THE NATIONAL LABOR RELATIONS ACT

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THE National Labor Relations Act was framed against a background of failure to secure the enforcement of clauses (1) and (2) of subsection 7 (a) of Title I of the National Industrial Recovery Act. A bill similar to the present Act had been introduced by Senator Wagner in 1934 and an amended version of it had been reported favorably to the Senate by the Committee on Education and Labor in May 1934, but this bill had been sidetracked in favor of a compromise known as "Public Resolution 44," adopted in June 1934, for the implementation of clauses (1) and (2) of subsection 7 (a). The continuance of failure to secure general compliance from employers with these clauses, as interpreted by boards set up under Public Resolution 44, led to the introduction by Senator Wagner in February 1935 of the bill which was enacted, with some modifications, in July 1935, as the National Labor Relations Act. It was passed by the Senate on May 16, at a time when the extension of the life of section 7 (a) beyond June 16, 1935, seemed assured. Before the bill was acted upon in the House of Representatives, the decision of the Supreme Court of the United States in the Schechter case (May 27, 1935) had practically terminated the Recovery Act phase but it is unlikely that an act of the character of the National Labor Relations Act would have been passed in 1935 had it not been preceded by subsection 7 (a) of the Recovery Act.

The purpose of the National Labor Relations Act according to its title is primarily "to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce." In order to eliminate certain causes of labor disputes it makes a fundamental change in the substantive law governing industrial relations, at least in such industries or employments as can be brought under federal jurisdiction under the commerce power (except the railroads, which are under a separate Act). It is a more direct, specific and vigorous successor to clauses (1) and (2) of subsection 7 (a) and Public Resolution 44, both in statement of the law and in provision for enforcement. Its sphere is that of
law rather than that of intervention to remove disagreements between parties legally free either to accept or reject the terms or relations proposed.

I

Changes in Substantive Law

Like clause (1) of subsection 7 (a) of the Recovery Act, the new Act affirms the right of the workers to self-organization and to collective bargaining through representatives of their own choosing and denies the right of the employer to "interfere with, restrain, or coerce employees in the exercise" of these rights. It goes beyond the 7 (a) clause, however, in declaring specifically that the employer may not "refuse to bargain collectively with the representatives of his employees." It also supplements the 7 (a) language by the prohibition of specific activities on the part of the employer deemed incompatible with self-organization and true collective bargaining, and by the statutory affirmation that it is the majority of the workers and the majority alone who are given these collective bargaining rights. These three provisions will be taken up in order.

Prohibition of Refusal of Collective Bargaining.—In one sense, the right of the workers to organize and bargain collectively had long been recognized in the law; it was not unlawful for them to do these things. But the right of the workers was matched, or overmatched, by a legal right on the part of the employer to refuse to allow them to do these things while in his employ. He might,

1 Clauses (1) and (2) of subsection 7 (a) read as follows: "... (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, 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 self-organization 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 or to refrain from joining, organizing, or assisting a labor organization of his own choosing; ..."

These clauses were to be made part of "every code of fair competition, agreement, and license approved, prescribed, or issued under this title."

Public Resolution 44 confirmed the interpretation of the term "representatives" in clause (1) to include a labor organization. The National Labor Relations Act also defines "representatives" to include "any individual or labor organization." (Section 2, (4)).
legally, discriminate against workers to the point of discharge for organizing activities or even for membership in a labor organization. He had a legal right to refuse to have any dealings with any committee or organization chosen by his workers to bargain with him. If he chose to deal with his workers as a group on any matters, he could, legally, specify the way in which the representatives were to be selected and fix the qualifications for service as representative. The prohibition of interference, restraint, or coercion by the employer in either the workers' organizing activities or their choice of representatives was introduced for industry (apart from the railroads, for which the principle was established by the Railway Labor Act of 1926) in the Recovery Act of 1933.

This prohibition was not in the Recovery Bill as introduced in Congress. Clause (1) of subsection 7 (a) in the original bill stipulated "that employees shall have the right to organize and bargain collectively through representatives of their own choosing" and stopped there; it did not specifically proscribe interference, restraint or coercion by the employer. The additional language of the clause as enacted is taken from the "declaration of policy" in section 2 of the Anti-Injunction Act of 1932. It must be noted that the declaration of policy in the 1932 Act did not change the substantive law. It is a statement of the reasons for refusing the sanction of the federal courts to a contract entered into by an employee with his employer not to join a labor organization and for curtailing the issue of injunctions in labor disputes. It declares, not what is the law, but what rights it is necessary and proper that the workers should be allowed to exercise without "interference, restraint or coercion" by employers. Consequently the language employed in that section was not as specific as it might have been had Congress been enacting a statutory prohibition upon the employer or imposing upon him a statutory obligation in the way of positive action.

Whether clause (1) of subsection 7 (a) imposed upon the employer not only the negative duty of non-interference in the activities of the workers up to and through the choice of representatives to bargain for them collectively, but also, by implication, the positive duty of meeting with those representatives and
attempting to reach an agreement with them on terms of employment, was a subject of controversy throughout the life of the Recovery Act. The National Labor Board, which acted on disputes arising under this provision from August 1933 until the appointment of the National Labor Relations Board under authorization of Public Resolution 44 in June 1934, as well as that National Labor Relations Board itself, held that subsection 7 (a) imposed a positive obligation upon the employer to meet with the representatives chosen by his workers and attempt in good faith to reach an agreement with them. Both boards, however, found themselves unable, under the terms of their respective authorizations, to compel such specific performance from an unwilling employer.

It was on the recommendation of Chairman Biddle of the National Labor Relations Board that the refusal of an employer “to bargain collectively with the representatives of his employees” was included in the list of specified “unfair labor practices” in the new Act. (Section 8, (5).) Senator Wagner, the author of the bill, explained that “while the bill does not state specifically the duty of an employer to recognize and bargain collectively with the representatives of his employees, because of the difficulty of setting forth this matter precisely in statutory language, such a duty is clearly implicit in the bill.” Chairman Biddle, however, believed that because “there has been so much disagreement and confusion with respect to the employer’s duty to bargain collectively . . . this duty should be expressed in the Act.” Dean Lloyd K. Garrison, former chairman of the same National Labor Relations Board, and Mr. Edwin S. Smith, also a member of that Board (and now a member of the Board created by the new Act), endorsed this amendment.²

What this clause really means is not that the employer must bargain “collectively” (which seems a contradiction in terms) but that he must not refuse to allow his workers to bargain collectively with him if they wish. It is concerned with the form of bargaining on the workers’ side. To make it clear that the choice whether the workers shall negotiate collectively now belongs in law to the

² Hearings before the Committee on Education and Labor, United States Senate, 74th Cong., 1st Sess., on S. 1958, Part 1, pp. 43, 44, 45, 79-80, Part 2, pp. 136-8, 171.
workers and not to the employer, it prohibits the employer from refusing to deal through the medium chosen by the workers, when that choice is the choice of a majority.

Obviously this statutory prohibition upon the employer does not insure the fixing of the terms of employment by an agreement between the employer and his workers collectively. The prohibition does not extend to a refusal by the employer to concede terms acceptable to the workers. And the Act leaves the workers as free as before to refuse the terms offered by the employer. It is concerned with the form of negotiation, not with the outcome of the negotiations, with the establishment of the right of the workers to choose the channel of negotiation regardless of the wishes of the employer, not with the securing of agreements.

In this respect the National Labor Relations Act differs from the Railway Labor Act. That Act associates the duty of the employer to deal through the medium chosen by the workers with a procedure which insures an opportunity for governmental intervention to bring about an agreement on terms of employment in case direct negotiations between the employer and the workers fail to secure such agreement, a procedure which is binding on both parties. The duty of the employer to negotiate with the representatives chosen by the workers is a corollary of the duty resting upon him, and upon the workers as well, to make every reasonable effort to reach an agreement on terms without creating the necessity for governmental intervention. That duty was enjoined upon the carriers and the workers in Title III of the Transportation Act of 1920 but it was not until 1926 that the correlative duty of the employer to negotiate with his workers through an agency chosen by them without interference from him was made a legally enforceable obligation. Thus the outlawing of employer refusal to bargain with his workers collectively was developed as an essential part of a procedural system for securing agreements on terms of employment.

To be sure, the similar provision of the National Labor Relations Act is declaredly intended to remove a cause of labor disputes interrupting interstate commerce. It is also intended to facilitate the fixing of terms of employment by agreement between the employer and his employees. But it is not the resultant of a
federal system of intervention in labor disputes in industry to promote the making of agreements at all comparable to the system of intervention provided for the railroads. Nor has the passage of the National Labor Relations Act yet been supplemented by the establishment of any such system. The prohibition upon the employer stands in more immediate relation to the promotion of collective bargaining as a means of "restoring equality of bargaining power between employers and employees"³ than to the prevention of disputes over terms of employment.

Employer Domination.—A second prohibition expressly laid upon the employer in the new statute is that he shall not "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." (Section 8, (2).) The definition of "labor organization," which gives added significance to this prohibition, is extended to cover "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." (Section 2, (5).) There is a proviso that the prohibition is not to be construed as estopping the employer from allowing employees to confer with him during working hours without losing their wages for that time. "Subject to rules and regulations made and published by the Board" created by the Act "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." (Section 8, (2).)

Here again the statutory prohibition is aimed at practices which, it was contended, were forbidden by implication in subsection 7 (a). The initiation by the employer of a plan of representation for dealing on the terms of employment constituted interference in fact, it was contended, with the workers' freedom of choice of an agency for collective dealing. The employer was legally precluded, according to this interpretation, from taking any action with reference to the workers' selection of representatives prior to their selection. Further, it was his duty to deal with them, after

³ Section 1,
they were selected, as "the party of the second part" to the negotiations; it was especially contrary to the intent of the statute for the employer to pay those who dealt with him on behalf of the workers for acting in that capacity.

But this interpretation was neither accepted by employers generally nor enforced upon them. The rapid multiplication of "employee representation plans" on the initiative of employers after the passage of the Recovery Act, coupled with the insistence by employers that dealing through such a plan constituted collective bargaining within the meaning of subsection 7 (a), to the exclusion of the necessity of dealing through any other agency for the workers covered by the plan, was one of the main reasons for the introduction of the Wagner bill in 1934.

The Labor Relations Act does not forbid the employer to participate in the formation or administration of an organization of his employees, or to contribute to it financially, if it is formed for other purposes than those defined. Nor does it forbid him to set up or finance a plan of conferences with workers' representatives on such other matters. But it does make clear that no organization or system of representation in whose formation or administration or financing the employer has any part shall be used as an agency for collective bargaining on general terms or for adjusting particular grievances. The Act does not stop with declaring such organizations or plans outside the category of agencies through which the employer may not refuse to deal. It goes much farther than that; it forbids the existence of any such organization or plan in this sphere of employer-employee relations. By a combination of a prohibition upon the employer and a definition of labor organization it removes the legal possibility of the workers being asked to choose between a "dependent" organization or system of representation and an "independent" labor organization as an agency for dealing with the employer, not only for general terms of employment but in the adjustment of particular grievances.

One interesting feature of this statutory handling of the matter is the departure from accepted usage with respect to the terms "employee representation plan" and "labor organization." In the past "employee representation plans" were not generally regarded
as labor organizations in the usual meaning of that term, nor were they intended to be such by those who promoted them. As the name implies, "employee representation plans" were systems under which the employees could choose representatives from their own ranks to confer with the management on "matters of mutual interest." Generally all employees of a stated length of service were entitled to vote; there was no formal organization of those with voting rights, no "constitution" apart from the plan itself. Now, as a means of preventing the employer from forming or financing such a plan, the statute declares that an employee representation plan is a "labor organization."

Whatever overturns of terminology may be involved in the statutory definition, the purpose of the statute to "outlaw" what used to be known as "employee representation plans" is clear. They must be either shorn of characteristic features or excluded from one of the most important spheres, if not the most important, in which they were intended to function. In short, employee representation plans in the older meaning of the term are proscribed. Even if the workers wish to deal through such a plan, it is legally impossible for them to do so.

Majority Rule.—A third express declaration establishes the statutory rule that when the majority of the workers in a particular unit have chosen an agency for collective bargaining the employer shall not deal with any other set of representatives on terms of employment for workers in that unit. The statute not only states that the employer may not refuse to "bargain collectively" with the representatives of the majority but it also, in effect, forbids dealing on terms of employment with any other group. Subsection 9 (a) reads: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."
In this section the new Act follows the interpretation given clause (1) of subsection 7 (a) of the Recovery Act by the National Labor Board, and also by the National Labor Relations Board with supporting arguments derived from Public Resolution 44. But the ruling of the National Labor Relations Board was widely flouted by employers and an attempt to secure its enforcement through court action was pending when the decision of the Supreme Court in the Schechter case led to the abandonment of the suits by the Department of Justice.

What gave especial pertinence to this issue was the belief that the employer was in many cases evading bargaining in fact with an independent agency representing the majority by dealing at the same time through a medium which he himself had fostered and which was accepted by only a minority of the workers. This goes beyond the question as to which agency commands the support of the majority of the workers; the Act elsewhere provides (as did Public Resolution 44) a procedure for ascertaining which set of representatives is really the choice of the majority. (Section 9, (c).) Nor is it so much a question of whether there shall be different terms of employment for workers of the same category, in the same plant, one set of terms for the majority group and another or others for one or more minority groups—a situation which is generally conceded to be impracticable as a permanent policy—as it is a question of whether the terms which will be applicable to all shall be fixed in fact through dealings with the representatives of the majority. To allow the employer to continue to deal at all through a minority agency invites the danger that the employer may play the minority group off against the majority and so avoid real bargaining with either or that he, and not the majority of the workers, will decide through what organization or set of representatives he will deal in reality on the terms to be applied to all.

The choice of language employed to insure statutory protection to the majority in exercising their right to bargain collectively through representatives of their own choosing does not seem especially fortunate. It departs from the method of express prohibition upon the employer in favor of a positive declaration that the representatives chosen by the majority "shall be the exclusive
representatives of all the employees in such unit for the purposes of collective bargaining.” This language seems to make the representatives of the majority the agents of any who may not want collective bargaining at all as well as of those who do want it, whereas what it really means is that when a majority of the workers have designated representatives for collective bargaining these shall be the only agency through whom the employer may deal. That result might well have been achieved by adding to the prohibition of refusal by the employer to bargain with the workers collectively through representatives chosen by a majority, a further prohibition, as an “unfair practice,” of dealing on terms with any other agency for workers in that unit.4

Whatever language is employed to prevent the employer from dealing with an agency or through a plan covering only a minority in the face of a clear choice by the majority of a different agency, the fact is that the new law deprives a minority which prefers to select its representatives separately and deal as a separate group of a legal right which they previously had. This deprivation is a necessary incident of the adoption of such a prohibition upon the employer, just as the deprivation of workers who may wish to deal through representatives paid by the employer of the legal right they formerly had of dealing through such a medium is a necessary incident of forbidding the employer to pay workers’ representatives. The first deprivation does not become operative, however, until the preference of the majority is established. Thus “proportional representation” in the agency which is to deal for the workers (which was never common in American industry) is not forbidden by the Act unless and until there is a single organization or set of representatives which has a majority of the voters behind it.

The Act does not attempt to define what is an “appropriate” unit for collective bargaining, within which no minority may maintain separate representative dealing alongside collective deal-

4 The Railway Labor Act, as amended in 1934, also embodied “majority rule” in the matter of choice of representation in collective negotiation with the carriers, but its language is different. “The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.” Moreover, the Railway Labor Act treats a dispute over who are the representatives of the workers as a dispute among employees.
ing by the majority. Whether it is a craft, a department, the whole plant, or all the employees of a single employer, is to be decided by the National Labor Relations Board created by the Act. (Section 9, (b).) This gives the Board authority to compel a company with several plants to deal for all its plants with an organization which has a majority in the plants as an aggregate although in one or more of the individual plants it may represent only a minority of the workers.

It also vests in the Board the decision, in case of a dispute, whether a minority which is a majority of those doing a particular type of work is to be allowed to bargain collectively through a separate organization. This is an issue different in kind from the question whether the efforts of the majority to attain real collective bargaining shall be weakened by dealings between the employer and a minority group of workers of the same class or classes as the majority. The issue here is the right of a majority of those doing a particular kind of work to separate collective bargaining with the employer for their own kind of work, when a majority of all the workers in the plant or plants of the company decide to bargain through a more vertical type of organization, whether “outside” or “inside.” It is an issue between conflicting types of organization for collective bargaining both of which may be regional or national in scope. Heretofore a craft organization had a right to separate collective bargaining if it could induce or compel the employer to deal with it. Under the terms of the Act it no longer has that right if a majority of workers in a more inclusive unit demands collective bargaining through its organization and the Board decides the larger unit is the “appropriate” unit.

It must be noted that subsection 9 (a) does not forbid all individual bargaining on wages, hours, or other terms of employment, when a majority of the workers in “the appropriate unit” has decided for collective bargaining. The exclusive mandate given by this section to the representatives of the majority is for collective bargaining, not for all bargaining. Presumably it excludes only that individual bargaining which is necessarily in conflict with the setting of terms by collective bargaining.
The fixing of terms by collective bargaining resulting in an agreement with the employer may well leave considerable room for individual bargaining for particular terms. In the past the practice of collective bargaining has not precluded individual bargaining by workers for terms more favorable to the worker than those stipulated in the agreement. This is especially true in the matter of wages; collective bargaining for wages has for the most part been confined to minimum rates of wages, leaving the way open for individual bargaining for wages above the minimum. Presumably, individual agreements for wages above the rates set by collective bargaining are still permissible under this section.

How much room is to be left in actual practice for individual negotiation is a matter to be settled by the parties to the collective bargaining; the limits are not fixed in the Act.

To be sure, the practice of collective bargaining does considerably reduce the scope for individual bargaining. The individual is not allowed to work for less than the wage rates specified or to work more hours per day or week for his normal rate of wages than the number stipulated as the maximum to be worked without higher "over-time" rates, even if he wishes to as a means of getting more employment. This is not merely a matter of a "union obligation" voluntarily assumed by union members. Ordinarily an agreement between a union and an employer binds the latter to observe the minimum of wages and the maximum of hours, as well as other terms of employment, with respect to all his employees of the given class, not with respect to union members alone. This constitutes, of course, a limitation on individual bargaining by those who have not participated in the collective bargaining through union membership—if any such are employed. It is an incidental result of an agreement between the employer and his organized workers. It was legal for him and for them to make such an agreement before the passage of either the Recovery Act or the National Labor Relations Act. Section 9 of the latter Act takes nothing away from the individual worker which it was not legal for the majority to take from him before 1933, if it could get the employer to agree.

Whatever curtailment the Act involves of the individual worker's legal freedom to make his own bargain with the employer
flows from the prohibition of refusal by the employer to allow the majority to bargain collectively with him rather than from the “exclusive representatives for collective bargaining” provision. Presumably this prohibition compels the suspension of individual bargaining for changes in wages, hours or other terms of employment while collective bargaining on these matters is in process. How much the outcome of the collective bargaining restricts the scope of individual bargaining depends on whether an agreement is arrived at and on the terms of that agreement. The statute does not compel the making of an agreement. Of course, the Act may contribute to the making of agreements by compelling employers to deal with their employees collectively who would otherwise refuse to do so. This is undoubtedly an intended result. But how far its accomplishment can be ascribed to legal pressure as distinct from the economic strength of the workers may be difficult to determine in any particular case.

_Discrimination and the Closed Shop._—For clause (2) of subsection 7 (a) of the Recovery Act, which forbade the employer to require a worker “as a condition of employment to join any company union or to refrain from joining, organizing or assisting a labor organization of his own choosing,” the new Act substitutes a clause which forbids an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” It carries a proviso, however, that neither it nor the Recovery Act shall be construed to preclude the employer from making a “closed shop” agreement with an independent labor organization representing the majority of the workers in the particular unit. (Section 8, (3).) Neither the National Labor Board nor the National Labor Relations Board had so construed subsection 7 (a) but there were some who still contended that subsection 7 (a) “outlawed” the closed shop.

The substitution of “any labor organization” in the language of the new statute for the contrast between the “company union” and “a labor organization of his own choosing” is a return to the original wording of clause (2) of subsection 7 (a) in one respect. In the Recovery bill as first introduced, clause (2) of subsection
7 (a) forbade the employer to require any employee or prospective employee "to join any organization or to refrain from joining a labor organization of his own choosing." Nothing was said about "company unions." Apparently what the amended language was intended to prohibit was the use of a requirement to "join" a company-controlled "union" as a barrier in fact to membership in or activity on behalf of an independent labor organization. But the amendment was also intended to avoid a form of statement which might be construed as estopping the employer from entering into a closed-shop agreement with an independent union. The new statute disposes of the company-dominated union threat in other clauses, and more thoroughly. And it takes care that in returning to the prohibition of discrimination in favor of "any" organization it delivers no blow at the legality of a closed-shop contract by saying so specifically in a proviso. The clause in the Railway Labor Act, as amended in 1934, which forbids the employer "to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization" is accompanied by no such proviso.

II

ENFORCEMENT

The enforcement of the substantive law laid down in the new Act is conceived by the framers of the statute as essentially a task of preventing "unfair labor practices" by employers. All of the changes in substantive law discussed above are enacted in the form of prohibitions, except that which makes the representatives chosen by the majority the "exclusive representatives of all the employees" in the particular unit for purposes of collective bargaining. To make these prohibitions effective the statute sets up a Board empowered to issue orders to persons found by it to be engaging in any of these "unfair labor practices" to "cease and desist from such unfair labor practice and to take such affirmative action . . . as will effectuate the policies" of the Act. These orders are enforceable in the federal courts on action brought by the Board and are, of course, subject to court review.

5 In this the Act follows closely the pattern of the Federal Trade Commission Act for the prevention of "unfair methods of competition."
The new National Labor Relations Board set up by this Act, like the National Labor Relations Board established under authorization of Public Resolution 44 which it replaces, is to be composed of three persons. No one of them may "engage in any other business, vocation or employment" while serving as a member of the Board. All are "public" representatives rather than representatives of organized workers or employing interests. The members of the Board are appointed by the President, subject to confirmation by the Senate. Their term of office is to be five years and they are eligible for reappointment. The salary is $10,000 a year.

The National Labor Relations Board is the only Board with jurisdiction (except for the federal courts) over the matters with which the Act deals. It may establish subordinate agencies for the investigation of complaints, the holding of hearings, etc., but the National Labor Relations Board makes the final decisions and issues the orders. There are no other labor boards which may exercise like functions on equality with the National Labor Relations Board or interpret the language of the statute with respect to unfair labor practices. The collapse of the Recovery Act put an end to the situation in which the National Labor Relations Board was attempting to interpret and apply clauses (1) and (2) of subsection 7(a) of the Recovery Act in the face of several other boards established under codes, or even under Public Resolution 44, with authority to interpret and apply the same clauses in a different way in their particular industries without review by the National Labor Relations Board. This bill was aimed at that situation and the statute specifically provides against the restoration of any such confusion. The power given the National Labor Relations Board is "exclusive and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." (Section 10, (a).)

Unlike the former National Labor Relations Board the new Board is independent of any of the Departments of government. The first National Labor Relations Board was established by

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6 In order that all terms shall not expire simultaneously only one of the original appointees is to be appointed for five years and the other two for one year and three years, respectively.
Executive Order of the President "in connection with the Department of Labor." The Department of Labor had no right to review its findings or decisions but the Board had to report through the Secretary of Labor and did "consult the Secretary of Labor with respect to all major appointments." The members of that National Labor Relations Board, and the former chairman of that Board as well, had urged that the new Labor Relations Board be made entirely independent of the Department of Labor and in spite of the recommendation of the Secretary of Labor that it be included in that Department, 7 Congress gave the new Board an independent status in keeping with its quasi-judicial function.

The provisions of the Act which are in sharpest contrast to what had gone before are those which give the Board authority to issue orders and to go directly into the federal courts and ask for the enforcement of them by court order. The first National Labor Relations Board derived no authority from Public Resolution 44 to issue orders of any standing in the courts except in connection with the holding of elections to determine who were the representatives of the employees. In those cases it could itself seek the aid of the courts to secure compliance with its orders for the production of pertinent documents or the appearance of witnesses to give testimony under oath in the same manner as the Federal Trade Commission. But it could not issue an order enforceable by a court to meet with the representatives certified by it or to reinstate a discharged worker or desist from "interference, restraint or coercion." If its decisions were flouted in such matters it was dependent upon the willingness of the Recovery Administration to withdraw the fast-fading "Blue Eagle," or the withdrawal of government contracts by the executive departments, or the institution of a suit at the discretion of the Attorney-General, to support its decisions. If the Department of Justice took up the case, the record had to be built up again from the beginning; the facts found by the Board would have no standing until established anew by the testimony of witnesses in the trial court. Only a few such suits were started by the Department and

none had been successfully prosecuted before the Schechter decision led to their withdrawal.

The new Act gives the Board authority to issue subpoenas requiring the testimony of witnesses and the production of evidence, not only in its proceedings to determine who are the representatives of the workers but also in the investigation of and hearings on complaints of any of the "unfair labor practices" forbidden by the statute. If anyone refuses to testify or to produce evidence the Board may apply to a federal court for an order to compel him to do so under pain of punishment for contempt of court. In the hearings before the Board or its agent "the rules or evidence prevailing in courts of law or equity shall not be controlling." (Section 10, (b).)

If after the Board has issued a "cease and desist order" it finds it necessary to ask a federal court to issue an order to enforce the Board's order, the transcript of the record of the case before the Board is to be filed with the court and "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." No additional evidence is to be admitted by the court unless the party asking to have it admitted "shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board" or its agent. If the court decides that additional evidence should be admitted it is to be taken before the Board or its agent and is to be added to the transcript of the evidence; the Board may then modify its findings. All this is to prevent employers from refusing to take the Board's investigations and hearings seriously, reserving their defense for the court proceedings. To the same end the statute provides that "no objection that has not been urged before the Board" or its agent shall be considered by the court "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." (Section 10, (e).)

An appeal from an order of the Board, in whole or in part, may be taken to the court by an employer without waiting for the Board to go to the court for an order. Or any other person "aggrieved" by an order of the Board, in whole or in part, or by
the refusal of the Board to issue an order, may appeal to the court. If any "aggrieved" person appeals to the court against the Board he must file a transcript of the proceedings before the Board, certified by the Board, and the same rules hold as to "conclusiveness" and the admission of new evidence or objections. (Section 10, (f).) Whether the case comes to the court from the Board or on appeal from the Board, the court has exclusive jurisdiction (subject to review by a higher federal court) after the case gets to it; the court may affirm, modify, or deny the Board's order. However, the taking of the case to the court "shall not, unless specifically ordered by the court, operate as a stay of the Board's order." (Section 10, (g).)

Thus the final reliance for enforcement is upon an order or decree of a federal court. The order may be not only to cease a specified practice or practices but also to take affirmative action such as reinstating a discharged worker, paying wages lost through "discrimination," or "bargaining" with certified representatives of the workers. If anyone fails to comply with the court order he is liable to punishment for contempt of court. There are no penalties laid down in the statute itself for engaging in any of the unfair labor practices prohibited by the Act, to be imposed after conviction in a criminal court. Here is another turn of the wheel in labor law. The injunction and contempt proceedings, so long fought by organized labor as unfairly used in labor disputes against organized workers, are to be invoked to secure the new legal rights of organized workers. And the new statute expressly provides that the courts, in reviewing and enforcing the orders of the National Labor Relations Board, "shall not be limited" by the Anti-Injunction Act of 1932. (Section 10, (h).) When the Board issues an order the case has presumably passed out of the category of "labor disputes."

III
Prevention of Strikes

Will the new Act "diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce"? In the employments to which it can be constitutionally applied the Act should reduce the resort to strikes in certain types of cases,
if and when the constitutionality of its prohibitions and its procedure is established and its coverage is determined. But for some months to come the outstanding factor affecting the operation of the statute will be the fact that it represents an attempt to change the substantive law governing industrial relations and enforce that change in the face of opposition from many employers unwilling to accept this curtailment of their legal rights.

If the experience of the first National Labor Relations Board and of the National Steel Labor Relations Board in their attempts to exercise the limited powers given them under Public Resolution 44 to determine whom the workers wished to represent them in collective bargaining is any guide, the new Board’s orders will be met in many cases by prompt appeals to the courts to set them aside or by refusals to comply until the Board itself has secured a court order. Constitutional issues will undoubtedly be raised at every step until these have been finally passed on by the Supreme Court. And even within the limits of such constitutional authority as the Supreme Court may affirm, the orders of the Board will be subject to review by the courts on the Board’s interpretation of the language of the statute.

The primary question as to which industries or employments come under the Act is a puzzling one from the constitutional standpoint. The Board is empowered by the statute to prevent any of the unfair labor practices defined in the Act “affecting commerce.” (Section 10, (a).) “Commerce” is elsewhere limited to “trade, traffic, commerce, transportation, or communication” of interstate or foreign character. “Affecting commerce” is defined as “in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.” (Section 2, (6) and (7).) Obviously the determination by the courts of what falls within this definition of the Board’s jurisdiction will be a long process—unless the Supreme Court holds the whole Act unconstitutional.

Whether the constitutional application of “affecting commerce” be wide or narrow, the prohibitions of the Act and the “exclusive representatives” clause will undoubtedly be challenged under the Fifth Amendment as deprivation of life, liberty or property with-
out "due process of law." And the enforcement procedure of the Board will be challenged on the same ground. There is no intention here to hazard a judgment on the constitutionality of any of the provisions of the Act; the point is, objections that the Act violates the Constitution will be made, to delay or avoid compliance with the Board's orders.

Many questions of interpretation of the language of the statute will also have to be settled by court review. That is inevitable in any attempt to bring such a complicated set of relationships under statutory regulation. The application of the "unfair labor practice" prohibitions will necessitate building up a new body of case law. What is allowed and what is not will have to be "spelled out" through a line of decisions. This means a period of uncertainty and of delays in the enforcement of the law.

Apart from the delays involved in court review, the procedure laid down for the Board itself necessitates some delay before the Board can arrive at a decision and issue a "cease and desist order," or refuse one, as the facts found by the Board may require. Investigation of complaints, the holding of a hearing, the weighing of the facts as shown by the evidence, all will consume time, however much the Board may attempt to speed up the proceedings. The findings of the Board cannot be given the presumption of finality which is aimed at unless it observes time-consuming procedures which a committee without statutory powers or obligations may dispense with. And if, as seems likely, there are to be in many cases hearings before local agencies, to be followed by hearings by the Board itself before an order is issued by the Board, the delay between complaint and final action by the Board will be extended.

The delays that are inevitable in the proceedings of a Board with quasi-judicial status, together with the uncertainties and delays inherent in the indispensable subjection of the Board's orders to court review, seriously threaten the effectiveness of the Act as a means of averting strikes. Granting that eventually the bulk of the complaints brought under the Act may be disposed of without interruption of work, the fact remains that, because of the uncertainties and delays involved, the relief offered by the Act may in many cases prove an unacceptable alternative to the resort
to the strike as a means of terminating alleged unfair labor practices of the types prohibited by the statute. The Act does not require the complaining workers to await the action of the Board—and the courts—and refrain from striking in the meantime. On the contrary, section 13 specifically provides that "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

It is clear, too, that the Act does not forbid strikes to support demands which would not be sustained by the Board or which the Board has refused to sustain, as for example, a demand for the reinstatement of a worker alleged to have been discharged for union activity. The worker may not have a case which will stand up in court and yet it may seem necessary from an organizing standpoint to demand his reinstatement and even to strike to secure it. Such cases may not be common, but they are possible. Nor does the Act prevent a "jurisdictional" strike, even after the Board has decided that the "collective bargaining" for the terms on which the work in question shall be done belongs to another organization than the one striking to obtain "control" over it. In short there is nothing in the Act to prevent an organization from striking to secure what it can get without regard to the provisions of the Act.

It would seem that the changes in the substantive law embodied in the Act, if enforced, will aid poorly organized workers more than the strongly organized—and it is strongly organized workers who are in the best position to "interrupt commerce." Discrimination against a worker for belonging to a labor organization, however important it may be from the standpoint of public policy or sound industrial relations to forbid it, has been more a preventive measure against organization than a major cause of strikes of magnitude; if the employer acts speedily enough he can kill the organization movement before the organization is strong enough to defend its members by a strike. The Act may well be regarded in this respect as more an affirmation and means of enforcement of rights than a preventive of strikes.

The elimination of the dependent type of employee representation plan, commonly called a "company union," from the sphere
of dealing on terms of employment or the adjustment of grievances will remove a cause of friction which has loomed large since the passage of the Recovery Act. But this has not been an important cause of strikes where the workers were strongly organized before the Recovery Act. It has given most trouble where "outside" unions were trying to organize the workers and had not succeeded in establishing strong organizations. The Act should eliminate strikes or strike threats over the "company union" issue but it will not prevent strikes to establish independent unions in a stronger position in former "company union" territory if and when the prospects are favorable. Similarly the prohibition of refusal "to bargain collectively," together with the election procedure, may eliminate many strikes or strike threats which would otherwise be called forth by a refusal to deal with an outside union at all, but it will not eliminate strikes to secure a satisfactory agreement.

To the extent that the changes in substantive law attempted in the Act are successfully enforced, the Act may, for some time to follow, operate as an indirect cause of an increase in the number of strikes over terms of employment. If it means, as it is intended to mean, a large increase in independent labor organization following the method of collective bargaining, it may well result in an increased resort to strikes to enforce demands.

It is not meant to imply that the policy of encouraging independent organization among the workers for the purposes of collective bargaining is a mistake, or that the substantive law should not be changed in the direction of real freedom to organize and to bargain collectively. What is under consideration here is the effect of the Act in the sphere of strike avoidance. The clear that, whatever may be the merits of the substantive law, too much must not be expected of strikes, especially in the years in