accompanied by violence, became increasingly commonplace.

The Great Depression of the early 1930's, which brought unemployment, job competition and economic malaise to all industries, exacerbated these underlying tensions. The common law condemned the

5.Cox, *Law and the National Labor Policy* 1 (1960).

6.Coles, Book Review, New York Times Book Review, Oct. 13, 1968, p. 3.

7.45 U.S.C. § 151 et seq.

disruptive manifestations of labor conflict, but offered few remedies for its causes. Indeed, the frequent recourse to labor injunctions had become so discredited that in 1932 Congress passed the Norris-LaGuardia Act, limiting Federal court jurisdiction in such disputes. It was in this setting of growing antagonism and discord that Congress broadly legislated in the field of interstate labor relations to deal with the causes and consequences of unresolved and unregulated controversy over the basic right to organize.

b. *The Policies and Administration of the Labor Act.*

The Labor Act was enacted in 1935 and amended in major respects in 1947 and 1959. The forerunner of this Act was Section 7(a) of the National Industrial Recovery Act of 1933, asserting the right of employees to organize and bargain collectively. It has not one but many policies.[9] If this complex legislative scheme can be fairly reduced to an essential formula, it is this: Employees have the right to decide by majority rule whether they wish to be represented for purposes of collective bargaining; if they choose to be represented, their employer must recognize and bargain in good faith with their representative as the exclusive agent of all employees in an appropriate unit with respect to their wages, hours, and other terms and conditions of employment. The law contemplates that, through the give-and-take process of good faith collective bargaining, labor and management will rationally and fairly resolve their own problems, free from government dictation, and subject to the peaceful exercise of economic power by each side to achieve its own legitimate objectives.

These principles are embedded in Section 7, which is the heart of the statute. It declares:

> Employees shall have 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 the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Surrounding the conceptual core of the Act are a number of specific

8.29 U.S.C. § 151 et seq.

9.Many would agree with Professor Howard Lesnick's description of the Act as a "complex, multi-contradictory statute." Lesnick, *Establishment of Bargaining Rights without an NLRB Election*, 65 Mich. L. Rev. 851, 865 (1967).

rights, duties and restraints placed on both labor and management. Violations of employee rights are "unfair labor practices." Employee free choice is primarily implemented through secret ballot elections conducted in "appropriate bargaining units."

Unlike the Railway Labor Act, the National Labor Relations Act is essentially a remedial statute, and Congress entrusted to the National Labor Relations Board—which administers the Act—wide discretionary authority to fashion suitable remedies for violations.

The Board is a 5 member, quasi-judicial, independent agency. The statute separates the adjudicatory work of the Board from its investigative and prosecutive functions. The latter are performed by the Board's independent General Counsel, who supervises 31 N.L.R.B. regional offices throughout the Nation. The agency's present annual budget is $35 million; it employs approximately 2300 employees.

In recent years the Board has received over 30,000 election petitions and unfair labor practice charges annually. Each year it conducts over 8,000 secret ballot elections in which over half a million industrial voters choose whether or not they wish to be represented for purposes of collective bargaining. The agency also disposes annually of over 17,000 unfair labor practice charges, in 9 out of 10 cases without the necessity of litigation before the Board or in the courts.

3. *Coverage of the Labor Act and Jurisdiction of the NLRB in the Transportation Industry*

The constitutional source of the Labor Act is the Commerce Clause,[10] and the law applies to all employers and labor organizations whose activities "affect commerce"[11] with stated exceptions.

The Act applies to all sectors of the transportation industry, again with certain prominent exceptions. Indeed, the very first case decided by the Board after its creation in 1935 involved a garage operated by an interstate carrier,[12] and one of the quintet of cases which established the constitutionality of the statute was also in the transportation industry.[13]

"Carriers" which are subject to the Railway Labor Act are expressly excluded from coverage of the National Labor Relations Act.[14] As a

10. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
11. Section 1.
12. *Pennsylvania Greyhound Lines*, 1 NLRB 1 (1935).
13. *Washington, Virginia & Maryland Coach Co.* v. *NLRB*, 301 U.S. 142 (1937).
14. Section 2(2).

practical matter, this means that the railroad and airline industries are not subject to coverage of the Labor Act or the jurisdiction of the NLRB. For certain secondary boycott purposes, however, the Labor Act applies to them in limited respects,[15] and from time to time the Board has decided a variety of issues regarding the coverage of the Act with respect to employers and employees in these industries. Recently, for example, the Board asserted jurisdiction over an intra-state, air passenger carrier over which the National Mediation Board had declined jurisdiction.[16]

The Labor Act applies generally to the maritime industry, both to dock-side[17] and ship-board employers. Decisional law has identified two prominent exceptions to the Act's coverage in this industry. The Supreme Court has held that the statute does not apply to the foreign seamen of a foreign-owned vessel temporarily docked in an American port.[18] The Court has also held that the Act does not apply to the foreign crew of a foreign-registered vessel operated in American foreign commerce by a wholly owned subsidiary of an American corporation.[19]

Section 2(2) of the Labor Act expressly excludes "any wholly owned Government corporation . . . or any State or political subdivision thereof." Accordingly, the Board has no jurisdiction over municipally-

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15.See, e.g., *Electrical Workers (B.B. McCormick & Sons)*, 150 NLRB 363 (1964), enforced 350 F.2d 791 (C.A. D.C. 1965), cert. denied 383 U.S. 943 (1966). For an example of intra-governmental comity between the NLRB and the National Mediation Board in this industry, see *Flight Safety, Inc.*, 171 NLRB No. 30 (1968).

16.*Air California*, 170 NLRB No. 1 (1968). Although the National Mediation Board would not assert jurisdiction over this air carrier, its activities were found by the N.L.R.B. to affect commerce within the meaning of the National Labor Relations Act. The Board applied to this carrier the jurisdictional standards which are normally applied to local passenger transit systems.

17.Each sector of the transportation industry has its own specialized labor relations practices and traditions. In the longshore industry, hiring halls are an established feature of the industry's labor relations structure, and a number of cases involving the operation of the hiring halls for longshoremen and stevedores have come before the Board. See *Pacific Maritime Association*, 172 NLRB No. 234 (1968). See also *Alaska Steamship Company*, 172 NLRB No. 124 (1968).

18.*Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957).

19.*McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U.S. 24 (1963). Compare *British Rail-International*, 163 NLRB No. 89 (1967), in which the Board declined to assert jurisdiction over an enterprise incorporated in New York which sold tickets for British railways and vouchers for rooms and meals in British hotels in connection with rail travel in Britian because, *inter alia*, the enterprise was owned by an agency of the British Government.

owned transit systems, but it does assert jurisdiction over privately owned transit systems which operate under public regulation.[20]

The Labor Act applies to the remaining sectors of the transportation industry which "affect commerce," including privately-owned local transit systems, interstate passenger carriers, the maritime industry and the trucking industry.

Before the statute may be applied to a particular business, there must be a factual showing that the employer "affects commerce." This is of course a jurisdictional requirement. Additionally, the N.L.R.B. has promulgated guidelines or "dollar yardsticks" which generally govern its assertion of jurisdiction with respect to different industries. These yardsticks vary from industry to industry. The Board asserts jurisdiction over most non-retail employers upon a factual showing that the employer "affects commerce" and that he has an annual $50,000 "inflow" or "outflow," direct or indirect, across state lines.[21]

The Board asserts jurisdiction over interstate passenger and freight transportation enterprises and all other enterprises which function "as essential links in the transportation of passengers or commodities in interstate commerce which derive at least $50,000 gross revenues per annum from such operations, or which perform services valued at $50,000 or more per annum for enterprises as to which the Board would assert jurisdiction under any of its jurisdictional standards."[22] Privately owned transit systems are covered if their gross annual revenues exceed $250,000.[23]

4. *Statutory Problems of Special Concern to the Transportation Industry.*

While the N.L.R.B.'s administration of the Labor Act is nationally uniform and preemptive of inconsistent State laws,[24] the Board strives to be sensitive to the unique labor relations and economic

20.See *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383 (1951).

21.*Siemons Mailing Service*, 122 NLRB 81 (1958).

22.*HPO Service, Inc.*, 122 NLRB 394, 395 (1958).

23.*Charleston Transit Company*, 123 NLRB 1296 (1959). See also *Vaca Valley Bus Lines*, 171 NLRB No. 179 (1968).

As a matter of discretion the Board does not assert jurisdiction over intra-state school bus operations which it regards as essentially local in character and in aid of the State in the field of education. See, e.g., *S. & L. Lines*, 164 NLRB No. 140 (1967); *Community Interprises*, 164 NLRB No. 141 (1967).

24.See *Garner* v. *Teamsters*, 346 U.S. 485 (1953).

characteristics of the various industries embraced by the policies of the Act. In the transportation industry, which is especially heterogeneous, a number of statutory issues are of recurring importance. The limitations of this brief essay permit a discussion of only a few prominent problems which affect this constantly changing industry, and because readers of this journal are primarily interested in the motor carrier field, the discussion which follows is devoted mainly to motor carrier labor relations.

a. *The Status of Owner-Operators, Lease-Drivers and Driver-Salesmen*

In a variety of contexts the Board and courts have dealt with legal and labor relations questions involving the status of owner-operators, lease-drivers and driver-salesmen. The factual and legal character of the relationship between such drivers and carriers is often litigated in representation cases which present the question whether they are "employees," who are entitled to vote in N.L.R.B. elections and who generally are protected by the provisions of the Labor Act, or "independent contractors," who may not vote and generally are not so protected.[25] The Board's resolution of this question requires a factual determination in each case whether the carrier exercises the common law "right of control"[26]

The Seventh Circuit on several occasions has disagreed with the Board's application of the "right of control" test.[27] The Supreme Court resolved the conflict between the Board and the Seventh Circuit this year, affirming the Board's finding of "employee" status in an insurance industry case. While acknowledging that these are frequently close questions, the Supreme Court held that the Board's finding of "employee" status "should not be set aside just because a court would, as an original matter, decide the case the other way."[28]

25.Section 2(3): "The term 'employee' shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor . . . ." Cf. *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111 (1944).

26.*Deaton Truck Lines, Inc.*, 143 NLRB 1372 (1963), affirmed 337 F.2 d 697 (C.A. 5 1964). For a discussion of earlier cases on this subject, see Singer and Hardman, *Administrative "Bulls" in the Delicate China Shop of Motor Carrier Operations: The Status of Owner-Operators*, 17 Lab. L. J. 584 (1966).

27.See, e.g., *Frito-Lay, Inc. v. N.L.R.B.*, 385 F.2 d 180 (C.A. 7 1967); *United Insurance Co.* v. *N.L.R.B.*, 371 F.2 d 316 (C.A. 7 1966); *United Insurance Co.* v. *N.L.R.B.*, 304 F.2 d 86 (C.A. 7 1962).

28.*N.L.R.B.* v. *United Insurance Co.*, 390 U.S. 254, 260 (1968).

Economic and legal arrangements between carriers and owner-operators have also been a fertile source of litigation. In *Local 24, Teamsters* v. *Oliver*,[29] the Ohio courts restrained the operation of provisions of the 1955 Central States Area Over-the-Road Motor Freight Agreement which regulated leases and rentals to be paid to owners-operators. The Ohio courts held that these collective bargaining provisions violated the state antitrust law because they unreasonably limited the owner-operator's use of his own property. Reversing, the Supreme Court held that the union's right to negotiate minimum rentals and other lease provisions for owner-operators, during periods when their equipment was leased in the service of a carrier, was protected by the Labor Act's policy of promoting collective bargaining over wages, hours and other conditions of employment. The Court reasoned that a driver's equipment rental payments are closely related to his hourly wages; therefore, the union could legitimately seek to protect employees' wage standards by bargaining about equipment rentals. The Ohio law, which interfered with this statutory right, was thus held to conflict with preeminent federal regulation.

Not infrequently litigation arises when an employer seeks to change the status of drivers from "employees" to "independent contractors." This was the issue in *Shamrock Dairy*[30] where an employer who had operated with driver-salesmen, who were employees, sought to convert their status to "independent contractors" and to negotiate individual contracts with them, without notifying or bargaining with their exclusive bargaining agent about the change. A majority of the Board held that this unilateral change was unlawful because the union was entitled to be notified about the change and to be given an opportunity to bargain about it. The implications of this issue were further delineated in the well-known *Fibreboard*[31] decision. There a unanimous Supreme Court upheld the Board's interpretation of the bargaining obligation under the statute that an employer must notify and bargain with an exclusive employee representative about changes in an employer's method of doing business which have a substantial impact on employee contract rights and employment security.

b. *Secondary Boycotts.*

Another persistent and difficult statutory issue in the motor carrier field involves secondary boycotts and "hot cargo" agreements under

29.358 U.S. 283 (1959).

30.*Shamrock Dairy, Inc.*, 124 NLRB 494 (1959). See *Carnation Co.*, 172 NLRB No. 215 (1968).

31.*Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964).

Sections 8(b)(4) and 8(e). These sections have an elaborate legislative and decisional history, for they seek to regulate an extremely complex aspect of industrial relations.

The first federal prohibition of secondary boycotts was enacted in 1947. Its purpose, said Senator Taft, was to make it unlawful "to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees."[32] By this prohibition Congress sought to preserve the traditional right of employees to strike against their own employer, but to insulate truly neutral employers from disputes not their own.[33] This fundamental distinction between primary and secondary conduct has been difficult for Congress to explicate in legislation and no less difficult for the Board and courts to interpret and apply.

The famous cases known as the *Sand Door*[34] trio, one of which involved a motor carrier, illustrates this historical difficulty. The Supreme Court held under the Taft-Hartley secondary boycott provisions that a "hot cargo" contract, in which a carrier agreed that his employees would "not be allowed to handle or haul freight to or from an unfair company," was a lawful contract which the carrier could lawfully comply with voluntarily; but the contract, nevertheless, was not a defense to a union's inducement of its members to refuse to handle the goods of a neutral employer with whom the carrier's employees had no dispute.

In 1959 Congress enacted amendments to strengthen the secondary boycott provisions of Section 8(b)(4), and at the same time it enacted Section 8(e) expressly to prohibit entering into or enforcing "hot cargo" agreements. Again Congress was careful not to impinge on the right of employees to engage in protected primary activity.[35] *National Woodwork Manufacturers Association*,[36] the leading Supreme Court decision interpreting Section 8(e), upheld the Board's finding that a labor organization did not violate this prohibition by refusing to install pre-cut and pre-fitted doors pursuant to a contract clause that employees would not handle material coming from a mill at which doors had been pre-cut and pre-fitted. It was the Board's view, with which a majority of the Supreme Court agreed, that the union's

32.2 Legis. Hist. of L.M.R.A. 1106.

33.*N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675 (1951); *N.L.R.B.* v. International Rice Milling Co., 341 U.S. 665 (1951).

34.*Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93 (1958).

35.*Local 761, I.U.E.* v. *N.L.R.B.*, 366 U.S. 667, 681 (1961).

36.*National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967).

contract and its related conduct were lawful because the union was endeavoring to protect traditional work of employees in the bargaining unit, not to put pressure on secondary employers. In other words Section 8(e) acknowledges the right of unions to protect and preserve the traditional work of employees, while prohibiting work protection agreements which are essentially directed against neutral, secondary employers.

Another recent case in the motor carrier industry reflects the difficulty of applying Section 8(e). *S. & E. McCormick*[37] involved the validity of an owner-operator contract clause by which carriers agreed to engage only "employees" to operate leased-equipment and further agreed to exercise a "right of control" over all such drivers.[38] The application of this contract required certain owner-operators and fleet-operators, stipulated to be "independent contractors," to become "employees" of the carriers and also to become members of the union: if owner-operators refused to become employees of the carriers and to join the union, the contract, in effect, required the carriers to cease doing business with them.

After weighing the facts and contentions of the parties, including the history of bargaining and the character of the work involved, the Board concluded that this clause did not violate Section 8(e). It was the Board's view that this clause was lawful because it sought to protect the work which had traditionally been performed by unit employees from erosion by subcontracting to owner-operators, who performed virtually the same hauling work under virtually identical circumstances. Additionally, this clause protected wage standards for unit employees from erosion through lease agreements which might undermine negotiated standards. While acknowledging that the owner-operator clause might require owner-operators to become employees of the carriers and to join the union, this consequence was not illegal, in the Board's opinion, for it was a natural incidence of expansion of the bargaining unit resulting from the lawful prohibition against subcontracting.

The Third Circuit disagreed. It saw the owner-operator clause not as

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37. *Teamsters, Local 107 (S. & E. McCormick, Inc.)*, 159 NLRB 84 (1966), enforced in part 383 F.2d 772 (C.A. 3 1967).

38. 159 NLRB at 92: "In all cases hired or leased equipment shall be operated by an employee of the . . . carrier and such employee shall be paid pursuant to the terms of this Agrement. The Employer expressly reserves the right to control the manner, means and details of, and by which the owner-operator performs his services, as well as the ends to be accomplished."

a valid work-protection agreement, necessary to protect bargaining unit work and standards from erosion, but as a measure calculated to require owner-operators and fleet-operators to join the union. The court believed that other clauses of the contract adequately protected the union against the threat of subcontracting of unit work, and this, the court believed, diminished the validity of the union's claim that the owner-operator clause was needed for such purpose.

The Board held in another recent case that the Teamsters violated Section 8(b)(4)(ii)(B) by threatening to fine an independent owner-operator, who was a union member, because he had violated the union's constitutional prohibition against doing business with an employer with whom the union had a dispute. The Board believed that the union's threat transgressed the law, notwithstanding that the owner-operator was a union member.[39]

In speeches, articles and Congressional testimony, one often hears management and union lawyers assert that they clearly understand the words and intention of Congress in enacting Sections 8(b)(4) and 8(e); and on the basis of their authoritative understanding they appear to have little difficulty in applying Congress' words and intention to particular cases. However, these same lawyers authoritatively disagree with each other in most cases; they also frequently disagree with the Board and the courts, including the Supreme Court. From this contrariety of opinion, what is clear is that this is a many-sided and complex problem area in which generalizations are hazardous and definitive answers should be viewed with skepticism.

c. *Multiemployer Bargaining and Lockouts.*

Collective bargaining in the trucking industry is "characterized by multiemployer bargaining of almost every conceivable size, shape, and character,"[40] reaching a pinnacle with the execution of the National Trucking Agreement in 1964. It reportedly applies to 16,000 employers and nearly half a million employees.[41]

Multiemployer bargaining has deservedly received much attention

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39. *Local 209, Teamsters (East Bay Counties Dry Cleaners Association)*, 167 NLRB No. 6 (1967).

40. Feinsinger, *Collective Bargaining in the Trucking Industry* 31 (U. of Pa. Press, Industry-Wide Collective Bargaining Series, 1949).

41. Previant, *Economic and Political Implications of the National Trucking Agreement of 1964*, 17 N.Y.U. Conf. on Labor 281, 283 (1964). See Burstein, *The National Teamsters' Agreement—A Management View*, 17 NYU Conf. on Labor 297 (1964). See also *H.L. Washum*, 172 NLRB No. 40 (1968).

from many writers, including a tongue-in-cheek carrier representative who said: "the greatest advantage of multi-employer bargaining is the fact that it makes it possible for a number of carriers to be second class s.o.b.'s instead of one carrier to be a first class s.o.b. negotiating a ridiculous [sic] contract."[42]

There are two main problems with respect to multiemployer bargaining: Those relating to its creation and termination, and those relating to strikes and lockouts.

Multiemployer bargaining is "based on the consent of the parties to treat with one another through the agreed units."[43] Thus, cases often involve the threshold question whether the parties intended to create a multiemployer unit.[44] Having consented to embark on multiemployer bargaining, they are free to withdraw their consent in appropriate and timely ways.[45] The Board has held, with judicial approval, that the rules which govern employer withdrawal from multiemployer bargaining apply in the same way to union withdrawal.[46] In the transportation industry, where multiemployer bargaining is so prevalent, many kinds of questions involving entry into and withdrawal from such units have been litigated.[47]

The law governing multiemployer strikes and lockouts is not entirely settled, for new issues continuously emerge. In the leading *Buffalo Linen*[48] case the Supreme Court, affirming the Board, held that non-

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42. Buck, *Multi-Employer Bargaining Staff Viewpoints*, Seventh Annual National Forum on Trucking Industrial Relations 135-136 (1956).

43. *N.L.R.B.* v. *Sheridan Creations, Inc.*, 357 F.2d 245, 248 (C.A. 2 1966), cert. denied 385 U.S. 1005 (1967); *N.L.R.B.* v. *Southwestern Colorado Contractors Association*, 379 F.2d 360 (C.A. 10 1967).

44. See *Western States Regional Council No. 3, Woodworkers v. N.L.R.B. (Weyerhaeuser Company)*, 365 F.2d 934 (C.A. D.C. 1966), on remand 166 N L R B No. 7 (1967).

See also *Santa Barbara Distributing Co.*, 172 NLRB No. 190 (1968).

45. *Retail Associates, Inc.*, 120 NLRB 388 (1958); *Sheridan Creations, Inc.*, 148 NLRB 1503 (1965), enforced 357 F.2 d 245 (C.A. 2 1966).

46. *Detroit Newspaper Publishers* v. *N.L.R.B.*, 372 F.2 d 569 (C.A. 6 1967); *Publishers Association* v. *N.L.R.B.*, 364 F.2 d 293 (C.A. 2 1966), cert. denied 385 U.S. 971. See also Note, *Withdrawal from Multi-Employer Bargaining—Reconsidering Retail Associates*, 115 U. of Pa. L. Rev. 464 (1967).

47. See, e.g., *Commercial Automotive Corp.*, 169 NLRB No. 76 (1968), where an employer withdrew one of three garages from a multiemployer unit after negotiations had begun. The Board held that the withdrawal was untimely. As a remedy the employer was ordered to execute the multiemployer contract and to give retroactive effect to its terms and conditions.

48. *N.L.R.B. v. Truck Drivers Union, Local 449*, 353 U.S. 87 (1957).

struck members of a multiemployer association may temporarily lockout their employees in response to a strike against one member which has "imperiled the employers' common interest in bargaining on a group basis." More recently, in *American Ship Building*,[49] the Supreme Court, reversing the Board in a single employer lockout case, held that economically motivated, offensive lockouts are lawful unless they are "inherently . . . prejudicial to union interests and . . . devoid of significant economic justification."

Several recent cases involved the lockout of employees outside a bargaining unit in which a strike occurred. In *Acme Markets*[50] a union struck Acme, a food chain, but did not strike the remaining members of a multiemployer unit. Other employers in the unit then defensively locked out their employees. Acme, the struck employer, thereafter also locked out employees in 28 other stores, even though these employees were not represented for purposes of collective bargaining and were not in the multiemployer unit. Acme's reason for locking out its employees in the 28 stores was to preserve the multiemployer unit, for these stores were in competition with stores of other members of the multiemployer unit which had engaged in the defensive lockout. The Board concluded that Acme's lockout of non-unit employees was lawful because it was calculated to "serve the legitimate business end of preserving the integrity" of the multiemployer unit. This conclusion was buttressed by evidence that Acme took steps to protect locked-out employees from economic loss.

In still another case, the Board held that it was lawful for one employer to lockout its employees defensively in support of a second employer which had been struck. The two employers—while bargaining separately—faced virtually identical demands from the union at the same time, and, therefore, their interests were joined in a single dispute.[51] On the other hand, where a member of a multiemployer unit locked out its employees who were represented by a union which had called a strike in another area against employers which were not covered by the first employer's multiemployer agreement, the Board held that the first employer's lockout was unlawfully motivated.[52]

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49. *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 311 (1965).

50. *Acme Markets, Inc.*, 156 NLRB 1452 (1966).

51. *Evening News Association*, 166 NLRB No. 6 (1967), on remand from 382 U.S. 374 (1966), vacating 346 F.2d 527 (C.A. 6 1965). See *Weyerhaeuser Company*, 166 NLRB No. 7 (1967), on remand from 365 F.2d 934 (C.A. D.C. 1966).

52. *Friedland Painting Co.*, 158 NLRB 571 (1966), enforced 377 F.2d 983 (C.A. 3 1967).

This, too, is a challenging problem area of the law in which constant refinements result from the innovative practices of labor and management.

d. *Unit Problems Affecting Motor Carriers.*

The Board conducts elections only in "appropriate bargaining units." It must "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the appropriate unit . . . shall be the employer unit, craft unit, plant unit, or subdivision thereof."[53]

Many unit issues in the transportation industry are indistinguishable from those in other industries. "Supervisors," for example, are excluded from the Act's coverage and are not permitted to vote in N.L.R.B. elections, nor are they protected generally by Sections 7 and 8. The Board thus regularly decides whether dispatchers in the motor carrier industry possess the indicia of supervisory authority.[54] Another unit problem common to all industries concerns the status of business entities which have economic interrelationships. In a recent motor carrier case, the Board held that four freight forwarders and a freight handler constituted a single employer because they were wholly owned subsidiaries of another corporation, were located on the same premises, had interlocking officers, intermingled their employees at the same location under the same supervision, and in many instances did each other's work.[55]

Should the unit include only one or a number of terminals or warehouses operated by the same employer? The Board makes such determinations in the light of a number of criteria, among them geographic separation, autonomy, lines of supervision, interchange of employees and historical practices of the parties.[56] Recently the Board examined whether a single warehouse might be an appropriate unit when an employer operates several warehouses as part of a single

53.Section 9(b).

54.See, e.g., *C.A. Froedge Delivery and Trucking Service, Inc.*, 172 NLRB No. 8 (1968), where the Board found that a dispatcher was a supervisor who possessed the authority to exercise independent judgment in making assignments to truck drivers, to grant time off, and to require truck drivers to "punch out." See also *R.M.E., Inc.*, 171 NLRB No. 32 (1968), where the Board recently held that a common carrier's president, secretary-treasurer, sales and traffic administrator, and dispatch supervisors were "supervisors."

55.*Western Freight Association*, 172 NLRB No. 46 (1968).

56.See, e.g., *Bowman Transportation, Inc.*, 166 NLRB No. 111 (1967).

warehouse enterprise.[57] The Board concluded that one warehouse was an appropriate unit because, *inter alia*, employees of each warehouse were under separate immediate supervision, interchange and transfer of employees between warehouses was very limited, and the three warehouses were geographically separated.

The unit placement of truckdrivers is an issue which the Board has considered in many proceedings. In the leading *Koester Bakery*[58] case the Board recognized that the work of truckdrivers sometimes is so integrated with that of other employees in a production enterprise that the drivers would enjoy "fullest freedom" if they were included with non-drivers. But in other instances drivers have distinct employment interests which warrant their being represented in units limited to drivers alone. *Koester* explains:

> [The] complexity of modern industry, with its many variables, precludes, for the most part, the application of fixed rules for the unit placement of truckdrivers. For case experience has demonstrated that a wide variation in conditions of employment governing mutuality of interests exists both with respect to local and over-the-road drivers of a given employer, and as between the various industries and from plant to plant within a given industry. Thus, in a particular set of circumstances, the truckdrivers' interests could be sufficiently separate and distinct from those of other employees as not to require their inclusion in a broader unit, whereas in other circumstances such interests could be . . . so closely related to those of production employees as to warrant denial of their severance from an overall unit.[59]

In *Kalamazoo Paper Box*[60] the Board faced the reverse situation. Drivers historically had been represented in a unit with non-drivers, and a union sought to sever them for separate representation in a unit limited to drivers. As in *Koester*, the Board rejected a mechanical approach:

> Where [relevant]factors support a conclusion that the community of interest shared by truckdrivers with other plant employees

57. *Amfac, Inc.*, 173 NLRB No. 126 (1968).

58. 136 NLRB 1006 (1962). Cf. *N.L.R.B. v. Tallahassee Coca-Cola Bottling Co.*, 381 F.2d 863 (C.A. 5 1967); *N.L.R.B. v. Cumberland Farms, Inc.*, 370 F.2d 54 (C.A. 1 1966), on remand 167 NLRB No. 86 (1967).

59. 136 NLRB at 1010.

60. *Kalamazoo Paper Box Corporation*, 136 NLRB 134 (1962). See *Mallinckrodt Chemical Works*, 162 NLRB No. 48 (1966).

> outweigh those which would be the basis for severance from an existing production and maintenance unit, we shall deny severance to truckdrivers. . . . and we hold the view that this determination must be based upon the factual situation existing in each case and not upon title, tradition, or practice.[61]

In making unit determinations the Board tries to weigh sensitively the relevant factors which the parties bring to its attention. While maintaining flexibility in terms of deciding each case on its own special facts, the Board also strives—we believe with demonstrable success—to provide meaningful guidance to the parties in their understanding of the essential ingredients of unit appropriateness.

Conclusion

This brief essay has sketched only a few of the statutory, labor relations issues in the transportation industry. Several others must at least be noted.

A problem of understandable concern to the motor carrier in commerce has been the potential area of conflict between his duties under the common law and the Interstate Commerce Act and his duties under the Labor Act and under collective bargaining agreements.[62]

Various kinds of secondary boycotts, not fully discussed here, have been a major source of litigation before the Board and the courts.[63]

Organizational and recognitional picketing, regulated in many respects by Section 8(b)(7), have given rise to a whole jurisprudence of Board and court decisions.[64]

Although the N.L.R.B. has a very limited statutory role to play in national emergency disputes, this, too, is a subject of deep concern in

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61. *Kalamazoo Paper Box Corporation, supra*, at 138-139.

62. See, e.g., Scurlock, *Carriers and the Duty to Cross Picket Lines*, 39 Tex. L. Rev. 298 (1961); Marshall, *Carrier Service and the Picket Line: A Dilemma*, 13 Lab. L.J. 301 (1962).

63. Lewis, *Consumer Picketing and the Courts—The Questionable Yield of Tree Fruits*, 49 Minn. L. Rev. 479 (1965); Cohen, *Observations on Two Aspects of Secondary Boycott Cases*, 15 J. Pub. L. 220 (1966); Note, *Common Situs Picketing and the Construction Industry*, 54 Georgetown L.J. 962 (1962); Note, *Primary Picketing at a "Movable Situs" as a Test for Secondary Boycotts*, 67 Colum. L. Rev. 1535 (1967).

64. Samoff, *Recognition and Organizational Picketing*, 14 Lab. L.J. 891 (1963); Feldesman, *Restrictions on Picketing and Boycoits*, 14 Lab. L.J. 325 (1963); Meltzer, *Organizational Picketing and the NLRB*, 30 U. of Chi. L. Rev. 78 (1962); Dunau, *Some Aspects of the Current Interpretation of Section 8(b)(7)*, 52 Georgetown L.J. 220 (1964); Note, *Illegal Picketing under Section 8(b)(7)*, 68 Colum. L. Rev. 745 (1968).

the transportation industry, as it is in other industries which vitally affect the health and welfare of the Nation.[65]

Under Section 301 of the Taft-Hartley Act, labor contracts are enforceable in the federal courts. Many important problems concerning arbitration have been resolved; others remain.[66]

Statistics help to illustrate the importance of the Labor Act's role in protecting the interests of labor, management and the public in the transportation field. In Fiscal Year 1967 the N.L.R.B. processed 2743 representation and unfair labor practices cases in this industry, the bulk of which (2089 cases) involved motor freight, warehousing and transportation services.[67] Approximately two-thirds were unfair labor practice cases, one-third, representation cases. The Teamsters Union alone participated in nearly one-third of all elections conducted by the Board during this year.[68]

As these statistics suggest, the peaceful procedures of the Labor Act have aided labor and management to solve literally hundreds of representation and unfair labor practice disputes each year under rules of law and fairness embodied in Congressional policy. Year after year and in industry after industry, the little known, often under-appreciated operation of the statute has been a major stabilizing factor in American industrial life, for the law offers rational, orderly and peaceful procedures to resolve many problems of deep and immediate concern to employers and employees. Problems remain; some problems are inherent in a society which prizes free choice and freedom of contract. But the basic ground rules for industrial behavior have been defined in the law, and disputes over the rules of behavior have been replaced by fair legal standards and fair procedures.

Recent proposals have emerged for revising or even discarding the policies of the Labor Act and its familiar and tested procedures, proposals sometimes based on broad distortions of the present law and

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65.Sandberg, *Emergency Labor Disputes and the National Interest*, 16 Lab. L.J. 359 (1965); Herlong, *Transportation Strikes: A Proposal for Corrective Legislation*, 36 Fordham L. Rev. 175 (1967); Rothman, *National Emergency Disputes under the LMRA and the RLA*, 15 Lab. L.J. 195 (1964); Smythe, *Public Policy and Emergency Disputes*, 14 Lab. L.J. 827 (1963).

66.Smith and Jones, *Supreme Court and Labor Dispute Arbitration: The Emerging Law*, 63 Mich. L. Rev. 751 (1965); Cushman, *Arbitration and the Duty to Bargain*, 1967 Wis. L. Rev. 612; Note, *Section 301 and the Federal Common Law of Labor Agreements*, 75 Yale L.J. 877 (1966).

67.32nd Annual Report of N.L.R.B., p. 225, Table 5.

68.*Ibid.*, p. 238, Table 13.

its administration. These proposals should be carefully weighed against the proof of the historical workability of the present law. For this is an area of American life in which violence and strife, once so prevalent, have diminished sharply, have become the disturbing exception rather than the intolerable rule.

In relationship to these recent proposals, one also hears occasionally sharp criticism of the agency entrusted by Congress with its present labor policies. Honest criticism helps the Board and the Congress and thereby serves the public interest; distorted criticism does not.

Senator Dirksen recently counseled businessmen to "Cooperate with executive departments and regulatory agencies. . . . These agencies are not the ogres that some businessmen seem to think they are; they're just doing the job that the statutes require of them."[69]

69. Dirksen, *The Governmental Environment*, Nation's Business, June 1968, p. 59.