Labor Relations--A National or a State Problem

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LABOR RELATIONS—A NATIONAL OR A STATE PROBLEM

A Study of the Conflict in Jurisdiction Between the National Labor Relations Act and the Minnesota Labor Relations Act

By GERALD HEANEY*

I. INTRODUCTION

W hen the National Labor Relations Act1 was passed in 1935, there were no similar state acts in existence. It was not long, however, until agitation for such legislation was commenced, and in 1937, state labor acts modeled after the federal act were enacted in Massachusetts,2 New York,3 Pennsylvania,4 Utah,5 and Wisconsin.6 Since then, state labor acts have been passed in Michigan7 and Minnesota.8

The demand for such legislation has continued, and, according to a survey of state legislatures, thirty-eight of which were in session in February, 1941, bills relating to labor relations were before twenty-seven of them.

A total of thirteen states were considering some form of labor relations acts, nine of which were patterned after the Wagner Act, while three embodied the Garrison suggestion that units should not be established where rival units disagree on the type appropriate. The thirteen states are: California,9 Connecticut, Illinois, Maryland,10 Minnesota,11 Nebraska, New Hampshire,

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2 Massachusetts, Acts and Resolves 1937, ch. 436.

3 New York, Laws (Thompson 1939) ch. 31, art. 20.


5 Utah, Laws 1937, ch. 55.

6 Wisconsin, Stat. (1937) ch. 111.


9 This state also has bills before its state legislature restricting union activities, picketing, and coercion.

10 There is also a bill establishing a division of conciliation requiring a ten-day notice before a strike can be called, and similar in other respects to the Minnesota act.

11 This bill has failed to obtain committee approval. Departmental requests for amendments are: (1) a provision limiting the time a strike notice is valid to ninety days; (2) an amendment to sec. 7, providing that if the governor does not appoint members of the public service commission within five days after notification to him by the conciliator the limitations imposed on the parties by sec. 7, shall be inoperative; (3) an amendment to sec. 14,
New Jersey, New Mexico, Ohio, Rhode Island, Texas, and Wyoming.

On the other hand, at least four states have before them only proposals to restrict union activities. The so-called equalizing statutes forbidding unfair practices of employees, very common two years ago, are conspicuous by their absence.

With this rapid increase in state legislation, the question as to the relative jurisdiction of the national and state acts is becoming increasingly important. The existing state enactments have taken care of this problem in various ways. The Massachusetts act\(^1\) is expressly not applicable to unfair labor practices subject to the national act; the Pennsylvania act\(^4\) does not apply to employers subject to the national act; and the New York act\(^1\) does not apply to employees of any employer who concedes to and agrees with the state labor board that such employees are subject to the national act. The Michigan,\(^1\) Wisconsin,\(^1\) Utah,\(^1\) and Minnesota acts are silent on this question.

This jurisdictional question has been considered by the Wisconsin supreme court in two cases,\(^2\) in which it was held that the providing that no temporary restraining orders shall be issued unless the same are returnable within seven days from the time they are granted. It is also the duty of the court under this amendment to give such suits precedence over all other civil suits which are ready for trial. Failure of the trial court to decide a motion for a temporary injunction within sixty days shall dissolve any restraining order. Failure of the trial court to decide any suit brought under this section within forty-five days shall dissolve any restraining order or temporary injunction issued therein without further order of the court; (4) a provision giving the conciliator power to subpoena witnesses in representation cases; (5) an addition to the unfair practices sections making it an unfair practice for either employers or employees to violate a collective bargaining agreement. These amendments are contained in Senate file no. 468, and were introduced by Senator Galvin. They have been reported back with approval from the committee on labor. All of these amendments have been enacted into law (ch. 469, Laws of 1941). In addition, sec. 12 was amended so as to make it an unfair practice to lock out employees who have given information or testimony under the act.

\(^1\)The Rhode Island bill is the only one which was finally approved. This was approved May 7, 1941, and became effective July 1, 1941.
\(^2\)Massachusetts, Acts and Resolves 1937, ch. 436, sec. 14 (b); see note in (1939) 27 Cal. L. Rev. 438.
\(^4\)New York, Laws (Thompson 1939) ch. 31, art. 20, sec. 715.
\(^7\)Utah, Laws 1937, ch. 55.
\(^8\)Mason's Minn. Supp. 1940, sec. 9254 (20-40).
State Labor Relations Board could act even though the industries were engaged in interstate commerce. In Pennsylvania the State Labor Board has held that it will not be bound by the determination of the national board that an employer is engaged in interstate commerce. In Massachusetts it has been decided that a company doing a business that was local in nature, but which did some interstate business and was financed by the General Motors Corporation, was within the jurisdiction of the Massachusetts board. Also, the New York board has decided that it could exercise jurisdiction over industries in interstate commerce until the national board had assumed jurisdiction in the particular case. The fact that the employers conceded that they were subject to the national act did not divest the state board of jurisdiction.

It can be seen from the above résumé that there are troubled waters ahead. The Supreme Court of the United States has not yet considered the problem, but with the rapid growth of state acts and other measures dealing with labor, the question is one

21 The first case arose under the earlier act cited in footnote seventeen, and the second under the Wisconsin Employment Peace Act. Laws 1939, ch. 57. See also Plankinton v. Hotel and Restaurant Employees Local No. 122, case no. 78, c. w. 4, Feb. 15, 1940, 5 L. R. M. 650.

22 In re Union Premier Food Stores, Inc. v. Madnick, (1939) case no. 142, Oct. 10, 1939, Penn. Labor Rel. Board, 5 L. R. M. 642. Ninety per cent of the raw materials came from other states, and sixty-seven of the finished products were sent to warehouses in other states. The National Labor Relations Board had taken jurisdiction in representation proceedings involving stores in the same chain. The Pennsylvania board said: “Although the Pennsylvania Labor Relations Board has the highest respect for the deliberations and determinations of the National Labor Relations Board, it does not feel constrained to accept such action by the National Labor Relations Board as conclusive upon the jurisdiction of the Pennsylvania Labor Relations Board, especially where, as here, the question of jurisdiction was resolved by the simple expedient of a stipulation of the parties to that effect. In the nature of respondent’s operations, it is difficult to see how that which touches only one store or one community can have the direct effect upon interstate commerce which, under the decisions and the National Labor Relations Act, give the National Labor Relations Board jurisdiction. When the merchandise is received at each store for local consumption, to all intents and purposes it has come to rest and any interstate features of respondent operations, even if such were the test, have completely ceased.” Cf. In re Wm. Flaccus Oak Leather Co. v. International Brotherhood of Firemen and Oilers, Local No. 75, case no. 204, Oct. 17, 1939, 5 Labor Relations Manual 644.


that may profitably be examined. The purpose of this article is to point out some of the issues that must be considered before the courts can arrive at a conclusion.

In laying a foundation for this discussion the purpose and the jurisdiction of the National Labor Relations Act must first be considered.

II. PURPOSE AND SCOPE OF THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act recites in section one that:

"The refusal by employers to accept the procedure of collective bargaining leads to strikes and industrial unrest;

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce. Therefore:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions to the free flow of commerce, when they have occurred, by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Within this recital can be found the real purpose of Congress in passing the National Labor Relations Act, i.e., to encourage collective bargaining between employers and workers and to remove certain important sources of industrial unrest engendered by the denial of the right of employees to organize and by the refusal of employers to accept the procedure of collective bargaining. The president, on approving the act, clearly recognized this purpose when he said:


There is a difference in opinion as to whether the preamble is a part of the statute. State ex rel. Berry v. Superior Court for Thurston County, (1916) 92 Wash. 16, 159 Pac. 92 (holding it is) but cf. Commonwealth v. Smith, (1882) 76 Va. 477; but that fact does not seem to have affected the use that the courts have made of the preamble. It is the generally accepted canon that it cannot be resorted to where the language of the act is unambiguous. Ellerman Lines, Ltd. v. Murray, [1931] A. C. 126, 36 Com.
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"A better relationship between labor and management is the high purpose of this act. By assuring the employees the right of collective bargaining, it fosters the development of the employment contract on a sound and equitable basis. By providing an orderly procedure for determining who is entitled to represent employees, it aims to remove one of the chief causes of wasteful economic strife. By preventing practices which tend to destroy the independence of labor it seeks for every worker within its scope, that freedom of choice and action which is justly his."

The authority for the enactment of the statute was found in the commerce clause of the United States constitution and is based on the theory that strikes in many businesses burden interstate or foreign commerce and that the federal government may therefore legislate to remove such burdens.

As the act is based on this theory, it does not cover all industry and labor, but is applicable only when a violation of the legal right of independent self-organization would burden or obstruct interstate commerce. The courts have, however, recognized that Congress wished to regulate the unfair labor practices enumerated and to protect the right to bargain collectively to the full extent of its constitutional power to regulate commerce.

The question is, How far does the power of the national government extend, since every activity imaginable can be said to...
affect interstate commerce in some manner?

Chief Justice Hughes has said:31

"Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical certainty or rigid formulas. But such formulas are not provided by the great concepts of the constitution, such as interstate commerce, due process, and equal protection. In maintaining the balance of constitutional grants and limitations, it is inevitable that we should define their application in the gradual process of inclusion and exclusion."

Thus, all that can be done is to draw inferences from the decided cases and try to discern the trend in the attitude of the present court.32

It is apparent from the recent decisions and the declarations of the court that the tendency is to extend and increase the powers of the federal government with regard to economic activities, especially in the field of labor relations.33 This extension is due in part to the absence of state legislation protecting the rights of employees, but it is also in part based upon the idea that the problem is national in scope and requires uniformity of regulation.34 This fact is recognized not only by the courts, but also by those engaged in administering the acts. Thus, Father Haas, a noted labor conciliator, speaking before the International Association of Governmental Officials of the need for a national labor board, said:

"To achieve this result, the National Labor Relations Board

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32(1940) 24 MINNESOTA LAW REVIEW 940.

"The Labor Board Act decisions, however, reveal a distinctive trend towards determining the existence of the appropriate connection between local activities and interstate commerce by accepting an organic view of the nature of our economic system. If with this there be coupled the trend towards according congressional decisions a higher degree of deference than has been the wont of courts at some periods in the past, the likelihood is very great that direct enactment of many of the rules regulating competition that were found in the code will be sustained for many businesses and activities that are neither interstate commerce nor a part of the current of such commerce."

34See cases cited in footnotes 26, 27, and 28.
is and will continue to be a necessary instrument to preserve collective bargaining standards horizontally across state lines and to abolish standard-corroding competition between states and between each state and the federal government."

And Paul Herzog, a member of the New York State Labor Relations Board, speaking of the conflict between the national act and the New York act, gave his opinion, saying:

"Obviously, all of us feel that the job is a job that should be done, if possible, on a national scale, and no one on the New York State Board desires to assert the board's jurisdiction to the prejudice of the national board."

It thereby becomes apparent that the trend is to extend the power of the federal government in labor relations. This fact is more clearly brought out by an enumeration of the following industries in which the national board has assumed jurisdiction, and in which the courts have sustained the action of the board:

1. Businesses engaged in interstate transportation and communication. This concept has been extended to certain intrastate employees of these companies, such as dockworkers, shopmen, and repair and maintenance workers. The act also applies to local express or pick-up companies which handle interstate shipments and complete the last stage of the journey, and to intrastate and local agencies of commerce which also handle interstate shipments, since the same facilities are used for both.

2. Intrastate industries upon which the agencies of interstate commerce are dependent.

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32 Proceedings of the 23d convention of the International Association of Governmental Labor Officials, Department of Labor Bulletins 653.
34 Buyer v. Guillan, (C.C.A. 2d Cir. 1921), 271 F. 65.
3. **Manufacturing or processing industries,** (a) which receive a substantial portion of their raw materials from other states and which ship out a substantial part of the finished products;\(^{43}\) (b) which obtain their materials from a local source but ship a substantial portion of the finished products to other states;\(^{44}\) (c) which obtain goods from extra-state sources but sell locally.\(^{46}\)

The ultimate test in all cases, as laid down in the *Jones-Laughlin Case* and reaffirmed in the *Santa Cruz Case*, is whether the stoppage of operations by industrial strife would result in a substantial interruption of, or burden upon, interstate commerce.\(^{49}\) The decisions leave no doubt that neither the character of the enterprise involved, nor its size, nor the number of men employed, nor the nature of the commodities produced or services rendered is a controlling factor in determining whether the act may be applied in a given situation.\(^{47}\)

The fact that the intrastate activities outweigh the interstate activities in volume or importance,\(^{48}\) or that the industry is not of national importance, will not make the employer's business immune from regulation.\(^{49}\) Nor is the tendency to obstruct lessened merely because the merchandise which the manufacturer ships is that of a consignee or of a customer in other states.

In connection with the scope of the act, it is important to note that the finding of jurisdiction by the board in any case is given great weight and will not be overturned if "a reasonable mind

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\(^{46}\)See Muller, Businesses Subject to the National Labor Relations Act, (1937) 35 Mich. L. Rev. 1286.

\(^{47}\)Second Annual Report of the National Labor Relations Board, (1937) 52.


\(^{49}\)National Labor Relations Board v. Fainblatt, (1939) 306 U. S. 601, 59 Sup. Ct. 668, 83 L. Ed. 10. This case also decided that the title to the goods was not a determinative factor in saying that the National Labor Relations Board has jurisdiction in a particular case.
might accept it as adequate to support a conclusion, or it affords a substantial basis of fact from which the fact in issue might be inferred. In fact, during 1938 no decisions of the board were set aside for lack of jurisdiction, and in 1939 only one was thus set aside.

No industries from Minnesota were involved in actual litigation either under the unfair practices sections or under the sections dealing with representation until 1939. In that year the Cudahy Packing Co., the Hamilton Brown Shoe Co., Wilson and Co., Montgomery Ward and Co., and the American Radiator Co. came before the circuit court of appeals of the eighth circuit. Other industries in this state where the national board has acted include: Minneapolis Moline, Swift and Co., Koppers Coke Co., and Paper, Calmenson and Co.

The only limitation on the power of the federal government under the National Labor Relations Act was indicated in the Jones-Laughlin Case, in which the court declared:

"Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them in view of our complex society would effectually obliterate the distinction between

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51Fourth Annual Report of the National Labor Relations Board (1939) 112. In National Labor Relations Board v. Idaho-Maryland Mines Corp., (C.C.A. 9th Cir. 1938) 98 F. (2d) 129, the court held the defendant not to be within act, even though its equipment had its origin in other states, and the gold was shipped outside the state.
52Cudahy Packing Co. v. National Labor Relations Board, (C.C.A. 7th Cir. 1939) 102 F. (2d) 383.
53Hamilton-Brown Shoe Co. v. National Labor Relations Board, (C.C.A. 8th Cir. 1939) 104 F. (2d) 49.
55Montgomery Ward and Co. v. National Labor Relations Board, (C.C.A. 8th Cir. 1939) 103 F. (2d) 147.
56American Radiator Co. v. National Labor Relations Board, (C.C.A. 8th Cir. 1939) 102 F. (2d) 974.
57(1939) 15 Nat'l Labor Rel. Rep. 79.
59(1939) 14 Nat'l Labor Rel. Rep. 87.
61The Minnesota act has been held applicable to the following industries which would undoubtedly come within the jurisdiction of the National Labor Relations Board: St. Cloud Bus Lines and Raymond Bros. Transfer Co., Koppers Coke Co., Northern States Power Co., The Interstate Iron Co., The Evergreen Mining Co., Fairibault Woolen Mills Co., The Transfer Companies in Minneapolis, and many others.
what is national and what is local, and create a completely cen-
tralized government."

III. EFFECT OF THE NATIONAL LABOR RELATIONS ACT UPON
STATE LABOR LEGISLATION

It is in consideration of the effect of the National Labor
Relations Act upon state labor legislation that the chief problem
arises, but it is inevitable as long as we continue to operate under
a dual system of government such as ours. In settling this con-

flict the constitutional principles that have been developed are
relatively clear.

Even in the absence of federal legislation in matters of
national concern (those requiring uniformity of regulation) the
power to regulate interstate commerce is vested exclusively in
Congress, and state action is excluded. State action is also
excluded if it would unduly burden or discriminate against inter-
state commerce, but the state under its police power may enact
laws governing local affairs which affect commerce of national
import.

An exercise by Congress of its commerce power, by which it
regulates a matter that a state might regulate in the absence of
federal legislation, reduces to that extent the area of legitimate
state regulation of or affecting interstate commerce. It prevents
the enforcement of any state regulation that conflicts with its
provisions, or that interferes with the realization of its objec-
tives. And state regulation of the same subject matter may be
precluded, even though there is no direct conflict, provided a
congressional intent to occupy the field can be found. Such in-

63Leisy v. Hardin, (1890) 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed.
128; Wabash, St. Louis & P. Ry. v. Illinois, (1886) 118 U. S. 557, 7 Sup.
Ct. 4, 30 L. Ed. 244, Sanitary District of Chicago v. United States, (1925)
266 U. S. 405, 45 Sup. Ct. 176, 69 L. Ed. 352; (1940) 24 MINNESOTA LAW
REVIEW 217.

L. Ed. 1032, 101 A. L. R. 55.

65In re Raher, (1891) 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572;
Wisconsin State Fed. of Labor v. Simplex, (1934) 215 Wis. 623, 256 N. W.
56; (1938) 32 Ill. L. Rev. 732.

66United States, constitution, art. 6; Rottschaef er, Constitutional Law
(1940) 284; Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers Elevator
(N.S.) 203.

Ct. 207, 71 L. Ed. 432. In (1938) 86 U. Pa. L. Rev. 532, at p. 540 the
author says: "In the absence of an express provision to the contrary, actual
conflict or coincidence has provided the real test as to the superscure of
the state act. Thus the extensive theories propounded in relation to con-
tent, however, must be clearly manifested, and depends much on
the nature of the subject matter. The questions of conflict in
jurisdiction between the national and state legislation must be
examined with these constitutional provisions as a framework.

The first question that arises is: Has Congress evidenced an
intent to occupy the field to the exclusion of the states?

As the state undoubtedly has the power to regulate labor
relations in the absence of federal legislation, we must first
consider those factors that would tend to show a congressional
intent to occupy the field, the first of which is sec. 10 (a) of the
National Labor Act, providing that the board is to have exclu-
sive power to prevent unfair labor practices. It has been argued
by two state courts in sustaining their acts that this provision
was aimed at preserving exclusive jurisdiction, to the exclusion
of the other federal agencies, and was not made with reference
to the state. This argument would appear to be sustained by an
examination of the Congressional Record and would seem quite
logical in view of the fact that there were no state acts in
existence when the national act was passed.

The second factor that would tend to show a congressional
intent to occupy the field is the fact that the act contains no
saving clause. The state courts say that this factor should bear
but little weight, as there were no state acts in existence at the
time the federal act was passed. This argument is open to only
one objection, that is, that Congress purposely omitted the saving
clause, anticipating such legislation.

The third argument was that an inference of congressional
intent to occupy the field arose from the passage of complete
gressional 'occupation of the field,' despite the absence of conflict or coinci-
cidence, appear to find but limited support in the actual holdings." Cf. Hart-
ford Accident and Indemnity Co. v. Illinois, (1936) 298 U. S. 155, 56 Sup.
ct. 685, 80 L. Ed. 1099; Townsend v. Yeomans, (1937) 301 U. S. 441, 57
Sup. Ct. 842, 81 L. Ed. 1210; Kelly v. Washington, (1937) 302 U. S. 1;
58 Sup. Ct. 87, 82 L. Ed. 3.

1255; Kelly v. Washington, (1937) 302 U. S. 1, 58 Sup. Ct. 87, 82 L. Ed. 3.
58 L. Ed. 1149, 52 L. R. A. (N.S.) 266.
70Rottschaefer, Constitutional Law (1939) sec. 243, pp. 500, 510.
71Davega City Radio, Inc. v. State Labor Relations Board, (1939)
281 N. Y. 13, 22 N. E. (2d) 145; Wisconsin Labor Relations Board v.
Fred Rueping Leather Co., (1938) 228 Wis. 473, 279 N. W. 673, 117
A. L. R. 398.
72(1935) 79th Congressional Record 7569; 74th Cong., 1st Sess.; (1935)
U. S. Code, July 1935, Supp. Tit. 29, secs. 68 (3) 74; see (1940) 24 MIN-
NESOTA LAW REVIEW 279.
and detailed legislation in the particular field. This argument was dismissed by the same courts in the following language:

"The states have an interest equally as important as that of the federal government in the prevention of labor disputes and practically the benefits to be gained from concurrent operation in fields common to both far outnumber the advantage of mutually exclusive laws.

"It cannot have been intended to paralyze the effort of a state to protect her people against the impending calamity and to commit the matter to a distant and overworked federal agency."  

The above may be true, but if it is, the state courts are rather slow in waking to what they call this impending calamity, as for years they did nothing to advance the cause of collective bargaining.

Various factors that are said to indicate an intent not to pre-empt the field are that the board was given discretion as to whether or not it could act in a particular case, and that the uncertainty in the constitutionality and scope of the national act will for years preclude effective administration by either state or national governments. This latter argument can scarcely be said to be evidence of congressional intent one way or the other.

It can be seen from an examination of the various factors involved that there is not much evidence of a congressional intent one way or the other, and under the doctrine of Reid v. Colorado and Mintz v. Baldwin the result would be reached that there was no congressional intent to pre-empt the field.

As long as the state and federal acts embody the same principles, the differences in application of the two acts would not seem to be so great that the courts would be compelled to reach

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7See cases cited in footnote 71; Garrison, Government and Labor, The Latest Phase, (1937) 37 Col. L. Rev. 897. This argument was advanced upon the theory that the state and federal laws were similar. Dean Garrison in this article said, "Where jurisdiction is concurrent the national agency will be enabled to leave the doubtful and less important cases to the state boards, along with those of purely local significance. This will prevent delay in administration, and will tend to assure that cases of peculiarly local importance will be handled by people well acquainted with local conditions."


75The first of these arguments is based on Mintz v. Baldwin, (1933) 289 U. S. 346, 53 Sup. Ct. 611, 77 L. Ed. 1255. But in that case the statute expressly authorized state action if the national board was silent. It is also important to note that in the railroad regulations cases the courts refused to consider the validity of state orders until the matter had been presented to and acted upon by the Interstate Commerce Commission. Napier v. Atlantic Coast Line R. R., (1926) 272 U. S. 605, 47 Sup. Ct. 207, 71 L. Ed. 432.
a different result. The National Labor Relations Board has itself recognized the healthful purpose that the state act can serve, and in their second annual report in 1937 it is stated:

"This trend of applying the principles embodied in the National Labor Relations Act to all industries, whether interstate or intrastate, is a healthful one, and will undoubtedly become more widespread. It is important that uniformity of legal principles and administrative policies be achieved, and the board hopes to aid in achieving this result by means of conferences with various state boards and by exchange of information."

It is very important to note that when the national board made this statement the only state acts in existence were those that were copied from the Wagner Act, and that the board in this paragraph stressed the need for uniformity. Such uniformity could be substantially achieved if the acts were the same, even though they were being administered by two different boards; and it would be possible to arrange a system of cooperation whereby all industry would be given coverage.

The second question to be determined is: Does a conflict exist between the national act and the state act?

The first consideration is under what circumstances a conflict arises. This problem arose recently in Wisconsin under the Wisconsin Employment Peace Act in the case of Allen Bradley Local No. 1111 United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board. Chief Just-
tice Rosenberry, in a lengthy opinion, held that no conflict as to jurisdiction between the National Labor Relations Act and the Wisconsin act existed, as the National Labor Relations Board had not taken action in that particular case. He said:

"The vital question for consideration in this case is not whether there is repugnance in the language of the two acts but is one of jurisdiction between the state and federal government. Inasmuch as the National Labor Relations Act depends for its effective operation upon the determination of the National Labor Relations Board, there can be no conflict between the acts until they are applied to the same labor dispute.

"The appellants, while asserting that they do not do so, in fact, argue this case as if the failure of Congress to define unfair labor practices of employees operates as a license to employees in the enforcement of their demands to do any or all of the things declared by the Employment Peace Act to be unfair practices. This argument stems from the idea that Congress is regulating labor relations instead of interstate commerce."

Undoubtedly, this was the easiest way out of a difficult problem, but it is submitted that the decision is based on a false premise, i.e., that Congress was not trying to regulate labor relations but was attempting to regulate interstate commerce. The commerce clause, as has been pointed out, was the constitutional peg, but the real objective was the regulation of those labor relations that could be regulated under the commerce clause. The argument also overlooks the beneficial effect that the mere existence of the act has on industrial relations subject to its control. Thus, one of the most important achievements of the act is its effect on the employer-employee relationship generally. In other words, when industries and employees see that the act will be enforced, they will abide by the provisions of the act and will frame their industrial relations in accord with it.

Industry itself recognizes that this is true, and one of their representatives, C. E. French,80 said:

"On the whole it may be said that the Wagner Act has resulted in a marked improvement in personnel practices connected with discharges and has contributed substantially to the security of the wage earner by placing a curb on autocratic action by

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local managements and supervisory forces and by reinforcing the efforts of personnel men to see that fair treatment is accorded."

The National Labor Relations Board in its annual report in 1939 stated that the act not only had led to a decrease in strikes but had had a positive effect which could be seen in the increase of written trade agreements which had occurred in the past few years as collective bargaining procedures have been extended and more widely accepted throughout American industry.

Judge Rosenberry ignores the positive effect of the national act when he says:

"When the appellants concede that the state may punish unlawful acts of strikers who are engaged in striking because of unfair labor practices of the employer, they concede the power of the state to deal with some aspects of every labor dispute. In the case of the National Labor Relations Act, the jurisdiction of the federal authority is not aroused until such a situation has arisen that interstate commerce is impeded or obstructed. On the other hand, state action is regulatory and is designed to bring about industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services for the promotion of the general welfare. The federal act deals with a situation that has arisen; the state act seeks to forestall action which may lead to disorder and loss of life and property."

Chief Justice Hughes in the Jones-Laughlin Case also recognized this positive effect when he said:

"If Congress deems certain recurring practices, though not really a part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision."

His position was reiterated in the Consolidated Edison Case, where he declared:

"It cannot be maintained that the exertion of federal power must await the disruption of commerce."

"Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act."

Even though jurisdiction may have to be determined by the courts as the cases arise, this jurisdiction is based on the fact that an unfair labor practice in the particular industry will burden interstate commerce; it is not based on the fact that the board

82237 Wis. 164, 295 N. W. 791, 800.
took jurisdiction in the case. Jurisdiction existed because of the
fact that certain practices in that business would burden com-
merce, and when the board acted in that case, it merely decided
that that situation was one calling for the exercise of the juris-
diction.

By way of dictum in the *Consolidated Edison Case,* the
Supreme Court intimated that the question of whether the al-
leged unfair labor practices do actually threaten interstate or
foreign commerce in a substantial manner is necessarily pre-
sented, and in determining that factual question, regard should
be had to all the existing circumstances, including the bearing
and effect of any protective action to the same end already taken
under the state authority. That again, however, does not amount
to saying that no conflict in jurisdiction can arise until the
national board has actually acted, but is a recognition of the prin-
ciple stated above that the applicability of the act to any industry
depends on existing circumstances and not upon action by the
board. A conflict can thus arise even though the national board
has not acted, if the state act has different objectives or different
means aimed at reaching the same objectives.

To determine the question as to whether there is such a con-
lict between the Minnesota act and the national act, the provi-
sions of the two acts must be examined and compared. The em-
ployer unfair practices will be discussed first.

The National Labor Relations Act declares in sec. 7 that
employees shall have the right of self-organization, to form, join
or assist labor organizations, to bargain collectively through rep-
resentatives of their own choosing, and to engage in concerted
activities for the purpose of collective bargaining or other mutual
aid or protection. By sec. 8 (1) it is made an unfair labor prac-
tice to interfere with, restrain, or coerce employees in the rights
guaranteed in sec. 7; and these rights are further protected by
sec. 8 (5), which provides that it shall be an unfair labor prac-
tice for an employer to refuse to bargain collectively with rep-
resentatives of his employees.

Under the Minnesota act, the employees are said to have the
same rights as exist under the national act, but no general sec-
tions similar to 8 (1) and 8 (5) are set up to protect these
rights by making the refusal to bargain, or the interference with
any of these rights which the employee is said to have, an unfair
labor practice. The sections of the Minnesota act dealing with conciliation are the only sections of the law that would extend a similar protection, and these would protect those rights only indirectly, and not to the same extent that the national act does. These sections do not make it an unfair practice to refuse to negotiate with an employee or to refuse to come before the conciliator. The only possible sanction for a refusal to do either would be a loss of benefits under the act, as under sec. 15, any employee or employer who violates the provisions of the act is not entitled to any of the benefits of the act in that labor dispute, and shall not be entitled to injunctive relief with respect to any matter growing out of that labor dispute.

Section 8 (2) of the national act provides that it is an unfair practice to dominate or interfere with the formation or administration of any labor organization or contribute financial support to it. The Minnesota act has no similar provision, and the only deterrent to this practice, other than the protection that 12 (c) will give, is found in sec. 16 (b), which provides that the labor conciliator shall not certify any labor organization which is dominated, controlled, or maintained by an employer.

Under sec. 8 (3) of the national act, the employee is protected in his right to join labor unions by its being made an unfair labor practice for an employer to encourage or discourage membership in any union (labor organization) by discrimination in regard to hire or tenure of employment, or any term or condi-

88 In brief, these sections provide that when either employer or employee wishes to change any existing agreement, or desires any changes in rates of pay, working conditions, etc., a written notice of its demands shall be given to the opposing party. It shall thereupon be the duty of the parties to endeavor, in good faith, to reach an agreement. If no agreement is reached in ten days, any employer may give notice of intention to strike or lock out. It shall be unlawful for any labor organization or representative to institute or aid in the conduct of a strike, or for an employer to institute a lockout, unless a notice has been served upon the labor conciliator and the other parties to the dispute at least ten days prior to the time the strike or lockout is to become effective. Just what is meant by "duty" has not as yet been settled by the State Supreme Court, but failure to obey either of the above requirements could be found to be a lack of good faith in attempting to reach an agreement and the offending party be denied the benefits of the act until he had, in good faith, made use of all means available under the act for the peaceful settlement of the dispute. This practice seems to have been followed in Ericson Oil Co. v. Filling Stations Attendants, Local 977 (Hennepin County District Court, 4th Judicial District) where the court refused the employer an injunction against unlawful picketing because the employer had not endeavored, in good faith, to reach an agreement with his employees. This case, however, can be justified on the alternative ground that the employer had encouraged certain of the employees to join a company-dominated union.
tion of employment. Employees receive the same protection under the Minnesota act in sec. 12 (c).

Both the national act, sec. 8 (4), and the state act, sec. 12 (d), provide that it shall be an unfair practice to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the act.

The similarity in the unfair practices ends with these sections. In addition to the practices declared to be unfair on the part of the employer under the national act, the Minnesota act provides that it shall be an unfair labor practice to institute a lockout in breach of a valid collective bargaining agreement with which the employees are complying in good faith, or to institute a lockout in violation of sec. 6, requiring, in substance, notice of intention to change a written agreement, ten days of negotiations, and a ten day notice of intention to lock out.87

In sec. 12 (c) it is made an unfair labor practice to spy on the activities of employees or their representatives.88 And under sec. 12 (f), any employer is guilty of an unfair labor practice if he distributes or circulates any black list of individuals exercising any legal rights or of members of a labor organization for the purpose of preventing individuals so blacklisted from obtaining or retaining employment.89

In addition to the above, the only restriction imposed on the employer is the requirement that before an employer-organization can be recognized by the conciliator, it must file with him a statement with information concerning the organization.

If the unfair practices under the Minnesota act are held to be applicable to an employer in interstate commerce, the most burdensome restriction on the employer would be the possibility of incurring penalties under both acts for the same practice, since the Minnesota law does not go beyond the National Labor Relations Act in any important respect.90

87 In industries affected with a public interest, the governor is authorized to appoint a commission to hear the dispute and submit a report. In these cases no strike can be called for a period of thirty days.
88 This practice would also be unfair under the National Labor Relations Act, In the matter of Montgomery Ward and Co., (1939) 17 N. L. R. B. 12.
89 This practice would also be unfair under the National Labor Relations Act, In the matter of the Federal Bakery, (1937) 4 N. L. R. B. 467.
90 Inasmuch as the initiative for a change in agreement is rarely, if ever, taken by the employer, this requirement would not appear to be a burdensome one upon the employer. The lockout provision is more burdensome, but only five notices were given from April 1939 to June 1940. The question would, however, be substantially the same as it is in regard to the employee unfair practices.
Our questions are these: (1) Can the employer be subjected to penalties under both acts? or (2) Does action by one preclude action by the other? or further still, (3) Does the mere existence of a national remedy preclude state action, or vice versa? For example, could an employer be convicted of a misdemeanor, sued for damages, and denied injunctive relief against unfair practices of the employee under the state act, and be required by the national board to obey a cease and desist order and to take affirmative action?

A dictum in the *Consolidated Edison Case* would seem to point out the best means of solving this problem:

> "When the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employer's intrastate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce is necessarily presented. And in determining that factual question, regard should be had to all the existing circumstances including the bearing and effect of any protective action to the same end already undertaken by the state authority. The justification for the exercise of the federal power should clearly appear. But the question in such case would relate not to the existence of the federal power but to the propriety of its exercise on a given state of facts."

This dictum makes the question solely one of propriety, and does not go to the existence of the power to act. Thus, under such a view, the mere existence of the state act would have no effect at all. If the state had acted or had commenced proceedings in a particular case, whether the National Labor Relations Board would act would depend on the circumstances of the particular case and whether they believed the policies of the National Labor Relations Act had been substantially effectuated, but under no

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91 Consolidated Edison Co. v. National Labor Relations Board, (1938) 305 U. S. 197, 59 Sup. Ct. 206, 83 L. Ed. 126. At the time this case was heard by the National Labor Relations Board, the New York act had been passed but had not as yet become effective. The Supreme Court sustained an order of the National Labor Relations Board which required the employer to take certain affirmative action.

In (1938) 33 Ill. L. Rev. 55, it is suggested that the mere existence of the state act was not a sufficient reason to preclude the national board from acting, but where a proceeding has been commenced under the state act, the national board, as a matter of comity, should defer its action until the state board had acted. And once it was affirmatively shown that the state board had actually acted, federal action would be precluded unless it could be shown that a particular practice threatened interstate commerce. This suggestion was limited, however, to those industries local in nature whose activities affect such commerce.

92 It is suggested in (1920) 34 Harv. L. Rev. 105 that the experience of Australia, where the power over industrial relations was held to be co-
circumstances could the state take away from the National Labor Relations Board the power to find that the employer had committed an unfair labor practice.

If the National Labor Relations Board had acted in a controversy and had found the employer to be guilty of an unfair labor practice, and had ordered him to take certain action, the state would be barred from giving further civil relief as far as cease and desist orders or damages were concerned, as this would be circumventing the policies of the National Labor Relations Act; but the state could probably enforce the criminal penalty, as the United States has made no attempt to impose criminal penalties for a violation of the unfair practices sections.

The following unfair employee practices defined in the Minnesota act are those which give rise to the contention that its object was different from that of the national act:

Sec. 11 (a) For any employee or labor organization to institute a strike if the calling of such strike is in breach of a valid collective bargaining agreement;

(b) For any employee or labor organization to call a strike

ordinate, was undesirable even though legally acceptable because of the confusion of conflicting and overlapping awards. See Union v. Abbot, (1928) 26 Commonwealth Arbitration Ref. (Aus.) 489.

63United States constitution art. 6; Rottschaefer, Constitutional Law (1939) sec. 243; Lemke v. Farmers Grain Co., (1922) 258 U. S. 50, 42 Sup. Ct. 244, 66 L. Ed. 458.

64This is on an analogy to Board of A. R. Commissioners of North Dakota v. Great Northern Railway Co., (1930) 281 U. S. 412, 50 Sup. Ct. 391, 74 L. Ed. 936; Northwestern Bell Telephone Co. v. Nebraska Ry. Comm., (1936) 297 U. S. 471, 56 Sup. Ct. 536, 80 L. Ed. 810.


66United States v. Lanza, (1922) 260 U. S. 377, 43 Sup. Ct. 141, 67 L. Ed. 314; Herbert v. Louisiana, (1926) 272 U. S. 312, 47 Sup. Ct. 163, 71 L. Ed. 270; Gilbert v. Minnesota, (1920) 245 U. S. 325, 41 Sup. Ct. 125, 65 L. Ed. 287; but cf. Southern R. R. v. Railroad Comm'n, (1915) 236 U. S. 439, 35 Sup. Ct. 304, 59 L. Ed. 661. To do this the criminal proceeding would have to be interpreted as necessary to prevent breaches of the peace. If it is used merely as an additional economic weapon, it is hard to distinguish it from the provisions giving civil relief.

67It has been stated that no co-ordinate jurisdiction can exist in interstate commerce unless Congress expressly provides for it. Gavit, The Nature and Scope of the Commerce Power (1934) 34 Col. L. Rev. 994, 996. A Note in (1940) 27 Cal. L. Rev. 438, suggests the following possibilities: (1) Whichever takes jurisdiction retains exclusive jurisdiction; (2) Co-ordinate orders existing at the same time; (3) Give both jurisdiction until the National Labor Relations Board has acted; (4) Co-existing powers to issue orders, but the National Labor Relations Board's order controlling in case of conflict. It is submitted that the third possibility is the most acceptable from both an economic and legal standpoint. Each of the above assumes that the provisions of the two acts are similar, and that is the basis on which the discussion has proceeded thus far.
in violation of sections 6 or 7, or to violate the provisions of a valid collective bargaining agreement;

(c) For any person to seize or occupy property unlawfully during the existence of a labor dispute;

(d) For any person to picket or cause to be picketed a place of employment of which place said person is not an employee while a strike is in progress, unless a majority of the pickets are employees of said place of employment;

(e) For more than one person to picket or cause to be picketed a single entrance to any place of employment where no strike is in progress at the time;

(f) For any person to interfere in any manner with the operation of a vehicle or the operator thereof when neither the owner nor the operator is at the time a party to the strike;

(g) For an employee or labor organization to compel or attempt to compel any person to join or refrain from joining any labor organization or strike against his will by any threatened or actual unlawful interference with his person, immediate family or physical property, or to assault or unlawfully threaten any such person while in the pursuit of lawful employment.

Sec. 13: It shall be unlawful for any person at any time to interfere with the free and uninterrupted use of public roads, etc., or to wrongfully obstruct ingress to and egress from any business or place of employment.

In determining whether there is a difference in objectives, it is permissible to start with the premise that the state cannot take away from the National Labor Relations Board the power to find that the employer has committed an unfair labor practice, and to make the employee whole if such an unfair practice is found. Thus, although it has been held by the National Labor Relations Board that an entire repudiation of a collective bargaining agreement is a sufficient reason for an employer to discharge an employee, the board never has tried to enforce collective bargaining agreements generally, nor have they held an insignificant breach by an employee to be a sufficient reason for his discharge. Now, under sec. 11 (a) of the Minnesota act, if an employee went out on strike, contrary to the terms of this section, or violated the terms or conditions of such agreement, he would lose the benefits of the Minnesota act, and it would appear that the strike (or some features of it) could be enjoined, and that the employer could sue for damages for the breach of the collective bargaining agreement. But it does not follow from


National Labor Relations Board v. Sands, (1939) 52 Harv. L. Rev. 974 approves this holding of the board.

this that the National Labor Relations Board would be precluded thereafter from finding that, in fact, the contract had been entered into with an employer-dominated union.\textsuperscript{101}

This would be true even though a Minnesota court had found the contract to be valid and had allowed recovery for its breach. Nor would it preclude finding that the real reason for the discharge of the employees was their union activities and, thus, that they would be entitled to be reinstated with such affirmative relief as the national board might consider necessary to effectuate the policies of the act. This recovery would necessarily include any damages recovered by the employer in the state court, and thus the state action would be nullified, and the employee would have been subjected to this penalty during the interim. To reach any other decision would be to give the state supremacy in the field of interstate commerce. This same reasoning holds true for all of the unfair practices on the part of the employees, and, as a result, in many cases state relief to the employer would be effectively taken away. Thus, even though sec. 11 (b) of the state act can be sustained as a valid limitation on the right to strike,\textsuperscript{102} in so far as the due process clause is concerned, the National


\textsuperscript{102}The validity of sec. 11 (d) and (e) has been urged, Chernov, The Labor Injunction in Minnesota, (1940) 24 MINNESOTA LAW REVIEW 792, on the basis that these regulations have a reasonable relation to the prevention of violence and can thus be sustained under the police power, (1939) 88 U. Pa. L. Rev. 118. Since these discussions, the Supreme Court has clearly identified the right to picket with the freedom of speech, Thornhill v. Alabama, (1940) 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 659; and a recent case note in (1941) 25 MINNESOTA LAW REVIEW 238 has expressed doubts as to the validity of sec. 11 (d), forbidding picketing unless a majority of the pickets are employees, and sec. 13, which prohibits interference with the use of the public streets, highways, or methods of transportation. Such doubts would appear to be well-founded, in view of the recent case of Fur Workers Union, Local No. 72 v. Furworkers Union, (D.C. 1939) 105 Fed. (2d) 1, where an injunction against picketing by a minority union after the majority had entered into an agreement with the employer was refused. Accord, Blankenship v. Kaufman, (C.C.A. 7th Cir. 1938) 92 F. (2d) 450, 453; cf. Donnelly Garment Co. v. Internation L. G. W. Union, (W.D. Mo.) (1937) 21 Fed. Supp. 807, affd. 308 U. S. 522, 60 Sup. Ct. 292, 84 L. Ed. 443. But cf. Oberman & Co. v. United Garment Workers of America, (D. Mo. 1937) 21 Fed. Supp. 20; and the two recent Supreme Court cases, Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, (1941) 61 Sup. Ct. 552; American Federation of Labor v. Swing, (1941) 61 Sup. Ct. 568; discussed in (1941) 25 MINNESOTA LAW REVIEW 640.

If the courts allow an injunction against all picketing because of a breach of secs. 11 (a) or (b) even though the picketing is otherwise within the limits of (d) and (e), it would meet with the same objection.
Labor Relations Board could still give relief for employer unfair labor practices.

Therefore, granted that the state cannot legalize employer-conduct or take away from the National Labor Relations Board the power to award relief to the employee, the most important question is: Do these unfair practices operate so as to interfere with the objectives of the National Labor Relations Act? We have seen that the states have a valid interest to protect and that the passage of the National Labor Relations Act, by itself, is not enough to divest states of the right to prescribe regulations under the state police power; but we have also noted that Congress has the power to legislate in this field, and that if there is a conflict, the federal regulation will prevail. A conflict can also arise if the state act will so interfere that the purpose of the national act cannot be accomplished, or its operation within its chosen field frustrated.\textsuperscript{103} It is not necessary that the state act specifically limit some of the rights granted by the federal government or purport to take away some of the remedies.

It has been noted that the purpose of Congress was to lay what it considered to be an essential foundation for industrial relations. In laying this foundation, certain elements, thought by Congress to be necessary to achieve harmonious industrial relations, were included, and certain others, thought to be unnecessary, were left out. The act was passed, not as a new experiment, but as the result of many years experience in the field of labor relations.

"Indeed, Congress has time and again passed acts designed to give labor the bargaining power of which it had been deprived long ago in England by the ancient statutes of laborers. But as often as Congress has attempted to restore to labor this lost bargaining power, the decisions have construed it away."\textsuperscript{104}


\textsuperscript{104}Geffs and Hepburn, The Wagner Labor Act Cases, (1938) 22 Minnesota Law Review 2, see footnote 23. "In a striking series of cases decided between 1908 and 1923, the Supreme Court nullified a variety of efforts on the part of Congress to benefit the working classes. These decisions dealt in a manner uniformly adverse to the interest of labor and favorable to the actual or apparent interests of business."

With respect to the approach of the Supreme Court to the National Labor Relations Act, the court has adhered to the third of three typical approaches to statutory construction: (1) the literal or plain meaning approach, in which the court does not go beyond the four walls of the statute unless an ambiguity arises; (2) the Golden Rule, which permits a departure from literal or plain meaning if an absurd result would be reached by interpreting the statute literally; and (3) the mischief approach, in which the court interprets the statute in the light of the mischief
At the time of the passage of the act it was criticized by some persons as one-sided and unfair, but this argument was rejected by the Supreme Court in the Jones-Laughlin Case,\(^{105}\) where it was said:

"We are dealing with the power of Congress, not with a particular policy or with the extent to which the policy should go."

And Congress has rejected various equalizing amendments which have been proposed,\(^{106}\) and has, even in the face of the present emergency, turned down a proposal (the Vinson bill) requiring employees to give a notice of intent to strike in defense industries.

The argument is made that the national act was passed to encourage collective bargaining, and as the Minnesota act purports to do the same thing, one cannot look around beyond the words of the national act or of the state act. But this is not true. Collective bargaining cannot be considered in an abstract sense. One must go beyond mere words and see what Congress intended to guarantee. This can be discovered only by looking to the factors which we already have considered. The definition of the words "collective bargaining" will tend to bear this out, for they have been defined as "the way by which the insignificant bargaining power of the individual is increased and a better balance of the economic forces of capital and labor in industrial relations can

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\(^{106}\)See hearing before the Senate Committee on Education and Labor, S 2926-73 Congress, 2d sess.; (1939) 7 Int. Jurid. Ass'n Bull. 85, 91.
Thus, what Congress did by the National Labor Relations Act was to establish what it considered to be the proper balance between capital and labor; and a state regulation which destroys this balance is just as inapplicable to industries in interstate commerce as if it had expressly taken away one of the rights granted under the National Labor Relations Act.

The state is not deprived of its police power by the national act, but if it attempts to exercise this power in such a way that it in effect upsets the balance established by the national act, its legislation is not applicable to industries in interstate commerce.

The Minnesota act, by putting limitations on the right to strike and the right to picket, undoubtedly has restricted union activities. If these various provisions can be sustained as having a reasonable relationship to the prevention of violence, they can be applied to industries in interstate commerce. But if they go further and restrict the economic strength of the unions or the employees on the theory that such restrictions are necessary to promote equality of bargaining power and harmonious industrial relations, they cannot be applied to industries in interstate commerce, because to allow such regulations would be to allow the state to interfere with the objectives of the national act.

This principle was well illustrated by the recent case of *Kelly v. Washington*, where the United States Supreme Court sustained a state statute providing that certain boats could be inspected for seaworthiness by state authorities, even though the federal government had previously provided extensive regulations. The Court said:

"We have found that in relation to the inspection of the hull and the machinery of these tugs in order to insure safety and seaworthiness, there is a field in which the state law could operate without coming into conflict with the present federal laws. If, however, the state goes beyond what is plainly essential to safety and seaworthiness, the state will encounter the principle that such requirements, if imposed at all, must be through the action of Congress in a uniform rule."

The history of the Minnesota act would lead one to believe that these restrictions have a broader purpose than the prevention of violence. They were inserted by the so-called "farm bloc," and

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108 (1937) 302 U. S. 1, 58 Sup. Ct. 87, 82 L. Ed. 3.
109 See (1940) 24 Minnesota Law Review 217, for a comprehensive history of the passage of the act.
were not contained in the bills offered by the bar association or the labor unions. Apparently, their purpose was to set forth disapproval of certain acts hitherto committed by labor and to provide for a means of limiting certain activities viewed by the "farm bloc" as detrimental to peaceful industrial relations. If their purpose was limited to the prevention of violence and intimidating activities on the part of labor, the restrictions were unnecessary, as these practices have always been subject to injunction under the common law. The soundness\footnote{Chernov, The Labor Injunction in Minnesota, (1940) 24 Minnesota Law Review 792.} of that position was recognized in the Labor Disputes Injunction Act of 1933.\footnote{Mason's Minn. Stats., 1940 supp., secs. 4260-1-4260-15.} Thus, these provisions would seem to be an entrance by the state into the field of collective bargaining in an attempt to promote the settlement of disputes and the prevention of these disputes by setting up certain standards of conduct for employees and employers. In so far as these standards are different from those set up under the national act, and in so far as they go beyond the prevention of violence and intimidation, they are attempts by the state to establish what it considers to be the proper balance between labor and industry.

The unions themselves feel that the legislation has this effect,\footnote{Commonweal, Sept. 29, 1939; Proceedings of the 57th Convention of the Minnesota State Federation of Labor 95.} and that it takes away from them certain powerful weapons and thus deprives them of their economic strength at the bargaining table. This is especially true of sections 11 (a), 11 (b), and 11 (d), which the unions claim have no reasonable relationship to the prevention of violence.

**IV. Summary**

It is submitted that the requirements of the Minnesota act which change the relative economic strength of the parties should not be applied to industries in interstate commerce. By the national act Congress has increased the economic strength of the employees and of the unions, and if the local regulations are sustained, the state would be decreasing that economic strength. Even if it be argued that the state has not cut down the relative strength of the parties, it has endeavored to establish what it considered to be the proper balance between employers and employees, and in doing this has changed the requirements that Congress has considered necessary to establish this balance, and the
state provisions must fall for that reason. This is necessarily true since Congress is the sole judge, not only of the proper balance between labor and capital, but also as to how that balance shall be established.

This result might not appear to be desirable, as it involves a degree of centralization that may be viewed by many with alarm; but it must follow if Congress is to have the supreme power to regulate labor relations in the field of interstate commerce.

If it is argued that the state can impose restrictions and limitations beyond those which the federal government considers necessary, and beyond those necessary for the protection of the public peace, the nation will be faced with the problem of forty-eight different labor laws in as many states, and uniformity would become impossible. In addition, the states would be in a position to nullify the efforts of Congress to create equality of bargaining. The fact that the national board would not be precluded from acting, even if the state board had acted, would not be sufficient protection. In the interim the employer, or the employee, as the case may be, would be forced by practical necessity to obey the state order, and would be prejudiced to such an extent that a reversal of the order by the federal board would be of little help. And, most important of all, the positive effect of the national act would be necessarily limited.

Unless a third alternative is found, the Supreme Court's recognition that Congress could regulate labor relations in interstate commerce raises this dilemma: If the regulations of the states are sustained as applied to interstate commerce, it will be impossible to obtain uniformity of regulation among the states; yet if the regulations are held not applicable, there will be a lack of uniformity as applied to industries within the same state.

In search of the way out, it is possible to consider federalism from another point of view. Instead of regarding our two governmental centers as independent agencies, each jealous of any encroachment by the other, we may regard them as mutually

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13 Clark, Federal and State Cooperation in Labor Legislation, (1937) 27 Am. Labor Legis. Rev. 167; Koenig, Federal and State Cooperation Under the Constitution, (1938) 36 Mich. L. Rev. 752. Suggested means are: (1) Inducement through information; (2) Federal grants in aid by way of inducement; (3) A tax credit device on the nature of the Social Security program; (4) Interstate compacts; (5) Reciprocal legislation; (6) Interstate regional planning; (7) Forbidding transportation in interstate commerce of goods produced or shipped into a state in violation of state laws; (8) The utilization of the state administrative agencies by the Federal Government.
supplementary agencies, best performing their task through coordinated effort. Thus, through the current exercise of their respective powers, the federal and state governments could broaden the sum total of legislative power applicable to a given problem and call into action their combined administrative agencies and facilities.

To do this it is necessary that the two agencies have a common starting point. It is submitted that it is possible to achieve this by regarding labor relations as primarily a national problem, solution of which requires incidentally protecting local interests. Those interests can best be safeguarded by having a local administration of a uniform national law, an administration which would be in a position to temper that law to meet the interests of each community.\(^{114}\)

\(^{114}\) Under such a view, the public peace would, of course, be protected by the state police agencies. No separate treatment was given in the body of this note to the sections dealing with conciliation and the selection of proper representatives for bargaining. The Norris LaGuardia Act, Act of March 23, 1932, ch. 90, 47 Stat. at L. 70, 29 U. S. C. A. 101-115, 2 Mason's U. S. Code, tit. 29, secs. 101-115, contains a provision for the appointment of federal conciliators. Under this provision there is no waiting period, and the whole proceeding is voluntary. The fact that the state conciliator is already acting in the case will not prevent the federal conciliator from entering the dispute; in fact, the two often cooperate in the same labor dispute. The more important question is, Do the parties have to give the statutory notice required under the Minnesota act?

It has been pointed out that the provision requiring a ten-day notice of intention to strike and making it an unfair practice unless this is done is probably not applicable to industries in interstate commerce. However, the provision in the Minnesota act, requiring a written notice of an intent to change an existing agreement, or to negotiate a new agreement, and the provision requiring the parties to meet with the conciliator to attempt to reach an agreement could be applied to industries in interstate commerce, as no attempt is made in these sections to give economic strength to either side; nor is there an attempt to destroy what Congress considered the proper balance between industry and labor. There is also no attempt made by these provisions to impose a penalty for the failure to abide by them.

In the collective bargaining sections of the respective acts there are the following differences: (1) Under the state act an existent craft unit must be designated as the appropriate unit, and under the national act the National Labor Relations Board can designate whatever unit it thinks will effectuate the purposes of the act; (2) Under the state act no industry-wide bargaining unit is possible unless all the employers agree, and under the national act such a unit is possible even though the employers are against having such a unit; (3) Under the state act both employer and employees can petition to have the bargaining agent certified, and under the national act only the employees have this right. All these rights would appear to be substantial and appear to change the rights of the various parties; they would therefore be subject to the same limitations as the unfair practices considered.