ality of the National Industrial Recovery Act and, it might be said, of much of the recovery legislation thus depends upon the acceptance by a majority of the Supreme Court of one of these two lines of reasoning. NORMAN PARKER, '34.

LABOR'S RIGHT TO ORGANIZE UNDER THE N. I. R. A.

Those who professed to be apostles of the faith of fully individualistic enterprise in 1928 are apostates in 1933. The National Industrial Recovery Act contemplates the alignment of American industry into trade-associations, in the hope that the united efforts of industrial leaders can bring business out of the shambles into which the excesses of fully competitive activity have led it.[1] Anti-trust laws, long indicted by industrial spokesmen as the shackles which kept business from setting its disorganized house into order,[2] are suspended within the area of approved code agreements.[3] Industrial organization is encouraged and given the government blessing. The collectivist approach to the solution of economic difficulties is definitely the working theory of the technique of recovery.

This new concert of objective has brought hope into the American economic outlook, but it has raised concomitant problems. If the newly-constituted trade-associations attain any approximation of success in coping with the excesses of unrestricted competition, it seems hardly probable that industry will ever surrender, voluntarily, the advantages which come from a measure of economic planning, through code organization.[4] The united

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[1] "The basic economic diagnosis on which the Recovery Act rests is that there are points at which it may be advantageous to restrain business competition, if our economic system is to function in a vigorous and healthy way, and that the application of some such restraints at the present time will do something towards terminating the economic paralysis, which, until recently, has held the nation in its grip." Asst. Sec. of Commerce Dickinson, The Major Issues Presented by the Industrial Recovery Act (1933) 33 Columbia Law Review 1095.

[2] See, Torbriner and Jaffe, Revision of the Anti-Trust Laws (1932) 20 California Law Review 585; Dickinson, The Anti-Trust Laws and the Self-Regulation of Industry (1932) 18 American Bar Association Journal 600.

[3] P. L. No. 67, 73d Cong., 1st Sess., sec. 5: "While this title is in effect (or in the case of a license while section 4(a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period shall be exempt from the antitrust laws of the United States."

[4] "What has really happened is that we have taken another step, declaredly for a limited time only, along the line of public policy that leads from *lais-*

fronts of the national trade associations are factors in American industrial life to which permanent adjustment must be made.

The fear is expressed that there must be some restraining influence upon these newly-encouraged industrial combinations.[5] Checks and balances, it is asserted, are as essential to industrial democracy as they are to free political institutions. One suggested means to assure a degree of economic "balance of power" is the encouragement of the development of labor unionism, so that a united front of labor may be presented as a counterpoise to the new power of the united trade-associations.[6] Vigorous labor organizations, if their activities were intelligently directed, doubtless would prove a counter-force of considerable effect. Whether American labor unionism, as present organized and led, could ever fulfill such a constructive function is a question as to which there must be considerable doubt. The N. I. R. A. did not undertake to meet the problem of fitting American labor organizations for their place in the new economic set-up. It did, however, make definite provision guaranteeing to those employed in industries organized under the Act the right to "organize and bargain collectively through representatives of their own choosing."[7] In the following analysis of those provisions of the Act which grant to labor the right to organize, it is fundamental that the background of this newly-recognized "balance of power" function of organized labor be kept in mind.

1. THE RIGHT TO ORGANIZE PRIOR TO THE PASSAGE OF THE N. I. R. A.

The history of labor organization in the United States has been a stormy one.[8] At the outset of the American labor movement, early in the nineteenth century, the common law concept of conspiracy was applied to this new situation; so as to render labor

sez faire through enforced competition and regulated competition toward regulated combination and monopoly for industry in general." Gulick, Some Economic Aspects of the N. I. R. A. (November, 1933) 33 Columbia Law Review 1103.

[5] "Against the drift towards fascism something more than the good intentions of a few officials, no matter how highly placed, will be necessary." Norman Thomas in The World Tomorrow for August 31, 1933.

[6] "Cartel organization under the N. R. A. will increase industrial feudalism, and that requires the counter-force of strong labor associations. Paul H. Douglas, lecture before the St. Louis League for Industrial Democracy, October 23, 1933.

[7] N. I. R. A., section 7(a).

[8] Frankfurter and Greene, The Labor Injunction (1929); Oakes, Organized Labor and Industrial Conflicts (1927); and Witte, The Government in Labor Disputes (1932) are among the many excellent treatments of the development of American labor law.

associations, *ipso facto*, criminal conspiracies subject to prosecution.[9] Since the decision of the leading case of *Commonwealth v. Hunt*[10] in 1840, however, the right of workers to organize for lawful co-operative activity has generally been recognized at law, in the sense that combination is not legally prohibited, as such.[11] Realistically speaking, however, the simple refusal of an employer to tolerate organization among his workers has been as complete a check to workers' organization, in the majority of cases, as any positive prohibition of law could have been.[12] No criminal indictment or contempt process can have the compelling weight of economic pressure.

Recognizing that, in view of the superior economic position of the employer, the worker's right to organize can be guaranteed fully only by restraining the power of employers to discharge those who enter into union affiliations, several of the states enacted legislation making it illegal for any employer to discharge an employee because of his membership in a labor organization or otherwise to restrain, by coercion or threats of discharge, the organization of trade unions within his business establishment.[13] Without exception, these statutes have been declared unconstitutional by the courts.[14] A similar effort of Congress in the Erdman Act[15] of 1898 to make it criminal for an interstate carrier to discharge or discriminate against an employee because of his membership in a labor union[16] was invalidated by the Supreme Court of the United States in the case of *Adair v. United States*,[17]

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[9] People v. Melvin (New York 1810) Select Cases 111. "Conspiracy is the gist of the charge; and even to do a thing which is lawful in itself, by conspiracy, is unlawful."

[10] 4 Met. 111.

[11] Nelles, Commonwealth v. Hunt (1932) 32 Columbia Law Review 1128. See Frankfurter and Greene, The Labor Injunction (1929) at pages 2-5.

[12] Eighty-five per cent of American industry was unorganized at the time of the passage of the N. I. R. A.

[13] The Wisconsin statute, for example, made it an offense for any person or corporation "to discharge an employee, because he is a member of any labor organization." Wisconsin Laws of 1899, chapter 332.

[14] State ex rel. Zillmer v. Kreutzberg (1902) 114 Wis. 530, 90 N. W. 1098; State v. Julow (1895) 129 Mo. 163, 31 S. W. 781; People v. Western Union (1921) 70 Col. 90, 198 Pac. 146; Gillespie v. People (1900) 188 Ill. 176, 58 N. E. 1007; Coffeyville Vitrified Brick & Tile Co. v. Perry (1904) 69 Kan. 297, 76 Pac. 848.

[15] 30 Stat. 424, c. 370.

[16] The tenth section of the act provided: "Any employer subject to the provisions of this act who shall . . . threaten any employee with loss of employment or shall unjustly discriminate against any employee because of his membership in such a labor association . . . is hereby declared to be guilty of a misdemeanor."

[17] (1908) 208 U. S. 161.

first, as an invasion of liberty and property under the Fifth Amendment to the Constitution of the United States; and, *second,* as beyond the power of Congress to enact, the court finding that there was no "real or substantial relation to or connection with" interstate commerce, in the provision under consideration.[18] The effect of this decision has been greatly minimized by the later Supreme Court decision in *Texas & N. O. R. R. Co. v. Brotherhood of Railway & Steamship Clerks,*[19] which upheld a section of the Railway Labor Act of 1926,[20] providing that railroad employees, in designating their representatives for collective bargaining provided under the Act before the United States Board of Mediation, should be free from the "interference, influence, or coercion" of their employers. The *Adair* case, however, has never been expressly overruled, and the present anomalous state of the Federal law on the problem is to the effect that although an interstate carrier cannot, under the Federal Constitution, be restrained from discharging or threatening to discharge his employees because of their union membership, he may be restrained from influencing them in any way, in certain of their concerted activities.[21]

In the exercise of this legally-protected privilege to discharge their workers as they see fit, employers have adopted various means of keeping their plants unorganized. The greater number have found it sufficient merely to dismiss those who are known to have formed union affiliations, and the existence of a labor surplus, except in the skilled crafts which largely constitute the membership of the American Federation of Labor, has rendered this plain expedient destructive to the hopes of the union organizer.[22] Other employers have devised the company union mechanism, in the expressed interest of a "happy industrial family."[23] The anti-union device provocative of the most controversy has been the "yellow dog" contract, by the terms of which the employee is required to agree, as a condition precedent to employment, not to become affiliated with any labor organiza-

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[18] Mr. Justice Harlan in delivering the opinion of the court asked: "But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?" The dissenting justices, however, found such a connection in the possible effects of organized labor activities upon the carrying on of commerce and a system of arbitration created to insure its continuity.

[19] (1930) 281 U. S. 548.

[20] 44 Stat. 577; 45 U. S. C. 152.

[21] See Note (1930) 40 Yale Law Journal 92.

[22] N. 12, above.

[23] Leiserson, Company Unions (1931) 4 Encyc. of the Social Sciences 123. Dunn, Company Unions (1927).

tion during the period of his employment.[24] Litigation has centered about the enjoining of labor union activity in the inducement of breaches of these "yellow dog" contracts,[25] if as contracts they may be considered at all.

Those sympathetic with the objectives of unionism have agitated for the legislative outlawry of the "yellow dog" device, but state efforts to render such agreements illegal, or unenforceable by injunction in the state courts, have uniformly, wherever tested in the state courts, met with the same nullifying reception as did the efforts to render illegal the discharge or coercion of workers because of union affiliations.[26] Prior to the N. I. R. A. the most important legislative development in the anti-"yellow dog" controversy came with the passage of the Norris-LaGuardia Anti-Injunction Act,[27] which, inter alia, deprived employers of the injunctive process of the Federal courts to restrain the inducement, by the agents of labor, of violation of the agreements under consideration.[28] The constitutionality of this Act has not yet been the subject of judicial determination.[29] New state statutes have also recently been enacted, and await judicial test in the state courts. A standard anti-"yellow dog" contract statute, prepared by the American Federation of Labor, which, as does the Norris-LaGuardia Act, declares that any "yellow dog" promise is unenforceable as contrary to the public policy of the state, has been enacted in six jurisdictions,[30] but has not yet

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[24] Note, The "Yellow Dog" Device as a Bar to the Union Organizer (1928) 41 Harvard Law Review 770; Cochrane, Why Organized Labor Is Fighting "Yellow Dog" Contracts (1925) 15 American Labor Legislation Review 227.

[25] Among the more celebrated cases are: Hitchman Coal & Coke Co. v. Mitchell (1917) 245 U. S. 229; Red Jacket Consolidated Coal Co. v. Lewis (C. C. A. 4, 1926) 18 F. (2d) 839. See Frankfurter & Greene, The Labor Injunction (1929).

[26] People v. Marcus (1906) 185 N. Y. 257, 77 N. E. 1073; Goldfield Consolidated Mines Co. v. Goldfield Miners' Union (D. Nevada 1908) 159 F. 500. Sanction was given to these typical state decisions by Coppage v. Kansas (1914) 236 U. S. 1.

[27] 47 Stat. 70 (1932) 29 U. S. C. 101-115.

[28] 29 U. S. C., section 103, provides that every undertaking whereby:

"(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or employer organization; or

"(2) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or employer organization;

is here declared to be contrary to the public policy of the United States" and "shall not be enforceable in any court of the United States and shall not afford any basis for legal or equitable relief by any such court."

[29] Christ, Is the Norris Act Constitutional? (1932) 19 Virginia Law Review 51.

[30] Arizona, Colorado, Nevada, Ohio, Oregon, and Washington.

come up for judicial consideration there. However, in an advisory opinion, the New Hampshire court held that such a bill was unconstitutional.[31]

The state of American labor law, then, at the time of the passage of the National Industrial Recovery Act, was to the effect that the law would not forbid workers' association for lawful purposes, if the workers were able to wrest the right to organize from their employers. With certain exceptions under the Railway Labor Act of 1926, constitutional restrictions would permit no effort to equalize the economic positions of worker and employer by a positive requirement that the employer refrain from coercive measures aimed at unionization within his establishment. In its creation of such a positive requirement, within industries organized under its provisions, the N. I. R. A. is a revolutionary development in American labor law.

2. THE RIGHT TO ORGANIZE AS GUARANTEED UNDER THE N. I. R. A.

Section 7(a) of the National Industrial Recovery Act[32] provides:

> "Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing,[33] and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives, or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union,[34]

[31] In re Opinion of the Justices (1933) 166 Atl. 640. See, Note, Statutory Attempts to Eliminate the "Yellow Dog" Contracts (1932). 81 University of Pennsylvania Law Review 68.

[32] P. L. No. 67, 73d Cong., 1st Sess. Approved June 16, 1933.

[33] The words following "*choosing*" in this clause were added as an amendment to the draft of the section as it came from the Senate to the House Committee on Ways and Means, at the express request of William Green of the A. F. of L., who offered the amendment, as a representative of labor. Hearings before the House Committee on Ways and Means, May 18-20, p. 117. The amendment, it will be noted, is a verbatim statement taken from the declared public policy of the United States as set forth in the Norris-LaGuardia Anti-Injunction Act. 19 U. S. C. 102. Cf. the Railway Labor Act of 1926, n. 20, above.

[34] The words "*company union*" were substituted for the word "*organization*" at the request of President Green, who declared that "this amendment would make clear and definite the real meaning and purpose of this part of the act." Hearings Before the House Committee on Ways and Means, May 18-20, p. 117.

or to refrain from joining, organizing, or assisting a labor organization of his own choosing. . . ."

Here, clearly, is an effort to accomplish through the code mechanism that which penal statutes had previously been enacted to do—to restrain the employer's economic power to coerce his workers to remain unorganized. As to the "yellow dog" contract, the Act represents a great advance over the Norris-La-Guardia Bill, in that clause (2) provides not merely a negative restraint against one method of anti-union action, but a positive prohibition against "yellow dog" agreements within the scope of those industries organized under codes. Similarly, the Federal authority, having been denied in *Adair v. United States*[35] the power to render illegal the discharge of or discrimination against employees because of union membership, now, insofar as the voluntary agreements are concerned, seeks to negotiate a trade, by which the employer waives his privilege to discharge at will in exchange for the advantages of trade association. Having voluntarily written section 7(a) into a code, employers must concede to employees the advantages of organization. Violations of this section, as of other provisions of a code, are dealt with: (1) by injunction to restrain code violations as "unfair competition" within the meaning of the Federal Trade Commission Act;[36] (2) by the penalty imposed for violation of any code provisions, occurring in a transaction in or affecting interstate commerce;[37] (3) by the reserved weapon of licensing interstate business.[38] As to employers who have voluntarily entered into codes, there would seem to be no substantial constitutional question, in the enforcement of section 7(a).

[35] N. 17 above.

[36] N. I. R. A., section 3(b) provides: "After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended. . . ."

Section 3(c) provides: "The several district courts of the United States are hereby invested with jurisdiction to present and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

[37] N. I. R. A., section 3(f) states: "When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense.

[38] N. I. R. A., section 4(b).

The scope of the N. I. R. A., however, includes more than those industries which voluntarily join into trade-associations. Section 3(d) of the N. I. R. A. provides:

> "Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has been approved by the President, the President, after such public notice and hearing as he shall specify, may *prescribe* and approve a code of fair competion for such trade or industry, or subdivision, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this article."

This provision is substantially duplicated in section 4(b), the licensing provision of the Act, which provides:

> "Whenever the President shall find that . . . activities contrary to the policy of this title, are being practiced in any trade or industry or subdivision thereof, and . . . shall find it essential to license business enterprises in order to make effective a code of fair competition . . . or otherwise to effectuate the policy of this title, and shall publicly so announce, no person shall, after a date fixed in such announcement, engage in or carry on any business in or affecting inter-state or foreign commerce specified in such announcement, unless he have first obtained a license pursuant to such regulations as the President shall prescribe."

Clearly, then, the N. I. R. A. has a mandatory as well as a permissive aspect. Industries which have never voluntarily signed a code may be required to respect section 7(a); as it is to be included not only in approved agreements and codes but also in every "code . . . agreement, and license . . . *prescribed or issued.*" The same constitutional question arises here as arises in the other mandatory features of the recovery legislation.

A reasonable interpretation would seem to indicate that the substance of section 7(a) may very possibly be imposed upon all industry. Prescribed codes are to be imposed for every trade or industry in which "abuses inimical to the public interest and contrary to the policy herein declared are prevalent." In the N. I. R. A.[39] itself, and in the statements of such of its chief

[39] Section 7(b) provides: "The President shall, so far as practicable, afford every opportunity to employers and employees . . . to establish by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment. . . ."

draftsmen as Senator Wagner,[40] it can be seen that one dominant policy of the Act is encouragement of labor organization for purposes of collective bargaining. Would not, then, the denial of the right to organize, in any business, be denominated an "abuse contrary to the policy herein declared"? To the same effect, it would seem that a denial of organization privilges by any employer would be an abuse "inimical to the public interest" within the meaning of section 3 (d), in the light of the declaration in the Norris-LaGuardia Act which defined the public policy of the United States as favorable to the objectives of labor organization.[41] It would appear that the refusal of any employer, who has not entered into a voluntary code, to concede to his workers the right to organize would, in itself, justify the President or his administrators in imposing a prescribed code or license upon the business.

We may regard the N. I. R. A., therefore, as granting secured organization rights to all workers in industries voluntarily organized under codes, and as offering a definite possibility that all employers, whether they choose to or not, may be required to concede the introduction of unionism into their establishments. As to this latter class of employers, the same constitutional point arises as is present in the other mandatory features of the Act. It would be strange, indeed, if so great a change in the labor policy of a nation had not called forth controversies as to the interpretation and as to the wisdom of the new trend.

3. CONTROVERSIES ARISING WITH REFERENCE TO THE INTERPRETATION OF SECTION 7(A).

Perhaps the most heated controversy over the interpretation of the labor section of the N. I. R. A. has been as to its effect upon the so-called open shop. This problem is of great practical importance, in the light of the expressed determination of industrial leaders not to surrender the principle of the open shop.[42] Labor leaders, in opposition, long have held the view that there can be

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[40] "All we are stating is that if the laborers so choose, they may bargain collectively." Statement of Senator Wagner in committee. Hearings before Senate Finance Committee, May 22-June 1, 1933, p. 228.

[41] (1932) 47 Stat. 70, 19 U. S. C. 102. ". . . the public policy of the United States is hereby defined as follows: it is necessary that he (the individual worker) have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment. . . ."

[42] Former Sec. of Commerce Lamont, appearing for the American Iron & Steel Institute before the Senate Finance Committee declared: "The industry stands positively for the open shop; it is unalterably opposed to the closed shop." Hearings before the Senate Committee on Finance, May 22-June 1, p. 394.

no such thing as a true "open" shop, that there must be a closed union shop, or else the employers, by granting preferences in advancement to the non-union element, and by destroying unanimity of objective among the workers, will work out what will be in practical effect a closed non-union shop.[43]

Under the N. I. R. A. the closed non-union shop is barred from all industries organized under codes. Leaders of industry contend that the closed union shop must similarly be barred. It is to be regretted that there was no express declaration in the Act as to whether the closed union establishment was intended to be barred along with the corresponding closed non-union shop. In the first draft of section 7(a), as it came from the Senate to the House Ways and Means Committee, the closed union-shop was clearly forbidden; as the section then provided that "no employee and no one seeking employment shall be required as a condition of employment to join any *organization.*" At the express request of President William Green of the American Federation of Labor, the phrase "*company union*" was substituted for "*organization*" by the House committee.[44] As a result of the House amendment, there is nothing in the act which states expressly that an employee or a candidate for employment shall not be required as a condition of employment to join a labor union. Efforts expressly to forbid the closed union shop within the individual codes were likewise rejected by the Administrator.[45] Clarification of the application of section 7(a) to the closed union shop set-up has been urged by industrial leaders throughout the country, but there has been no clear declaration of policy. President Roosevelt's statement that the section means "just what it says" was hardly helpful. The tenor of the statements of those charged with the administration of the act seems to indicate that the closed union shop is barred.[46] Labor representatives, how-

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[43] "Theoretically it (the open shop) means a shop in which men are hired, fired or promoted with no regard to their membership or non-membership in international or company unions. Actually it has meant, in most of the ununionized industries, discrimination against union members and an absolute ban on union organizers." Duffus, quoted in the New York Times, Aug. 27, 1933, Part IX at page 1.

[44] N. 34, above.

[45] The Automobile Industry attempted to provide that: "Employers in this industry may continue the open shop policy. . . ." The Administrator refused to allow this provision to be incorporated into the code.

[46] "If an employer should make a contract with a particular organization to employ only members of that organization, especially if that organization did not have 100 per cent membership among his employees, that would in effect be a contract to interfere with his workers' freedom of choice of their representatives or with their right to bargain individually and would amount to employer coercion on these matters which is contrary to the law." N. R. A. Official Release No. 625, Sept. 4, 1933. Cited in Note, 47 Harvard Law Review at page 122.

ever, in treating with employers, have refused to accept this interpretation and, as ever, are endeavoring to secure closed union shop agreements.[47]

A related problem arises with reference to the probability that the new grant of opportunity for workers' organization will lead to struggles between the existing labor associations and new organizations. It is hardly probable that the American Federation of Labor will be able, unchallenged, to maintain its near-monopoly as the labor representative of the United States. The supremacy of the Federation's United Mine Workers has already been challenged vigorously by the Progressive Miners. What will be the situation in a particular industry when two unions struggle for recognition as representatives of the workers employed? It is not stated definitely in clause (2) of section 7(a) that an employee or one seeking employment shall be required to join one labor union rather than another. However, the general declaration in the first clause that "no employee and no one seeking employment shall be required to refrain from joining, assisting, or organizing a labor union *of his own choosing* would indicate that the worker may choose the one of the two or more competing unions, which he regards as most representative of his interests. The same question will arise in conflicts between the company union and the independent (of the employer) labor union. In this situation the free choice of the workers to designate their representatives is guaranteed; as they may not be required to join the company union under clause (2).

A nice problem of administration will arise as to how to determine which union is "of his own choosing." It is evident that two unions cannot function successfully within one establishment, because successful collective bargaining requires the highest degree of united objective. In fact, the fullest advantage of the collective bargain will be difficult to obtain if there are competing unions within one industry. When an establishment includes workers who are adherents of different groups, whether the conflict is between two independent labor unions or between an independent labor union and a company union, there must be developed some means of determining which of the rival groups will be dealt with as representative, for the purposes of collective bargaining. The National Labor Board has laid down rules for the conduct of polls within establishments in which inter-union disputes have arisen, to allow the workers the privilege of determining by secret ballot, which of the rival organizations

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[47] In drafting the code for the Coat & Suit Industry, the International Garment Workers tried to insert a closed shop agreement, but it was rejected.

is to be recognized as representative. Agreements reached through mediation before the Regional Labor Boards have provided for plebiscites of this character.[48]

In these submissions to the popular decision of the workers there are problems of detail to be considered. First of all there is a question as to what is to be considered a unit for purposes of balloting. Will the workers within each particular factory vote to determine which union will be regarded as representative within that particular establishment, or will the unit include either a geographical section of the industry or the whole industry? Recalling our original consideration of the asserted value of presenting a united labor front to the united front of the trade association, it is clear that for this purpose the best unit would be the entire industry. Practical reasons, however, seem to have ruled out this approach. If the clash is between a company union and an independent labor union, the only possible unit would be the individual establishment; as the scope of the company union is limited to the one plant. In conflicts between two rival labor unions, the varying strengths of the two organizations in different sections of the country would make the submission of the union which is nationally in the minority[49] to a plebiscite within a unit which included the entire country unlikely. Consequently, in the determinations to date, the procedure has been to poll the workers within each factory or mine as to which of two rival associations will represent the labor interest in dealing with the management of that establishment.[50] Similarly there is the question, when the workers' poll is to be conducted during a time of strike, whether strikers or strike breakers are to be allowed to vote in the designation of representatives. As the wording of section 7(a) providing for representation by representatives "of his own choosing" is general, such detail will have to be worked out by those in charge of the administration of the Act.

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[48] The settlement of the St. Louis needle trades strike, reached with the aid of the St. Louis Regional Labor Board, is typical. The strike had been the result of the refusal of employers to recognize the International Ladies' Garment Workers Union as the chosen representative of the workers for collective bargaining. In the agreement finally reached, it is provided that the representatives for collective bargaining will be designated by a majority vote of the workers in each factory.

[49] Perhaps the best example of such a union is the Progressive Miners' Union, which, although powerful regionally, is greatly in the minority nationally. The submission of this group to a national plebiscite, in which the federated United Mine Workers would prevail overwhelmingly, cannot be considered seriously.

[50] See n. 48, above. The same single establishment unit was adopted in plebiscites conducted in the mining disputes to date.

CONCLUSION

Securing the right of workers' organization in section 7(a) of the N. I. R. A. is but the first step in the development of vigorous and intelligently directed labor organizations, capable of fulfilling a constructive function in the new economic set-up brought into being under the recovery legislation. Unless further steps are taken to assure a responsible labor leadership, the wisdom of providing this encouragement to labor association is open to serious question. It would require optimism of a high degree to believe that American labor organization, as present constituted and directed, could measure up to the new demands made upon it.

Labor organizations, it must be conceded, do not, at present, possess the full respect of the American public. The American Federation of Labor, with its antiquated guild organization and its exclusive racial and other requirements for membership, presents a claim to be recognized as representative of all of American labor, which is hardly worthy of serious consideration. Its affiliated unions have been too busy in carrying on their own jurisdictional squabbles to accomplish much of a constructive nature in bettering conditions of all labor in the United States. Labor racketeering, too, has been an unpleasant phenomenon of our times. A drastic overhauling of our existing agencies for collective action of workers is imperative.

The N. I. R. A., in the encouragement of co-operative action among employers provides for government participation in the formulation of objectives towards which the co-operative action is to be directed. An industrial code is a contract to which the President, representing the federal authority, is a party. There are adequate means to insure that the terms of that contract are respected by the industrial leaders. In encouraging co-operative action of labor, however, the N. I. R. A. has made no provision for government participation in the formulation of labor policies. A suggestion, worthy of serious consideration, is that of a code for labor unions, in which the same government participation in the drafting and carrying out of labor policies will be assured as is provided in the drafting of industrial codes for the trade-associations.[51]

Against arbitrary action by union leadership there is no insurance provided. A suggestion that the licensing provisions of the N. I. R. A. be deemed applicable to labor unions was summarily rejected in the hearings during the drafting of the Act.[52]

[51] See David Lawrence, A Code for Labor Unions, Too, United States News, Sept. 4, 1933.

[52] Senator Gore made the suggestion, expressing the belief that such provision would guard employers against arbitrary labor action in repudiation

The only guarantee that the collective power of the unions will be exercised constructively is the responsibility of the present union leadership, and the discretion of that leadership during the past few years has not been so exercised as to create much public confidence. Further means for guarding against arbitrary union action must be provided.

There are two other great needs in the present labor set-up. One need is for workers' organization which will represent all workers rather than a relatively small number of those more skilled. The A. F. of L., always committed to the policy of "horizontal" organization, according to crafts, may now be able to include all workers by "vertical" federal unions, or organizations on an industrial basis.[53] If there is to be a counterpoise to the power of trade-associations organized on an industrial basis, it would seem that it can come only from labor unions organized on the same basis. If the A. F. of L. cannot provide such a labor structure it will have to come from new industrial unions.

The second great need is for adequate technique in dealing with industrial disputes. The only provision under the administration of the N. I. R. A. has been for "mediation boards" which have acted with indifferent success, usually after the dispute has developed into a strike, and have settled the disputes on a compromise basis, with little consideration for the actual rights involved in the controversy. Labor disputes require the opposite technique. *Arbitration,* as distinguished from *mediation,* can give the only settlement fair to both sides in an industrial controversy. The development of arbitration agencies, equipped to give sound judgments in industrial disputes, is the necessary guarantee against the unsettling industrial effects of the strike.

Judging the N. I. R. A. labor policy by its results, we find that it has led to labor organization on a greater scale than ever before. The effect of this unprecedented trend towards unionism, however, has been the increase of strikes in equal proportion. The drive towards industrial recovery demands an environment of industrial peace. Further government action, to insure that favorable condition, is a considerable present need.

HARRY WILLMER JONES, '34.

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of agreements entered into and would "protect legitimate labor organizations" against labor racketeering. Hearings before Senate Committee on Finance, May 22-June 1, p. 16.

[53] At the last convention of the A. F. of L. held recently in Washington, the problem of "vertical" unions came up for consideration. The majority of the delegates were still in favor of continuing the present organization along "horizontal" or craft lines.