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THE "NEW" NATIONAL LABOR RELATIONS ACT IN OPERATION: FIRST EIGHT MONTHS

WILLIAM B. LOCKHART

This paper is an interim report on the application of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947, during its first eight months of operation. It does not purport to be a critical analysis of the Act, nor to consider and resolve all problems which may arise in its application in the future. Excellent critical analyses of the Act are already available. Rather, this study is primarily informative in character, designed to direct attention to significant National Labor Relations Board and court decisions. Necessarily, such a report is interim in nature, since the last word has not been said on many of the issues decided by the Board and the lower federal courts. Still, the current decisions applying the Act are significant, not only because labor and management must take account of Board and lower court determinations until reversed, but because the

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1. 61 Stat. 136 (1947), 29 U. S. C. A. § 141 et. seq. (Supp. 1947), hereinafter referred to as LMRA. Title I, § 101, of LRMA is the National Labor Relations Act as amended, consisting of 17 sections. In this study references to Sections 1 through 17 will be to the National Labor Relations Act [NLRA] as amended by LMRA, unless otherwise indicated. References to Sections 102 through 503 will be to the balance of LMRA. The Act became effective on August 22, 1947.
2. Decisions of the National Labor Relations Board and the courts between August 22, 1947 and April 22, 1948, are considered, except for the addition of brief references to a few important decisions handed down in May after this paper was in the printer's hands.
Board's decisions may be final on many representation matters, and its policy determinations are given great weight even when subject to judicial review. Board and court decisions will be considered only insofar as they relate to changes made by the amended Act or reflect changes made in representation matters.

4. Only when an unfair labor practice order "is based in whole or in part on facts certified" in a representation investigation does the Act provide for judicial review of a representation decision. Section 9 (d); American Federation of Labor v. NLRB, (1940) 308 U. S. 401; NLRB v. Falk Corporation, (1940) 308 U. S. 453. The new Act is identical with the original NLRA in this respect, despite a proposal in the original House Bill to authorize court review of certifications. See analysis and criticism of this proposal in Minority Report, House Rep. No. 245, 80th Cong., 1st Sess., p. 94 (1947). However, the Supreme Court has expressly left undecided the possibility of limited review of certification decisions through the federal courts' original jurisdiction under Section 24 of the Judicial Code. See American Federation of Labor v. NLRB, (1940) 308 U. S. 401, 412; Inland Empire Council v. Millis, (1945) 325 U. S. 697, 699-700. The lower courts have divided on this question. See Annotation, 158 A. L. R. 1339, 1347 et seq. There is also the possibility of judicial review under Section 10 of the Administrative Procedure Act unless the NLRA is construed to "preclude judicial review." See 60 Stat. 243 (1946), 5 U. S. C. A. 1009 (Supp. 1947) : cf. United States ex rel. Trinler v. Carusi, (C.C.A. 3d 1948) 166 F. 2d 457 (deportation order). In actions to enjoin application of the reporting and non-communist oath provisions of the amended Act (see p. 665 infra), two federal district courts have assumed jurisdiction to review Board action in representation matters, but the Board's action was sustained in each case. Oil Workers International Union v. Elliott, (N.D. Tex. 1947) 73 F. Supp. 942; National Maritime Union v. Herzog, (D. Dist. of Col. 1948) 21 LRRM (Lab. Rel. Ref. Man.) 2648.

5. Under the original NLRA this was not only true as to findings of fact, on which the Board's findings were conclusive when "supported by evidence" [Section 10 (e) (f)], but was also true with respect to policy determinations more nearly approaching questions of "law." See, e.g., NLRB v. Hearst Publications, (1944) 322 U. S. 111, 131 (board's determination as to who are "employees" is to be "accepted if it has 'warrant in the record and a reasonable basis in law'); Frank Bros. Co. v. NLRB, (1944) 321 U. S. 702, 704 (remedy which will effectuate the purposes of the act is for the Board to determine); Medo Photo Supply Corp. v. NLRB, (1944) 321 U. S. 678, 682 n. 1 (in reviewing unfair labor practice determination, the Court points out that even on "questions of law, the experienced judgment of the Board is entitled to great weight"). While Section 10 (e) and (f) of the amended Act now make findings of fact conclusive only when "supported by substantial evidence on the record," the same is true with respect to the policy determinations of the Board because of its experience and expertness in the field of industrial relations. Two Circuit Courts of Appeal have agreed that this amendment will not result in review resembling a trial de novo, but opinions differ as to whether in practice it will make any material change in the scope of judicial review. See NLRB v. Austin Co., (C.C.A. 7th 1947) 165 F. 2d 592; NLRB v. Caroline Mills, (C.C.A. 5th 1948) 21 LRRM 2542.

6. Only the leading Board decisions will be cited on most points. A considerable number of subsequent cases have been decided upon the authority of the cited decisions. The full text of most decisions is not yet available. The analysis herein is based, in the main, on the condensed reports appearing in Labor Relations Reference Manual. All quotations are from the text of the NLRB opinions.
in policy attributable to the new legislation. They will be presented in the following order: (1) Reporting and non-communist affidavit requirements. (2) The scope of the Act with respect to "employees" protected by it. (3) Representation proceedings and problems. (4) Unfair labor practices, including restrictions on union security devices and the use of injunctions. Decisions concerned only with those provisions of LMRA not related to the amended NLRA will not be considered.

LABOR ORGANIZATION REPORTS AND NON-COMMUNIST AFFIDAVITS

In order to be entitled to specified benefits of the act, each labor organization, and any national or international labor organization with which it is affiliated, must file with the Board the so-called non-communist affidavit executed by each officer, and must file with the Secretary of Labor detailed reports concerning its organization, officers, procedures and finances. No enforceable duty to file these...
reports and affidavits is imposed, but the act provides that unless they are filed:

(1) "No investigation shall be made by the Board of any question . . . concerning the representation of employees, raised by a labor organization . . ." pursuant to Section 9 (c).

(2) No petition by the labor organization for a union shop election pursuant to Section 9 (e) shall be entertained by the Board.

(3) No complaint of an unfair labor practice shall be issued by the Board on a charge made by the labor organization.10

Effect of Non-Compliance in Representation Proceedings

In three major decisions the Board gave sweeping scope to the provision that no investigation shall be made of a representation question raised by a non-complying labor organization. It first ruled that it would hold no election to determine the bargaining representative on petition of a non-complying labor organization, and, after giving a reasonable opportunity to comply, dismissed such a petition even though filed prior to the effective date of the Act.11 The board reasoned that the ban on "investigation" of a representation question applied not only to initiating an investigation, but also to continuing one after the effective date of the Act. It next ruled that though the petition for an election was filed by a complying labor organization an intervening union which had not complied was not entitled to a place on the ballot.12 Finally, it ruled that even when the petition for an election was filed by the employer, a non-complying labor organization could not be placed on the ballot.13 In that case a complying union, which also claimed to represent the employees, was placed alone on the ballot; in a later case in which the sole union claiming recognition was not in compliance, the Board dismissed the employer's petition for an election.14

10. These sanctions appear in substantially identical language in Sections 9 (f) and (h), which require the original detailed reports and affidavits respectively. Section 9 (g), requiring annual reports, is substantially the same as to the last two sanctions, but the first sanction is stated differently and provides merely that a non-complying labor organization "shall not be eligible for certification . . . as the representative of any employees." Other verbal differences are pointed out in Note (1947) 42 Ill. L. Rev. 487, 488.
In the first two cases the representation question was directly raised with the Board by a non-complying labor organization as petitioner or intervenor, and any investigation of a question so raised was expressly forbidden by the Act. But in the third case, the non-complying union contended that the representation question was not "raised by a labor organization" but by the employer, and hence the Board was free to proceed with a full investigation and to place the non-complying union on the ballot. The Board replied that the representation question was "raised by a labor organization" within the meaning of the Act when the union made a demand on the employer for recognition. It pointed out that while the employer's petition set the machinery in motion, the "labor organization's initial claim for recognition . . . makes it possible for the employer to invoke that machinery," and added that Sections 9 (f) and (h) speak "in terms of questions raised, rather than petitions filed, by labor organizations." Recognizing that the language of the Act provided "no sure answer," the Board sought further support for its position by falling back on the "supervening policy of denying the imprimatur of Government to such labor organizations." After stating that the issue was one not only of law, but also of policy, the Board announced broadly:

"We construe the amended Act to provide, in essence, that a non-complying labor organization shall not be the beneficiary of any Board investigation of a question concerning representation."

In an earlier opinion of less permanent significance, the Board had also fallen back on a similar broad conclusion with respect to the policy of the act. It refused to certify a non-complying labor organization which had won a representation election prior to the effective date of the act, and ordered the investigation closed. The union contended that the investigation was completed prior to the effective date, and that after the election was won certification was a purely ministerial act and no part of the investigative procedure. To this the Board ruled that certification was "the final step" in investigations conducted pursuant to Section 9 (c). But it

15. Herman Loewenstein, Inc., note 13 supra, 21 LRRM 1033.
16. Id. at 1032.
17. Myrtle Desk Co., (1947) 75 NLRB No. 29, 21 LRRM 1021. A Federal District Court took a similar view when it refused, on petition of a non-complying union, to order NLRB officials to count the ballots cast at an election held prior to the effective date. Oil Workers International Union v. Elliott, (N.D. Tex. 1947) 73 F. Supp. 942. The court ruled that it had power to review the action of the Board on a petition for a mandatory injunction. But see note 4 supra.
18. 21 LRRM 1021. The Board did not note the fact that Section 9 (g) forbids "certification" of a union which fails to file the required annual re-
buttressed this reasoning with the following broad conclusion:

"Despite some ambiguity, moreover, we believe that Subsections 9(f), (g) and (h), taken as a whole, reflect an intention on the part of Congress completely to debar non-complying unions from access to the Board's processes in representation cases."

The Board has ruled, however, that a certification made prior to the effective date of the act will not be disturbed for failure to comply, though, as will be seen later, the employer will not be required to bargain collectively with the non-complying certified labor organization.

The practical result of these rulings is to recognize a new and broad Congressional policy denying the aid of the Board to non-complying labor organizations as paramount to the basic Congressional policy to recognize and protect the right of employees to bargain collectively through representatives of their own choosing.

The latter policy could have remained paramount, had the Board given the term "raised by a labor organization" a restrictive interpretation, limiting it to the case in which the labor organization itself seeks the aid of the Board by petition or intervention. Whether it has correctly interpreted the will of Congress remains to be determined, either by Court decision or Congressional action. It

ports, whereas Sections 9(f) and (g), here involved, merely forbid "investigation" of a representation question. See note 8 supra. It might be urged that since Congress indicated a distinction between certification and investigation, the Board should not read the latter as including the former. However, the Report of the Conference Committee gives no indication that any difference in the sanction was intended for annual as distinct from the original reports or affidavits. See House Report No. 510, 80th Cong., 1st Sess., (1947) p. 51.

19. 21 LRRM 1021.
22. See Sections 1 and 7.
23. The Board recognized it was forced to choose between conflicting policies (see Herman Loewenstein, Inc., supra note 13, 21 LRRM at 1033), but did not expressly indicate the policy basis for its choice as distinct from the above-stated interpretation of the statutory terms. The reporting requirements could hardly be thought paramount to the basic policy of the Act, but the evident purpose of the affidavit requirement to eliminate Communist officers from labor organizations may well have been intended by Congress to take first place in case of conflict. That this purpose was prominent in the Board's deliberations seems indicated by its express reliance on this purpose in one of its first rulings under the amended Act. See Northern Virginia Broadcasters, (1947) 75 NLRB No. 2, 20 LRRM 1319, considered p. 669 infra. Compare the emphasis on this purpose in National Maritime Union v. Herzog, (D. Dist. of Col. 1948) 21 LRRM 2648 passim.
24. The issue could be raised by judicial review of an unfair labor practice order based on a certification of a complying union which won an election from which a non-complying union was excluded. Other possible avenues of review are suggested note 4 supra.
might be pointed out, however, that the first report of the Congression-4
al Joint Committee on Labor-Management Relations indicated no dissatisfac-

tion with the Board’s decisions on this matter.25

In a fourth major decision on the effect of non-compliance on representation questions, the Board ruled that a non-complying union, presently certified, would be placed on the ballot when the employees petitioned for a decertification election.26 It reasoned that to hold otherwise would confer on non-complying unions “the power to immunize themselves against decertification” by their refusal to comply with the act, and thus encourage non-compliance contrary to the Congressional purpose. The Board ruled that the representation question was “raised” by individual employees, not by a labor organization. Certainly the union, which was already certified, was not raising the question of decertification! If the union lost the election it would lose its certification, but the Board’s opinion indicated that even if it won the union would still lose its certification, unless it had brought itself into compliance. The Board stated that in the absence of compliance it would “only certify the arithmetical results of the election.”27 The result of such arithmetical certification would be to inform the employer that a majority of his employees still wished the union to represent them, and he would be free to bargain with it, but under no enforceable obligation to do so.28

While the ban on direct Board aid to a non-complying labor organization cuts deeply, a number of limitations and means of avoiding it have been recognized when the non-complying union is not directly involved.

In one of its first rulings under the new Act the Board held that AFL was not a “national or international labor organization” required by the Act to comply before an “affiliate or constituent unit” could petition for an election.29 The Board reasoned that in “ordi-

26. Harris Foundry and Machine Co., (1948) 76 NLRB No. 14, 21 LRRM 1146. Section 9 (c) (1) (A) (ii) provides for an election to determine whether the union “which has been certified or is being currently recognized by their employer as the bargaining representative” is still desired as the representative by a majority of the employees. Considered pp. 709-12 infra.
27. 21 LRRM 1147. The Board has consistently adhered to this policy since its announcement in February, 1948. See e.g., Burry Biscuit Corp., (1948) 76 NLRB No. 98, 21 LRRM 1229; Colonial Hardware Flooring Co., (1948) 76 NLRB No. 150, 21 LRRM 1281.
28. As indicated p. 673 infra, the Board has ruled that even when it properly has jurisdiction it will not order an employer to bargain with a non-complying labor organization, though it represents a majority of the employees.
nary labor relations parlance" the term "national and international labor organization" means the "autonomous, self-governing units of the labor movement" in various crafts, trades and industries, and does not include the CIO and AFL which are "federations" of the national and international organizations. It also urged that this interpretation would more nearly effectuate the Congressional purpose "to eliminate Communist influence from the labor movement," since if the federations were required to comply, and did not do so, there would be no incentive for the local and national organizations to rid themselves of Communist officers.

This restrictive interpretation of the ban on permitting a complying local to use the Board processes when its national was not in compliance may have suggested the possibility of attempting the reverse—a complying national seeking recognition when its local had not complied. At any rate, such an attempt was successful. The petition of a complying national labor organization, the United Auto Workers, for an election in which it would be named on the ballot as bargaining representative was granted over the objection that its non-complying local union was chartered by the petitioner and admitted to membership employees of the employer involved.

The Board simply ruled that the compliance status of the local was not in issue, because the petition was filed by the national organization. Such a ruling would seem to permit the complying national to by-pass the local, at least formally, secure certification itself, and still lean on the local for advice and support. Indeed, in a later case the Board rejected the contention that the petition of the national should be dismissed on the claim that the non-complying local was "the true bargaining agent," ruling that the local's compliance was not in issue since it was not the petitioner. It may be doubted, however, whether the Board would take the same position if it became apparent that the national was simply fronting for the

30. Id. at 1321.
31. Id. at 1322.
33. Lion Oil Co., (1948) 75 NLRB No. 88, 21 LRRM 1220; cf. Granite Textile Mills, 76 NLRB No. 93, 21 LRRM 1216. The Lion case may be explained on quite a different ground for which it was later cited—the issue of compliance is an administrative matter for the Board to decide, not a matter for litigation in a representation hearing. See Electrical Equipment Co., (1948) 76 NLRB No. 155, 21 LRRM 1285. Accord: Baldwin Locomotive Works (1948) 76 NLRB No. 124, 21 LRRM 1263; cf. Beattie Mfg. Co., (1948) 77 NLRB No. 55, 22 LRRM 1015 (representation petition need not allege compliance). The Board has likewise ruled that it will not consider attacks on the truth of the non-communist affidavits, leaving this to the Department of Justice. Craddock Terry Shoe Corp., (1948) 76 NLRB No. 120, 21 LRRM 1194.
non-complying local which was, in fact and in practice, the true bargaining representative.

An analogous case in point arose as a sequel to a Board ruling that the reporting and affidavit requirements apply only to labor organizations, not to individual employees petitioning for decertification of the bargaining representative. In the first ruling, the Board held that failure of a petitioning employee to file the non-communist affidavit was no bar to the decertification election for which he petitioned. In the sequel, the Board ruled that a former union member and officer, seeking certification as an individual bargaining representative, was barred from the ballot because she was, in fact, “acting as an agent of” a non-complying labor organization. The Board’s careful consideration of the evidence indicates that it would have permitted the individual to appear on the ballot, despite her former union connections, had it been convinced that she was acting independently and not as the agent for the non-complying union. The same principle would seem to apply to a national or international union fronting for a local, though it would appear more difficult to prove that a national is acting for a local rather than on its own behalf.

The mere fact that a non-complying labor organization may have encouraged employees to request Board action on their own behalf as individuals is not, in itself, a bar. A certified labor organization charged at a hearing on an employees’ decertification petition that a non-complying union had instigated the filing of the petition and was in fact the true petitioner. The Board found “no merit” in this contention, ruling that the desires of the employees could best be ascertained by ordering an election. The reason for throwing off this contention as without merit may have been that it was not substantiated, or that the Board was simply pursuing its usual policy of treating non-compliance as an administrative matter not to be litigated at representation hearings. Also, the Board must have had evidence indicating that at least 30% of the employees were dissatisfied with the certified representative, and hence an election was called for regardless of who may have in-

37. See note 33 supra.
38. See, p. 710 infra.
stigated the employees to petition. At any rate, the result of the case would seem to be that a non-complying union can undertake to organize the employees to the point where, through them, it can bring about a decertification election to vote out the certified union, thus leaving the non-complying union free to seek recognition.

Can the foregoing cases be considered authority for permitting a non-complying union to cause a sympathetic and loyal member to petition for certification as individual bargaining representative of his fellow employees, so long as no control is retained over him as its agent? Or for permitting a non-complying union to cause a member to file charges of employer discrimination because of union membership? Although in the suggested cases the issues are quite different from those in a decertification petition, there is a close resemblance in that the non-complying union encourages but is not a party to the proceedings and will benefit indirectly by its success. At any rate, the Acme Boot, Whitin Machine and Campbell Soup cases, cited in the foregoing paragraphs, appear to indicate a Board pattern which distinguishes between action by individual employees, possibly encouraged by union relationships, and action by the non-complying labor organization itself or persons actually acting for it.

In one situation only has a non-complying labor organization been recognized as having any rights in a representation proceeding: This is when it seeks to establish an existing collective bargaining contract as a bar to an election. The Board recognizes an existing collective bargaining contract as a bar to election of another representative for a contract period not to exceed two years.39 Not only does it make this protection available to the non-complying union with a valid collective bargaining agreement, but it has ruled that the union may also present evidence at the representation hearing on the issue as to the appropriate bargaining unit. The Board

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39. Early in 1947 the Board ruled that a two year collective bargaining contract, whose expiration date was not imminent, would bar an election even though a contract of such length was not customary in the industry. Reed Roller Bit Co., (1947) 72 NLRB 927. On August 21, 1947, it made three important rulings further broadening such a contract bar. It ruled: (1) A four year contract, unreasonable in duration, is a bar for its first two years. Puritan Ice Co., (1947) 74 NLRB 1311. (2) A contract of indefinite duration, with power to reopen, is a bar for its first two years. Filtrol Corp., (1947) 74 NLRB 1307. (3) Such a contract, with a provision for renegotiation of wages, hours and working conditions, which was actually reopened to renegotiate such matters, is still a bar for the two year period. S and W Fine Foods, Inc., (1947) 74 NLRB 1316; Puritan Ice Co., supra; Filtrol Corp., supra. The underlying thesis of these decisions was that greater stability of the collective bargaining relationship could thus be encouraged without sacrificing needed flexibility in the substantive terms of the contract.
reasoned that the defense of the collective bargaining contract necessarily entails the defeat of the petition seeking to alter the bargaining unit covered by the contract. The effect, however, may well be much broader than protection of the contract, for a favorable decision to retain a plant-wide bargaining unit, rather than to permit craft units to be broken off, will leave the non-complying industrial union in a stronger position even after expiration of the contract.

Effect of Non-compliance on Unfair Labor Practice Proceedings

The express provisions of Sections 9 (f), (g) and (h) make it clear that no Board complaint will be issued on an unfair labor practice charge filed by a non-complying labor organization. But how about the complaints issued prior to the effective date of the Act on charges filed by such unions? Or charges filed by individual employees who are members of non-complying unions? The Act does not expressly forbid Board relief in either of these situations. In the former, partial relief only has been given the non-complying union. In the latter, there are no decisions, but the regulations of the Board permit filing of charges by any individual without reference to union affiliation, and the General Counsel's office has declared that it is acting on charges filed by individuals despite their membership in a non-complying union. The decisions on the first class of case should provide some light on the probable disposition of this latter class.

In brief summary, when the complaint was issued before the effective date on the charge of a non-complying union, the Board will refuse to require collective bargaining with the non-complying union but will give relief against other unfair labor practices. The leading case is *Marshall & Bruce Company*, decided in October, 1947. The employer had refused to bargain with a certified union.

40. American Chain and Cable Co., (NLRB, 1948) 21 LRRM 1269; Marine Iron and Bldg. Co., (1948) 76 NLRB No. 112, 21 LRRM 1258; cf. Baldwin Locomotive Works, (1948) 76 NLRB No. 124, 21 LRRM 1263 (limiting to contract issue held not prejudicial since union's offer of proof and its brief fully explored issues); Borg-Warner Corp., (1948) 76 NLRB No. 136, 21 LRRM 1271 (same); Newark Transforming Co., (1948) 76 NLRB No. 145, 21 LRRM 1280 (limiting to contract issue is proper where that is the sole issue involved). In the Baldwin Locomotive and Newark Transforming cases the Board stated that the non-complying union with a contract was entitled to present evidence on all relevant issues, without any indication that it would be limited to the issue of an appropriate unit or other issues having some bearing on the effect of the contract.


43. (1947) 75 NLRB 90, 21 LRRM 1001.
The Board ordered the employer to bargain but conditioned its order upon the union complying with the reporting and affidavit requirements within 30 days. It reasoned as follows: (1) The obligations of employers which arose under the original Act continue in effect despite the changes in the amended Act. They are "liabilities" within the meaning of general savings statute which prevents extinguishment of liabilities under a repealed statute unless the repealing statute expressly so provides. The Board noted that not only was no provision made in the Act for absolving employers of liabilities for their unfair labor practices prior to the amendment, but the legislative history shows that a proposal to do so was rejected. (2) Hence, the Board had the "power" to issue the usual remedial order requiring the employer unconditionally to bargain with the union. On these points the Board was unanimous. (3) Relying on the Board's discretion to issue such remedial orders as will "effectuate the policies of the Act," a majority of three ruled that the Congressional policy would not be effectuated by a bargaining order which would place the non-complying union "in the position of a newly certified bargaining representative." It reasoned that to require an employer to bargain with a union "is often tantamount in practice to a certification" because it looks to a future relationship. It could not believe that Congress would have intended the Board to require an employer to bargain in the future with a union which it now lacked the authority to certify. Again the Board fell back on the broad policy conclusion already noted in the representation decisions:

"We are convinced that Sections 9 (f), (g) and (h) not only provide procedural limitations upon the Board's power to act with respect to cases arising after the effective date of the amendment, but also embody a public policy denying utilization of the Board's processes directly to aid the bargaining position of a labor organization which has failed to comply with the foregoing Sections."  

Not only has the Board consistently adhered to this decision, but its position has been approved and followed by the Circuit Court of Appeals, Second Circuit. In that case the Board had issued a collective bargaining order in 1946, and later petitioned the court for an order enforcing it. The union had not yet complied with the reporting and affidavit requirements. The court's order enforcing

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44. 16 Stat. 431 (1871), 1 U. S. C. 29 (1940).
45. 21 LRRM 1002. The Board's reasoning with respect to the effect of the general savings statute was quoted with approval in NLRB v. National Garments Co., (C.C.A. 8th 1948) 166 F. 2d 233, 236-7.
46. 21 LRRM 1003.
47. Ibid.
the Board order was conditioned upon compliance by the Union within 30 days. The court reasoned that "since enforcement by the court of the order to bargain looks to the future, the policy evidenced by sections 9 (f), (g) and (h) precludes enforcement unless the union shall comply with the requirements of those sections."48

In these decisions the Board and the court are both ruling that there is no enforceable duty to bargain with a non-complying union, because that would bring about a result contrary to the policy of Congress. Exactly the same reasoning would seem to apply if the issue should arise on a complaint issued pursuant to a charge of an individual employee, for the only remedial order the Board could issue would be one requiring the employer to bargain with the non-complying union. This it has clearly indicated it will not do.

In a companion decision to the Marshall case, the Board adhered to the basic policy first announced in the Marshall opinion, and entered an order aimed at interference and coercion in violation of Section 8 (a) (1) and discrimination in violation of Section 8 (a) (3), even though the charges were filed by a non-complying union.49

Of course, the complaints had been issued prior to the effective date of the act. The Board ordered reinstatement and back pay for the employee discriminated against, and the usual cease and desist orders. This policy has been adhered to consistently in cases not involving an order for collective bargaining.

The courts have also sustained this position of the Board in cases not involving a collective bargaining order. Board orders, arising out of charges made by non-complying unions, have been enforced by two Circuit Courts of Appeal, in cases involving interference and coercion in violation of Section 8 (a) (1) and discrimination in violation of Section 8 (a) (3). Both cases involved orders of reinstatement as well as cease and desist orders. In both cases the Board order itself was entered prior to the effective date, but the reasoning of the courts would not have required a different result so long as the complaint was issued prior to that date. In one case, it was contended that the Board's petition for enforcement

48. NLRB v. Brozen, (C.C.A 2d 1948) 166 F. 2d 812, 813. It might be noted that the decision was not contested in this respect, for the Board requested this change to be made in its order and the union was not represented. Cf. Fulford v. Smith Cabinet Mfg. Co., (Ind. App. 1948) 77 N. E. 2d 755, ruling that an employer has no duty under NLRA to bargain with a non-complying union, and hence had not failed to comply with "any obligation imposed by law" within the meaning of a state injunction statute.

of its order was the equivalent of a complaint, but the court ruled that the complaint referred to in Sections 9 (f), (g) and (h) was only the Board's procedural step for commencement of an unfair labor practice proceeding, and that this had taken place prior to the effective date of the act. The other court concurred in this reasoning, and also relied upon the general savings statute which the Board had indicated in the Marshall & Bruce case would preserve rights and liabilities already accrued by unfair labor practices in violation of the original act.

Do these cases shed any light on the probable results of a charge filed by an employee-member of a non-complying union charging the employer with interference and coercion in the exercise of employee's rights and discrimination because of union membership? They indicate that the Board and the courts are willing to protect employees against such unfair labor practices, even though the non-complying union which filed the charges will benefit indirectly in the encouragement to organizational and other union activity which such orders would provide, and in the credit which the union may receive for obtaining the relief. Such indirect benefit was not considered contrary to the policy of Congress, and the procedure was within the letter of the law since the complaints were issued prior to the effective date. When the complaint is issued after the effective date, but on a charge filed by an employee individually rather than the union, the procedure is equally within the law and the indirect benefit to the union is no greater, and possibly less, since it will receive no credit for obtaining the relief. The Board, it is suggested, reached the outermost limit of its broad policy argument when it decided in the Marshall case that Congressional policy prevented use of the Board's processes "directly to aid the bargaining position" of the non-complying union. Indirectly strengthening the union through preventing coercion, interference and discrimination against individual employees and union members seems too far removed from direct aid to the bargaining position to fall within the condemnation of Congressional policy.

Constitutionality of Non-Communist Oath Requirement

The Board has consistently refused to consider the constitutionality of the non-communist oath requirement. Its position has been that it is inappropriate for the Board, as an administrative agency,
to pass upon questions regarding the constitutionality of Congressional enactments. Two federal district courts have sustained the constitutionality of the requirement, the last one being a special three-judge court in the District of Columbia.

No attempt will be made to consider the opinions of these two lower courts. The constitutional issues have been thoroughly discussed elsewhere. It might merely be pointed out that there is no assurance of an early Supreme Court decision on this issue, as it might well be ruled that the District of Columbia court had no jurisdiction to pass on the matter in a suit to enjoin enforcement of the reporting and affidavit requirements in view of the provisions of the Act with respect to judicial review.

Scope of the Act with Respect to "Employees" Covered

Two major changes were made with respect to employees protected by the act. Section 2 (3) excluded "any individual employed as a supervisor" and "any individual having the status of an independent contractor" from "employees." These changes were the Congressional response to Supreme Court decisions which had held that foremen were entitled to organize and bargain collectively under the protection of the act, and that small business men, such as newsboys, might properly be considered "employees" when their economic status more nearly resembled employment than independent business.

Who Are Supervisors?

The Act defines supervisors, now excluded from its benefits, as follows:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other em-

53. See, e.g., Rite-Form Corset Co., (1947) 75 NLRB 174, 21 LRRM 1011, 1012.
54. Oil Workers International Union v. Elliott, (N.D. Tex. 1947) 73 F. Supp. 942; National Maritime Union v. Herzog, (D. Dist. of Col. 1948) 21 LRRM 2648. In the latter case one judge dissented from dismissal of the complaint on the ground that evidence should be taken as to the nature of the Communist party to determine whether the Congressional abridgment of freedom of speech was justified.
56. See note 4 supra.
ployees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

No consideration will be given to the numerous decisions applying this definition to employees clearly falling within or without its terms, but it should be noted that the requisites are stated, and applied, in the alternative. For example, responsibility to direct employees, if it requires the use of independent judgment, is sufficient to classify an employee as a supervisor even though he has no authority to hire, discharge, etc., or to recommend such action.

Similarly, authority of an inspector to recommend dismissal of an employee for defective work is sufficient, even though he has no responsibility to direct the employee's work.

In addition to the duties clearly specified in the definition, the Board has stressed the following factors in finding particular employees to be supervisors: (1) Assignment of work to production employees by working foremen with responsibility for their output. However, merely handing out work under the supervision of a general foreman is not alone enough. (2) Authority to select employees for overtime work. (3) Authority to criticize work of employees and report on their performance to the head of the department. (4) Authority to send an unwilling employee back to the employer's office.

In three cases the Board has ruled that infrequent or sporadic supervision will not justify classification of the employee as a supervisor. In the clearest case, the Board ruled that a production employee who acted as a substitute foreman for approximately one month out of twelve was not a supervisor. The opinion does not intimate how much more than one-twelfth of the time the employee must have supervisory rank before he will be classified as a supervisor. Might the Board possibly adopt the 50% rule it has applied

59. Section 2 (11).
60. See, e.g., Farmville Mfg. Co., (1948) 76 NLRB No. 34, 21 LRRM 1186; American Sugar Refining Co., (1948) 76 NLRB No. 146, 21 LRRM 1270.
64. Steelweld Equipment Co., supra note 62.
65. Ibid.
66. Farmville Mfg. Co., supra note 60 (classified as "discipline").
in the case of guards. Another case involved an attempt to classify 11 out of 21 warehouse employees as supervisors because each headed up a one-man department, such as shipping or receiving, and on occasional rush periods received assistance from other employees whom he would then supervise. On such occasions about 20% of his time would be devoted to supervision. The Board ruled that the supervisory authority was "exercised too sporadically to warrant supervisory classification." There is no intimation, however, that a working foreman who regularly devotes 20% of his time to supervision and the rest to personal production would not be classified as a supervisor. The stress was laid, not upon any regular time ratio between supervision and production, but upon the absence of any supervisory authority during most of the time. Indeed, the Board decisions hold that the working foreman who does manual work right along with his crew will be classified as a supervisor if he has supervisory authority, without giving any consideration to the proportion of his time devoted strictly to supervisory duties.

The Board has ruled that inspectors in a manufacturing plant, with authority to order machines shut down because of defective work and thus to affect the earnings of production employees, are not supervisors, but recognized that some inspectors may have supervisory functions within the statutory definition. Its conclusion that inspection alone, with authority to shut down machines, was not a supervisory function was based largely on legislative history rather than any detailed consideration of the statutory terms. The opinion pointed out that inspectors had been expressly included among supervisors in the bill as it passed the House but excluded in the final bill, and their exclusion noted in the Conference Report. With such indication of legislative intent, inspec-

68. See p. 698 infra.
70. Cf. Electric Auto-Lite Co., (1948) 76 NLRB No. 167, LRRM 1308 (sporadic, rare and infrequent nature of reports on employees' progress stressed in finding group leaders and occasional instructors are not supervisors).
71. Farmville Mfg. Co., (1948) 76 NLRB No. 34, 21 LRRM 1185; Steelweld Equipment Co., (1948) 76 NLRB No. 116, 21 LRRM 1252. The board has also ruled that foremen "temporarily" demoted to production employees because of a cut-back in production will not be excluded from a bargaining unit as "supervisors," despite the employer's asserted intention to restore them to supervisory positions on expansion of operations. Geneva Forge, Inc., (1948) 76 NLRB No. 78, 21 LRRM 1206.
tion duties alone could not be considered as including supervisory functions. Subsequently, however, the Board gave supervisory classification to an inspector who had authority effectively to recommend dismissal of an employee because of defective work. In the absence of some such expressly enumerated supervisory power, inspectors will doubtless remain within the protection of the Act. Whether they should be placed in a separate bargaining unit will be considered at a later point.

In a similar earlier case the Board ruled that time-study and standards employees, whose principal function was to determine the factual basis for an incentive wage plan, were not supervisors. Here, also, the Board relied on a legislative history almost identical with that of inspectors, the only variance being the reference in the Conference Report to the possible classification of time-study personnel as "professional employees."

**Effect of Excluding Supervisors from Protected Employees**

The foregoing decisions were in representation proceedings, in which the Board consistently excluded employees found to be supervisors from any bargaining unit, thus effectively barring them from representation by a statutory exclusive bargaining representative. Likewise, in the unfair labor practice decisions, both the Board and the courts have ruled that they will give supervisors no protection against future employer practices such as refusal to bargain, coercion, and discrimination.

All unfair labor practice decisions affecting supervisors have thus far involved employer practices engaged in before the amendment. Even in such cases the Act is now construed to foreclose orders which restrain future employer conduct aimed at interference with organization and bargaining of supervisors. The Board has ruled that refusal of an employer to bargain with the certified representative prior to the effective date will not now justify an

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75. See p. 700 infra.
76. Worthington Pump & Machinery Corp., (1947) 75 NLRB No. 80, 21 LRRM 1066.
77. See Conference Report, supra note 73 at p. 35. Their classification as professional employees is considered p. 690 infra.
79. The Act does not prevent the supervisors and employer from voluntarily agreeing that the union certified for other employees may also represent the supervisors, but there is no compulsion to agree and no statutory protection to such union as the exclusive representative of all supervisors. See Section 14(a).
order requiring future collective bargaining. Likewise, reviewing courts have set aside and refused to enforce Board orders, entered prior to the effective date, which would have required collective bargaining with the certified representative of supervisors after that date. The reason given was that the order "if allowed to stand, would operate in futuro in a manner contrary to the amended statute," which makes it "unmistakably clear ... that ... Congress intended to deny and has denied the benefits of the Act to 'supervisors.'" The Board has also ruled that an employer's coercion, restraint and discrimination directed at supervisors prior to the amended Act will not now justify an order forbidding future conduct of that character. Similarly, a reviewing court has refused to enforce a pre-amendment Board order protecting supervisors against future coercion, restraint and discrimination. Exactly the same principle has been applied with respect to other changes in the Act. The courts have consistently refused to enforce Board orders, proper when made, but requiring future conduct no longer consistent with the amended Act.

This does not mean that the courts will refuse to enforce orders

82. Young Spring and Wire Co. v. NLRB, supra note 81 at 960-7.
83. Pullman-Standard Car Mfg. Co., (1948) 76 NLRB No. 182, 21 LRRM 1305 (board refused to decide alleged pre-amendment violation of Section 8(a) (1), because it "cannot order respondent to cease and desist from conduct which would be lawful if engaged in now"); Briggs Mfg. Co., (1947) 75 NLRB No. 65, 21 LRRM 1056; (board specifies that order forbidding discrimination in violation of Section 8(a) (4), though based on pre-amendment discrimination against a supervisor, can only apply to employees as presently defined by the Act).
85. NLRB v. Atkins and Co., (C.C.A. 7th 1947) 165 F. 2d 659 (refusal to enforce order to bargain with union admitting both guards and other employees to membership; see p. 699 infra); NLRB v. Brozen, (C.C.A. 2d 1948) 166 F. 2d 812, 21 LRRM 2340 (refusal to enforce order to bargain with non-complying union; see p. 675 supra); NLRB v. Sandy Hill Iron and Brass Works, (C.C.A. 2d 1947) 165 F. 2d 660 (because of "free speech" provision [8 (c)] order against coercion of employees was limited by interpretation to permit statements derogatory to unions, short of prohibited "threat of reprisal or force or promise of benefit;" see p. 715 infra). On the other hand, so long as the pre-amendment order is consistent with the Act as amended, it is enforced. Ibid.; NLRB v. National Garment Co., (C.C.A. 8th 1948) 166 F. 2d 233, 236-37 (approving Board's analysis in Marshall and Bruce case, p. 674 supra); NLRB v. Mylan-Sparta Co., (C.C.A. 6th 1948) 166 F. 2d 485.
corrective in nature, such as orders for reinstatement and back pay, designed to remedy individual wrongs committed against supervisors at a time when they were protected by the Act. The reason for refusing to require an employer to refrain from future "unfair labor practices," no longer unlawful when aimed at supervisors, does not appear applicable to orders which only provide individual relief for past wrongs. As to these liabilities to individuals, the general savings statute invoked by the Board in the non-communist affidavit cases would seem to apply. While there are no direct rulings ordering reinstatement of supervisors for pre-amendment discrimination, a recent decision indicates that the Board would give such relief in a proper case. There the Board dismissed a charge of coercion of supervisors in violation of Section 8 (a) (1) without considering its merits because the only "effective remedy" would be a cease and desist order which could not now be made since such conduct is no longer unlawful. In the same case it passed on the merits of three charges of discrimination against supervisors, though it found no violation. Had it not believed that reinstatement and back pay for the supervisors would have been proper in case the violation was made out, it would have dismissed the charge in the same manner as it did the charge of coercion. In one case the Supreme Court appears to have recognized this distinction between correcting a past wrong to individual supervisors and preventing future discrimination against them. On petition for certiorari, it refused to disturb that part of a pre-amendment enforcement decree which ordered reinstatement and back pay for a foreman, but granted certiorari limited to that part of the decree which required an employer to cease and desist from discouraging membership in the Foreman's Association in the future. The Court vacated this latter part of the order, and remanded the cause to the lower court to consider the effect of the amended Act. This same distinction between corrective orders for reinstatement and preventative orders directed at future conduct in labor relations was also noted by the Circuit Court of Appeals, Second Circuit, in a case involving the free speech amendment to the Act.

One Board decision suggests the possibility of a significant

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86. See p. 674 supra.
89. See NLRB v. Sandy Hill Iron & Brass Works, (C.C.A. 2d 1947) 165 F. 2d 660, 662 (explained note 85, supra; the corrective portions of the order, however, did not involve an amendment while the preventative portion did).
limitation on the exclusion of supervisors from the Act's protection. An employer had induced a discharged foreman to withdraw a pending unfair labor practice charge in order to secure reemployment. The Board ruled that he violated Section 8 (a) (4) because the foreman was not yet a supervisor when the violation took place but only an applicant for a supervisor's job. It reasoned that he "did not acquire the status of a supervisory employee... until he was hired after the discrimination which violated Section 8 (4) took place." Instead, he "was a member of the working class when he applied for the job," an "employee" within the broad definition which does not require an employment relationship with the particular employer. Such reasoning, if followed, would give complete protection against unfair labor practices directed at applicants for supervisor's jobs, or, as in this case, directed at former supervisors who apply for reinstatement after discharge. Possibly the Board had some doubts about its own reasoning, for, it added, in the alternative, that even though the applicant's status "be considered as supervisory because he was applying for a supervisory job," supervisors were employees within the coverage of the Act when the violation took place. Hence, on either basis, an order for-bidding discrimination "against any employee because he has filed charges... under the Act" was proper because it would be limited to such persons as are now within the definition of employee.

Exclusion of Independent Contractors from Protected Employees

In expressly excluding "any person having the status of an independent contractor" from protected "employees" covered by the amended Act, Congress demonstrated its dissatisfaction with the decisions of the Board and courts drawing the line between employees and small independent business men. Its particular target was NLRB v. Hearst Publications, Inc., in which "newsboys," who sold their papers at fixed spots and were mature men supporting themselves and their families with the proceeds, were held to be "employees" within the Act, even though their income depended on the difference between their cost and sales price. In sustaining this conclusion of the Board, the Supreme Court refused to consider the distinction between employees and independent contractors as one to be decided solely on the basis of criteria and "traditional legal distinctions" developed in private law controversies without

91. Section 2(3). The problems raised by this amendment are analyzed in Cox, supra note 3 at 5-8.
92. (1944) 322 U. S. 111.
regard to the purposes of the Act.\textsuperscript{93} It stressed, as relevant to the decision, that the particular workers "are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them. . . ."\textsuperscript{94} These evils it itemized as (1) interruption of commerce through labor disputes between some "who, for other purposes are technically 'independent contractors' and their employers," (2) inequality of bargaining power, and (3) dependence on a daily wage. It pointed out that for each of these evils collective bargaining was an appropriate and effective method of settlement.\textsuperscript{95} On that foundation the Court set out its criterion for distinguishing between an employee and independent contractor for the purposes of the NLRA:

"In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protection."\textsuperscript{96}

The specific exclusion of independent contractors came into the amended Act as a direct response to this decision. Both the House Committee in reporting out the bill for passage with this change in it,\textsuperscript{97} and the Conference Committee, in approving the change,\textsuperscript{98} referred by name to the \textit{Hearst} case as demonstrating the viewpoint the amendment was designed "to correct."\textsuperscript{99} Stating that Congress intended its words to be given their "ordinary meanings," the House Report emphasized that "in the law there always has been a difference" between employees and independent contractors. This difference it stated as follows:

"'Employees' work for wages and salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor and what they receive for the end result, that is, upon profits."\textsuperscript{100}

This quotation has been accepted by the Board as a statement of the criteria which must govern its future decisions.\textsuperscript{101}

\begin{itemize}
\item \textsuperscript{93} Id. at 126-29.
\item \textsuperscript{94} Id. at 127.
\item \textsuperscript{95} Ibid.
\item \textsuperscript{96} Id. at 128 (italics added).
\item \textsuperscript{97} House Rep. No. 245, 80th Cong., 1st Sess. p. 18 (1947).
\item \textsuperscript{98} House Rep. No. 510, 80th Cong., 1st Sess. p. 32 (1947).
\item \textsuperscript{100} Ibid.
\end{itemize}
The first case to raise the effect of the amendment held that certain "newsboys" of the Kansas City Star were independent contractors. The relationship between these newsboys and the paper was such that, consistent with the Hearst case, they might well have been held independent contractors on the authority of a previous Board decision. There the Board had followed the basic reasoning of the Hearst opinion but found that the "economic facts" in the particular newsboy relationship made it "more nearly one of independent enterprise than of employment in respect to the ends to be accomplished by the Act." The significance of the Kansas City Star case lies in the fact that the Board, though recognizing the similarity of the two cases, declined to place any reliance on the earlier decision, departed completely from its earlier reasoning, and based the decision on the criteria set out in the House Report quoted above.

The second case also gave independent contractor status to "agents" who operated rural telephone exchanges for a large company under contracts requiring them to keep the exchange open 24 hours each day, to make contracts for the company, and collect the revenue for the account of the company. In both the Kansas City Star and the telephone decision the following factors were stressed in finding an independent contractor status: (1) In each the contractor was free from control as to detailed manner in which the business was conducted, and the contracts and collections made. This freedom to decide "how the work will be done" was one of the factors mentioned in the House Report. (2) In each the contractor hired his own helpers and the company exercised no control over this. This factor was emphasized as "most persuasive" in the telephone case. (3) In each the contractor had discretion over the salaries he would pay his helpers. (4) In each the contractor was not required to devote his time exclusively to the job, and could hire as much work done by others as he desired, thus increasing or decreasing the amount of his profit. This was stressed as significant in the telephone case, and is one of the factors mentioned in the House Report. (5) In each the profit depended upon the

101. See Kansas City Star, (1948) 76 NLRB No. 52, 21 LRRM 1185, 1186.
102. Ibid.
104. Id. at 1240.
105. See 21 LRRM 1186.
107. 21 LRRM 1300.
108. Id. at 1299.
difference between cost to the contractor and gross proceeds from the undertaking. This, too, was stressed in the House Report.

Chairman Herzog dissented in the telephone case and emphasized several factors looking toward an employee relationship, which were not present in the *Kansas City Star* case. In such borderline cases, where conflicting factors point in different directions, complete agreement can hardly be expected. It is noteworthy, however, that the approach of Chairman Herzog was substantially the same as that of the majority, stressing those factors which would be weighed in any private law controversy in distinguishing on "general principles of law" between an agent and an independent contractor. Thus the primary significance of these decisions is the complete abandonment by the Board of its previous reliance on the "economic facts" in their relation to the purposes of the Act, and its submission to the apparent intent of Congress that in distinguishing between "employees" and small business men the traditional legal distinctions shall control without regard for the objectives of the Act.

**PROCEEDINGS TO DETERMINE COLLECTIVE BARGAINING REPRESENTATIVE**

One of the major changes with respect to representation proceedings was the withdrawal of Board jurisdiction to investigate questions of representation raised by a labor organization not complying with the reporting and non-communist affidavit requirements. The effect of this change has already been considered. Other amendments of significance relate to (1) determination of the appropriate bargaining unit, (2) election procedure and requirements, and (3) decertification proceedings. These will be considered in that order.

**Determination of the Appropriate Bargaining Unit**

Apart from specific changes with respect to professional employees, craft units, guards, and the effect to be given "the extent

109. Id. at 1300-1301. The following factors were stressed: (1) The equipment used belonged to the company, not the agent. (2) The revenue collected was for the account of the company. (3) The company paid for Social Security and Workmen's Compensation coverage for the agents and their operators. (4) The contract could be terminated with or without cause on one day's notice, which, coupled with the fact that the work of the agent is part of the company's regular business, "reminds sharply of a master and his servant."

110. Id. at 1300.


112. Section 9 (b) (1), (2) and (3).
to which employees have organized,"\textsuperscript{113} no basic changes were made in the provisions of the Act with respect to determining the appropriate bargaining unit. A minor verbal change was made in stating the purpose of the Board's decision as to the unit appropriate for collective bargaining,\textsuperscript{114} but the change does not appear significant. The Board has indicated that the amendments in the Act have not changed its basic criterion for determining the appropriate unit. This was affirmed when the Chrysler Corporation sought to establish separate units for different divisions of office employees, such as the sales, accounting and manufacturing divisions. In approving a plant-wide unit for office and clerical employees, the Board stated:

"The principal criterion used by the Board in grouping employees for bargaining purposes has been community of interest. The Board has generally held that employees with similar interests shall be placed in the same bargaining unit. The recent amendments to the Act have not changed this rule of decision, except to emphasize the distinctiveness of craft employees, professional employees, and guards."\textsuperscript{115}

This affirmance that the basis for determining the appropriate unit has not changed, except as expressly provided in the Act, is underlined by decisions reasoning that inspectors\textsuperscript{116} and timekeepers\textsuperscript{117} may properly be included in the same unit with production workers, because, unlike guards, Congress did not specify that they must be in separate units. These particular decisions will be further considered after the guard provision has been studied.

Professional Employees

Section 9 (b) (1) expressly requires a separate bargaining unit for professional employees, unless a majority of the professional employees vote for inclusion in a unit also containing non-professional employees. Apart from its initial decisions as to which employees are "professional," the Board has no discretion to require their inclusion in a wider unit. The definition of professional em-

\textsuperscript{113} Section 9 (c) (5).

\textsuperscript{114} In the original Act the purpose was "to insure to employees the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of this Act." Section 9(b). In the amended Act the purpose is "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act." The change would seem appropriate in view of the greater freedom under the Act for professional and craft employees to decide for or against a separate unit.

\textsuperscript{115} Chrysler Corp., (1948) 76 NLRB No. 10, 21 LRRM 1163, 1164.

\textsuperscript{116} Clayton Mark & Co., (1948) 76 NLRB No. 33, 21 LRRM 1174.

\textsuperscript{117} Art Metal Construction Co., (1947) 75 NLRB No. 11, 20 LRRM 1331.
ployees is quite exacting, and thus far the reported Board decisions have held only attorneys and time-study employees to be professionals. Newspaper editors and reporters, chemical laboratory employees who perform routine chemical analysis, diesel engine mechanics, and a building construction company's surveying party, its construction inspectors and its mechanical engineers with primarily inspection duties have been ruled non-professional.

All four opinions which classify the employees as non-professional stressed the "routine" character of their work. In ruling that the city editor, night editor, sports editor and out-of-town reporters on a daily newspaper were not professional employees, the Board noted that "although judgment and discretion are involved to a greater or lesser degree ... much of the ... news coverage consists of routine news items, and, in other stories, the individual reporter governs himself according to the known policies of the Employer." This might seem to intimate that if a substantial part of the work is routine, and the rest involves a degree of judgment and discretion but is controlled by "known policies of the Employer," it does not meet the statutory requirement of "consistent exercise of discretion and judgment." Yet trial attorneys for an insurance

118. Section 2 (12). "The term 'professional employee' means—

"(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

"(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

119. Lumberman's Mutual Casualty Co. of Chicago, (1948) 75 NLRB No. 129, 21 LRRM 1107.
120. Worthington Pump & Machinery Corp., (1947) 75 NLRB No. 80, 21 LRRM 1066.
122. Wasatch Oil Refining Co., (1948) 76 NLRB No. 58, 21 LRRM 1203.
123. Ferguson-Steele Motor Co., (1948) 75 NLRB No. 159, 21 LRRM 1286.
126. See note 118 supra (italics added).
company were held to be professional, even though their exercise of discretion in preparation and trial of cases was governed by policies set forth by the company,\textsuperscript{127} and any lawyer knows that a considerable amount of their work was fairly routine in nature. Obviously, it will not always be easy to draw the line between "routine mental . . . work" and work "predominantly intellectual and varied in character" requiring "the consistent exercise of judgment and discretion in its performance."\textsuperscript{128}

Fortunately, that is not the sole criterion. There is more to the professional status than that distinction. The statutory requisites for professional employees are cumulative,\textsuperscript{129} and the absence of one professional requisite may influence a borderline decision on another. Thus, the non-professional character of the newspaper editors' required training may well have influenced the Board's remarks on the non-professional character of their work. At any rate, a second reason given for the newspaper decision was that "none of the employees in the editorial department are required to have a license or to undergo special training in a school of higher learning. A few are graduates of schools of journalism or academic colleges."\textsuperscript{130} The latest case, holding the surveying party and mechanical engineers in building construction non-professional, likewise noted that the employees were not required to have a professional engineering degree or its equivalent, though such a degree helped in securing employment.\textsuperscript{131} Thus the Board recognized and stressed the very special type of knowledge required to qualify as a professional employee—that "customarily acquired by a prolonged course of specialized . . . study in an institution of higher learning or a hospital, as distinguished from a general academic education."\textsuperscript{132}

It seems apparent that, apart from the statutory definition, the traditional concept of a "profession" will have some bearing on the

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\item \textsuperscript{127} Lumberman's Mutual Casualty Co. of Chicago, supra note 119.
\item \textsuperscript{128} See statutory definition, supra note 118.
\item \textsuperscript{129} Ibid. Contrast the functions of supervisors which are stated in the alternative, See p. 678 supra.
\item \textsuperscript{130} Jersey Publishing Co., (1948) 76 NLRB No. 70, 21 LRRM 1196, 1197. The Board also mentioned that "the most highly regarded employees are those who have had considerable practical experience in newspaper work."
\item \textsuperscript{131} Starrett Bros. & Eken, Inc., (1948) 77 NLRB No. 37, 22 LRRM 1003, 1004-5.
\item \textsuperscript{132} See statutory definition, supra note 118. Cf. Charles Eneu Johnson & Co., (1948) 77 NLRB No. 3, 21 LRRM 1325, holding that a "professional chemist who performed electrical maintenance work was not a professional employee. Clearly, it is the character of the work and the knowledge required to perform it, which controls. \end{itemize}
decisions in close cases. For example, the reference to no necessity for licenses in the newspaper case has no basis in the definition, but licenses are one of the indicia of some of the professions. Several of the traditional professions are enumerated in the Congressional reports as among those for whose benefit this provision was inserted, and these reports have been given controlling weight by the Board. Indeed, they seem to have been the sole reason given for the decision in the attorney case, and in the newspaper case the Board mentioned the absence of any indication in the legislative history that reporters or editors were intended to be included among the professions.

In one instance the Board appears to have given unjustifiable weight to a remark in the Conference Committee Report with reference to time-study employees. It ruled that such employees, whose function was to determine the factual basis for the operation of the employer's incentive wage plan, were professional employees rather than supervisors. Its reliance on the legislative history to rule that such employees are not supervisors appears entirely sound, but the Board's further conclusion that the "Conference Report indicates that, at the very least, time-study employees may be regarded as professional employees" appears unfounded. After explaining that the conference agreement did not treat time-study employees as supervisors, as had the House bill, the Conference Report merely stated:

"Since, however, time-study employees may qualify as professional personnel, the special provisions of the Senate amendment . . . applicable with respect to professional employees will cover many in this category."

While it is evident from this sentence that the members of the Committee believed "many" time-study employees would qualify as professional employees, there is no indication that they believed

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133. The Conference Committee Report says the "definition in general covers such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants." See House Report No. 510, 80th Cong., 1st Sess., p. 36 (1947). The Senate Labor Committee Report states the provision is intended to recognize the special problems of "many professional persons, including architects, engineers, scientists, lawyers, and nurses." See Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 11 (1947).


135. See Jersey Publishing Co., (1948) 76 NLRB No. 70, 21 LRRM 1196, 1197.


137. Ibid. (italics added).

time-study personnel as a class should automatically be treated as professional.

No reasoned application of the definition of professional employees to time-study employees was made in the foregoing case. The Board did state that "time-study employees . . . by reason of their training and responsibilities, are professional employees within the meaning of Section 2 (12)," but went on to rely on the above legislative history to justify that conclusion without any analysis of the actual duties and required training of the employees as applied to the statutory definition. It should be noted, however, that the professional status of the employees was not actually in issue. The employer was defending a charge of refusal to bargain with the time-study employees' certified union on the ground that they were supervisors or management employees, and there was no contested issue before the Board as to their right to a separate bargaining unit. If such a problem should arise, the Board will doubtless give more searching consideration to the issue.

Craft Employees

Unlike the provision for professional employees, Section 9(b) (2) does not require a separate unit for craft employees even though the majority desire it. All it requires is that the Board shall not decide that a craft unit is inappropriate "on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation." Literally, this merely provides that if the reason for denying a separate craft unit is a prior Board determination in favor of a different unit, then the craft employees' vote must be permitted to decide the matter.

Despite this literal meaning, during the first seven months under the amended Act the craft proviso appeared to have the effect in practice of permitting a separate bargaining unit whenever a majority of the craft members desired it. In a large number of cases separate elections were ordered, some in industries which had a history of plant-wide bargaining over periods up to ten years. Until March 23, 1948, seven months after the effective date, no petition for an election to determine the craft employees' desires

139. 21 LRRM 1066.
140. Section 9 (b) (2) (italics added).
141. See, e.g., Continental Can Co., (1948) 76 NLRB No. 18, 21 LRRM 1159 (10 years); Harnischfeger Corp., (1947) 75 NLRB No. 74, 21 LRRM 1064 (9 years); Westinghouse Electric Corp., (1947) 75 NLRB No 73, 21 LRRM 1063 (7 years); Buckeye Steele Castings Co., (1948) 75 NLRB No. 117, 21 LRRM 1099 (7 years).
for a craft unit appears to have been turned down when a true craft group was involved. Finally, a decision on March 23, and another early in April, imposed important restrictions on the establishment of craft units.

In the first case\textsuperscript{142} the International Brotherhood of Electrical Workers sought to carve out a separate craft unit for 200 electricians from 8500 employees in a division-wide industrial unit in the Baldwin Locomotive Works. The 200 were employed as production electricians, construction electricians, maintenance electricians, substation operators, and electronics technicians and instrument assemblers. The electricians in each department worked with the employees of that department, rather than with the other electrical workers. Thus, the production electricians worked with other production employees under the general direction of supervisors exercising control over all operations in the integrated production process. The Board ruled against a separate craft unit, stressing three considerations: (1) This situation was unlike those in which severance had been granted to a "homogeneous" craft unit, where there was "little or no commingling with other crafts engaged in an integrated production process.\textsuperscript{143} (2) The major portion of the proposed unit had no special community of interest any greater than their community of interest with other employees.\textsuperscript{144} (3) Section 9(b) (2) does not compel the granting of the petition, as claimed by petitioner, "inasmuch as we are not basing our conclusion on any prior determination.\textsuperscript{145}

In the second case\textsuperscript{146} the Bricklayers Union contended that the Board had no discretion to refuse to carve out a craft unit for bricklayers in the National Tube Company's basic steel plant. In rejecting this contention the Board reasoned as follows:\textsuperscript{147} (1) "The only restriction imposed by Section 9(b) (2) is that a prior board determination cannot be the basis for denying separate representation to a craft group." The statutory language is not ambiguous, and the inconclusive legislative history does not justify a decision that Congress also intended to exclude use of the bargaining history of a particular employer as a controlling factor. (2)

\textsuperscript{142} Baldwin Locomotive Works, (1948) 76 NLRB No. 124, 21 LRRM 1263.
\textsuperscript{143} 21 LRRM 1264.
\textsuperscript{144} "The production electricians appear to have no greater community of interest with the construction electricians, for example, than they have with any non-electrical craft in the plant." Ibid.
\textsuperscript{145} Ibid.
\textsuperscript{146} National Tube Co., (1948) 76 NLRB No. 169, 21 LRRM 1292.
\textsuperscript{147} See 21 LRRM 1293-4 (italics added).
Even assuming Congressional intent to exclude such bargaining history as a controlling factor, the only restriction is that "such prior determination or bargaining history may not be the sole ground" for denying a separate craft unit, but it may be used "as a factor to be considered in determining the issue of craft severance."

(3) The "bargaining history in an industry may be considered as a weighty factor" on the appropriateness of separate craft representation, as there is no suggestion in the proviso or the legislative history of any limitation on the use of this factor, regardless of a possible limitation on the bargaining history of a particular employer.418 (4) The Board can give such weight as it deems necessary to the other factors on which it "has customarily based its determination as to the appropriateness . . . of a proposed unit," including "the basic nature of the duties performed by the craft employees in relation to those of the production employees," and "the integration of craft functions with the over-all production processes of the employer."

Having thus disposed of the contention that it had no choice in the matter, the Board proceeded to state two basic reasons for denying the bricklayers a separate unit: (1) The brickmakers were integrated with the production employees in the steelmaking process itself. (2) The steel industry generally had a long history of collective bargaining upon the basis of an over-all unit in which craft employees, including brickmakers, have been included.419 The latter point was rather briefly stated, but the Board developed the integration factor at more length. It pointed out that, unlike the usual craft maintenance employees whose work on any particular piece of production equipment occurs at irregular intervals, the brick-

148. The Board pointed out that Section 9 (b) (2) was enacted by "Congress with an eye directed toward" the American Can doctrine [American Can Co., (1939) 13 NLRB 1252], substantially modified later, which had permitted the bargaining history of a particular employee to be a sufficient basis for denying separate representation to a craft unit, but added that the American Can rule "generally was not applied to questions of separate craft representation where the controlling factor relied upon by the Board was the bargaining history at the plant of the particular employer concerned." 21 LRRM 1294.

149. See 21 LRRM 1295. These two basic reasons were summarized in the concluding paragraph of the opinion: "... we are of the opinion that the factors relied upon by the Board in Matter of Geneva Steel Company (67 NLRB 1159) particularly those of integration and bargaining history in the industry are equally present here. They continue to present a compelling argument in favor of an over-all bargaining unit, and against separate units of these particular craft employees in the basic steel industry." Ibid. (italics added). On the same day an identical ruling was made in the case of another employer on the authority of the National Tube case. American Rolling Mills Co., (1948) 76 NLRB No. 170, 21 LRRM 1295.
layers were engaged in a “definite program of replacing and repairing on regularly succeeding occasions, the instrumentalities used in the continuous production of basic steel.” They had specialized skills with reference to construction and repair of equipment peculiar to the steel industry. Thus the bricklayers’ “functions were intimately connected with the steelmaking process itself.” They and the steel production employees “enjoy similar working conditions,” and by a job evaluation program the “wage rates of all production employees, including . . . bricklayers . . . have been integrated into a single coordinated wage structure.” The significance of these integrated operations is summarized in the following:

“The Board is greatly impressed by the argument of the Employer that, due to the integrated nature of operations in the steel industry, any change in the unit governing the bargaining relations between the Employer and its employees would be detrimental to the basic wage rate structure underlying the Employer’s present operations, and would necessarily have an adverse effect upon its productive capacity in an industry of vital national concern.”

Indeed, production could soon be stopped completely by the strike of a separate craft unit performing essential functions in an integrated production process.

It should not be concluded from these cases that the Board has abandoned the liberal policy toward permitting separate craft units, so evident during the first seven months of the amended Act. During that period the Board gave no apparent weight either to prior Board determinations or to the previous bargaining history of the particular employer, and despite its reservation of the right to give limited weight to those factors in the National Tube opinion, there is little reason to expect a change in this policy. Indeed, in the National Tube opinion the Board said that the decision should not be taken to mean that the trend “in the direction of easing the path of a union desiring severance of a craft unit” “is about to be reversed.”

On the other hand, these recent cases do indicate that the Board feels under no compulsion to permit separate craft units when factors other than individual bargaining history and prior board determinations make such a unit inappropriate in its judgment.

Briefly summarizing, the cases thus far indicate that the following factors may incline the Board against a separate craft unit: (1) An integrated production process with which the craft is intimately connected along with other production employees, as contrasted with a craft group engaged primarily in maintenance and

150. 21 LRRM 1293.
other auxiliary functions.\textsuperscript{151} (2) A community of interest, such as similarity of working conditions and related wage patterns, between craft employees and other employees, as contrasted with a somewhat segregated homogeneous unit among the craft employees.\textsuperscript{152} (3) A long history of collective bargaining within the industry upon the basis of the overall unit in which craft employees are included.\textsuperscript{153}

Though the statute does not define "craft" the Board appears to have had no trouble in applying the term. Illustrative of the crafts which have been authorized to establish separate units under the amended Act are pattern-makers,\textsuperscript{154} pipe fitters and plumbers,\textsuperscript{155} machinists,\textsuperscript{156} sheet metal workers,\textsuperscript{157} steam engineers,\textsuperscript{158} carpenters and tinsmiths.\textsuperscript{160} The Board has been rather strict in requiring that a true craft be involved, but the problem has not been what constitutes a craft, but rather whether the particular employees involved meet the standards of one of the recognized crafts. For example, employees engaged in painting new freight cars were held not to constitute a craft, because they were recruited from the unskilled labor force and "their skills are not comparable to those of journeymen painters who require a considerable period of apprenticeship before attaining the rank and status of craftsmen."\textsuperscript{166} Similarly, a separate unit for tool room employees was denied because only two of the eight employees had prior experience as tool and die makers. The Board reasoned that the predominance of inexperienced workers and absence of a formal apprentice training program

\textsuperscript{151} In addition to the National Tube and Baldwin Locomotive Works cases, this consideration was mentioned in Pacific Car and Foundry Co., (1948) 76 NLRB No. 2, 21 LRRM 1161, and General Motor Corp., (1948) 76 NLRB No. 122, 21 LRRM 1253, in both of which the Board found that true crafts were not involved.

\textsuperscript{152} In addition to the National Tube and Baldwin Locomotive Works cases, this factor was mentioned in General Motor Corp, supra note 151.

\textsuperscript{153} Contrasted with the National Tube case, the converse of this factor was mentioned in a number of cases authorizing separate craft units for the reason, among others, that craft units were "frequently encountered" in the industry. See, e.g., Continental Can Co., (1948) 76 NLRB No. 18, 21 LRRM 1159; Firestone Fire and Rubber Co., (1948) 76 NLRB No. 32, 21 LRRM 1167; Westinghouse Elec. Corp., (1947) 75 NLRB No. 73, 21 LRRM 1063.

\textsuperscript{154} Westinghouse Electric Corp., (1947) 75 NLRB No. 73, 21 LRRM 1063.

\textsuperscript{155} General Motors Corp., (1948) 76 NLRB No. 122, 21 LRRM 1253.

\textsuperscript{156} Continental Can Co., (1948) 76 NLRB No. 18, 21 LRRM 1159.

\textsuperscript{157} Firestone Tire and Rubber Co., (1948) 76 NLRB No. 32, 21 LRRM 1167.

\textsuperscript{158} Allied Mills, (1948) 76 NLRB No. 138, 21 LRRM 1266.

\textsuperscript{159} Gulf Oil Corp., (1948) 77 NLRB No. 42, 22 LRRM 1009.

\textsuperscript{160} Pacific Car and Foundry Co., (1948) 76 NLRB No. 2, 21 LRRM 1161.
disproved petitioner's assertion that this was a highly skilled craft group.\textsuperscript{161} In another case, the employees in a forge, annealing and heat-treatment department of a ball bearing plant were held not to constitute a true craft, because none of the employees performed all of the functions attributable to the blacksmith's craft.\textsuperscript{162}

The Board has likewise been careful to require that the proposed separate unit be exclusively a craft group. Thus, it denied a petition for a separate unit when only 80 of the 325 foundry employees in the proposed unit were coremakers and molders.\textsuperscript{163} In another case it denied the petition when it appeared that the employees in the proposed unit ranged from turbine engineers, electrical engineers and machinists to floormen and the ash gang.\textsuperscript{164} The emphasis in the latter opinion on the absence of any "special community of interest," and the "heterogeneous skills and functions," would seem to indicate that, even with the floormen and ash gang removed, a true craft group would still not arise out of three quite distinct crafts. This seems borne out by a decision in a converse situation in which the Board refused to merge two separate craft units of toolroom employees and maintenance electricians. The Board reasoned that while each craft could constitute a separate unit, they could not be united into one unless "the type of work performed and the actual working conditions . . . are sufficiently integrated to indicate a substantial mutuality of interests separate and apart from those of the other production and maintenance employees."\textsuperscript{165}

Plant Guards

Unlike the provisos with respect to professional and craft employees, aimed at protecting such employees' interest in greater self-determination as to their bargaining unit, Section 9 (b) (3) is aimed at protecting the employer's interest in the undivided loyalty of his plant guards entrusted with enforcing rules against other employees. Hence, the guard proviso is more drastic than the others in two respects: (1) A bargaining unit cannot under any circumstances include both guards and other employees. Thus, no self-determination by the guards to bargain in the same unit with

\textsuperscript{161} Norge Division, Borg Warner Corp., (1948) 76 NLRB No. 136, 21 LRRM 1271; cf. Combustion Engineering Co., (1948) 77 NLRB No. 11, 21 LRRM 1333.

\textsuperscript{162} General Motors Corp., (1948) 76 NLRB No. 122, 21 LRRM 1253.

\textsuperscript{163} Link-Belt Co., (1948) 76 NLRB No. 59, 21 LRRM 1201.


\textsuperscript{165} Purolator Products, Inc., (NLRB 1948) 21 LRRM 1208. This case arose on a request of the employer to merge the two craft units which had elected the same bargaining representative at consent elections.
other employees is permitted. (2) No labor organization can be certified to represent guards if it admits employees other than guards to membership, or is affiliated with an organization which does so.\textsuperscript{166}

Thus far the Board appears to have had no difficulty in deciding when an employee is "employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises."\textsuperscript{167} Watchmen,\textsuperscript{168} gatemen of various kinds,\textsuperscript{169} and deck patrols\textsuperscript{170} on a ship have been classified as guards, but firemen and fire inspectors\textsuperscript{171} have been excluded when their duties did not meet the statutory requirements. A recent decision ruled that in the absence of evidence as to the duties of "watchmen" the Board would "assume that they perform the normal duties of such employment, and, therefore, enforce against employees and other persons rules to protect the property of the Employer."\textsuperscript{172}

It might be noted that in the proviso the definition of guard appears only in the first clause relating to the bargaining unit, but it has been applied as well to the second clause requiring that the certified union shall not admit other employees to membership.\textsuperscript{173} Obviously this was intended, as the restriction on union membership applies only to a union certified as the representative for "a bargaining unit of guards."\textsuperscript{174}

\textsuperscript{166} The proviso reads as follows: "Provided, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." Section 9(b)(3). The proviso was a compromise. The House bill had excluded guards from the Act altogether, classifying them with supervisors. The Conference Committee chose in this manner to give them the benefit of the Act, but separate them entirely from other employees in their union relationship so as to eliminate any danger of collusion or conflicting loyalties arising out of such relationships.

\textsuperscript{167} See note 166 supra.

\textsuperscript{168} See, e.g., Macungie Silk Co., (1948) 75 NLRB No. 88, 21 LRRM 1077; C. V. Hill & Co., (1948) 76 NLRB No. 24, 21 LRRM 1172.

\textsuperscript{169} See, e.g., ibid.; Young Patrol Service, (1947) 75 NLRB No. 51, 21 LRRM 1046 (included gatemen, gangplank men, hatch watchmen, ship deck patrols, and employees who watch cargo on the docks).

\textsuperscript{170} Ibid.

\textsuperscript{171} Monsanto Chemical Co., (1948) 76 NLRB No. 109, 21 LRRM 1239.

\textsuperscript{172} American Zinc Co. of Ill., (1948) 77 NLRB No. 7, 21 LRRM 1327.

\textsuperscript{173} Young Patrol Service, (1947) 75 NLRB No. 51, 21 LRRM 1046.

\textsuperscript{174} See note 166 supra.
The classification of part-time watchmen is the only controversial issue to arise thus far under this section. In a 3 to 2 division the Board ruled that employees who spend less than 50% of their time on guard duties will be placed in a bargaining unit with other employees. In companion cases, this 50% rule was applied to exclude from the guard proviso (1) janitors who devoted full time to guard duties as watchmen one week out of four,176 and (2) employees who regularly combined maintenance duties with duties as night watchmen, if the latter duties required less than 50% of their working time.176 The majority reasoned that Section 9(b) (3) did not require the Board to classify as a guard every employee devoting "any part of his working time, however insignificant" to guard duties. Rather, an individual should be considered employed as a guard only if his guard duties "constitute a dominant aspect, and not merely an incidental feature of his total work pattern."177

The dissenting members of the Board contended that there was no statutory authority for excluding part-time guards from Section 9(b) (3), and that to do so ignored the Congressional purpose to eliminate the possible "conflict between his loyalty to fellow union members and to his employer" for that period during which guard duties were performed.178

Though it would seem reasonable to exclude insignificant or trivial guard duties as establishing a guard status, it may well be questioned whether an arbitrary 50% dividing line achieves the Congressional purpose. Particularly in the small establishment where it is not economically feasible to employ full-time watchmen, and janitors and other maintenance men are entrusted with subsidiary duties as guards to prevent unauthorized entry by employees and others, this 50% rule would deprive the employer of the protection Congress intended to provide. However, any change in this rule would seem now to depend upon judicial or legislative action, for, having voiced their disagreement, the dissenting members announced they would follow the majority rule thereafter;179 and one of the dissenting members later participated in a panel which ruled unanimously that employees devoting one-third of their time to

175. Radio Corp. of Am., (1948) 76 NLRB No. 115, 21 LRRM 1250.
176. Steelweld Equipment Co., (1948) 76 NLRB No. 116, 21 LRRM 1252. The record as to time devoted to guard duties was not clear. The Board ruled that if they spend more than 50% of their time as watchmen they would be considered guards; otherwise, not.
177. Radio Corp. of Am., supra note 175, 21 LRRM 1250-51.
178. Id. at 1251. Reynolds and Murdock dissented.
179. Steelweld Equipment Co., supra note 176, 21 LRRM at 1252.
guard duties could be included in a bargaining unit with other employees.\textsuperscript{180}

The Board has ruled on two occasions that the guard proviso is mandatory and cannot be waived by agreement of the parties, including the employer.\textsuperscript{181} Certainly no opening is left for such waiver in the terms of the Act which expressly forbid the Board to find any unit appropriate if it contains both guards and other employees. Even though the proviso seems designed primarily to protect the employer, it may well have been intended by Congress to free him from concerted pressure to waive his right to insist on a separate unit and separate union for his guards.

Complete independence of any union representing a bargaining unit of guards seems assured by a recent Board ruling that a federal labor union, created and chartered by AFL for the sole purpose of representing plant guards, did not meet the requirements of Section 9 (b) (3) forbidding affiliation "directly or indirectly" with a labor organization admitting other employees to membership.\textsuperscript{181a} The Board reasoned that through the medium of the federation, the guard union was indirectly affiliated with the national and international labor organizations constituting the AFL.

The guard proviso has a broader sweep than merely limiting future establishment of bargaining units and future certification of bargaining representatives. Two Circuit Courts of Appeal have held that the proviso prevents future enforcement of Board orders, entered prior to the effective date, requiring employers to bargain with certified representatives of guards no longer eligible for certification because their membership was not limited to guards.\textsuperscript{182} The courts reasoned that it would be contrary to the policy of Congress embodied in Section 9(b) (3) to require bargaining with such unions as representatives of guards.\textsuperscript{183} While less articulate,
this reasoning was parallel to that on which the Board and courts have ruled that a union not eligible for certification, because of non-compliance with the reporting and affidavit requirements, is also barred from an order compelling collective bargaining.\textsuperscript{184} The Board has agreed with this position of the Courts in the guard cases.\textsuperscript{185} Hence, pre-amendment certification of a bargaining representative for guards cannot be expected to result in an obligation to bargain in the future, unless the unit and the union meet the requirements of Section 9(b) (3).

On the other hand, the pre-amendment certification of a bargaining representative for guards has been held not to prevent the subsequent certification of the same union as the representative of other employees.\textsuperscript{186} The Board reasoned that Section 9(b) (3) only precludes certification of a union as a representative of guards if it admits other employees to membership, but does not bar the converse. This result seems reasonable when it is realized that the opposite ruling would preclude many unions, such as the International Chemical Workers' Union here involved, from performing their principal function of organizing and representing the rank and file employees because they happened previously to have been certified as a representative of guards. Furthermore, to have required the union to withdraw as representative of the guards before permitting it to represent other employees would have jeopardized the contracts already entered into on behalf of the guards. When those contracts expire the employer could refuse to bargain with the union as representative of the guards, and the rulings set out in the preceding paragraph indicate that he would not be required to bargain with a union now representing other employees. Bearing indirectly on this, the Board did point out that "quite a different question" would arise if the union had been seeking a "new certification for a guard unit."

\textbf{Inspectors, Time-study Employees, and Timekeepers}

It has been urged that separate units and unions should be required for inspectors, the same as for guards, even though Congress only required it for the latter. In a case in which the inspectors worked as a separate department, with authority to require machines to be shut down for defective work, the Board ruled by a majority of three that the inspectors were properly included in the same bargaining unit with the production employees whose work they in-

\textsuperscript{184} See pp. 673-75 supra.
\textsuperscript{185} See NLRB v. Jones and Laughlin Steel Corp., supra note 182, 21 LRRM at 2146 (Board concedes the point in court).
\textsuperscript{186} E. R. Squibb & Sons, (1948) 77 NLRB No. 14, 21 LRRM 1336.
Two of the majority reasoned that Congress was familiar with previous Board decisions placing inspectors in production units, had given consideration to the matter, and had made no special provision for inspectors as it had for guards. Therefore, these two would make no change in the previous Board policy. Chairman Herzog agreed with the result because the employer had not sought a separate unit for inspectors but had sought their complete exclusion from any unit. He was of the opinion, however, that "strong arguments frequently prevail for establishing a separate unit of inspectors" when one of the parties seek it, pointing out that such separate units were established in 1944. He urged two reasons for separate units: (1) "Inspectors' own interests are often sharply divergent from those of ordinary production employees," a consideration relevant to the usual Board criterion of a community of interest between employees in the same unit. (2) Employers may believe that "such segregation will help to encourage the loyalty of their inspectors." Members Reynolds and Gray, dissenting, would not only have established a separate unit for the reasons enumerated above, but would have ruled, also, that the inspectors could not be represented by the same union as the rank and file employees because of the conflict in loyalties which would arise.

So long as the viewpoint of the present members of the Board remains the same, it would seem that a majority of three could be marshalled in favor of a separate unit for inspectors when requested, but not for a separate union. The former can be required under the Board's discretionary power to decide the unit appropriate for collective bargaining purposes, which certainly per-

187. Clayton Mark & Co., (1948) 76 NLRB No. 33, 21 LRRM 1174. Attention has already been directed to the ruling in this case that inspectors are not automatically classed as supervisors. See p. 679 supra.
188. Special attention was called to Luminous Processes, Inc., (1946) 71 NLRB 405, decided eight months prior to the enactment of LRMA, in which the same decision was made over a dissent raising the same issues.
189. See Clayton Mark & Co., supra note 187, 21 LRRM at 1175. It was pointed out that the House bill had excluded inspectors as supervisors, but in reversing this decision the Conference Committee gave no indication that inspectors were to be placed in a separate unit as it had contemplated with respect to the companion problem of time-study employees who "might be regarded as professional employees." Ibid.
190. See, e.g., Consolidated Vultee Aircraft Corp., (1944) 55 NLRB 577; Consolidated Vultee Aircraft Corp., (1944) 58 NLRB 1009. In both cases it was ruled that inspectors should be in a unit separate from production and maintenance employees, emphasizing the lack of similarity of interests.
191. See Clayton Mark & Co., supra note 187, 21 LRRM at 1175.
192. Id. at 1176.
193. Chairman Herzog, Reynolds and Gray.
mits consideration of such elements as lack of community of interest
between inspectors and production employees, and the conflict of
loyalties which would arise in case all belonged to the same bar-
gaining unit. But to take the further step advocated by the two
dissenting members, and require a separate union, would appear
to have no statutory basis and to be contrary to Section 9(a), which
provides that the representative selected by a majority of employees
in the appropriate unit "shall be the exclusive bargaining repres-
sentative." There is no Board authority to rule that such a repre-
sentative is inappropriate, except in the case of guards.

The same problem was temporarily avoided in the case of time-
study employees by classifying them as professional, and even this
was not in issue since they already constituted a separate unit with
an independent union. In that case, however, Mr. Reynolds served
notice that he concurred only because the certified union was indi-

dependent from any labor organization representing rank and file
employees, and took the position that its certification should be con-
tinued only so long as it maintained that independent character.
The doubtful classification of all time-study employees as "profes-
sional," previously considered, does not really solve the problem,
since professional employees have the option of voting for inclusion
with other employees. If that should occur, the same problem as
that involved in the inspector case will be presented, and would
seem to depend upon the same basic considerations.

In an earlier decision a similar issue was raised with respect to
timekeepers, when it was ruled that they could be included in an
existing maintenance and production unit. The Board rejected
arguments pointing to the absence of a community of interest and
the dangers of possible conflicts of interest or collusion. To the
latter it gave the blunt answer that discharge was the remedy for
collusion or neglect of duty, and added that had Congress intended
to apply to timekeepers the same principle it had applied to guards
"it would have said so."

The community of interest argument would seem of much great-
er weight for setting technically qualified inspectors and time-study
employees, as distinct from ordinary timekeepers, apart from the
run-of-the-mill production workers. On the other hand, the con-

194. Worthington Pump & Machinery Corp., (1947) 75 NLRB No. 80,
21 LRRM 1066, considered p. 690 supra.
195. Id. at 1067.
196. See pp. 690-91 supra.
197. Art Metal Construction Co., (1947) 75 NLRB No. 11, 20 LRRM
1331.
198. Ibid.
consideration based on possible collusion and conflict of interests would seem more nearly of equal weight in all three situations, unless it be thought there is greater danger of abuse in favor of fellow union members in positions involving discretion and judgment than in purely clerical operations such as timekeeping. The ultimate position of the Board on all three situations must await further clarification.

Extent to Which Employees are Organized as a Factor

Section 9(c) (5) provides that "the extent to which the employees are organized shall not be controlling" in determining the appropriate unit. This amendment came at a time when the Board had just reaffirmed its position that the extent of organization was a significant factor but never the sole consideration. The Board explained that this policy often made collective bargaining for the smaller unit "a reasonably early possibility," while prolonged delay to perfect wider organization might tempt the organized employees to strike for recognition or permit the unorganized employees to thwart collective bargaining by those who desired it. But the Board also made clear that the extent of organization was "never . . . the sole criterion, nor . . . often the controlling one" and the coexistence of two other facts was always required: (1) Bargaining on a more comprehensive basis must be improbable in the near future, and (2) the "unit sought must itself be homogeneous, identifiable and distinct" with work physically separated or functionally coherent and differentiated from that of other employees.

The terms of the amended Act are reconcilable with this position of the Board restated three days before its enactment, since the Act merely provides that the extent of organization shall not be "controlling." Still, the amendment indicates that Congress intended to bring about a change in policy without completely eliminating extent of organization as a factor. The limited evidence thus far points not only to greatly decreased emphasis on extent of organization by the Board, but even to the possibility that it has been completely

199. Garden State Hosiery Co., (June 20, 1947) 74 NLRB 318, 20 LRRM 1149. The LRMA was enacted three days later, on June 23, 1947. This position of the Board was repeated in its annual report for the year ending June 30, 1947. See 21 Lab. Rel. Rep. (LRR'M) 183, 185.

200. See 74 NLRB 321-22. Compare similar statement made the same day in Hudson Hosiery Co., (1947) 74 NLRB 250, 252: "Extent of organization can be most important but it can never be controlling in the full sense of that term. It must also appear that the unit sought is composed of a well-delineated and functionally coherent group of employees, and that it has some objective support over and above the petitioning union's momentary preference."
eliminated as a potent factor, though verbally retained as a possible make-weight in a close case. No such close case has yet arisen.

In the three cases in which the Board has considered the extent of organization since the Act became effective, it has refused to approve the requested unit on the ground that the only basis for doing so would be the extent of organization, and the Act prohibits making that factor controlling. In each opinion it stated that the extent of organization is still one of the “factors to be weighed” though never the sole or controlling “justification” for the unit, but in no decision since the effective date of the Act does this factor appear to have been given any consideration in determining an appropriate unit. This negative record seems significant in view of the frequency with which the extent of organization was given weight prior to the amendment. Complete absence of any reliance on that factor in the first eight months of the amended Act, as compared with at least twelve cases in which it was made a potent factor in the preceding eight months, would seem to indicate a basic change in policy resulting from Section 9 (c) (5). It cannot be said with assurance that without the amendment different results would have been reached in the first two cases, for the required element of homogeneity was lacking, but in the last case a different decision

201. Delaware Knitting Co., (1947) 75 NLRB No. 27, 21 LRRM 1025; Pomeroy’s, Inc., (1948) 76 NLRB No. 96, 21 LRRM 1224; Mandel Bros., Inc., (1948) 77 NLRB No. 88, 22 LRRM 1046. Cf. Carson Pirie Scott & Co., (1948) 75 NLRB No. 148, 21 LRRM 1130 (pre-amendment Board determination based on extent of organization reversed because of unduly artificial and impractical grouping, inappropriate even under pre-amendment standards; “impact” of the amended Act not considered).


203. See Delaware Knitting Co., (1947) 75 NLRB No. 27, 21 LRRM 1025; Pomeroy’s, Inc., (1948) 76 NLRB No. 96, 21 LRRM 1224, 1225. Unlike the Garden State Hosiery case (supra note 199) where the knitters and their helpers were found to be an homogeneous group, because all were highly skilled, closely integrated and physically separated from the rest of the workers, the unit rejected in the Delaware Knitting Co. case consisted of a variety of non-knitting personnel, with sharp distinctions in their function, great variance in their required skill and training, and no apparent physical separation from the rest of the workers. In Pomeroy’s case the unit rejected consisted of furniture salesmen in a department store whose basis of compensation, working conditions and benefits were the same as all other employees, and who were required to have no special skill, knowledge or experience which would set them off from the other employees.
as a result of the amendment is clearly indicated. That case involved one of the pre-amendment bargaining units approved in 1947 because of the extent of organization, and the Board refused to order collective bargaining with the certified union because the amended Act now precluded it from finding the unit appropriate.203a

Election of Bargaining Representative—Effect of Amendments

Secret Ballot

The original Act provided that the Board may “take a secret ballot of employees, or utilize any other suitable method” to ascertain the collective bargaining representative desired by the majority of the employees in the bargaining unit.204 Thus union membership cards, statements signed by a majority of the employees, and other similar methods were once used for this purpose,205 although the Board’s policy later changed to require elections except when the parties consented to the certification or to a card check as a substitute for an election.206 The amended Act leaves no choice in the matter and specifies that if the Board finds a question of representation exists “it shall direct an election by secret ballot and shall certify the results.”207 The Board has ruled that this requires literal compliance. Thus, even though three employees constituting the entire unit expressed the desire to be represented by a particular union, the Board refused to make an immediate certification and ruled that the question of representation can be resolved only by secret ballot.208

Twelve Months between Elections

Section 9(c) (3) precludes an election in any bargaining unit in which “a valid election shall have been held” in the preceding twelve month period. This has been held to apply to valid elections held prior to the effective date of the amendment,209 but the election is not considered “valid” within the meaning of the statute if it was not conclusive on the question of representation. Thus, second elections have been ordered without waiting 12 months when a clear majority was not obtained in the first election due to par-

204. Section 9(c).
205. See NLRB, Third Annual Report (1939) 150-156.
207. Section 9 (c) (1).
208. Firestone Tire and Rubber Co., (1948) 76 NLRB No. 32, 21 LRRM 1167, 1168.
ticipation of ineligible voters,\textsuperscript{210} and when the first election was won prior to the effective date by a union which could not be certified because it failed to comply with the reporting and affidavit requirements.\textsuperscript{211} It has also held that a card check, consented to by the employer as a substitute for an election under the original Act, is not a "valid election" within the meaning of this section.\textsuperscript{212}

In almost identical language Section 9(e) (3) provides that no union shop election shall be held in any bargaining unit within which a "valid election shall have been held" within the preceding 12 month period. The Board has ruled that such "valid election" means a former union shop election, not an election on the issue of bargaining representative.\textsuperscript{213} Apart from the complete separation of the two sections, and the legislative history indicating that only a second election on the issue of a union shop was contemplated under Section 9(e) (3), the Board pointed out that to rule otherwise would require a union which wins an election as bargaining representative to wait twelve months before it could request an election on the union shop issue. While the converse situation has not arisen, it would seem likewise to follow that a union shop election would not bar an election on the issue of representation for a twelve month period, since Sections 9(c) (3) and 9(e) (3) are held to be unrelated. On the other hand, a decertification election, even though successful, will bar the election of another bargaining representative for twelve months,\textsuperscript{213a} as both are elections within the terms of Section 9 (c) (3).

**Employer's Right to Petition for Election**

An innovation in the amended Act is the right of an employer to petition for an election pursuant to Section 9 (c) (1) (B) when presented with a union claim for recognition. Many such elections have been ordered, but on May 13, 1948, the Board dismissed such a petition when at the hearing the union seeking recognition disavowed any claim to represent a majority of the employees. The Board reasoned that a "question of representation" no longer existed as required by the Act. It also urged the more potent policy consideration that to order an election when the union no longer

\textsuperscript{210} Napa New York Warehouse, Inc., (1948) 76 NLRB No. 119, 21 LRRM 1251.
\textsuperscript{211} Nashville Corp., (1948) 77 NLRB No. 19, 21 LRRM 1334.
\textsuperscript{212} Arrow Hart & Hegeman Elec. Co., (1948) 77 NLRB No. 32, 22 LRRM 1002.
\textsuperscript{213} Gilchrist Timber Co., (1948) 76 NLRB No. 177, 21 LRRM 1302.
\textsuperscript{213a} See Federal Shipbuilding and Drydock Co., (May 3, 1948) 77 NLRB No. 78, 22 LRRM 1034, considered infra p. 710.
claimed to represent a majority "would deprive the employees of any opportunity to select any bargaining representative for an entire year after the election" in view of the provisions of Section 9 (c) (3). 213b

Right of Strikers to Vote

Under the original Act the Board's rule was that strikers were entitled to vote at representation elections because they were still employees 214 within the broad terms of Section 2(3). 215 After 1941 replacements for such strikers were also entitled to vote, 216 unless hired after an unconditional offer by the strikers to return to work, 217 or unless the strike arose out of the employer's unfair labor practice instead of an "economic" labor dispute. 218 Even though permitted to vote, economic strikers were entitled to reinstatement only until permanent replacements were hired for their jobs. 219 However, those who went out on strike because of an employer's unfair labor practice were entitled to reinstatement despite attempted permanent replacements. 220

Into this setting Congress injected the following sentence in Section 9(c) (3): "Employees on strike who are not entitled to reinstatement shall not be eligible to vote." The Board has made no decision determining the eligibility of employees to reinstatement within the meaning of that sentence, although it would seem that the criteria outlined above would apply. However, the Board has decided the impact of this provision on the procedure to be followed when conducting an election during a strike. It followed the same device used previously when the right of replacements to vote depended upon undetermined facts. It ruled that all strikers

215. "The term 'employee' shall include... any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice..." The amended Act is identical in this respect.
216. Rudolph Wurlitzer Co., (1941) 32 NLRB 163; Columbia Pictures Corp., (1945) 64 NLRB 490. The Wurlitzer case overruled A. Sartorius & Co., (1938) 10 NLRB 493 in this respect, as the Sartorius case had ruled that replacements were not eligible to vote.
218. Ibid.
and replacements shall be permitted to vote, subject to challenge.\textsuperscript{221} The unchallenged ballots are then counted, and only if the challenged ballots will affect the results is it necessary to determine the eligibility of the strikers and replacements. In so ruling, the Board made clear that it was not prejudging the right of the striking employees to reinstatement, or whether the new employees were permanent replacements, but was merely using this procedure as a device to determine the active employment status of strikers and their replacements without unduly delaying the election. This procedure has since been applied both to elections of bargaining representatives\textsuperscript{222} and to decertification elections.\textsuperscript{223}

Impact of “Free Speech” Guarantee on Representation Election

Section 8(c) of the amended Act provides that “expressing of any views, argument or opinion... shall not constitute... an unfair labor practice... if such expression contains no threat of reprisal or force or promise of benefit.” In a divided decision the Board ruled that an employer’s anti-union expression of opinion, which fell short of an unfair labor practice because no threat or promise could be found, nevertheless required an election, in which the union lost, to be set aside because his conduct prevented a “free and untrammeled choice.”\textsuperscript{224} The employer had conducted an intensive anti-union campaign in which the evils of unionism and the beneficence of his company were emphasized in innumerable ways, all falling short of the prohibited threat or promise. The particular conduct which the Board held prevented a fair election consisted of (1) bringing the employees into the employer’s personal office in some 25 groups of 20 to 25 individuals, and reading to each of them in that “locus of final authority in the plant” an intemperate anti-union address, and (2) sending his foremen to the homes of his workers to propagandize against the union.\textsuperscript{225}

In ruling that expressions of opinion which do not constitute an unfair labor practice may still invalidate an election, the majority pointed out that Congress limited the effect of Section 8(c) to unfair labor practices. It took the position that conduct which did not violate the law so as to permit the imposition of a penalty, might still, if extreme enough, fail to satisfy the “Board’s own administra-

\textsuperscript{221} Pipe Machinery Co., (1948) 76 NLRB No. 37, 21 LRRM 1178.
\textsuperscript{222} H. O. Canfield Co., (1948) 76 NLRB No. 92, 21 LRRM 1217.
\textsuperscript{223} Colonial Hardwood Flooring Co., (1948) 76 NLRB No. 150, 21 LRRM 1281.
\textsuperscript{224} General Shoe Corp., (1948) 77 NLRB No. 18, 21 LRRM 1337.
\textsuperscript{225} 21 LRRM 1340.
tive standards” for an election which would “determine the uninhibited desires of the employees.” In support of this position, it cited a Board decision under the Wagner Act which had set aside an election because of union misconduct which impaired the employees’ freedom of choice at a time when the union conduct was not unlawful. The dissenting members, Reynolds and Gray, urged that Congress intended the employer to be free to persuade his employees not to join unions without restriction in time or place, so long as he refrained from threats or promises, and pointed out that the Board had theretofore consistently overruled objections to elections predicated on anti-union utterances falling short of unfair labor practices. This prior practice is scarcely conclusive on the issue, when it is borne in mind that, prior to the amendment, conduct which was extreme enough to interfere with the free choice of the employees could be found to be an unfair labor practice.

Apart from the problem of interpretation, this decision may possibly place the Board in a difficult tactical position. It can set aside an election for expression of opinion made in a manner or under conditions which flagrantly interfere with the free choice of the employees, but cannot enter an order preventing that conduct. The employer is then free to repeat his successful tactics each time an election is held, so long as he steers clear of the prohibited threats or promises. If he successfully defeats the union, all the Board can do is to set aside the election, wait until the effect of the employer’s campaign has subsided, and order a new election. In this merry-go-round the employer will continue to come out on top so long as he is able to persuade his employees to see things his way. Actually, however, the Board’s solution may be more successful than this analysis suggests, for such employer tactics would seem likely to lose their force with repetition, and the very fact that the Board set aside the election for employer misconduct might carry sufficient weight with the employees to offset the force of the employer’s persuasion.

Decertification Proceedings

An innovation under the amended Act is the provision for an election to determine whether the representative previously certified,

226. 21 LRRM 1341.
228. 21 LRRM 1341, citing M. T. Stevens & Sons, (1946) 68 NLRB 229.
or "currently recognized by the employer," 230 is still desired as the bargaining representative by a majority of the employees in the bargaining unit. 231 Before ordering a decertification election the Board must find at a hearing that "such a question of representation exists." 232 Before such a hearing will be ordered, the Board requires a showing of 30% of the employees in support of the decertification petition. 233 This preliminary showing is only an administrative determination and the record at the hearing need not show the petitioner's interest, 234 nor reveal the names of the employees originally attached to the decertification petition. 235

The certified union cannot prevent an election by showing that a majority of the employees are its members when it is operating under a union shop contract. 236 In so ruling the Board recognized that a union with such a contract might have a majority of employees on its membership records and still be unequivocally repudiated by them. It reasoned that Congress would not have intended employees to jeopardize their jobs by withdrawing from the union as a condition of filing a decertification petition.

A certified union can prevent a decertification election by advising the Board that it no longer claims or wishes to represent the employees. In such a case the Board cancelled the scheduled election and dismissed the decertification petition over the employer's objections, one member dissenting. It reasoned that to hold an election when the union no longer claims to represent the employees would not only waste federal funds, but would mean that the employer could safely refuse to bargain collectively with any union for 12 months, since a decertification election would preclude the election of another bargaining representative for 12 months under the provisions of Section 9 (c) (3). 236a By follow-

230. If the employer has withdrawn recognition from an uncertified union, a decertification petition will be dismissed since the statutory requirement that the union be certified or "currently recognized" is not met. Queen City Warehouses, Inc., (1948) 77 NLRB No. 35, 22 LRRM 1012. If the union demands recognition, the proper remedy in such a case is a petition for investigation and certification of a bargaining representative.

231. Section 9(c) (1) (A) (ii).

232. Section 9(c) (1).


ing these tactics a union needing more time to build up a majority can give up its present status as bargaining representative in exchange for a later opportunity for an election after it has strengthened its ranks.

As in the case of proceedings to elect bargaining representatives, evidence of unfair labor practices is not admissible to defeat a petition for decertification election. Thus, evidence that a petition was instigated by the employer or brought about through his intimidation of employees was held properly excluded by the examiner, and the Board ordered the election held. The correct procedure in such a case is to file unfair labor practice charges against the employer, in which case the election will be postponed if the charges are sufficiently substantiated to justify issuance of a complaint.

In an analogous converse situation, the Board ruled in a 3 to 2 decision that a decertification petition could be withdrawn despite the employer's assertion that the certified union coerced the petitioner to request withdrawal. The Board relied upon its long established practice permitting withdrawal of representation petitions and upon the irrelevance of evidence of an employer's unfair labor practice in both representation and decertification hearings. It reasoned that the same principles should apply to withdrawal of decertification petitions and to evidence of an union's unfair labor practice. The Board indicated that if an unfair labor practice charge were filed, a complaint issued and the hearings consolidated, the ultimate disposition of the case might well be different. The dissenting members objected that this approach was unrealistic, since

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238. See report of administrative rulings dismissing decertification petition where unfair labor practice charges were pending. 21 Lab. Rel. Rep. (LRRM) 266. Cf. NLRB v. Consolidated Machine Tool Corp., (C.C.A. 2d 1948) 16G F. 2d 470. In that case the court had previously entered an order enforcing a board order requiring the employer to bargain with the certified union. Soon thereafter a majority of the employees filed a petition for decertification. The Board sustained the regional director's refusal to proceed with the decertification petition on the ground that compliance with the Board's order had not yet been effected. The Court refused to modify its order, ruling that "it is for the Board to decide whether non-compliance is a reason for refusing to consider the employee's petition." Id. at 2546. Cf. Franks Bros. Co. v. NLRB, (1944) 321 U. S. 702, sustaining Board's decision that employer must bargain with union which had majority when refusal to bargain began, even though it no longer had a majority.

239. Underwriters Salvage Co. of N. Y., (1948) 76 NLRB No. 91, 21 LRRM 1210.

240. 21 LRRM 1211.
coercion effective enough to cause withdrawal of the petition would likewise prevent the filing of unfair labor practice charges. Still, they apparently would not admit evidence of unfair labor practices in the decertification hearing. Instead, they would adopt the blanket position that once a decertification petition is supported by sufficient evidence to meet the statutory requirements, "it should be processed to ultimate solution of the question in the protected atmosphere of the ballot box" rather than to risk possible coercion by permitting voluntary withdrawal. The majority simply could not agree to create thus "an irrebuttable presumption that once a petition for certification has been filed, subsequent efforts to withdraw it are necessarily induced by coercion or other improper means."  

UNFAIR LABOR PRACTICES AND RELATED MATTERS

Employer's Unfair Labor Practices

Affiliated and Unaffiliated Unions

Probably the most revolutionary decision on unfair labor practices by employers arose out of the requirement in Section 10(c) that in deciding cases under Section 8(a) (1) and 8(a) (2) the "same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope." Here Congress was aiming at a long-established Board practice which treated independent unions more severely than affiliated unions in case of employer domination, support or interference in violation of Section 8(a) (2). In such cases the Board invariably "disestablished" the unaffiliated union and ordered the employer to withhold recognition from it permanently. Such a disestablished union could never be certified. On the other hand, the affiliated union was never disestablished. Instead the Board only charged a violation of Section 8(a) (1), rather than 8(a) (2), and ordered the employer to cease the interference and to withhold recognition pending certification by the Board. This difference in treatment was based upon the Board's belief that, unlike an unaffiliated, company-sponsored

241. No attempt will be made to document this practice here. It is explained and documented in Carpenter Steel Co., (1948) 76 NLRB No. 104, 21 LRRM 1232, 1233; Detroit Edison Co., (1947) 74 NLRB 267, 278-9; Cox, supra note 3 at 22-24.

242. Three days before the final enactment of LMIRA the Board, in a divided decision, withheld this drastic remedy for the first time, in a case in which the unaffiliated union had been free from employer influence for three years. Detroit Edison Co., supra note 241.
union, a union affiliated with a national organization "could not be permanently and completely subjugated to the will of the employer." 243

The Board's solution to the Congressional edict that affiliated and unaffiliated unions must be treated alike was to recognize, in effect, two degrees of violation of Section 8(a) (2): (1) "Domination" of the organization would result in its permanent disestablishment, whether affiliated or unaffiliated. (2) "Interference and support," falling short of domination, would result only in an order that recognition be withheld pending certification, whether affiliated or not. 244 Since "domination" of an affiliated union is likely to be found on rare occasions, if ever, the result of this solution would appear to be to leave substantially the same remedy in effect in the case of affiliated unions, but to make possible a less severe treatment of company or other unaffiliated unions when the support and interference has not been extensive enough to amount to actual domination and control. 245

Whether any substantial change from pre-amendment practice will result from this answer to the Congressional command will necessarily depend upon the Board's application of its new formula. As if to guarantee its good faith, on the day it announced its formula the Board decided two cases, both involving unaffiliated unions; in one it found domination and ordered disestablishment, 246 while in the other it found only support and interference and ordered the lesser remedy. 247 Since that day in mid-March, 1948, the Board has decided several additional cases, all involving unaffiliated organizations. The total score to date is five findings of domination with consequent disestablishment 248 as against two findings of support and interference with orders not to recognize, pending certification. 249

244. Id. at 1234.
245. The Board thought cases of "actual domination" of "any labor organization" would be "perhaps few in number." Ibid. (Italics the Board's). There were five in the first month, all unaffiliated unions. See note 248 infra.
246. Ibid.
249. Hershey Metal Products Co., (1948) 76 NLRB No. 105, 21 LRRM 1237; Pacific Tel. & Tel. Co., (1948) 76 NLRB No. 123, 21 LRRM 1255.
No nice formula for distinguishing between the death-dealing domination and the non-lethal interference and support has been attempted by the Board, nor does one seem possible. The decision in any case must depend on the composite result of a number of factors, tempered with good judgment as to whether the organization is free of employer control and domination. The decisions finding domination seemed most influenced by the following factors:

1. Participation by the employer in the formation of the organization.  
2. Participation by the employer or his supervisors in the organization's meetings and activities.  
3. Cessation and revival of organization activity at will of the employer.  
4. Ability of employer to unseat any elected "representative" of the employees by discharging or transferring him to another department.  
5. No meetings of employees with their "representatives" and no right to participate in the organization affairs except by annual election of a representative.  
7. Meetings held on company time, and employees paid for time in attendance and time devoted to other organization activities.  
8. Recognition of the organization as the bargaining agent without requiring proof of majority status.

In the decisions finding only interference and support, the following factors seemed important as indicating lack of domination:

1. Inception and organization of the union by the employees themselves, without employer participation.  
2. Refusal of the union to delay a strike as requested by employer, with consequent settlement resulting in wage increase.  
3. Refusal to accept employer's offer of company attorney's assistance in formation of organization, and consultation with attorney of employees' own choice contrary to employer's advice.  
4. Freedom of another

252. Carpenter Steel Co., supra note 248; cf. Pacific Moulded Products Co., supra note 248 (no meetings ever held or officers chosen).
254. Ibid.
255. Ibid. Cf. Rathbun Molding Corp., supra note 248 (employer pressure to get signed check-off slips).
258. Hershey Metal Products Co., supra note 249.
259. Ibid.
260. Ibid.
union of similar company-sponsored ancestry from domination, as indicated by its joining a CIO national labor organization.\textsuperscript{261}

**Free Speech Provision**

Section 8(c) amends the original Act to add the following:

"The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be the evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

In view of the greatly increased liberality of the Board toward the employer's freedom to express anti-union views during the year preceding this amendment, little basic change was to be expected in the decisions on interference and coercion arising out of employer's anti-union propaganda campaigns.\textsuperscript{262} In the main, this seems borne out by the decisions, but the amendment has had the immediate and obvious effect of focusing attention on the necessity of finding a "threat of reprisal or force or a promise of benefit."\textsuperscript{263}

Such threat or promise is not required where the forbidden interference or coercion consists of conduct other than expressions of views, arguments and opinion, such as interrogating employees about union affiliation,\textsuperscript{264} or circulation of anti-union petitions.\textsuperscript{265}

But where the basis for finding coercion is only the expression of anti-union views and opinions, the forbidden threat or promise must be found.

A number of cases have turned on the presence or absence of a threat or promise. A threat to close the plant in case the union wins\textsuperscript{266} or the promise of favorable individual contracts if the

\begin{thebibliography}
\item \textsuperscript{261} Pacific Tel. \& Tel. Co., supra note 249.
\item \textsuperscript{262} Cox, supra note 3 at 15-20 presents a careful analysis of this provision in the light of the pre-amendment background of Board and court decisions, and the legislative history.
\item \textsuperscript{263} See NLRB v. Sandy Hill Iron and Brass Works, (C.C.A. 2d 1947) 165 F. 2d 660, 662 (pre-amendment Board order forbidding coercion in background of highly derogatory anti-union remarks enforced with explanation that it would be interpreted as only forbidding "threats, intimidation, or promises").
\item \textsuperscript{264} Ames Spot Welder Co., (1947) 75 NLRB No. 45, 21 LRRM 1040.
\item \textsuperscript{265} R. J. Lovvorn, doing business as Georgia Twine \& Cordage Co., (1948) 76 NLRB No. 12, 21 LRRM 1149; Kentucky Utilities Co., (1948) 76 NLRB No. 121, 21 LRRM 1259.
\item \textsuperscript{266} Unique Ventilation Co., (1947) 75 NLRB No. 41, 21 LRRM 1029; Chamberlain Corp., (1948) 76 NLRB No. 138, 21 LRRM 1122. The Unique case also involved a threat not to carry out plans for veteran "on the job training," and the Chamberlain case involved a threat to withhold a promised wage increase. But cf. Bluefield Garment Manufacturers, (1947) 75 NLRB No. 56, 21 LRRM 1047 (threat to close plant, unless union solicitation during working hours stopped, held protected free speech).
\end{thebibliography}
union is deserted, 267 are obviously coercive conduct outside the protection of Section 8(c). On the other hand, extremely vigorous, virulent and even vicious attacks on the union have been held within the protection of this section, when no threat of reprisal could fairly be implied, 268 even though addressed to a "captive audience." 268a Indeed the argumentation may be so forceful and effective as to require the setting aside of an election for interference with the "free and untrammeled choice" of the workers, and still not constitute an unfair labor practice because threats and promises are carefully avoided. 269

The Board has read Section 8(c) to permit a finding of interference and coercion when a veiled threat can be implied, even though express threats are carefully avoided. Thus, the statement by the employer's superintendent that so far as he was concerned there never would be a union around any company where he worked was held in a three to two decision to be a veiled threat of reprisal against any employee engaged in union activity. 270 The absence of any assurance to the employees that they were free to join or not to join a union was given some weight in this finding, 271 as was the presence of other acts of interference and a discriminatory discharge. 272 The Board distinguished an earlier decision holding non-coercive a foreman's remark that if the union came in he would

268. General Shoe Corp., (1948) 77 NLRB No. 18, 21 LRRM 1337; Fulton Bag & Cotton Mills, (1948) 75 NLRB No. 111, 21 LRRM 1124 (foreman's statements that anyone who joins the union is "nothing more or less than a cut-throat, gangster and an outlaw" and he hoped to see them starve to death); Bailey Co., (1948) 75 NLRB No. 113, 21 LRRM 1112.
269. General Shoe Corp., (1948) 77 NLRB No. 18, 21 LRRM 1337, considered pp. 708-9 supra on this point.
270. West Ohio Gas Co., (1948) 76 NLRB No. 27, 21 LRRM 1156. The dissenting opinion did not intimate that the Board could not find an implied threat in a proper case, but interpreted the superintendent's statement differently from the majority.
271. See 21 LRRM 1158.
272. Ibid. This is the only intimation thus far that the so-called "totality of conduct" doctrine may still be applied to read unspoken threats or promises into the employer's anti-union remarks, because of other conduct which gives meaning to the words which they would not have standing alone. In an earlier case, the Board carefully pointed out that its finding of interference was based solely on promises of economic benefits and not on the "course of conduct theory." See Bailey Co., (1948) 75 NLRB No. 113, 21 LRRM 1112. For a discussion of this theory, and its application to Section 8(c) see Cox, supra note 3 at 17-18. The Congressional intent appears equivocal on this point. Id. at 18.
obviously there is a vast difference between a foreman threatening to leave and threatening reprisal against union employees. In another case an employer’s poll of his employees, after an anti-union speech, as to whether the employer should “step out completely and let the business go on its own power,” was held to convey the threat that he would shut down the business if the employees chose the union. Though there will be close cases in which neither the Board members, nor commentators, can agree as to the presence of an implied threat or promise, the Board must have power to control such veiled coercion if its power over threats and promises is to be effective.

No Board opinion has been found which concerned itself with the far-reaching provision in Section 8(c) which prohibits the Board from receiving as evidence of any unfair labor practice an expression of anti-union opinion, however violent, unless it contains the required threat or promise. Professor Cox has pointed out the important effect this provision can have when the employer’s expressions of opinion might otherwise throw light on the motive for ambiguous conduct, such as the discharge of employees. Chairman Herzog has indicated that such evidence has been eliminated from consideration in accordance with the Act.

The effect of this “free speech” provision on union unfair labor practices has not arisen in any Board decisions; indeed, there have been no Board decisions on any union unfair labor practices. But in a temporary injunction proceeding brought by the Board and dismissed because the court found insufficient effect on interstate commerce, the federal district court added the comment that blacklisting a non-union contractor on the unfair list at the Building Trades Council headquarters was a protected expression of “views, arguments or opinion” within Section 8(c). While the court was without authority to make a final ruling on the merits, the opinion does indicate one of the possible applications of this section to union activities. Is placing a non-union contractor’s name on the union headquarter’s “unfair” list to be considered merely an expression

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274. Alliance Rubber Co., (1948) 76 NLRB No. 82, 21 LRRM 1221.
275. See Cox, supra note 3 at 17-18.
276. Id. at 19-20.
279. It found that the challenged conduct did not “affect” interstate commerce.
of opinion, or, when coupled with an understanding that union men will not work on the same job with non-union men, is to be viewed as implementing or inducing a concerted refusal to perform services in violation of Section 8(b)(4)(A)? It would seem that the "veiled threat" approach used in the employer speech cases might be applied here to find a thinly veiled direction to union men to put "operation boycott" into effect.

Discharge "For Cause"

Section 10(c) of the amended Act contains the following sentence:

"No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of back pay, if such individual was suspended or discharged for cause."

There never has been any question of the employer's right to discharge his employee for proper cause, such as unsatisfactory work or infraction of shop rules enforced against other employees, but the issue often arises as to whether the cause given was, in fact, the real cause of the discharge or a mere pretext to justify discharge for union activity. 280 Dissatisfaction with possibly overzealous Board decisions on such issues led to this enunciation by Congress of the right of the employer to discharge for cause. 281

Only one genuinely serious question is raised by the amendment. May the Board properly infer, as in the past, that a discharge was for union activity even though a proper ground for the discharge has been fully established and stated by the employer as the reason for his action? No discussion of this question has come from the Board as yet, but the General Counsel has stated his views as follows:

"As I see it, 'good cause,' as the basis of a discharge, must be just as good under the provisions of this Act as it ever has been... We are still not only entitled to, but are obligated to, weigh the bona fides of the so-called 'good cause' and to reject the 'good cause' theory if it has all the earmarks of nothing but subterfuge." 282

The General Counsel illustrated his point by reference to the typical case of discharge for a relatively minor offense, previously passed over without disciplinary action until the employee involved hap-

280. This issue was recognized in the initial NLRB case in the Supreme Court. See NLRB v. Jones and Laughlin Steel Corp., (1947) 301 U. S. 1, 45-46.

281. An excellent discussion of the background and legislative history of this amendment appears in Cox, supra note 3, at 20-22.

happened to be an active union leader. In such cases of discrimination the Board has continued to find that the discharge was for union activity rather than the stated cause, and to require reinstatement. It has also continued in many cases to find that the stated cause for the discharge was not established by the employer. Whether it will go further and infer from circumstantial evidence, other than discrimination, that a fully established justification and stated reason for the discharge was not the real “cause” must await further clarification.

One Board decision points to an obvious limitation on the scope of the “for cause” provision. It is confined by its terms to the corrective orders for reinstatement and back pay, and hence imposes no limitation on preventative orders to cease and desist future discrimination or coercion by suspensions or discharges. This limitation will make little difference so long as the provision is given a reasonable interpretation which permits the Board to find that the discharge was not for the cause stated, when the evidence justifies that conclusion. But if an unforeseeably strict interpretation is given the provision by the courts, the Board can at least fall back on cease and desist orders to guard against future discharges.

The Circuit Court of Appeals, Second Circuit, has interpreted this “for cause” provision to have reference to the particular cause for discharging the particular employee, not to a general cause, such as business curtailment for economic reasons. On reduction of operations the employees involved were discharged in the ratio of 12 union men to 1 non-union man, although the total plant ratio was approximately 2 to 1. In a pre-amendment order the Board found discrimination and ordered reinstatement. In enforcing this order, the court rejected the employer’s contention that the employees were discharged “for cause” due to the business curtailment.


285. Briggs Mfg. Co., (1947) 75 NLRB No. 65, 21 LRRM 1056. This case involved discrimination in violation of Section 8(a) (4), but the same principle would apply to violations of Sections 8(a) (1) and 8(a) (3).

286. NLRB v. Sandy Hill Iron and Brass Works, (C.C.A. 2d 1947) 165 F. 2d 660. Though the matter is not discussed, the Court apparently considered the “for cause” restriction on reinstatement and back pay orders to apply to court enforcement of pre-amendment Board orders.
and ruled that the statutory "cause" must relate to the reason for selecting the particular employees for discharge.

Collective Bargaining on Pensions and Insurance

In a significant decision on April 12, 1948, the Board ruled for the first time that the duty to bargain collectively includes a duty to bargain on pension plans and retirement benefits. The Board's broad conclusion was that the statutory subject of collective bargaining, "rates of pay, wages, hours of employment and other conditions of employment," should be construed to include "emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship." The amended Act did not change the pertinent terms of the statute, but the Board laid stress on the legislative history of the amended Act as indicating a deliberate refusal by the Congress to narrow the terms of the Act for fear it would result in excluding such benefits. Another case is now pending in which the issue is whether an employer must bargain on group insurance benefits, and a federal district court has restrained the employer from putting such a plan into effect without bargaining, pending the Board decision. In another fringe situation, the Board's order requiring collective bargaining on merit increases, and forbidding the granting of any such increases without consultation with the union, was upheld and enforced by the Circuit Court of Appeals.

Unfair Labor Practices by Labor Organizations

No Board decisions have dealt with the unfair labor practices by labor organizations forbidden by Section 8(b) of the amended Act. Many such cases are pending and in a number of in-

287. Inland Steel Co., (1948) 77 NLRB No. 1, 21 LRRM 1310.
288. See Section 9(a). Section 8(a) (5) makes refusal to bargain "subject to the provisions of Section 9(a)" an unfair labor practice.
289. Inland Steel Co., supra note 287, 21 LRRM at 1311.
290. See id. at 1313-14.
293. The union unfair labor practices created by Section 8(b) have been analyzed in the light of the precedents in the employer unfair labor practices cases by Foley, Union Unfair Labor Practices Under the Taft-Hartley Act, (1947) 33 Va. L. Rev. 697; cf. Note (1948) 5 Wash. & Lee L. Rev. 13. In two instances the Board has ruled that Section 10(c) of the amended Act does not authorize back pay orders against a union for procuring the discriminatory discharge of an employee prior to the effective date of the amendment. E. L. Bruce Co., (1947) 75 NLRB No. 62, 21 LRRM 1044; General Electric X-Ray Corp., (1948) 76 NLRB No. 11, 21 LRRM 1150.
294. On March 18, 1948, 420 charges of union unfair labor practices had been filed. One-third of these were on charges of secondary boycotts. Out of
stances temporary injunctions or restraining orders have been secured in the federal district courts enjoining such unfair labor practices pending determination of the issue by the Board. These Court decisions will be reviewed briefly below, but will not be considered in detail because they are tentative in nature, based on a finding of "probable" violation, pending Board decision of the issue on the facts and the law, and the Board decisions will be subject to review by the circuit courts of appeal rather than the district courts. Clarification of this new class of unfair labor practices must, therefore, await a series of Board decisions.

Union Security Provisions

No reported Board decisions have considered the substantive features of the ban on the closed shop, or the requirement that a union shop contract be approved by a majority vote of the employees in the bargaining unit. In one case a federal district court issued a temporary injunction to restrain the International Typographical Union's "no contract" policy aimed at achieving closed shop conditions in the newspaper industry, but no Board decision on this policy has yet been made. Despite this dearth of formal decisions, a major function of the Board since the amended Act became effective has been the supervision of union shop elections. Requests for such elections have constituted three-fourths of all incoming cases, amounting to 3500 in the month of February alone, but most of the elections are conducted by consent and require no action by the members of the Board in Washington.

The most significant action taken thus far by the Board in ap-
plying the union shop provisions of the Act has been in connection with the construction industry. Because the average building trades worker is employed by the same contractor for a comparatively short time, a union shop election within a bargaining unit limited to a particular employer was impracticable. Instead, the Board decided to divide the nation into approximately 700 construction areas, and to hold a single union shop election for each craft within each area. All craft employees, excluding casuals and transients, who work for contractors operating in the area will be eligible to vote for or against authorizing their craft union to enter into union shop agreements with the contractors in that area.\textsuperscript{301}

Pending decisions by the Board on the union shop provisions, some guidance may be found in the positions taken by the General Counsel. Since he has "final authority" on the issuance of complaints,\textsuperscript{302} his assurance that certain conduct does not constitute an unfair labor practice would seem a relatively dependable guide for his term of office, subject to a possible change of views. On the other hand, his position that certain conduct will be considered an unfair labor practice may not be followed by the Board, but his warning would seem to assure those who ignore it the opportunity to defend their conduct before the Board. In a series of policy announcements, the General Counsel has taken the following positions:

(1) Renewals of collective bargaining contracts may embody a union shop clause without waiting for an election, so long as they also provide that the union shop clause will take effect only after the employees vote for it as required by the Act.\textsuperscript{303} Otherwise, unjustified delays would occur in the renewal of contracts. The General Counsel reasoned that the law does not prohibit an employer from committing himself in writing to a union shop agreement which conforms to the law if the employees wish it, but pointed out that such a provision is completely ineffective until the election requirements have been met. This reasoning would appear to permit such a union shop clause in a new contract, as well as a renewal,
if it contains a proviso that it shall be effective only after approval by a union shop election.\textsuperscript{304}

(2) The automatic renewal of a pre-amendment contract with a union shop clause is subject to the statutory requirement of a union shop election. It "is the same in that respect as a new contract," and is not effective until approved by the employees.\textsuperscript{305}

(3) The required union shop election must be conducted by the Board; an election supervised by any other organization is completely ineffective to meet the Act's requirements.\textsuperscript{306}

(4) Once a labor organization wins authority for a union shop by an election, such authority is retained until (a) it is revoked by a vote of the employees under Section 9(e)(2), or (b) the union is displaced by another bargaining agent.\textsuperscript{307} Thus it is not necessary for a union to obtain a renewal of the authority each time a new contract is negotiated.

(5) In his capacity to process petitions for union shop elections on behalf of the Board,\textsuperscript{308} the General Counsel has ruled that no union shop elections will be held in states which make the union shop illegal. This decision was approved by the Board in a 3 to 2 decision in May, 1948.\textsuperscript{309}

\textsuperscript{304} The General Counsel's office has indicated that the mere entry into a union shop contract not authorized by an election is in itself interference and coercion in violation of Section 8(a)(1) even though no action is taken under it to discharge a non-union employee. See address by Associate General Counsel Brooks, Analysis, 21 Lab. Rel. Rep. (LRRM) 81, 82 (Mar. 15, 1948).

\textsuperscript{305} Id. at 81. A federal district court so ruled in a declaratory judgment involving a contract automatically renewed after the effective date. District Lodge v. Akmadzich, (S.D. Calif. May 6, 1948) 22 LRRM 2095.

\textsuperscript{306} See address by Associate General Counsel Brooks, (1948) 21 Lab. Rel. Rep. (LRRM) 217.

\textsuperscript{307} Id. at 218.

\textsuperscript{308} The Board has delegated to the General Counsel authority to process on its behalf all petitions filed pursuant to Section 9, with the privilege of appeal to the Board from dismissal of a petition by the General Counsel. See NLRB-General Policy, (1948) 13 Fed. Reg. 654, 21 LRRM 3007.

\textsuperscript{309} Giant Food Shopping Center, (1948) 77 NLRB No. 77, 22 LRRM 1070. See address, supra note 306 at 218. The decision depends on the interpretation of Section 14(b):

"Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

The issue is whether this section is to be considered as prohibiting union shop agreements when contrary to state law, thus placing the NLRA enforcement procedure back of the state policy, or is to be considered as merely permitting the state law to control despite the authorization of a union shop by a federally supervised election. Cf. Report of Joint Committee on Labor Management Relations, Sen. Rep. No. 986, 80th Cong., 2nd Sess., pp. 31-32 (1948). In eleven states union shops are now unlawful. See Tabular Analysis of State Labor Law Provisions (1948) 21 Lab. Rel. Rep. 312, 313-14.
The Use of Injunctions to Control Unfair Labor Practices

The original Act provided for enforcement of Board orders by circuit courts of appeal. Such court orders were expressly freed from the limitations of the Norris LaGuardia Act. These provisions were retained in the amended Act and became applicable to unions as well as to employers. The innovation of the amended Act is in its provisions for temporary injunctive relief prior to the Board decision in two situations, with nothing said about the Norris LaGuardia Act:

(1) Section 10(j) gives the Board permissive authority, after issuing an unfair labor practice complaint, to petition the federal district court for "appropriate temporary relief or restraining order." The Court is authorized to grant such temporary relief "as it deems just and proper." This power has been exercised only three times, once against an employer and twice against a union.

(2) If there is "reasonable cause," after a preliminary investigation, to believe a charge of violating the so-called secondary boycott provisions is true, and that a complaint should issue, Section 10(1) imposes on Board officers a mandatory duty to petition the federal district court for "appropriate injunctive relief pending the final adjudication of the Board." The court is authorized to grant "such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law." Such relief has been sought on ten reported occasions, and injunctive relief granted in seven of them.

Procedural Rulings

Relief has been granted under Sections 10(j) and 10(1) upon a finding that there is "reasonable probability" or "reasonable cause to believe".

310. Section 10(e).
311. Section 10(h).
312. See p. 728 infra.
313. Charges of a violating Section 8(b) (4) (A) (B) and (C) are included. The latter forbids an attempt to force "any employer" to bargain with or recognize a labor organization when another has been certified. Thus the cases covered are slightly broader than the so-called secondary boycotts.
314. See pp. 726-28 infra.
315. Evans v. International Typographical Union, (S.D. Ind. 1948) 76 F. Supp. 881, 885 ("the standard of inquiry ... is the probability of the existence of the facts"); id. at 2553 (injunction issued on this basis); Dounds v. Int. Brotherhood of Teamsters, etc., (N.D. N.Y. 1947) 75 F. Supp. 414, 418 ("reasonable probability").
316. Ibid.; Barker v. Local 1796, United Brotherhood of Carpenters, etc., (M.D. Ala. 1948) ... F. Supp. ..., 21 LRRM 2406, 2407 (same).
cause to believe” that the defendant is engaged in the alleged unfair labor practices. The Courts have recognized that they are granting temporary relief pending final determination of the issues by the Board.317 One court has taken the position that the “common law” requirements of irreparable injury and lack of an adequate remedy at law do not apply so long as the statutory requirements are met.318 Another has ruled that, though not a statutory requirement, the likelihood of “substantial and irreparable injury” . . . should serve as a guide and norm to the court when interpreting and applying what it “deems just and proper.”319 Several have indicated that the purpose of the injunctive relief is protection of the public interest as distinct from the employer’s private interest, and have thus looked for substantial or irreparable harm to the public as the determinative factor in granting320 or withholding relief.321

The courts have recognized that the injunctive jurisdiction granted by Sections 10(1)322 and 10(j)323 is not subject to the Norris LaGuardia Act. Even though there is no express waiver of that Act for such injunctions, as there is under the earlier provision for enforcing Board orders, one court reasoned “when the Court is given jurisdiction without limitation, the Act means just that.”324 Fruitless, also, was an attack on the constitutionality of this injunctive power on the ground that it did not involve a “case or controversy” and conferred administrative functions on the courts.

317. All opinions cited in notes 315 and 316 make this recognition, but the Evans and Doud opinions contain the best discussion of this function of the Courts. See also Styles v. Local 74, United Brotherhood of Carpenters, etc., (E.D. Tenn. 1947) 74 F. Supp. 499, 501.


320. Id. at 75 F. Supp. 452; Douds v. Int. Longshoremen’s Ass’n, (N.D. N.Y. 1947) 20 LRRM 2642; Sperry v. United Brotherhood of Carpenters, supra note 316; cf. Evans v. International Typographical Union, (S.D. Ind. 1948) 76 F. Supp. 881, 886, 893 (irreparable injury to both public and private interests).


323. Ibid.

324. Ibid. The quoted statement was in response to the contention that the Norris-LaGuardia Act applied to Section 10(j) since it did not contain the phrase “notwithstanding any other provisions of the law” found in Section 10(1).
The court ruled that the granting of interlocutory relief, pending final decision of the unfair labor practice issue by the Board, was essentially judicial in character, and final and conclusive on the judicial issue of interlocutory relief, subject only to review on appeal.\textsuperscript{325}

\textbf{Substantive Rulings}

All ten cases under the mandatory Section 10(1) were brought to enjoin so-called secondary boycotts in violation of Section 8(b) (4) (A).\textsuperscript{326} The seven cases in which relief was granted all involved refusal to perform services, or inducing such refusal, where the object was to force the immediate employer to cease doing business with some other person with whom the union had a primary dispute. In three of the cases the employees struck, or were called off the job, because the employer refused to cease doing business with a non-union firm.\textsuperscript{327} In three cases employees were induced by picketing, or encouraged or directed through union channels, to refuse to handle, transport or work on the products of a plant at which a strike had been called because of a dispute on wages and conditions of employment.\textsuperscript{328} In one case the dispute arose out of a

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\item \textsuperscript{325} Evans v. International Typographical Union, (S.D. Ind. 1948) 76 F. Supp. 881, 885. Two other grounds of attack were also rejected: (1) The claim that due process was violated by granting an interlocutory injunction in a proceeding in which the court could not compel a final decision by the Board. (2) The claim that the Board had improperly delegated its power to seek injunctive relief under Section 10(j) to the regional director.
\item \textsuperscript{326} Section 8(b) (4) (A) provides as follows:
\begin{quote}
"(b) It shall be an unfair labor practice for a labor organization or its agents—(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."
\end{quote}
\item \textsuperscript{327} Douds v. Local 294, International Brotherhood of Teamsters, etc., (N.D. N.Y. 1947) 75 F. Supp. 414 (strike against express company because it leased equipment to non-union company); Douds v. Local 294, International Brotherhood of Teamsters, etc., (N.D. N.Y. 1947) 21 LRRM 2154 (refusal to transport company's goods because it allowed non-union trucking concern access to its docks; no additional injunction actually issued on ground that the one issued in the first case would be sufficient; for facts not appearing in opinion see Report of Joint Committee on Labor Management Relations, Sen. Rep. 986, 80th Cong., 2nd Sess., p. 17 (1948); Barker v. Local 1796, United Brotherhood of Carpenters, etc., (M.D. Ala. 1948) F. Supp. , 21 LRRM 2406 (union carpenters called out of department store to force it to cease doing business with non-union contractor).
\item \textsuperscript{328} LeBaron v. Printing Specialties, etc., Union, (S.D. Calif. 1948) 75 F. Supp. 678 (picketing caused employees of transportation companies
struggle between longshoremen and teamsters for the business of transporting loaded truck trailers between Albany and New York. When the teamsters threatened to interfere with plans to carry the trailers on converted LST's unless they received stand-by pay, the longshoremen sought to force the shippers to cease doing business with the truck drivers, and use LST's instead, by calling a general strike against all shippers at the Albany port. In each case temporary injunctive relief was granted, although in one case the restraining order was later dissolved when there was no longer any danger that the forbidden practices would resume.

In three cases injunctive relief was denied but without questioning its propriety when appropriate. In one the Court found it had no jurisdiction because the effect on interstate commerce was too indirect. In another the union men had been called off a construction job using non-union men prior to the effective date of the Act, and the Court ruled that the Act did not forbid a continued refusal to perform services if the initial refusal commenced before its effective date. In the third case the Court construed Section 8(b) (4) (A) as intended to protect only "neutrals" and "innocent bystanders" who are "wholly unconcerned in the disagreement between the employer and his employees." Hence, it held that the Act did not forbid a union out on strike from picketing a firm to which the employer's work was subcontracted on a much larger scale than before the strike, under the circumstances pointing to such a close alliance between the union and the employer.

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332. Styles v. Local 74, United Brotherhood of Carpenters, etc., (E.D. Tenn. 1947) 74 F. Supp. 499. The court also reasoned that the case was moot because the construction in issue had been completed, and there was no indication that similar future conduct was likely.
two firms as to prevent a conclusion that the picketed firm had no interest in the labor dispute.\textsuperscript{333}

None of the cases considered the impact of the free speech guarantee of Section 10 (c) on an injunction against picketing, but one court ruled that the constitutional guarantee of free speech was not infringed by enjoining a picket line against two transportation companies carrying goods from a struck plant.\textsuperscript{334} It reasoned that such picketing was not the mere dissemination of information but was a type of "coercion" or "forcible technique" harmful to the interests of two strangers to the labor dispute.\textsuperscript{335}

As previously mentioned, another of the opinions reasoned that placing a non-union contractor on the union "unfair" list in union headquarters is protected free speech within the terms of Section 10(c), but the decision was rested on another ground.\textsuperscript{336}

All three cases brought under the permissive Section 10(j) resulted in injunctive relief. In one, a temporary restraining order was issued to prevent an employer, who was refusing to bargain with the certified union on a group insurance plan, from putting the plan into effect.\textsuperscript{337} In another, a secondary boycott was enjoined.\textsuperscript{338} In the third, the International Typographical Union was enjoined from encouraging or directing its local unions (1) to refuse to bargain in good faith for a definite term in accordance with the custom in the newspaper industry, or (2) to refuse to incorporate any agreement reached into a written contract, or (3) to give effect to any policy which would discriminate against employees because of non-membership in the union except as permitted by the union shop provisions of the Act.\textsuperscript{339} This temporary injunction was aimed at the ITU "no contract" policy by which it sought to achieve closed shop conditions by posted conditions of employment, and at its alternative policy of entering into contracts with sixty-day termination clauses by which the same object was to be achieved.

\textsuperscript{333} Douds v. Metropolitan Federation of Architects, etc., (S.D. N.Y. 1948) 75 F. Supp. 672.
\textsuperscript{334} LeBaron v. Printing Specialties, etc., Union, (S.D. Calif. 1948) 75 F. Supp. 678.
\textsuperscript{336} Sperry v. Denver Building and Construction Trades Council, supra note 331.
\textsuperscript{338} Douds v. Local 294, Int. Brotherhood of Teamsters, etc., (N.D. N.Y. 1947) 75 F. Supp. 414, considered p. 726 supra. The petition was filed under both Sections 10(1) and 10(1).
Private Actions for Injunction

Several attempts have been made, both by employers and by unions, to secure injunctions in private actions against alleged violations of the LMRA. One of the cases brought by an employer was based on Section 303 of the Act, which makes certain union conduct, including the so-called secondary boycott, "unlawful for the purposes of this section only" and gives a cause of action for damages in the federal district court. An amendment to authorize employers to secure injunctive relief in such cases was defeated in the Senate, and the sponsors of Section 303 explained that it was not intended to authorize injunctions. Yet one federal district court issued an injunction restraining a union from picketing the plaintiff bus company's depot in an effort to force the company to deny the use of its depot to another bus company with which the union had a labor dispute. The court based its decision on the danger of irreparable harm from the violation of Section 303 for which the Act's remedy of money damages was not adequate. It by-passed the Norris LaGuardia Act by reasoning that there was no "labor dispute" between the plaintiff and the union, ignoring the broad statutory meaning of that term. The decision seems clearly contrary to the Congressional intent, and in error on its ruling as to the Norris LaGuardia Act.

Two cases brought by employers arose in a California state trial court not subject to the Norris LaGuardia Act. In the first case the court refused to enjoin unnamed violations of the LMRA, reasoning that the Act's only remedies were the filing of unfair labor charges with the Board and actions for damages under Section 303. It relied upon the legislative history above mentioned. In the later decision the same court enjoined a union from picketing in an effort to force an employer to agree to a closed shop in viola-

340. The "unlawful" conduct described in Section 303 is the same as that designated as unfair labor practice by Section 8(b)(4). It is summarized in note 360 infra.
344. Id. at 957.
345. Ibid.
346. Section 13(a), 47 Stat. 73 (1932), 29 U. S. C. § 113 (a) (1940); cf. Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc., (1940) 311 U. S. 91 (picketing stores to force them to cease buying from price cutting vendors with whom union had labor dispute held protected from injunction by Norris-LaGuardia Act).
tion of the Act. It distinguished its prior ruling on the ground that the defendant union had not complied with the filing and affidavit requirements, and was therefore disqualified from seeking any kind of remedy from the Board. Inability of the union to invoke the Act's remedies would seem irrelevant, since its remedies were still available to the employer who could file unfair labor charges against the non-complying union for violation of Section 8(b) (2).

On two occasions unions have sought to by-pass the Board and secure injunctive relief against an employer's unfair labor practices. In the first case the federal district court overruled the intervening NLRB's motion to dismiss and entered an order requiring the employer to bargain collectively, but provided that the order should terminate if the Board ruled against the union. In effect this granted in a private action the temporary relief authorized by Section 10(j) only on petition of the Board. This decision was reversed by the circuit court of appeals, which ruled that the remedies provided by the Act were exclusive, and that the only remedy for an employer's unfair labor practice is through the Labor Board. A few days later another federal district court denied injunctive relief sought by a union against an employer's refusal to bargain and other unfair labor practices, ruling also that the Board had exclusive jurisdiction.

The circuit court of appeals reasoned that the plan of the Act to establish a single, paramount administrative authority, with specialized skill and experience, to deal with the whole field of labor relationships would be defeated if more than 200 district judges were vested with powers over unfair labor practices. It noted that the omission from the amended Act of the express provision in the original Section 10(a) making the Board's powers over unfair labor practices "exclusive" was explained by the Conference

349. Simons v. Retail Clerks Union (California Superior Court, Los Angeles, 1948) 21 LRRM 2685.
352. International Longshoremen's Union v. Sunset Line & Twine Co., (N.D. Calif. 1948) 21 LRRM 2635. In this case the union frankly argued that the Court should protect it because it could not obtain relief from the Board, due to failure to comply with the affidavit and reporting requirements. The argument was not received with sympathy. In the Amazon case, supra note 351, the court noted the possibility of such use of private injunctions as added reason for denying jurisdiction to issue them.
Committee's Report\textsuperscript{354} as intended to make allowance for the temporary injunctions authorized by Sections 10(j) and 10(1) and for the actions for damages against unions authorized under Section 303.\textsuperscript{356} It added that the meticulous limitation of the injunctive power granted by Section 10(j) and 10(1) to suits filed by the Labor Board negatives any Congressional intent to grant a general power over injunctive relief to the district courts.\textsuperscript{356} It urged that to recognize such general power would virtually repeal the Norris-LaGuardia Act,\textsuperscript{357} whereas the legislative history shows no such intention but rather a refusal upon the part of Congress to authorize injunctive relief even in the limited class of case covered by Section 303, and at least one reason for that refusal was the desire to avoid a return to the abuses existing prior to the passage of the Norris-LaGuardia Act.\textsuperscript{358}

The court's position with respect to the Norris-LaGuardia Act is born out by dicta in a recent Supreme Court opinion,\textsuperscript{359} possibly uttered to set the lower courts right on the impact of the LMRA on that Act. Although the decision approved an injunction because the case involved no "labor dispute" within the terms of the Act, Mr. Justice Frankfurter took pains to deny the argument that the LMRA had removed the Norris-LaGuardia Act ban on injunctions against "what are known as secondary boycotts":

"The short answer . . . is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party."

\textit{Private Actions for Damages}

Section 301 authorizes actions for damages in federal district courts against either employers or unions for violation of collective bargaining contracts, and Section 303 authorizes actions for damages against unions for a limited class of unfair labor practices.\textsuperscript{359} In no reported cases have any judgments been entered in either class of case, and only one case reports the bringing of such an action.

\begin{footnotesize}
\begin{enumerate}
\item See 167 F. 2d at 187.
\item Ibid.
\item Id. at 185.
\item Id. at 188-89.
\item Id. at 188-89.
\item Bakery Sales Drivers Local Union No. 33 v. Wagshal, (1948) 68 S. Ct. 630, 632.
\item These may be roughly summarized as follows: (1) secondary boycotts, (2) jurisdiction strikes, (3) strikes or picketing to force recognition of or bargaining with a union when another has been certified as the exclusive bargaining representative.
\end{enumerate}
\end{footnotesize}
In that one case, the employer brought an action against the union for damages under Section 301 for calling a strike in violation of the terms of its contract, and under Section 303 for damages as a result of a secondary boycott. On motion to dismiss, the district court upheld the complaint against all attacks. Three rulings are of interest: (1) It ruled that the contract clause calling for arbitration of disputes was intended to prevent strikes, not to require arbitration of the claim for damages prior to bringing a Section 301 action, when the strike was called in violation of the contract. (2) It ruled that the application of Section 301 to a contract entered into prior to the effective date of the Act was not retrospective operation of the Act in violation of the due process clause of the 5th Amendment, but prospective in operation, giving additional remedies for future breach of existing contracts. (3) It ruled that it would not consider the effect of the free speech guarantee of the 1st amendment on the secondary boycott prohibitions of Section 303, until the evidence had established the actual operation of the Act and its impact on the particular facts of the case.

**CONCLUSION**

A report on the first eight months of operation under the amended Act would be incomplete without reference to the extraordinary burden of cases which it places on a single Board of five members in Washington. The backlog of cases is continually increasing, with the consequent delays in securing decisions, 


362. See address of Chairman Herzog, (Mar. 18, 1948) 21 Lab. Rel. Rep. (LRRM) 243, 246-47, wherein he prophesies that many months like record-breaking February, 1948, with 4,500 new cases “will soon inundate the Board in Washington.” During the first six months, 12,500 cases poured into the regional offices, consisting of 2,800 petitions for representation elections, nearly 2,000 charges of unfair labor practices, and many thousand petitions for union shop elections, amounting to 3,500 for February alone. An estimated 30,000 union shop elections are contemplated for the next fiscal year. Most union shop elections are handled through the regional offices, and Congress is now considering the elimination of these, [see, (1948) 22 Lab. Rel. Rep. (LRRM) 10] but no solution is yet in sight for the balance of the caseload. At the end of the first six months under the amended Act, 40% of the 4,000 Wagner Act cases pending when the amended Act became effective were still undecided. Ibid. On March 1, 1948, a total of 9,500 cases were pending. See dissenting opinion of Chairman Herzog, Lidden White Truck Co., (1948) 76 NLRB No. 165, 21 LRRM 1290, 1292. At the end of March, 1948, this backlog had increased to 12,150 cases. This consisted of 1,593 unfair labor practice charges, 1,845 representation petitions, 144 decertification petitions, and 7,145 petitions for union shop elections. See (1948) 22 Lab. Rel. Rep. (LRRM) 32.

363. At the end of the first six months, the General Counsel had issued complaints in only 42 of the 2,000 charges of unfair labor practices. See
both in unfair labor practice cases and in representation matters, except for consent elections\textsuperscript{364} handled at the regional level. This growing backlog of cases seems destined for further increase by the Board's assumption of jurisdiction over the retailing of automobiles,\textsuperscript{365} and the possible avalanche of cases which may descend on the Board if retailing of other commodities of extra-state origin is taken over.\textsuperscript{366} Practical difficulties due to substantial variance between the federal and state labor acts make relief through cession of power to state agencies unlikely,\textsuperscript{367} unless Congress is willing to sacrifice uniformity for the advantages of local state administration.\textsuperscript{368} A more likely alternative would be for Congress to authorize delegation of representation and unfair labor practice decisions to the regional offices, subject to some discretionary power of review in the Labor Board in Washington to insure substantial uniformity of policy. Such decentralization would insure a uniform handling of labor relations in all industries affecting commerce, and at the same time permit more rapid decisions at the local level.

address of Chairman Herzog, supra note 362 at 247, n. 21. Assuming the majority of the charges may not justify issuance of complaints, the lag is nevertheless alarming. After eight months not one union unfair labor practice case had progressed to the point of decision, though 420 charges were filed against unions in the first six months and 24 complaints issued. Ibid. Likewise, complaints are common of long delays in securing decisions on representation matters. Chairman Herzog deprecates the delays but reports the Board has found no satisfactory solution. Id. at 247.


\textsuperscript{365} Liddon White Truck Co., (1948) 76 NLRB No. 165, 21 LRRM 1290 (Herzog and Murdock dissenting because assumption of jurisdiction was "administratively unwise"); Puritan Chevrolet, Inc., (1948) 76 NLRB No. 180, 21 LRRM 1309 (Herzog and Murdock express no dissent, deciding case on authority of Liddon White case).

\textsuperscript{366} This danger seems now averted by a decision on May 13, 1948, not to assume jurisdiction over a chain of retail grocery stores operating in one state. The decision was based frankly on policy grounds, rather than on lack of effect on commerce, and the automobile cases were distinguished on the ground that none of the goods came to the grocery directly across state lines and none of its sales were made to out of state customers. Hon-ond Food Stores, (1948) 77 NLRB No. 101, 22 LRRM 1064.

\textsuperscript{367} See an excellent consideration of this question in Boudin, Supersedure and the Purgatory Oath under the Taft-Hartley Act, (1948) 23 N. Y. U. L. Q. Rev. 72, 76-79. See also authorities and cases cited note 7 supra.

\textsuperscript{368} The Joint Committee on Labor-Management Relations at present questions the desirability of amending the Act to permit inconsistent regulations and policies under state administration. See Sen. Rep. No. 986, 80th Cong., 2nd Sess., p. 31 (1948).