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Interrelationship of Public and Private Programs In Labor Relations

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May 1-2, 1959

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Interrelationship of Public and Private Programs in Labor Relations

INDUSTRIAL RELATIONS
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Proceedings of the Spring Meeting
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Edited by Gerald G. Somers

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PREFACE

The IRRA's Spring Meetings are customarily devoted to a single central theme. In the 1959 sessions the speakers examined various aspects of the interrelationship of private and governmental activities in the field of labor relations.

Although the program could not include all areas of public-private interaction, a number of the most prominent meeting grounds were explored. In the presidential address, stress is placed on the need for combined labor, management and public action to relieve persistent unemployment. In discussing the settlement of jurisdictional disputes, the participants examine the relations between decisions of the National Labor Relations Board and the internal disputes agreements of the AFL-CIO and the building trades. The complementary and conflicting roles of public and private enterprise are discussed in the session on medical care. In appraising the administration of collective bargaining agreements, the participants discuss the competing jurisdictions of the NLRB and private grievance procedures. The final section is concerned with an analysis of the forces influencing union government and the potential role of public and private intervention in internal union affairs.

The Association is grateful to the program's participants for their prompt cooperation in preparing manuscripts and to Miss Geraldine Hinkel, whose notes taken at the meeting served as a basis for some of the published remarks. As in last year's initial publication of the Spring Proceedings, a major debt of gratitude is owed the LABOR LAW JOURNAL. These papers were initially included in the July, 1959 issue of the JOURNAL, and reprints were made available to the IRRA through the courtesy of Commerce Clearing House, Inc.

Gerald G. Somers
Editor

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The Persistence of Unemployment

By WILLIAM HABER

The author, professor of economics at the University of Michigan, is president of the Industrial Relations Research Association. In addition, Mr. Haber is a member and former chairman of the Federal Advisory Council on Employment Security.

THE business slump is over. Every economic measure but one appears to confirm this conclusion. The index of industrial production, the gross national product, retail sales, and the performance of nearly all our major industries indicates that we have passed beyond the peak levels which prevailed when the decline began in the summer of 1957. Some of the forecasts suggest that a boom of substantial proportions appears to be in the making.

The stubborn presistence of abnormally higher unemployment seriously disturbs this otherwise promising outlook. Recovery stands out sharply. Nearly 4½ million wage earners—about 6 per cent of the labor force —were still jobless when the United States Department of Labor issued its March reports.

The decline of the number of jobless in April was somewhat larger than the normal seasonal change. Even so, however, 3,627,000 remain jobless, representing over 5.3 per cent of the labor force.

To many, such a volume does not appear to be disturbing. It compares most favorably with the 7.5 per cent of a year ago. It is only about 1 per cent higher than the average for the three boom years, 1955-1957, when the over-all average was 4.3 per cent. In fact, it has been suggested that the jobless rate is somewhat exaggerated, since it is only slightly above normal. Such comparisons, however, overlook the fact that the unemployed in 1958 and 1959 have been out of work much longer than those who were unemployed in 1955; a large proportion—38.5 per cent of the jobless—have been without work for 15 weeks or more and, of 1,400,000 "long term" unemployed, about half have been seeking jobs for over 26 weeks. With every passing month the duration of unemployment for this "hard core" group increases. Joblessness is persistent, and a large proportion of the jobless have exhausted their unemployment insurance rights and their temporary unemployment compensation benefits as well.

The danger of continuing high unemployment throughout 1959 and 1960, even at only 1 or 2 per cent above the prerecession "normal," is that we may develop a hard core group of chronically unemployed people.

In spite of more-than-seasonal improvement in April, the average number of jobless for the year is likely to exceed 4 million, even if Secretary Mitchell's overly optimistic prediction of only 3 million unemployed by October, 1959, materializes. Twenty-four months after the beginning of the recession there are still a large number of labor market areas classified as having a "substantial labor surplus." It is clear that re-employment is not keeping pace with the recovery of industrial production. It is also clear that the situation is likely to prevail for some time.

Is this persistence of joblessness in the midst of recovery and prosperity of a transitional nature? Is there any solid evidence of a developing problem of chronic long-term unemployment on the national scale? Have we a substantial problem of technological unemployment, the result of automation and similar changes? Are we developing permanent pools of unemployment in certain regions or local areas?

These questions suggest themselves. The answers are not readily apparent. The statistical evidence, especially relating to technological displacement, is inadequate, and much of the problem can be seen more clearly looking backward than looking forward. The present surprisingly large volume of unemployment is the result of several factors, none of which suggest that we are

developing a serious long-term national problem of chronic unemployment.

Natural Lag in Recovery

The first element of our problem is related to the fact that unemployment usually lingers on for a considerable time after recovery. This is not the first time in our experience with recession that re-employment has proceeded at a slower pace than recovery and production. To a degree this was also true in our recovery from the recession of 1949 and again in 1954. Then, as now, production reached prerecession levels while unemployment, as a per cent of the labor force, remained considerably higher than the "normal" of the preceding period. Except when there is an exceptional burst of economic activity, the lag in the recovery of employment is quite natural. Before all those laid off are recalled, shorter hours are restored to normal. Unless there is firm confidence in the business outlook, overtime, even at premium rates, is more attractive to the employer than recalling the laid-off workers and/or adding new employees to the payroll. As a result, in many instances, those employees work full time and often overtime while thousands of furloughed employees are still waiting to be recalled. Only when recovery appears to be firm and future demand adequate does re-employment in earnest get under way.

Even then, however, unemployment remains high for at least two reasons. The net increase in the size of the regular labor force adds from 700,000 to 800,000 job seekers each year. Also, the recession is usually accompanied by considerable weeding out of excess personnel as well as substantial improvement in efficiency of operation. As a result, recovery must achieve a condition of prosperity considerably in excess of prerecession levels if the volume of unemployment is not to continue higher than before the recession began.

These considerations suggest that there is no basis for a serious expectation that unemployment will quickly evaporate. A substantial boom in production and business activity in general is essential before this will take place.

Technological Displacement

The second source of our problem is related to mechanization and technological displacement. There is no foundation for the belief that automation in any quantitative sense differs from the many technological changes which have been occurring in the past 14 years. The available statistical evidence does not provide the measure for estimating technological displacement. It is clear, however, that the unprecedented investment in industrial research and in capital improvement, including automation, makes possible prerecession volume with fewer wage earners.

In the past ten years, business invested almost $280 billion in plants and equipment. For the two years preceding the recession, such investment was being made at the rate of $35 billion a year. In addition, expenditures for industrial research and development programs were approximately $9 billion to $10 billion per year. Such investment in new plants and in more modern production techniques, as well as in research and development, is bound to lead to greater productivity per worker. This may explain in part the less rapid recall of laid-off workers when production levels reached or exceeded prerecession records. Thus, manufacturing production dropped 13 per cent during the recession (July-September, 1957—January, 1959) and then virtually recovered. Employment, on the other hand, declined 10 per cent and in March, 1959, was still 6 per cent below its prerecession level. In durable goods industries, employment was still 9 per cent below such levels. We can probably achieve 1956 production goals in steel, autos and rubber, for example, and levels of activity in railroads and other industries with considerably less-than-1956 employment in these industries. As a result, the present volume of unemployment is larger, and the problem in the short run is aggravated by technological change. It does not follow, however, that technological displacement represents a significant factor in the present situation nor that it is likely to provide the basis of a serious long-run unemployment problem. It does suggest, however, that until there is a greater advance in economic activity large enough to absorb not only the enlargement in the size of the labor force, but efficiency displacement as well, the volume of unemployment will remain high.

Distressed Areas

In the third place, the problem is seriously affected by the pools of unemployment and underemployment in distressed areas. In many areas, like those of western Pennsylvania, West Virginia, southern Illi-

nois, some textile centers in New England, and a considerable number of rural communities, the problem has been chronic and had existed for many years—even when the nation as a whole enjoyed full employment. The number of such areas is large, and the most recent addition of some of the automotive centers in Michigan to the group seriously aggravates the present jobless problem. The older industrial areas suffer from obsolescence and decay. Business located there operates under serious limitations. It would be a mistake to underestimate the drag upon the economy which arises from the unsolved problem of these local and regional problems.

Is Considerable Amount of Unemployment Inevitable?

There is a serious possibility that we may accommodate ourselves to the condition where unemployment of 5 per cent of the labor force is considered normal. There is, after all, no agreement as to what we really mean by "full employment." In 1951-1953, the average number of jobless was 2 million. Unemployment returned to the 2-million level after the 1954 recession. In 1955-1957, the average number of unemployed rose to 2.9 million, or 4.3 per cent of the labor force. Now, after the 1957-1958 recession, the number of jobless appears to be settling at 3.5 to 4 million or at 5 to 5½ per cent of the labor force. It is easy to accommodate oneself to that figure, since it appears to be a mere 1 per cent or 2 per cent higher than "normal"—a sort of post-recession normal. In the absence of a more vigorous burst in economic activity, we are quite likely to have a high volume of unemployment in 1959 and perhaps for most of 1960. A production spurt of the sort necessary to wipe out unemployment is not likely to be incurred, since our national policymakers appear to fear inflation much more than the present levels of unemployment. Unemployment may be the price we shall be asked to pay for more stable prices in 1959 and 1960. One can dispute the logic of this reasoning or its necessity, but one cannot seriously doubt that this obsession with inflation in conservative quarters has led many to believe that a considerable amount of unemployment is perhaps inevitable and may even be desirable if stable prices are to be maintained.

Our most serious danger lies in this point of view. If it persists, we will do little to deal with the problem of distressed areas and with substantial pockets of unemployment affecting older wage earners in many of our industrial centers. In time, such a viewpoint will reverse the central policy contained in the Employment Act of 1946. A United States economy with 3½ to 4½ million unemployed raises serious problems.

Conclusion

Even so, however, barring another recession, we are not likely to develop a chronic unemployment problem on a national scale. This should not blind us to the great human costs involved in the present situation. Large pockets of unemployment consisting of older wage earners in many industrial areas exist now and will continue for a long time. It will take more than the proposed depressed-area legislation before a serious dent is made in restoring these areas to economic health.

Our monthly reports on the "percentage of unemployment" obscure the seriousness of the problem. While unemployment in 1957 averaged but 2.9 million, 11½ million different persons suffered some degree of unemployment during the year. In 12 months —October, 1957, to October, 1958—an estimated 13 million different persons experienced some degree of joblessness. In all, 38 per cent of the families reported either unemployment, shorter hours, or some other setback of their financial situation which they blamed on the recession.

Since the problem is not national in scope and is highly concentrated in several states and regions, it is obvious that the methods for dealing with the problem need to be selective. Monetary and fiscal approaches do not lend themselves to dealing with stubborn local problems in distressed areas. Several steps can be taken to lighten the hardships for the jobless and to reduce joblessness. These involve action by management and labor, as well as the state and federal governments. Such steps should include increasing mobility out of distressed areas and from other centers where substantial unemployment is likely to prevail for some time. We must improve the mobility of our work force. There is substantial evidence that our work force is less mobile. During the past ten years there has been a change in labor turnover, a lower rate of accessions and especially of new hires, a lower quit rate, and greater stability. The evidence is perhaps not definitive, but there is some basis for the conclusion that our labor force is less fluid. In the past month,

hiring transactions arose from labor turnover—the need to obtain replacements—rather than from employment growth. The Bureau of Labor Statistics reports that the average monthly accession rates in manufacturing declined substantially in the last decade. There has also been a decline in the separation rate, especially in manufacturing, from 3.4 per 100 employees in 1947 to 1.4 in 1957. Even in 1955 and 1956, with high levels of employment and abundant job opportunities, it was only 1.6 per 100 employees.

The responsible factors for this decrease in mobility are not seriously in dispute. The rapid development of fringe benefits has had the effect of stabilizing employment by making both induction and severance costs a factor to be reckoned in the process of adding new workers. Home ownership, seniority rights, unemployment insurance laws which prejudice the benefit rights of wage earners who leave the area, and residence requirements for public welfare—all these have combined to discourage labor mobility.

The result of these developments is that workers who are unemployed tend to remain out of work for longer periods. A worker who has a job is deterred from leaving it not only because of local labor market conditions, but also as a result of the vested rights built up during his tenure on that job. The valleys and pockets of unemployment will remain unless we experiment successfully with programs for stimulating such mobility by authorizing the employment services to provide transportation and other costs for those who are prepared to seek jobs in more promising areas. We should implement existing provisions in some of our unemployment insurance laws and adopt measures, where necessary, to encourage the retraining of jobless wage earners who are not likely to return to their old jobs, and whose skills have become obsolescent.

The fact that nearly 3 million wage earners exhausted their unemployment insurance rights during this relatively minor recession suggests that we should increase the duration of unemployment insurance benefits to at least 30, and probably to 39, weeks. We should provide also for a national equalization or reinsurance account in our unemployment insurance trust fund in order to ease the cost burden of unemployment insurance in states with an abnormally high incidence and long duration of joblessness.

[The End]

Interrelationships in the Settlement of Jurisdictional Disputes

By DAVID L. COLE, Arbitrator

JURISDICTIONAL disputes still challenge the authority of the parent labor body. This is an old ailment. The American Federation of Labor suffered from it for half a century. There have been formal and semiformal arrangements within departments of the AFL, and the executive council has repeatedly taken action and made rulings. Yet there were such disputes that remained unsettled for decades. The story is a familiar one, and a mere reference to a few illustrations will suffice: There were, for example, the feuds between the Brewery Workers and the Teamsters, the Woodworkers and the Carpenters, the Machinists and the Millwrights (Carpenters), two of which lasted for 40 or 50 years despite all efforts to compose them. On at least three occasions the Carpenters withdrew from the building trades department in protest against unfavorable decisions in jurisdictional disputes, and they were not alone in following this course. The Bricklayers and the Electrical Workers took similar action. Perhaps the most unfortunate feature is that such withdrawals or threats of withdrawals sometimes resulted in reversals of positions or decisions and materially undermined the ability of the federation to cope with these problems.

Despite the setbacks suffered in the handling of such disputes, the AFL and later the CIO have continually maintained that only the parent bodies should undertake to resolve them—that such determinations should not be made by government. It is interesting to note how tentatively the law moved[1] when the public demand for relief became insistent and legislation was enacted, largely in the 1940's. In New York the law designed to protect the public from the impact of jurisdictional strikes nevertheless provided that the state labor relations board should not interfere in intrafederation disputes. This statutory rule remained in force until 1957, when an exception was written in which substantially weakened it.[2] The National Labor Relations Board, in its earlier days, as a matter of policy dismissed representation cases in which affiliated unions were contesting one another, but it subsequently relaxed this position and tended merely to cooperate with the federation to a greater or lesser degree.[3] A number of states adopted laws which by one device or another sought to restrict the right to strike, boycott or picket because of a jurisdictional dispute, but seldom was any means provided for settling the dispute. The underlying thought apparently was that when unions are denied the freedom to use self-help, they will have to look to their parent body for assistance in overcoming their differences. Despite such laws and even the pressures of wartime, some organizations held firm to their conviction that their interest in such matters is of such vital importance as to transcend all other considerations.[4] In the quarrel between the Machinists and the Millwrights, although the AFL had ruled some 25 years before that the work was in the jurisdiction of the Machinists, the Carpenters continued to contest; in 1940 an indictment under the antitrust laws was returned against the Carpenters, at the behest of Thurman Arnold, which the Supreme Court dismissed in the familiar *Hutcheson* case.[5] Although a form of agreement between the AFL and CIO was entered into in 1943, to arbitrate jurisdictional claims between their respective affiliates—which on the whole worked well—when a dispute arose at the Kaiser shipyards AFL unions which had entered into what were alleged to be prehire agreements with the employer, prevented the government board from acting on the dispute by persuading friendly members of Congress to attach a rider to the appropriations bill forbidding the use of any of the appropriated funds on complaints then more than three months old. Thus, the dispute was effectively outlawed.

The Taft-Hartley law followed a series of hearings in which a great deal of attention was devoted to the subject of jurisdictional disputes and to the insistence that something be done about them. In his State-of-the-Union message in January, 1947, President Truman urged corrective measures to protect the economy from the effects of these rivalries. During this period not only were the customary work-assignment disputes between craft unions continuing unabated, but the rivalry between the AFL and CIO unions was at its height. These involved bitter organizing and election campaigns, efforts to dislodge one another in whole or in part even after certification or recognition by the employer, carve-outs and whatever else occurred to imaginative leadership. Each federation was inclined to consider a victory for one of its affiliates as an important accomplishment, so that there was more than the mere urge on the part of the several unions to enlarge their membership or broaden their industrial coverage.

Nevertheless, the statutory provisions included in the new law were only halting in nature. In representation disputes the Board could conceivably exercise a certain amount of control by its determination of the appropriate bargaining unit, by the scope of the contract bar rule, and by allowing or disallowing carve-outs. But in the numerous struggles over the assignment of work, little of an effective kind was provided in the law. True, Section 8(b)(4) made it an unfair labor practice to demand that certain types of work be assigned only to members of particular crafts or unions, but this requires the filing of a charge to this effect before the Board may proceed. In Section 10(k), moreover, we see again an inclination to let the parties adjust these conflicts by voluntary methods. This, because of vagueness and uncertainty, has led to a twilight zone where the rules are at best fluid and indefinite.

[1] Millis and Katz, "A Decade of State Labor Legislation," 18 *University of Chicago Law Review* 282 (1948).

[2] New York State Labor Law, Sec. 705(3), amended April 28, 1957, Ch. 1034.

[3] Contrast *Seventh Annual Report, NLRB,* p. 54, and *Twelfth Annual Report, NLRB,* p. 8.

[4] For a discussion of the motivations in jurisdictional disputes, see Cole, "Jurisdictional Disputes and the Promise of Merger," 9 *Industrial and Labor Relations Review* 391.

[5] *U. S. v. Hutcheson,* 3 LABOR CASES ¶ 51,110, 312 U. S. 219.

The Board has deemed it to be its function principally to say what kind of private procedure will be required before it processes an unfair labor practice charge under Section 10(k). Its position seems to be that the private agreement must be binding on both of the contesting unions and on the employer as well. The Board, however, in such an unfair labor practice case will merely decide whether the respondent union is free to strike or take other action in support of its demand to have work assigned only to employees within the coverage of that union. It will not decide which union is entitled to the work. This is so despite the ruling of the United States Court of Appeals for the Third Circuit in *United Association of Journeymen*[6] that such a determination should be made by the Board.

In any event, by the Board's rule jurisdictional disputes of the kind arising under the no-raiding agreement would not have to be processed privately before the Board takes action, since the employer is not a party. Moreover, unfair labor practices subject to Section 10(k) are confined to the work-assignment category and do not apply to raiding disputes. Accordingly, the Board's position as to raiding disputes has been on the timid and uncertain side. It has cooperated with the umpire and with the AFL-CIO, to the extent of withholding initial action for 30 days when such a dispute comes before it, to afford the federation the opportunity to handle it under the procedures of the no-raiding agreement. If this time is insufficient or if either party declines to abide by the decision of the umpire, the Board will proceed as though there were no such agreement.

Indeed, in one case decided by the umpire, when the successful union went into the federal court to enforce the umpire's award, the Board sought to intervene as *amicus curiae* to oppose enforcement as contrary to public policy, on the theory that this would restrict the employees' freedom of choice of bargaining representative. The district court and, subsequently, the United States Court of Appeals for the Seventh Circuit[7] ruled against the Board and ordered the award enforced, relying on Section 301 of the Taft-Hartley Act as construed in the Supreme Court's opinion in *Lincoln Mills*.[8]

Parenthetically, the view that private or voluntary procedures for the settlement of jurisdictional disputes are contrary to public policy in that they restrict the freedom of employees to select or change their bargaining representative overlooks several cogent features. It does not give sufficient consideration to the value of overcoming the troublesome and long-standing problem of such disputes. It ignores the public policy in favor of minimizing or eliminating the wasteful practices that result from such conflicts, as well as the protection to which the employer and all other concerned parties are entitled once the representative has been selected. Such a view, moreover, is inconsistent with the Board's contract-bar rules and with the permissive union security provisions of the statute, both of which also restrict the employees' freedom of choice.[9]

The experience under the no-raiding agreement has been an interesting one. Bearing in mind the opposition over the years to the various attempts to restrain unions engaged in defending what they conceive to be their jurisdiction or their members' job rights, sometimes referred to as their "sovereignty,"[10] together with the active warfare between AFL and CIO unions for almost 20 years, it was no surprise that the unity committee in 1954 limited itself in the no-raiding agreement strictly to raiding cases. It did not dare, realistically, to go beyond this. The agreement is simple. All signatories promise not to interfere either directly or indirectly with the established bargaining relationship of any other signatory. An established bargaining relationship exists where there has been certification or where the employer has recognized the incumbent for at least one year. While 104 unions immediately became signatories, several large and important labor organizations declined to do so.

The narrow scope of the no-raiding agreement may be seen when it is compared with the CIO organizational disputes agreement, the AFL internal disputes plan, and the plan of the National Joint Board for the Settlement of Jurisdictional Disputes in the Building Industry. Since David Stowe, the umpire under that agreement, will discuss the CIO agreement and Louis Sherman, counsel for the International Brotherhood of Electrical Workers, the building industry plan, I shall not go into any detail as to them. It is

[6] 32 LABOR CASES ¶ 70,585, 242 F. 2d 722.
[7] *UTWA v. TWUA (Personal Products Company)*, 35 LABOR CASES ¶ 71,742, 258 F. 2d 743 (1958).
[8] 32 LABOR CASES ¶ 70,733, 353 U. S. 448.
[9] See Aaron, "Interunion Representation Disputes and the NLRB," 36 *Texas Law Review* 846 (1958).
[10] Aaron, "The California Jurisdictional Strike Act," 27 *Southern California Law Review* 237.

significant to note, however, for the purposes of comparison, that the CIO agreement regulates rivalries in organizing attempts as well as raids and sets forth several criteria to be applied to such disputes. The purpose of the national joint board, which is tripartite, is to minimize disruptions of work over disagreements as to the assignment of work, relying on prior decisions and on private agreements which it seeks to induce.

The AFL internal disputes plan is the broadest of all. It deals with all manner of interunion disputes—work assignment, organizational and raiding—and disputes are determined by reference to charter grants or to prior decisions within the AFL or by arbitrators or tribunals, the customary jurisdiction of each union, and any agreements pertaining to jurisdiction.

It is interesting to note that these plans all started in 1948 or later, that is, subsequent to the Taft-Hartley Act. The CIO program is now administered as an activity of the industrial union department. The national joint board has continued to function substantially as it had since its inception. The AFL plan, however, has largely been absorbed into the expanded no-raiding program.

As indicated, the no-raiding agreement predated the merger. The agreement, however, was incorporated by reference into Article XVIII of the constitution of the AFL-CIO, as well as into the merger agreement. Moreover, Article III, Section 4, provides:

"The integrity of each such affiliate of this Federation shall be maintained and preserved. Each such affiliate shall respect the established collective bargaining relationship of every other affiliate and no affiliate shall raid the established collective bargaining relationship of any other affiliate. When a complaint has been filed with the President by an affiliate alleging a violation of this section by another affiliate, that has not been settled under the provisions of the No-Raiding Agreement referred to in Article XVIII, the President shall endeavor, by consultation with the appropriate officers of both affiliates, to settle the matter by voluntary agreement between such affiliates. In the event no such voluntary agreement is reached within a reasonable time the President shall report to the Executive Council with such recommendations as he may deem appropriate. Upon such report being submitted, the Executive Council shall consider the same, shall hear the appropriate officers of the affiliates involved, and shall make such decision as it believes to be necessary and proper to carry out the provisions of this section. In the event an affiliate shall fail to comply with such decision, the Executive Council shall submit the matter to the convention for such action as the convention may deem appropriate under the provisions of this constitution."

On February 6, 1958, the executive council adopted a resolution holding that this provision of the constitution makes the principle of the no-raiding agreement applicable not only to the signatories, but to all affiliates of the federation. Thereafter all complaints of violation of this section of the constitution were to be processed under the procedures of the no-raiding agreement, except that the umpire would make recommendations in such cases as distinguished from the binding decisions he makes as between signatories to the agreement. The resolution also included this language:

"In the event a complaint is filed with the President by an affiliate alleging that another affiliate has refused to abide by a decision of the umpire administering the No-Raiding Agreement or the recommendations of the umpire administering the No-Raiding provision of the Constitution, the President of the AFL-CIO shall endeavor, by consultation with the appropriate officers of both affiliates, to secure forthwith compliance. In the event compliance is not obtained, the President shall promptly report to the Executive Council. Upon such report being submitted, the Executive Council shall consider the same, shall hear the appropriate officers of the affiliates involved and shall make such decision as is necessary to insure compliance with the decision or recommendation as the case may be."

Perhaps a greater step forward was taken by the executive council the same day, when it resolved that Article II, Section 8, and Article III, Section 4, of the constitution lead to the conclusion that "basic principles of trade union morality require that no affiliate of the AFL-CIO should engage in a boycott or similar activity of goods or materials manufactured or processed by employees represented by another affiliate of the AFL-CIO," and stipulated that charges of violation of such obligations shall be settled under the no-raiding provision (Article III, Section 4) of the constitution. This has been understood to mean that such disputes also go ultimately to the umpire for recommendations, but not for final decision.

The no-raiding agreement was extended for two years in 1955 and again in 1957. There are still only 104 signatories. By coincidence, 17 of the original signers have not executed the latest extension, but 17 other unions have become parties since 1954. Several of the original signatories could not sign the 1957 extension. Some have merged, and there have been some expulsions from the federation. Among the remaining nonsigners are some major unions. Generally, it is fair to say they have declined to bind themselves because some particular rival has not done so. There are some, however, which have smarted under unfavorable decisions or which hold that there is some advantage in remaining out of the agreement.

It is difficult to estimate the total number of disputes that have arisen under the no-raiding agreement as enlarged by the executive council resolution of February, 1958. Certainly, the number is not less than 300. Most have been resolved in the mediation step, which must take place before a case is referred to the umpire. The umpire has decided 59 disputes, aside from several more which were settled at the hearings. Of these 59, 39 were in the form of binding decisions and 20 were recommendations under the executive council resolution. Nine cases have been submitted on charges of boycott, and recommendations have been withheld pending receipt of briefs.

On the whole, considering the traditionally emotional approach to such problems, compliance has been good. It was somewhat better in the earlier stages than it has been recently. One union withdrew from the federation because of adverse rulings. Another has threatened to do so and two others have refused to respond either to offers of the officers of the federation to mediate or to the umpire's notices of hearing. Two or three unions tend to employ the procedures primarily for tactical purposes in connection with special feuds they have.

Despite the setbacks, which were to be expected, the number of raiding disputes going to the NLRB has declined sharply. This is the best indication of the progress made. In 1953, the last full year before the no-raiding agreement was made, there were filed with the Board, in cases of the kind in question, 823 petitions involving 240,323 employees. By 1957 the number of such petitions had dropped by over 67 per cent and the number of employees involved by over 92 per cent.[11]

Making Procedures More Effective

There remain three steps to be taken to make these voluntary procedures more effective:

The first is for the executive council to square the constitutional proposition in Article III, Section 3, that each "such affiliate shall retain and enjoy the same organizing jurisdiction in this Federation which it had and enjoyed by reason of its prior affiliation with either" the AFL or CIO, with the protection of established bargaining relationships provided for in Article III, Section 4. It is strongly and indignantly maintained by some organizations that the two are incompatible, and that when priority is given to the no-raiding principle this undermines their traditional jurisdiction and tends to lower the standards of their industry or craft. The argument, when advanced by a craft union, urges that the boycott of prefabricated products or of items not put together by members of the given union is a job protection device no different in purpose from the protests of industrial unions against the contracting-out of work its members are capable of performing. Oddly, this type of argument has not been made only by craft unions. In a recent case, one of the old-line industrial unions maintained with great vigor that it is the recognized bargaining representative in a certain industry and that to permit another union to continue its established bargaining relationship would simply lower the standards and impair the practices which have been developed in this industry and would be contrary to the principal laid down in Article III, Section 3, of the constitution.[12]

The second important step to be taken again involves the executive council and perhaps the next convention of the AFL-CIO. What is to be done about a union which refuses to comply? This problem is primarily one arising under the constitution, for the court in the *United Textile Workers* case demonstrated that decisions under the no-raiding agreement are enforceable, and Section 8 of this agreement anticipates that the successful party may institute actions to compel compliance. The more critical question is what to do about nonsignatories who will not comply. Expulsion is a very harsh and undesirable remedy. The creation

[11] As revealed by a study not yet published by George Brown of the AFL-CIO.

[12] *IUE v. Sheet Metal Workers,* Case C-56-59 (1959).

of an atmosphere in which compliance will be taken for granted would be much more desirable. This in turn is related to the third step about to be discussed.

To make the internal procedures of the labor movement effective, it seems necessary that the NLRB be directed by the Labor Management Relations Act to give full faith and credit to whatever determination the federation or its authorized agencies may make in jurisdictional disputes. This applies to work-assignment and representation disputes, both of which have been responsible for creating instability in labor relations and for causing the loss of untold man-hours of work. State and federal agencies have experimented with means of cutting down jurisdictional disputes, but there has never been a clean-cut legislative mandate, except in some limited area, to enocourage the parent body to resolve such matters as the final authority. As stated, the Board's policy has shifted over the years, and the most that can now be said is that the Board suffers the existence of such private procedures.

If recalcitrant unions were put on notice without equivocation that the Board's doors are closed to them once the federation has ruled on their jurisdictional dispute, the inevitable result would be much greater respect for the processes of the federation and much less inclination to disregard them. This should apply to any other voluntary tribunal which the parties set up for this purpose, and the Board should seek to support such efforts rather than to find means of holding their decisions ineffective. Certainly, the best stage at which to conclude such disputes is in mediation. The dispute would then not grow into a grim and relentless kind of controversy, and the flexibility possible in the mediation step would unquestionably be of mutual benefit. For example, in at least two cases before the no-raiding umpire, the only finding possible was that one of the unions was guilty of violating the no-raiding principle. The employees nevertheless had built up a good deal of sentiment in favor of displacing the incumbent. This created a situation much to the liking of unions not in the federation. In both cases the Teamsters stepped in and took over. Nothing could be done about this in the proceeding before the umpire, but in a family discussion at the federation this could have been anticipated and probably avoided.

Any attempted revision of the Labor Management Relations Act will undoubtedly include serious re-examination of the organizational picketing and secondary boycott provisions. Frequently, these techniques are used in connection with jurisdictional rivalries, so that to the extent that certain types of jurisdictional disputes are rejected by the Board, and the attendant activities outlawed, the objective of cutting down such picketing and boycotts will be achieved. It may be added that this would most likely be with the blessing of organized labor.

There does not seem to be any good reason why disputes of this kind should be kept within the Board's jurisdiction if solutions can be found in the house of labor itself. They are family quarrels; if the setting can be so arranged that they will occur more rarely, so much the better. For the Board they have been troublesome cases and have added a heavy volume of work. The time and effort devoted to them could be put to better advantage.

In any event, the hand of the federation would be considerably strengthened by the proposed legislation. Its private views expressed during mediation would carry far greater weight, and any decision which would have to be made under its procedures would have a far better chance of being observed.

The merger agreement between the AFL and CIO stipulates that means will be formulated for combining the CIO organizational disputes agreement, the AFL internal disputes plan and the no-raiding agreement. Although it is almost four years since merger, this formulation has not yet been undertaken. Apparently, the initial adjustment pains are still being felt, and the federation does not deem it wise to challenge further at this time the member unions which continue to have such strong feelings on the subject of jurisdiction.

This is not meant to deprecate the efforts of the federation in this area. Starting with a limited promise to protect only established bargaining relationships of AFL and CIO unions against one another on the basis of voluntary agreement, the federation now holds in effect that adoption of the constitution amounts to an extention of this principle to all member unions, regardless of their former affiliation. It has also held that the boycott of goods produced by members of other affiliates is simply a form of raiding in violation of the constitutional prohibition. These are long and courageous steps, in light of the bad history of jurisdictional activities and the intensity of feeling on the subject.

One is struck by the similarity between the reservations contended for by some unions with respect to the federation's handling of jurisdictional disputes and that of the United States when it agreed to submit to the jurisdiction of the Permanent Court of International Justice but only when the United States itself decided the court might exercise the jurisdiction.

It is safe to say that the introduction and development of constructive measures to obviate or, at least, to minimize such disputes is one of the major activities of the federation.

This is not an easy undertaking, and it deserves the encouragement and support of government. **[The End]**

The Organizational Disputes Agreement, Industrial Union Department, AFL-CIO

By DAVID H. STOWE

The author is umpire, Organizational Disputes Agreement, IUD, AFL-CIO.

THE AGREEMENT governing organizational disputes was adopted by the Congress of Industrial Organizations in October, 1951, to meet the growing problem of two or more industrial unions seeking to organize the same employees. Competing organizational campaigns were not only confusing to the employees concerned but, on occasion, were disruptive of the employer's business. Further, these competitive drives were often detrimental to the unions involved, in that in many instances, after a long and expensive campaign, the result was that either a third union or no union won the election. At the time the organizational disputes agreement was adopted, all except two of the CIO unions agreed to be bound by its terms.

The CIO machinery has functioned successfully from the outset. This success is due to a number of factors. Foremost among them are (1) the clear understanding, on the part of those who drafted the agreement, of the complexities and subtleties of the problem they were seeking to solve, (2) the avoidance of rigid rules and the adoption of broad criteria which permit the optimum of latitude and flexibility to the disputes arbitrator in resolving the particular problems in each situation, (3) the exceptional skill of the first disputes arbitrator, George W. Taylor, during the early days of the agreement, together with the complete cooperation of Allan S. Haywood, the director of organizations of the CIO, and (4) the unfailing support given to the program by the officers and executive board of the CIO, with the result that the enforcement of decisions under the agreement never became a problem.

Following the merger of the AFL-CIO, the administration of the organizational disputes agreement was placed in the industrial union department, AFL-CIO. This change of administration has not resulted in any significant change in the operation of the program nor in the number of signatory unions. At the time of the merger, the original signers of the agreement were afforded opportunity to withdraw if they so desired. None did. Recently, the industrial union department executive committee extended an invitation to former AFL unions now in the department to become signatories. To this date none have signed the agreement.

Thus far 126 cases have been processed under the agreement. Thirty-eight of these required a decision by the arbitrator; the remainder have been settled in the steps preceding arbitration.

The organizational disputes agreement has two major aspects:

The first is the simple and absolute no-raiding rule. Section 1 of the agreement states:

"Each of the parties hereto agrees that it will not attempt to organize employees in

any plant or property as to whom any other party hereto has been recognized by the employer or has been certified by the NLRB as the collective bargaining representative and that disputes involving a claim of violation of this principle may be processed at the instance of any party thereto, or the Industrial Union Department of the AFL-CIO, under the procedures set forth in paragraphs 4 and 5 of this agreement, provided, however, that in any case arising under this paragraph the jurisdiction of the Arbitrator shall be limited to the enforcement of this paragraph."

Charter and customary jurisdictions are irrelevant in an alleged raid situation—there are no "ifs" or "buts." The disputes arbitrator is specifically limited, in a case where raiding is found to exist, to the enforcement of the "no raid" principle.

There have been only three cases involving the no-raid provision. In two cases the evidence clearly revealed a raid, and the arbitrator directed the raiding party to withdraw. In the third case the raiding charge was not sustained, and the case was decided under the organizational rights provisions in Section 5 of the agreement.

The second and most frequently utilized part of the agreement is that which provides for the determination of organizational rights in situations in which no signatory union has been recognized or certified in the plant and where two or more signatory unions are claiming the right to organize the employees.

It is to be noted that reference is to organizational rights and not to jurisdiction. The disputes arbitrator does not determine jurisdiction. Jurisdiction is determined by the charter grant of the union or by the executive board of the parent organization. It is the function of the arbitrator to determine which union has, under the particular facts of the case, the superior claim to organizational rights in a particular plant.

The procedure for determining organizational rights under the agreement is divided into two parts: The first is the mediation process; the second is final and binding arbitration. These are separate and distinct procedures. The mediation proceedings are conducted by officers of the IUD. The arbitration proceedings are conducted by the disputes arbitrator.

The machinery of the agreement starts to function when one or both of the parties to a dispute request the director of the IUD to invoke the organizational disputes agreement. Each union is then called upon to designate their representatives who meet and attempt to resolve the dispute. While settlements are occasionally reached at this first step, more often the resolution of the problem occurs at the second step of mediation. Here, under the auspices of the director of the IUD, international officers of the parties—usually the president or the secretary-treasurer—meet and consider the case. At this step, the number of disputes resolved is quite high. Of the 126 cases which have been processed, 88 have been settled in the mediation processes.

The position of the men participating at this second step often enables them to take a more objective view of the dispute than is possible at the local level, where the conflict most often originates. But mediation can work only if the mediator possesses a status comparable to that of the representatives of parties and one which will command their respect. A large measure of the success of the IUD program can be attributed to the active interest which the IUD director has taken in the proceedings and to the constant support he has given to those who represent him as mediators.

If mediation fails, however, either party or the IUD may refer the case to the disputes arbitrator. It should be noted here that if the time is limited because of an impending NLRB election or for other valid reasons, the mediation steps may be omitted and the dispute referred directly to the arbitrator. This provision of the agreement not only permits expeditious handling of a dispute when an early election date has been set by the Board, but also permits the director of the IUD to send cases to arbitration when it appears that one or both of the parties are engaging in deliberate delaying tactics. The NLRB is currently under pressure to speed up its election processes; any time that the Board accomplishes this speed-up, I feel that the organizational disputes program has the necessary flexibility to keep pace. It is the intent of the agreement and the stated policy of the IUD not to permit tactics or maneuvers which would subvert the purpose of the agreement by removing the issues to another forum. In the event one party fails to appear at the scheduled arbitration proceedings, the arbitrator is authorized to take testimony ex-parte and to reach a decision on the basis of the facts available.

Under the language of the agreement the arbitrator is charged with the duty

of determining the dispute "on the basis of what will best serve in the interest of the employees involved and will preserve the good name and orderly functioning of the Industrial Union Department of the AFL-CIO." In reaching a decision, the disputes arbitrator shall:

". . . give due consideration to all of the relevant facts and circumstances including the following where he deems them relevant: (1) The charter or customary jurisdiction of each of the unions involved. (2) The extent to which each of the unions involved have organized: (a) the industry, (b) the area, (c) the particular plant involved. (3) The ability of each of the unions to provide service to the employees involved."

As was mentioned earlier, one of the outstanding features of the agreement is the flexibility permitted the arbitrator. The arbitrator is not confined to a consideration of the specific criteria. He may consider any and all facts he deems relevant. The specific criteria need be considered only to the extent that such factors appear relevant to the decision in the circumstances of a particular case.

By avoiding restrictive limits, the agreement provides the arbitrator with the "elbow room" which is often necessary in reaching a reasonable decision in complicated situations. In the complex industrial pattern of today, with many plants having a great variety of end products, jurisdictional claims based on charter rights are not as clear or as controlling as one might expect. Often, both unions are able to show a reasonable claim to jurisdiction based on their respective charters. It is obvious that in such a situation factors other than charter jurisdiction will be determinative. However, in cases where one party can show a clear claim to charter jurisdiction and the other party cannot, charter right will normally prevail unless the evidence reveals compelling reason to override the charter claim. This has occurred in at least one case.

More often the evidence reveals that the factors set forth in the criteria are so nearly in balance that the determination must rest on facts not specifically included in the listed criteria. In other cases the clear weight of one or more factors in favor of one party will be controlling.

Because of the interrelation of the listed criteria and other relevant facts, it is virtually impossible to analyze the decisions and arrive at any "box score" as to the relative importance of any single factor in winning decisions under the agreement.

The wide degree of discretionary latitude permitted the umpire by the organizational disputes agreement rests upon the foundation of voluntary participation which underlies the agreement; affiliates of the IUD are not compelled to sign or remain signatories to the instrument. Arbitration of interunion disputes, like arbitration in other areas, works best when the disputants themselves sincerely desire settlement, by a third party, of their disagreement. A superficial acceptance of mediation and arbitration procedures can be coerced by threat of sanctions, but true cooperation and compliance are not easily obtained. Unwilling participants in a disputes settlement procedure can be expected to confront the arbitrator with challenges to his authority and with efforts to limit severly his jurisdiction.

The broad authority which has been given the umpire under the organizational disputes agreement evidences the strong desires of the individual signatory unions to end all forms of interunion conflict and also their refusal to compromise with nonsignatories who may seek something less as the price of their participation. This is the strength of the organizational disputes agreement, and a source of its success.

[The End]

KEEP COSTS AND PRICES DOWN!

In a speech before the American Assembly at Harriman, New York, Secretary of Labor James P. Mitchell said: "Higher profits or higher wages, resulting in higher costs and prices that consumers won't pay, mean that some people may pay with their jobs." He urged both labor and management to keep these points in mind:

(1) Increases in labor costs for the economy as a whole ought to be so related to improvement in productivity that increases in price levels will not result.

(2) Workers and union leaders must be more concerned about real wages, not merely money wages.

(3) Management must recognize that it is not always possible to take the easy way out of passing along all cost increases to the customer.

The National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry

By LOUIS SHERMAN

The author is chairman of the Legal Advisory Committee, Building and Construction Trades Department, AFL-CIO, and is the general counsel of the International Brotherhood of Electrical Workers, AFL-CIO.

IN CONSIDERING the problem of interrelationship between the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry and the National Labor Relations Board, it is advisable to make a clear distinction between jurisdictional disputes involving work assignments and jurisdictional disputes involving representational rights. The former type of dispute relating to work assignments involves contests between trades or callings over which employees shall perform the particular work. The latter type of dispute relating to representational rights involves contests between unions as to which shall represent the employees who are doing the work. The national joint board is concerned solely with work-assignment disputes.

The board consists of an impartial chairman, Richard J. Mitchell; four regular and four alternate employer members; and four regular and four alternate employee members. There is an equal division in number among the employee members between the basic trades and the specialty trades. The employer members are also equally divided between the association of general contractors and the associations of specialty contractors.

Under the rules of procedure of the joint board, the contractor makes the initial assignment of the work. In making such assignment, he is supposed to follow four guide-posts, and in this order: decisions of records and agreements published in the "Green Book," interunion agreements and memoranda of understanding, trade practice and area practice.

Under the agreement establishing the board, it is the responsibility of the union to remain at work and to process complaints over jurisdictional disputes in accordance with the procedures of the joint board. The board receives notices of work stoppages, protests of work assignments and requests for job decisions. Prompt notification is given by the joint board to the international union, which may have a local union engaged in a work stoppage, with the request that the agreement be honored. Decisions on substantive jurisdictional disputes are made ordinarily on a job basis. The facilities of the joint board have also been utilized to work out many agreements on jurisdictional disputes between international unions. In such cases, there is consultation with the affected contractor groups.

The national joint board was established by an agreement which first became operative on May 1, 1948. At that time, it was known as the "board of trustees." Professor John T. Dunlop of Harvard University played an important role in the formulation of the original agreement and was the impartial chairman of the board until he was succeeded by Richard J. Mitchell in 1957. There has been general recognition of the outstanding performance of this joint board. It has succeeded in formalizing the machinery for the settlement of jurisdictional disputes, reduced the number and duration of such disputes and effected settlements of long-standing controversies through the medium of agreements between international unions.

In the general field of labor relations it has become increasingly necessary to perceive the interrelationship between the economic facts and the law. Legal decisions which are made on the basis of doctrinal positions unrelated to economic realities tend to become meaningless ritual. The

beneficial or detrimental effects of such decisions can be the product of accident resulting from the verbal elaboration of the applicable ritual. The extension of law in the field of labor relations in recent years is a substantial fact which must be taken into account in evaluating the economic realities of labor relations. Of importance, therefore, both to the economists and the lawyers who are called upon to assist in the making of decisions in this field, is the interrelationship of economic facts and law in this area.

The principal provisions of law applicable to jurisdictional disputes involving work assignments are contained in the two following sections of the Taft-Hartley Act. Section 8(b)(4) states that "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 a 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: . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . . .

Section 10(k) provides: "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

The national joint board is an agency of "agreement" within the meaning of Section 10(k) of the act, and has operated in this capacity. The relationship between this agency of agreement and the National Labor Relations Board, a government agency, is complex. I shall select three aspects of the problem of interrelationship between these agencies under the law.

Suppose the parties in the jurisdictional dispute are bound by the joint board agreement. They participate in the proceeding but one party is dissatisfied with the decision of the joint board. Should that party be able to secure a redetermination of the dispute under the Section 10(k) procedure? The NLRB in the *A. W. Lee, Inc.* case, 113 NLRB 947, decided that under such circumstances a Section 10(k) determination was not appropriate. It quashed the notice of hearing in that case and thereby gave a legal support to the joint board's decision, with full recognition of the effect of the agreement between the parties calling for a decision by the joint board. Obviously, if a losing party could have a second chance in another forum, the result would be adverse to the first forum in terms of its general prestige and its decision-making process.

Suppose that the parties are bound by the agreement, participate in the joint board proceeding, and the losing union refuses to comply with the joint board's decision. Should all NLRB administrative processes, including enforcement proceedings be quashed? The NLRB, in the case of *Acoustical Contractors Association of Cleveland,* 119 NLRB 1345, decided that although no Section 10(k) hearing may be called for, the board is nevertheless empowered to maintain its enforcement procedures against the union which strikes under these circumstances. The NLRB decision in this case, which is by way of dictum, has the beneficial effect of providing an additional support for the joint board's decision of the jurisdictional dispute.

Suppose the joint board has made a decision of the substantive issues in the jurisdictional dispute, and the employer claims successfully that he is not bound by the agreement. Should the NLRB proceed to make a substantive determination in a Section 10(k) proceeding? Under these circumstances, the most sensible interrelationship would appear to envisage a substantive determination of the jurisdictional dispute by the Board. The procedures of the joint board specifically provide for the giving of expert testimony in the NLRB proceeding by the chairman or other members of the joint board. Presumably, the NLRB decision under Section 10(k) would be in accordance with the rulings of the joint

board unless such rulings were arbitrary, unreasonable or capricious.

The consequences of the failure of the National Labor Relations Board to make a substantive determination of the jurisdictional dispute in these circumstances should be considered. If the private procedure is not available because of lack of agreement, and if the Board refuses to make a substantive determination under Section 10(k), the result will be to confirm a unilateral right in the employer to make the work assignment which cannot be disputed. The illusory advantages of such a unilateral determination of work assignments may induce employers who are not concerned with the historical experience of this industry and its long-range welfare to abandon the agreed-upon procedure for settling jurisdictional disputes. The consequent disruptive effects would neither be in the interest of the industry nor of the public.

The question arises whether the recommended interrelationship can be effected under the law. The position of the NLRB appears to be that its function in a Section 10(k) proceeding is limited to ascertaining the usually undisputed fact of "to whom" the employer has assigned the work in question. After announcing this fact, the Board then concludes that it is unlawful for the other labor organizations to engage in economic activity having as an object the transfer of the disputed work. This determination is, of course, identical with the issues in the Section 8(b)(4)(D) proceeding.

The NLRB appears to rest its position on the proposition that if it were to make a substantive determination of the dispute it would be taking an action inconsistent with the act's prohibition of the "closed shop."

It is apparent that the controversies in these matters are between trades or crafts and that there is nothing in a Section 10(k) determination which requires the union representing such trade or craft to have an illegal closed-shop agreement. Indeed, the difference between objective qualifications for work in a given craft and union membership has been explicitly defined by the Board, in other connections, in its *Mountain Pacific* decision, 119 NLRB 883. Furthermore, the refusal of the National Labor Relations Board to determine disputes under Section 10(k) has been judged to be illegal by two United States Circuit Courts of Appeals. (*NLRB v. United Association of Journeymen and Apprentices of Plumbing and Pipefitting, Locals 420 and 428,* 32 LABOR CASES ¶70,585, 242 F. 2d 722 (CA-3, 1957); *NLRB v. United Brotherhood of Carpenters and Joiners of America,* 36 LABOR CASES ¶65,012, 261 F. 2d 166 (CA-7, 1958)). The judicial view of the matter is based upon the detailed legislative history of Section 10(k) of the act and the common-sense reasoning that Congress did not intend the Board to engage in two administrative proceedings, each of which deals with the same subject and issue.

The Third Circuit has stated its view in this matter as follows:

"We do not believe that Congress intended to require judicial enforcement to be preceded by successive administrative determinations of the existence of a particular unfair labor practice. The preliminary Section 10(k) determination must have some different function. The scheme makes sense only if the first hearing under Section 10(k) is concerned with an arbitration type settlement of the underlying jurisdictional dispute, so that a subsequent Section 10(c) unfair labor practice adjudication becomes necessary only if a union shall fail to respect the jurisdictional boundary which the Board has delineated."

In this connection, it should be noted that the effect of a 10(k) determination, under the court's view of the law, would not be the imposition of a legal requirement on the employer to assign the work in accordance with the National Labor Relations Board's determination. Such determination would serve only to distinguish between allowable and prohibited economic activity by labor organizations.

The NLRB has not changed its position on Section 10(k) because of these circuit court decisions. Nor has it applied to the Supreme Court of the United States to reverse such rulings. There can be little doubt of the importance of the question of whether Section 10(k) should continue to be read out of the act. It would appear that the Board should either accept the rulings of these circuit courts of appeals, or secure a final ruling from the Supreme Court.

A final disposition of this matter would serve to complete the otherwise excellent development of the interrelationship between the national joint board and the NLRB. **[The End.]**

[On the next page the transcript of the general discussion which followed the presentation of the Cole, Stowe and Sherman papers is published.—Editor.]

General Discussion

David Cole: There is the question of whether the NLRB should or should not take as binding determinations of the joint board. In recent years it has been customary for courts to enforce arbitration awards. What is the objection to having the National Labor Relations Board observe and enforce the decisions made by supposedly competent tribunals in areas of jurisdictional disputes? What distinguishes these from other disputes?

Louis Sherman: Perhaps the difference may be in terms of decision and language. There is no objection to the idea of legal enforcement of arbitration; it's the same as the enforcing of a contract. As to the merits of the NLRB's enforcing of the decisions of a private body, the NLRB does not enforce contracts, but makes decisions in certain areas of law. Under Section 10(k), they would decide jurisdictional disputes, but they could not delegate that power and ratify the decisions of a private body. Obviously, a governmental agency facing that kind of an issue could take the joint board's decision into account and give heavy weight to it. Perhaps the rule could be that the decision of the private body should not be set aside unless it were arbitrary, unreasonable or capricious. The difference is principally a matter of language.

David Stowe: This is a perplexing problem. Where you have the work-assignment issue, the Board is really deciding the right to organize. The notice must come to the loser to withdraw from the ballot. You get into the problem of individuals expressing organizational right in the case of a first certification of a union. While it doesn't completely say they must choose these or nothing, it does mean choice between two signatories.

Mr. Cole: The obligation of the Board to enforce the law is no different from that of courts to enforce other statutes or contracts. Courts accept arbitration agreements. [Direct question to Louis Silverberg:] What is there about the ritual of the NLRB that makes it ignore rulings of other boards —for instance, the *Textile Workers* case, where the United States Court of Appeals for the Seventh Circuit, in Chicago, ordered the Textile Workers to withdraw its petition?

Louis Silverberg: Dave Stowe makes the charge that the NLRB suffers the existence of this agreement. Lou Sherman says why doesn't the NLRB administer the law—jump in and arbitrate! Dave Cole indicates that in the early days of the National Labor Relations Act the Board stayed clear of internal union fights. This isn't quite so. In the early days of the act, the Board's procedure was not quite formalized, but there was a standing arrangement with the AFL whereby the Board would be notified of AFL v. AFL representation disputes. In a large number of cases, the AFL succeeded in resolving its disputes. In a good number of cases, the AFL did let the Board know informally that it would be best if the NLRB resolved the problem.

This problem is much more complicated than is indicated. In the *Textile Workers* case, the union argued that the AFL-CIO constitution's no-raiding agreements were not contracts enforceable at law; the NLRB had the exclusive job of resolving these disputes. The union also argued that it was mandatory under the act for the NLRB to resolve this representation question. The union made much of the element of the desires of the individual worker. Several months before that, in another case, *Munsingwear,* there was the strange situation in which the same union argued that the constitution was a binding contract, that the very existence of the house of labor was at stake, and that the Board should not intervene; the same attorney was later making conflicting arguments in the Seventh Circuit case. The parties thus sometimes take an opportunistic approach to their particular problems. The Board feels that, having given private machinery a chance to operate and solve problems, if that does not suffice, it is mandatory for the Board to conduct the election.

In the Seventh Circuit case, the union which prevailed argued that the no-raiding agreement was a contract and the other union should be restrained. The "raiding" union had filed a petition for an election. The Board, in the early stages, sought to intervene in the court case because of the pending representation petition. The court felt otherwise, on the grounds that this was a private contract and the government was not properly in the picture, so the Board never was a party to this case. In its ultimate ruling, the court directed the union to withdraw its petition from the NLRB. The Board at no time had an opportunity to have itself heard in that proceeding. In permitting this withdrawal, the Board indicated that in future cases such withdrawal will not be granted unless the Board is given an opportunity to participate in the earlier proceeding. Thus,

the Board is trying to keep the door open in future cases.

Dave Cole appeared to indicate that it would be well taken if, in the amendments to the NLRA, some thought were given to the change in the picketing and secondary boycott conditions so that labor would not be plagued by these interunion jurisdictional disputes. I think this would be a great mistake.

Milton Derber: I wonder whether members of the panel might comment on what seems to me a more complicated jurisdictional problem—the fight between industrial and building unions over maintenance and repair work. This is not only an interunion dispute, but one that concerns a manufacturer and a contractor. What kind of machinery can cope with this?

Mr. Cole: In general, I think these questions were covered. I'll ask Lou Sherman to comment.

Mr. Sherman: With due deference to the importance of this issue, the national joint board has nothing to do with it in its concern with the settlement of jurisdictional disputes. Derber's question concerns a dispute between groups of unions. I think the question is primarily one of procedure. The first place to resolve it is in the internal procedures of the labor movement. My recollection is that an interunion agreement was reached, but that argument continued over the status and scope of that agreement. Although an agreement had been reached between the industrial union and the construction and building trades departments, the United Steelworkers took the position that it was not bound by the agreement. Its position was that the agreement between two departments did not apply to a particular union until the union itself affirmed the agreement. With respect to what you do about it if the departments can't come together and agree, Dave Cole commented that the provision in the AFL-CIO constitution regarding integrity of the organizing jurisdiction of the various unions should be given consideration in terms of the protection of their collective bargaining relationships. When negotiations were undertaken between the AFL and the CIO, it was the AFL which emphasized a procedure under Article 3, Section 3, relating to organizing procedure. George Meany read an amended version of the constitution, but the unity committee rejected it. It was offered by the AFL but rejected by the CIO at the very beginning of the merger.

Mr. Derber: Do you think your own situation could have worked as successfully if the contractors were not involved in that machinery?

Mr. Sherman: I think the participation of the contractors in the work of the national joint board has been helpful, although these disputes are principally between trades in the building and construction industry. In the work of the joint board there are documents which the contractors participate in administering, but these go back to the basic agreements between unions.

Mr. Cole: In conclusion, it might be noted: Don't take too seriously the outcry of the losing party. Jurisdictional disputes are a long, plaguing ailment.

ANTITRUST LAWS TO APPLY TO UNIONS

Unions today enjoy a general immunity from the federal antitrust laws. This is a result of court interpretation, according to Congressman Bruce Alger, Republican of Dallas, Texas. ". . . and [they] are free to restrain trade in a manner which would subject similarly acting employers to severe legal penalties." Congressman Alger has introduced a bill designed to protect small businessmen and the public by applying the principles of the federal antitrust laws to unions.

"If elimination of competition and artificially fixed prices are harmful to the public," said Congressman Alger, "what difference does it make whether they come about through collusion among manufacturers or as a result of union coercion of employers? The damage to our economy is the same."

The bill would make it unlawful for any union to enter into any arrangement, voluntary or coerced, with employers or other unions which would lead to product boycotts, price-fixing and other types of restricted trade practices. This bill would not restrict local unions in their proper organizational activities or in the use of their traditional economic weapons that enforce whatever wage demands they seek.

THE INTERRELATIONSHIP OF

Public and Private Health and Medical Care Programs

By HERMAN M. SOMERS and ANNE R. SOMERS, Haverford College

This paper was presented by Herman M. Somers before the IRRA meeting in Boston. He is a member of the executive board of the Industrial Relations Research Association.

IT IS NEWS TO NO ONE that the private economy accounts for the lion's share of health and medical care expenditures in the United States. However, it frequently appears to occasion surprise that public expenditures in this area are as large as they are and now constitute nearly one fourth of the total. Out of a total of $20.5 billion spent for these purposes in fiscal year 1957, private expenditures accounted for $15.5 billion, and public expenditures, $5 billion.

Within the private sector it is necessary to distinguish between direct personal payments by consumers—out-of-pocket expenses—and expenditures made through health insurance or some other prepayment mechanism. Here, again, the facts are at variance with popular mythology. In spite of the phenomenal growth of voluntary health insurance during the past two decades, especially in terms of enrollment, it accounted for less than one fifth of all health and medical care expenditures in 1957. Over half is still paid directly by consumers.[1] In other words, consumers are paying out-of-pocket for health and medical services over 2½ times as much as is being paid through health insurance (including the estimated $1.5 billion paid by employers for such insurance) and over twice as much as they are paying through tax-supported programs.[2] In fiscal year 1957, direct payments amounted to $10.4 billion and private health insurance to $3.2 billion.

Significant changes have been taking place during the past three decades. In 1929, public expenditures accounted for about 14 per cent of the total. The proportion rose rapidly until the end of World War II, after which it remained relatively stable at about one fourth of the total. Direct expenditures have been in steady, relative decline—from about 80 per cent in 1929 to 57 per cent in 1950 and to 51 per cent in 1957. The change in insurance expenditures has been most dramatic, jumping from less than 1 per cent in 1929 to 10 per cent in 1950 and 19 per cent in 1957.

It is important to remember that these shifting relationships have all taken place within the framework of a constantly expanding over-all total, an expansion which brought a sixfold increase in total expenditures between 1929 and 1957 and which has proceeded throughout this period at an average annual rate of about 6 per cent, considerably greater than the growth of gross national product. In such a context the public and private medical economies cannot be viewed as deadly rivals for a relatively fixed amount of the consumer's medical dollar. It is clear that both sectors have increased greatly in absolute terms and relative to the rest of the economy, whatever the alterations in their relation to each other. A persuasive case could be made for the proposition that in this, as in other areas of the economy, the growth of each has aided rather than impeded the other.

[1] A third category of private expenditures—philanthropy, especially for hospital construction, and in-plant health services—accounted for about 6 per cent of the total. For all 1957 data, see I. C. Merriam, "Social Welfare Expenditures in the U. S.—1956 57," *Social Security Bulletin*, October, 1958, p. 28.

[2] These figures include all expenditures for health and medical care except medical education. If the comparison is limited to expenditures for *personal* care only, excluding research, construction of facilities and community public health activities—which together account for about 10 per cent of the total—the proportions are not significantly different. On this basis the percentages for fiscal year 1957 were: public—22 per cent; total private—78 per cent; insurance—18 per cent.

It clearly suggests the possibility of a continuing mutually supporting and sustaining relationship between the two sectors rather than a situation where one can thrive and expand only at the expense of its "competitor." It is this assumption of continued over-all growth—an assumption firmly founded upon an analysis of the major characteristics of both the supply and demand aspects of the medical care equation [3]—which makes it possible to predict that the future pattern of United States medical economics will continue in the typical American pluralistic tradition, although the balance of emphasis may be periodically shifted.

The trends of the past decade indicate that both public medical care and private health insurance programs are likely to go on expanding. Direct personal payments, however, are almost sure to continue their relative decline with an increased proportion of out-of-pocket expenditures being channeled either through voluntary health insurance or public programs or, most likely, a combination of the two. The evidence indicates that there are few remaining Americans who are willing to bleed and die for their inalienable right to pay their medical bills all by themselves on a fee-for-service basis. The vast majority of us prefer to share these costs with our neighbors or fellow workers and *especially* with our employers, through insurance or taxes. The direct personal payment figure will continue its historic decline about as fast as insurance carriers and/or public administrators can devise acceptable mechanisms for permitting transfers of this category of expenditure into the other two classifications.

For example, in respect to hospital services, where it has had its most extensive growth, insurance now accounts for over 60 per cent of total private expenditures. By contrast, at the other extreme, costs of drugs and dentistry are just beginning to be met in some small degree through insurance. These categories each account for about one fifth to one fourth of the consumer's medical dollar. Extension of insurance coverage to include dental care and/or prescribed drugs—a possibility now being actively explored in several quarters—would result in further rapid alteration in the relations between direct payments and insurance. Similarly, a more vigorous extension of health insurance—either public or private—to the aged, about 60 per cent of whom now have no health insurance of any type, will cause a further relative decline in direct payments and a gain for the other categories.

II

The direction and degree of relative growth of the private and public sectors can be most reliably gauged by the predominant trends of the past two decades, particularly in the private area. It is almost axiomatic in American political life that government is permitted to do only what private institutions cannot or will not do. The central question is, thus, as to the degree to which private health insurance can succeed in meeting the growing demand for medical care, for gradually but certainly the view has taken hold in this country that health protection, through adequate medical care, is a basic civic right.

There is no time here to review the vast amount of data on the American experience with private health insurance.[4] Here we can only suggest a few significant summary generalizations:

(1) The over-all achievements of voluntary health insurance have been spectacular. It has played a substantial role in making possible a larger amount of better medical care for more Americans than ever before in our history.

(2) While the data suggest that enrollment is beginning to reach the limits of current feasibility, over one third of the civilian population remains with no health insurance of any sort.[5] The great majority of enrollees have only hospital-surgical protection. Only about 5 per cent of the population are enrolled in plans which provide comprehensive physicians' services, although the recent growth of "major medical" coverage is attempting to cope with this deficiency. The excluded are generally characterized by self-employment, advanced age, low income, or rural residence, as well as higher-than-average medical needs and costs. Because for the vast majority enrollment is

[3] See Herman M. Somers and Anne R. Somers, "Private Health Insurance; Changing Patterns of Medical Care Demand and Supply in Relation to Health Insurance," *California Law Review*, August, 1958, pp. 376-410.

[4] See, for example, Herman M. Somers and Anne R. Somers, "Private Health Insurance; Problems, Pressures and Prospects," *California Law Review*, October, 1958, pp. 508-557.

[5] "Voluntary Health Insurance: 1953 and 1958," *Progress in Health Services* (Health Information Foundation, May, 1959), p. 2. The actual enrollment ratios for 1958 were as follows: hospital—65 per cent of the population; surgical-medical—61 per cent. The corresponding figures for 1953 were 57 per cent and 48 per cent.

an attribute of employment status, because most individual policies are of a limited "term" character and because even in group policies there is frequently a maximum money limit leading to cancellation, the protection for many enrollees may prove at least partially illusory.

Even more important is the distinct possibility that some of the very forces which helped to accelerate the upsurge in coverage may now impede further expansion and, possibly, even lead to some decline. The commercial carriers, which now lead the field, achieved their primacy largely through differential or experience rating whereby they could pick off the better risks by offering them more favorable rates than could the community plans, like Blue Cross, with flat rates for all types of risks in a community. In this the carriers had the enthusiastic support of many unions and managements which simply sought maximum benefits at minimum costs to themselves.

The result is that Blue Cross and other community carriers are now being forced to adopt experience rating, through which they, too, must discriminate against the aged, those with serious chronic conditions, and other "poor risks." Not only is the opportunity for additional coverage thus retarded, but members of such groups already covered may begin to be priced out of the private health insurance market. Only a reversal of the trend to experience rating could give voluntary health insurance the opportunity to provide the nongroup population, or even some of the smaller groups, with anything like adequate protection—or perhaps even to assure the maintenance of all present enrollment.

(3) Even for enrollees, health insurance is meeting only 25-30 per cent of their total medical costs.[6] The revolution of rising expectations, in large part spurred by health insurance itself, has clearly made the typical hospital-surgical coverage appear inadequate, with rapidly growing consumer dissatisfaction.

(4) The rapid growth of indemnity plans, as opposed to service plans like Blue Cross and especially as compared to comprehensive group practice plans such as the Health Insurance Plan of Greater New York (HIP), has meant that the opportunity for taking advantage of available methods of cost control, quality control, the efficiency and economies of large-scale organization, and improvements in productivity, have been largely forsaken. Indeed, the major barrier to the insurance industry's capacity to meet the demand for more comprehensive coverage lies in the fact that the preponderant indemnity pattern permits very little control over the prices charged by vendors in a scarcity maket marked by oligopolist pricing practices, very little control of overutilization (the consumer is not the sole source of overutilization—overtreatment by physicians can be quantitatively just as serious), and no control over quality. The resulting price inflation and uncontrolled costs make it improbable that comprehensive protection can be provided through present patterns.

(5) For a variety of reasons, the majority of union and management purchasers of group contracts have been resistant to comprehensive service plans, although in some cases they may have had little choice.

For such reasons, and others which could be cited, it appears that while voluntary health insurance will undoubtedly continue to grow, at least for the immediate future—the extent depending upon the reforms the carriers and vendors can effect against their own internal deficiencies—nonetheless, pressure will increase for some public means to bail them out of cost difficulties, to fill in the large gaps they leave open or to underpin them in some other fashion.

III

While we have suggested that the growth of the private and public sectors can be, and should be, complementary and therefore peaceable, it is quite unlikely that the development will be smooth. There are, in the medical field, perhaps more built-in sources of conflict between public and private enterprise—and even within the private sector itself—than in most other aspects of the economy.

In the first place, there is the tradition of ideological conflict going back to the legis-

[6] The only nation-wide surveys of health insurance benefits in relation to family medical expenditures have been made by the Health Information Foundation. Its 1953 survey found that insurance paid about 19 per cent of total medical costs of insured families (O. W. Anderson and J. J. Feldman, *Family Medical Costs and Voluntary Health Insurance* (McGraw-Hill, 1956), p. xiii). In 1957, Dr. Anderson estimated that the proportion had risen to 25 per cent or more ("Issues in Voluntary Health Insurance," *Proceedings, Industrial Relations Research Association, 1957*, p. 117). The results of a 1958 resurvey should be available before the end of the year.

lative battles over the first national compulsory health insurance proposals during World War I and greatly intensified by the bitter debates of the forties over the successive Wagner-Murray-Dingell bills. Animosities bred in the heat of those battles still smolder and erupt at any signs of advancement by the so-called "adversary." The medical societies see in every proposal, however moderate, for government to fill in some interstices or even to bolster the private medical economy, the camel's nose under the tent leading to "socialization" of the profession, whatever that may mean. There are doctrinaire advocates of national health insurance who proclaim each advance of voluntary health insurance, like the recent innovation of "major medical," as a form of public deceit and a "prostitution of the medical profession to private profit," whatever that may mean.

Popular journalism usually deals with the question of governmental participation in health and medical affairs as if it were solely an issue of national health insurance. Such delusion or misrepresentation has seriously interfered with sober consideration of dozens of pressing issues. It is, for example, exceptionally difficult to deal objectively with the basic problem of medical personnel shortages and the closely related financing of medical education—prerequisites to successful medical care programs under either private or public auspices. Although the private carriers have a tremendous stake in effective personnel expansion as a cost factor, they, too, appear trapped by the obsolete slogans.

The prospects for reconciliation are not good in the foreseeable future. However, it may be hoped that growing experience with the many interactions developed in recent years may provide a higher degree of sophistication and tolerance on both sides.

Another difficulty lies in lack of appreciation by the insurance industry that public and private programs can be mutually supportive in their growth despite the positive experience with both survivor and retirement insurance. The feeling—so familiar to classical economics with its "lump of labor" concepts—that there can only be competition for a fixed quantity still prevails. This is illustrated at the moment by the conflict over the proposal to add limited hospitalization and, perhaps, surgical and nursing-home benefits to the Old-Age, Survivors, and Disability Insurance program (Forand bill). The carriers appear to believe that this would cut off a portion of their own business, yet there is ample evidence that such legislation could take the carriers "off the hook" of unprofitable poor risks, allow them to furnish a better product for their logical clientele, and take much of the sting out of present attacks on the inadequacies of private health insurance. It could also open the path for expansion of private health insurance by making the sale of supplementary programs more attractive, as in the case of life insurance and pension programs.

Similarly, the current proposals for health insurance coverage for federal employees illustrate how an apparent extension of the public sector would make the private carriers direct beneficiaries. Government self-insurance is not even being seriously considered, although this would undoubtedly be the cheapest way. The program will be one of "contracting out" to private carriers.

Here the conflict is between different types of carriers, primarily between the commercial group, which is advancing major medical coverage, and the so-called "comprehensive prepayment plans" as represented by the Group Health Federation of America. In any case, the private sector is clearly in for a big gain.

The special significance of this controversy lies in the number of individuals involved—approximately 2 million employees and their families—and in the fact that, since such coverage will be recognized as a public program, its influence upon the whole health insurance movement will be very great.

Still another reason for the special character of conflict relates to the peculiar nature of the commodity at issue. Unlike old-age or unemployment insurance, and their companion private programs—where benefits are strictly a matter of cash, unrelated to any particular goods or services—there is, in the health field, an inseparable relationship between the insurance mechanism and the organization for supplying and pricing the products.

Even where benefits are in the form of cash indemnities, the distinction persists. Unlike other basic necessities—food, clothing and shelter—where the nature of supply and marketing conditions are such that a given amount of cash can be assumed to purchase a reasonably identifiable quantity and quality of the intended goods, medical care is not so conveniently packaged or labeled. It is not always accessible. What is wanted or required is often unclear, and quality is often enshrouded in mystery and

superstition. A generous pension will usually buy basic old age security, but a generous dollar allocation for medical care may not buy adequate health services. Therein lies the key to much of the complexity, to the many dilemmas and even to the prospects of success or failure of any kind of health insurance.

Advocates of both public and private medical care insurance frequently protest that they have no desire to intervene in the organization of medical services. But it is inevitable that the method of financing cannot be neutral in its effect on organization and quality. On the contrary, the method of financing and organizing a health insurance program inescapably conditions, and is conditioned by, the organization and structure of the health services industry.

Indemnity insurance underwrites and tends to encourage solo fee-for-service practice. Comprehensive service-type coverage tends to encourage group practice and closer cost and quality controls. This is true whether the financing agency is public or private. The government's Medicare program has encouraged solo practice. In general, so have the public assistance medical programs. As already indicated, the impending decision on the federal civil service program will have a significant influence on forms of practice.

Many other examples of public and private impingements and difficulties could be furnished. But it may be more useful to examine a few of the many possible patterns of future public-private relationship in this area.

IV

We may begin by noting that compulsory national health insurance of the Wagner-Murray-Dingell variety appears entirely unlikely in the foreseeable future. Yet it may be germane to observe that the United States is the only industrialized nation in the world in which some form of national health insurance or national health service is not the major source of medical care. Stated in other words, this is the only country where the vendors of medical care—hospitals and doctors—and private insurance control the major instruments of medical care financing.

Historically, public health insurance emerged as a compromise between state-provided health services and private practice. In Europe it came about generally as a result of the gradual integration of existing private plans into a co-ordinated public scheme either through their assimilation (as in Bismarck's Germany and Lloyd George's England) or through subsidy and regulation (as in Scandinavia and France). It is interesting to note that in most countries the private insurance schemes eventually became pressure groups eager for the government to help them out of commitments and cost difficulties they could not meet.

The interaction between private and public programs is graphically illustrated by Governor Rockefeller's proposal for compulsory health insurance in New York. It has several significant and revealing aspects:

First, Mr. Rockefeller made the proposal initially during his election campaign. Despite the conventional mythology, his urging of a compulsory scheme clearly had no adverse effect upon his candidacy and was widely proclaimed as another master stroke in a very shrewdly conducted campaign.

Second, while the governor has yet to spell out the details of his program, he has indicated that it will probably be a "major medical" type of plan modeled after the workmen's compensation pattern of compulsory coverage and statutory benefits with private carrier financing and operation. Here we see the influence of private developments upon public policy. The recent rapid growth of the private carriers' major medical innovation set the stage for the governor's anticipation of the acceptability of his proposal. He is asking for a mandatory extension of a practice which already exists in a large number of industrial establishments. Moreover, recognition of the apparent incapacity of private insurance to meet the problem of "poor risks" led to the proposal to supplement the private carriers "with a state fund to underwrite any person or group who for some reason couldn't get private coverage."[7] It remains to be seen whether the governor will be able to develop some device for reconciling the major medical pattern with the strong endorsement of the "group practice prepayments approach" included in the Rockefeller report on the United States economy in 1958.[8]

[7] For a description of the present state of the proposal, see L. R. Chevalier, "Rockefeller Proposes Compulsory Major Medical Insurance," *Medical Economics*, March 30, 1959, pp. 67-71, 130.

[8] *The Challenge to America: Its Economic and Social Aspects* (Doubleday and Company, 1958) p. 58.

The trend toward "contracting out," or the private financing and administration of statutory medical care schemes, is also apparent in the program for New York State employees, adopted before Governor Rockefeller took office, and in the proposed federal civil service plan.

Another interesting point in the Rockefeller plan is that the major medical is intended to supplement rather than replace the "basic health insurance," which presumably refers to coverage by regular Blue plans, commercial carriers, and the like. In this connection, the governor indicated in his January, 1959 message to the legislature that he may ask for state action to "encourage improvements in basic health insurance" and he urged better coverage for the aged, the mentally ill and the unemployed.

On a national basis, the most widely discussed course of action for the near future is the provision of limited public insurance for specified categories of "poor risks," as the Forand bill proposes to do for the aged. We may here witness a historic break in the traditional united front in the health field. Despite the full and vigorous opposition of the medical societies, the hospitals have begun to indicate they would welcome such an opportunity to be underwritten and bailed out of their financial crisis, although the official American Hospital Association testimony has thus far been painfully ambivalent. The nurses have already endorsed the bill. As has been said above, if self-interest were really to guide the insurance carriers, they, too, might grasp the nettle. In any case, the proposal has already resulted in a huge burst of activity by private carriers in the attempt to find means of covering the aged.

A less likely form of public insurance but one brought into prominence by recent developments in Canada would limit coverage to a single type of high-cost benefit rather than to a single category of high-cost risk. Such a scheme might provide hospitalization only for the general population, thus partially removing a basic high-cost element from the difficulties of private insurance, but leaving to voluntary programs the whole range of supplemental protection.

If no type of public insurance materializes, we are likely to see an extension of public health and medical services into more "poor risk" and high-cost categories. The provision of public health care on a non-means test basis in cases of tuberculosis, venereal disease and mental illness and the support of the federal government in the construction of public and nonprofit hospitals under the Hill-Burton program are well known. The substantial costs of the large veterans' medical care program and the growing programs for public assistance recipients and dependents of servicemen are now recognized components of our medical economy. This approach might be continued, covering larger and larger categories. The facilities category could be extended to include an attack upon the drastic problem of personnel shortage. The disease category could take in more and more types of chronic illness. The federal, state and local programs for the indigent might be forced to embrace the vast and indefinitely expansible category of the "medically indigent," perhaps accompanied by some limited form of means test which would not cause many disqualifications.

Along with such a piecemeal expansion of public programs, we may well see a variety of governmental programs designed to strengthen and improve private insurance. The Administration's 1954 proposal for a federal reinsurance fund is perhaps the best known, but only one of many legislative bills advanced in Congress in recent years, intended to subsidize the financial base of private carriers.

More extreme are proposals based on the doctrine that health insurance carriers (and perhaps the hospitals and the profession itself) are "public utilities" and should be treated as such by extending the present limited state regulatory functions to pricing, restrictive trade practices, coverage and certain benefit provisions such as contract cancellation. The New York State Legislature has played a leading role in developing this doctrine in recent years. A major barrier to national application would be the still-unresolved issue of federal v. state regulation of the insurance industry.

Entirely different in method, but alike in its intent to strengthen private insurance, is the current drive to prevent monopoly and enforce competition among the various types of carriers. Illustrative of this approach are the efforts currently being led by the Group Health Federation of America to obtain repeal or amendment of the restrictive laws in about half the states which prohibit the organization of certain types of prepayment plans.[9]

[9] See Horace R. Hansen, "Group Health Plans —A Twenty Year Legal Review," 42 *Minnesota Law Review* 527-548 (March, 1958); and, also, Hansen, "Laws Affecting Group Health Plans," 35 *Iowa Law Review* 209-236 (Winter, 1950).

Finally, there are an increasing number who believe that in the present state of knowledge and amidst the chaotic conditions which prevail in the health field what is most needed is the designation of a special public agency charged with responsibility for continuous planning and formulation of national health policy. The agency would apply itself to constant information-gathering, evaluation and, perhaps, assistance through grants and loans, to both private and public groups for experiments with more productive systems of insuring improved medical care.

Possible patterns of public-private relationship in the health field are obviously multifold. The old stereotype of "national health insurance or nothing" is manifestly misleading. We can be certain of many new developments for good or for ill. The way and the extent that we travel, however, does not lie in the laps of the gods. The degree to which medical care will be considered a public policy issue is the degree to which it is regarded as an essential personal and national need in scarce supply; unfortunately, it now appears that the scarcity of supply is likely to become increasingly acute. But this is not inevitable.

A substantial portion of the big decisions ahead lies in the hands of union and management representatives in the health and welfare field. When we talk of voluntary health insurance we are talking, primarily, about employee benefit plans. Almost four out of five persons who have health insurance today are enrolled through some "health and welfare" plan. Over one third of these are covered through collectively bargained programs. About three fourths of the costs of all health insurance is paid through health and welfare plans. The general impact of these plans has been even greater than the numbers suggest because they are pattern setters—just as the influence of health insurance in general upon the character and distribution of medical care has been vastly greater than its one-fifth portion of medical expenditures.

Union and management forces, in concert with prepayment plans and insurance carriers, have thus far done very well quantitatively, but rather poorly qualitatively. It is conventional and convenient to criticize the medical profession's resistance to organizational and technical change but the consumer representatives in health and welfare plans must also take a considerable share of responsibility. Their qualitative performance in the negotiation, purchase and administration of voluntary health insurance will have an important influence upon the extent of public activity which may follow. Moreover, the patterns of financing and organization they devise in their own plans will sharply influence the design of future public programs.

We may hope that the years of experience in negotiations with insurance carriers and the medical profession will lead to a knowledgeable sophistication in this field so often obscured by the special mystery of medicine and the superstitions which still are common where life and death are at stake.

[The End]

Interrelationships in Health and Medical Care Programs

By LANE KIRKLAND, of the International Union of Operating Engineers

I ADD my endorsement of the Somers presentation. I wish to comment first on the adverse consequences of experience rating. The trend in this direction seems at present to be inevitable and all-encompassing. It is a destructive, competitive device that can't be contained, but spreads like a virus.

It now pretty well permeates Blue Cross, which for years advertised itself as defender of the community principle and community rates. It tends to hide this skeleton in its closet, but is proceeding with it nevertheless. This became evident in the New York Blue Cross rate hearings where it sought an increase of sizeable proportions and, in the

course of the hearings, spoke of its service to the community and devoted adherence to the community rate principle. Upon examination of the documents, however, it was discovered that, during the period in which the New York Blue Cross was claiming heavy losses necessitating a rate increase, it had been reimbursing a number of groups with whom it had signed experience rating contracts. It was proposing to apply the rate increase only to the community rating plans, not to the experience rating plans. Greater emphasis upon experience rating is expected to result in a greater volume of business. On the West Coast, Kaiser is sorely beset by the adverse effects of experience rating. Groups are going into the plan after being priced out of experience rating plans; Kaiser, itself, is now under pressure to move into experience rating.

Some little solace is found in the fact that experience rating is not itself the final end. The step beyond is that of self-insurance. The Somers paper laid some of the blame for spread of experience rating at the door of trade unions. So far as unions are concerned, the spread is attributable to the pervasiveness in health and welfare funds of administrators and consultants drawn from the insurance industry. Newcomers to the field of consulting on welfare funds, seeking a gimmick to secure a foothold in the market for consultants' services, are now advocating self-insurance plans. For a group that can look forward to favorable experience and high dividends, a contract with a commercial carrier may be foolish. Frequently, the only function of the carrier is to sign the claim check—the administration is carried out by the welfare fund. Although I am not personally advocating this procedure, it does have a little promise in that it eliminates an intermediary between the fund's administrators and the medical profession. The people paying the bills will sooner or later have to come into contact with the profession if any improvements are to come to pass, so—to the extent that self-insurance is the logical conclusion of experience rating and to the extent that direct experience in paying the bills will inevitably involve the operators and administrators of these programs more intimately with the medical profession and its practice—the trend may, in spite of itself, lead to some positive, as well as many negative results.

Several of the less obvious ways in which government influences the development of health insurance programs have been mentioned. Another that hasn't been mentioned is the disclosure act of the last Congress, requiring the filing and public availability of annual reports of all health and welfare plans. One of the results might conceivably, and even probably, be a greater awareness on the part of those who operate these programs of the alternatives and the choices open to them, and the actual results of the operation of their plans. For the first time, administrators of some of these programs may be able to compare their plans in respect to costs and benefits with those of other groups similarly situated. This possibility—fear of which was perhaps one of those that led the commercial insurance industry to oppose this legislation—will tend to remove the veil of mystery behind which the industry operates and to allow customers to compare experience, acquire a greater degree of sophistication, and further accelerate the trend to self-insurance. Thus, this legislation may have an influence on the future development of private programs.

There may also be substantial effects from the injection of state legislatures and insurance commissions, by means of rate hearings, into the affairs of Blue Cross plans and inevitably, thereby, into problems of medical and hospital care organization and costs. Following these cases, you find that what starts out as an inquiry into the justification for a rate increase goes more and more deeply into the subject and winds up with a look at the fundamental organization of the medical services covered by these plans. These inquiries are healthy, and may very well result in needed changes. A case in point is that of Pennsylvania, where the commissioner came out with a comprehensive set of proposals concerning hospital administration and patterns of service, etc. If you happen to believe that an occasional investigation from the outside is not desirable, consider the New York Blue Cross case. There it was found that Blue Cross, while pledging soaring costs, didn't really look at hospital costs because they had an automatic escalator reimbursement formula with which both the hospitals and Blue Cross were satisfied. They used a base figure for the hospital room rate which was readjusted periodically on the basis of an index constructed of two components: 90 per cent consisting of the average hourly wage in manufacturing for the United States at large and 10 per cent, the New York City retail food price index. Any relevance of such a figure to actual hospital costs is obviously coincidental.

The Somers paper properly stressed the importance of the federal employee program. It could prove to be most significant, if it passes, not just because of the large number of people involved, but because it provides an excellent proving ground for fundamentally different alternative approaches to health insurance needs. There have been a series of proposals by the Administration, going back over several years, but the Administration has now lost the initiative because of its current dedication to the budget issue. It started about five years ago with a proposal for the government to make a contribution to any plan or carrier the employee might indicate. The proposal got nowhere, and so the following year there was a proposal for the government to give each federal employee a free medical insurance policy with $500 deductible and, for families of federal employees, in multiples of $500; 75 per cent was to be paid above that. This proposal didn't pass either. Currently, a bill sponsored by the Government Employees Council has the general support of the American Hospital Association, Blue Cross and Blue Shield, and the Group Health Federation of America. The Administration, in opposition, proposed a new plan, so there are actually two proposals pending at present. Senate Bill 94 would allow employees to choose among several distinct types of plans representing each of the different approaches to health insurance that prevail in this country: (1) a national plan to be negotiated with a syndicate of insurance carriers set up along indemnity lines, (2) a national Blue Cross-Blue Shield plan based on the service approach, with equivalent benefit standards and (3) any local group practice prepayment plan—a choice of various types of intramural insurance plans developed and operated by certain federal employee unions, such as postal employees. The employee, after choosing one of these, could change his mind annually and switch to another. This kind of legislation has many possibilities: It would yield meaningful conclusions on the relative merits of these approaches, as an aid to free choice (the bill provides for continuing analyses of costs, benefits, etc.). It would also result in the setting-up of national Blue Cross-Blue Shield standards and would tend to raise the general tone of Blue Cross-Blue Shield plans available in various parts of the country, some of which are now in retrograde condition. It would mean a great deal to group practice plans because there are comprehensive direct medical service plans in operation in areas of great concentrations of federal employees—California, Washington, D. C., and New York.

The Administration bill, which is simply an outline as yet, would essentially eliminate the competition between Blue Cross-Blue Shield and the insurance carriers, but retain the other aspects of the plan. This bill would develop one national plan on an indemnity basis modeled along the General Electric major medical insurance with $50 deductible, full coverage for the next $500, and 75 per cent above that. While the group practice plan, and employee union plans are retained—though the employee would have to sign his way out of the basic national program to take advantage of them —Blue Cross and Blue Shield are completely out of the picture. Therefore, this would turn the basic national program over to the commercial insurance industry.

Much has been made of the fact that there has been no proposal for the government to self-insure. The reason is that none of the chief parties at interest is actively advocating it. The prospect of a self-insured plan handled by the current Administration is not one that many find enticing. It might be better, perhaps, to suffer the evils we know than fly to those we know not of. Competitive choice of plans seems more desirable at present.

Somers noted that numerous advocates take a gingerly approach to intervention in the organization of medical services. To do anything constructive and positive there must be enlightened outside intervention in the organization of medical services—not intervention in the practice of medicine, but in the *administration* of medical services. The greatest hope lies in the promotion of the broader development of the nonprofit community hospital as a focal point radiating the full range of medical services to a community and acting as a control center for the quality of care. My conception of the ideal approach to the development of health insurance programs is to eliminate all intermediaries and to contract directly with hospitals functioning in effect as group practice units which, in return for so much per capita, would provide medical care to the families covered—not fragments of medical care or an itemized list of certain services, but complete medical care. Unfortunately, there are many impediments to this—the principal one being the jurisdictional dispute between medical practitioners, who see any expansion of the hospital's role as a threat to their status as independent

proprietors of medicine, and hospital administrators. Doctors oppose the salary practice, expansion of out-patient services by hospitals, and other moves essential to the development of the hospital as a community health center. They would simply cut the hospital down to being a dormitory and a publicly financed place for the doctor to ply his private trade.

I do not hesitate to express the opinion that in this dispute, the public interest is clearly on the side of a far stronger role for the hospital as an institution. What is needed in this day and age, if a workable mechanism that can make the best of modern medicine available to the whole population is to be developed, is *more* rather than less "corporate practice," if you choose to apply that loose and invidious term, as some do, to a mode of organization such as I have suggested.

The key question of relationship between public and private programs is not *which,* but *what* kind of each. The content, rather than the label, is the important part of the package. **[The End]**

The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?

By DONALD H. WOLLETT

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JURISDICTION is not, perhaps, the correct word to use in describing this problem of competing claims, for there is no doubt that the NLRB has the power to lay hold of any unfair labor practice issue affecting interstate commerce. Moreover, the Board has authority to override private arrangements between employers and unions for the resolution of disputes if it chooses to do so.[1]

Section 10(a) of the NLRA reads in part, "This power [to prevent persons from engaging in unfair labor practices] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." It follows that the NLRB is free to take cognizance of an issue which the parties have agreed to submit to arbitration and to re-examine anew an issue which an arbitral award purports to set at rest.

My suggestion is that the Board should, as a matter of discretion, forego the exercise of its power in such situations in deference to the arrangement to which the parties have committed themselves. An appropriate analogy is to the doctrine of equitable abstention which has been developed by the federal courts in dealing with cases that involve questions of the constitutionality of state executive or legislative action.

Respect for the state courts as the primary arbiters of questions of state law and the desirability of avoiding gratuitous and premature decisions of issues of federal constitutional law have caused the Supreme Court of the United States to evolve a doctrine of either declining to exercise federal equitable jurisdiction[2] or postponing its exercise.[3] The technique of relinquishment—that is, dismissing the petition—has been utilized where the questions of state law are complicated and peculiarly local in nature. The technique of postponement—that is, holding onto the cause while the parties repair to a state tribunal for an authoritative

[1] *Knight Morley Corporation,* 116 NLRB 140 (1956); *Wertheimer Stores Corporation,* 107 NLRB 1434 (1954); *NLRB v. International Union, UAW, Local 291,* 21 LABOR CASES ¶ 66,763, 194 F. 2d 698 (CA-7, 1952).

[2] *Alabama State Federation of Labor v. McAdory,* 9 LABOR CASES ¶ 51,209, 325 U. S. 450 (1945).

[3] *Spector Motor Service, Inc. v. McLaughlin,* 323 U. S. 101 (1944).

declaration of state law—has been used where the local courts have not had an opportunity to deal with the question of state law and there are adequate state procedures available for its disposition.[4]

The doctrine of federal equitable abstention has developed, of course, out of concern for considerations of comity in a federal system. It is grounded on a policy of self-abnegation, not on an absence of power.

There are adequate, if not compelling, reasons for the NLRB to develop and follow similar policies. The NLRA contemplates that employers and unions will enter into private agreements that govern "wages, hours, and other terms and conditions of employment."[5] It is inevitable that these agreements will establish some rights and duties that overlap or affect the rights and duties prescribed by the federal act.

Furthermore, the NLRA contemplates that the parties, having executed an agreement, will bargain over "any question arising thereunder." The methods and procedures for the conduct of such bargaining are left to them. They are free to agree in advance to channelize the settlement of such disputes through grievance machinery, with arbitration as the terminal step.

If the Board does not respect the integrity of the private arrangement by eschewing the exercise of a competing jurisdiction, it may corrupt the mechanism by opening up an alternative forum to the recalcitrant party, who may run to the Board with his complaint rather than resort to the agreed-upon procedure.

Abstention Policy—First Type

As an additional dividend the Board can, by adopting and adhering to an abstention policy in appropriate cases, substantially reduce its case load.

The first proposition of the suggested policy of abstention is as follows: *The NLRB should not take hold of any issue of contract interpretation that is cognizable under the grievance and arbitration provisions of an agreement where the disposition of the contract issue will resolve the unfair labor practice issue.*

Situations in Point. — Exemplifying the above are cases where, under the statute as interpreted by the Board, the parties may by agreement suspend a statutory right or duty which would otherwise exist. There are three illustrations of this type of situation that come to mind.

First, there are the cases which involve the question of whether an employer has violated his duty not to change the terms and conditions of employment unilaterally during the life of the agreement. If the contract authorized the action, it is not an unfair labor practice.[6] If the contract did not authorize the action, it is an unfair labor practice.[7]

Second, there are the cases which involve the question of an employer's duty to bargain at large over proposed changes in the "unwritten" terms of the contract—that is, those not embodied in the written instrument. The decisive issue is whether the union, by executing the contract, waived its right; or, to put it the other way, freed the employer from the duty. If the answer is yes, the refusal to discuss is not an unfair labor practice. If the answer is no, it is.[8]

Third, there are the cases which involve the question of an employer's duty not to discipline employees for engaging in concerted activity where the decisive issue is

[4] A federal court does not lose jurisdiction of a case simply because the state courts have not had an opportunity to interpret the statute at issue (*Doud v. Hodge*, 350 U. S. 485 (1956)). However, "when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." (*City of Meridian v. Southern Bell Telephone & Telegraph Company*, 79 S. Ct. 455, 457 (1959)). But see *NAACP v. Patty*, 159 F. Supp. 503 (DC Va. 1958). (Federal court should go to the merits if the state statute is free of doubt and ambiguity; that is, is not susceptible to an interpretation which would avoid the federal question).

[5] Sec. 8(d).

[6] See *California Portland Cement Company*, 101 NLRB 1436 (1952).

[7] Cf. *John W. Bolton & Sons, Inc.*, 91 NLRB 989 (1950). Compare *General Motors Corporation*, 81 NLRB 779 (1949), enf. granted, 17 LABOR CASES ¶ 65,533, 179 F. 2d 221 (CA-2, 1950), and *Nash-Finch Company*, 103 NLRB 1695 (1953), enf. den., 25 LABOR CASES ¶ 68,316, 211 F. 2d 622 (CA-8, 1954) (where the Board held, respectively, that unilateral institution of a new benefit or elimination of an old one constitutes an unfair labor practice if the matter was not fully discussed or consciously explored during negotiation leading to execution of the contract) with *Speidel Corporation*, 120 NLRB, No. 97 (1958) and *Borden Company*, 110 NLRB 802 (1954), where the Board found, respectively, that unilateral discontinuance of an Easter bonus and unilateral reduction in milk delivery days from seven to six were not unfair labor practices on the ground that the union, in contract negotiations, had acquiesced in the company position that such decisions were management prerogatives.

[8] *Jacobs Manufacturing Company*, 94 NLRB 1214 (1951), enf. granted, 21 LABOR CASES ¶ 66,949, 196 F. 2d 680 (CA-2, 1952).

whether the conduct of the employees either violated the express or implicit terms of the contract or is intended to accomplish its modification. If the answer is yes, it is not an unfair labor practice for the employer to discipine them.[9] If the answer is no, it is.[10]

There are also the cases where, under the statute as interpreted by the Board, the parties may by agreement bring into operation a statutory right or duty which would otherwise not exist.

One illustration of this type of situation that comes to mind is the case which involves the question of a union's duty not to strike during the life of an agreement. If the strike either violates the express or implied terms of the contract or is intended to accomplish their modification, it constitutes an unfair labor practice (refusal to bargain). If it does not, it is not an unfair labor practice.[11]

Application of Policy

In each of these types of cases, the Board's disposition of the unfair labor practice issue depends upon how the contract is interpreted. Since I believe that the NLRB should, as a matter of policy, respect the integrity of the private arrangement for resolving such issues, it follows that if the question of contract interpretation is submissible to the grievance machinery and to arbitration, the Board should refuse to entertain the case until that procedure has been exhausted.

Clearly, if the charging party has failed to resort to the grievance machinery, a complaint should not be issued. With the exception of the *Standard Oil* case in 1950,[12] this has been Board policy since the Taft-Hartley amendments in unilateral action cases.

The leading case is *Crown Zellerbach Corporation,*[13] in which the Board dismissed a complaint charging a violation of the duty to bargain where the question of the propriety of the employer's unilateral action in reducing piece rates raised an issue of contract interpretation submissible to established grievance and arbitration machinery and the charging party made no effort to utilize it.

There are other cases, such as *McDonnell Aircraft Corporation*[14] and *United Telephone Company,*[15] in which the Board applied the same doctrine. In the former, the Board held that unilateral action by an employer changing work assignments is not a refusal to bargain where an issue of contract interpretation is raised; the company is willing to submit the matter to the grievance machinery; and the union, ignoring that forum for settlement, goes directly to the NLRB. In the latter, the Board held that unilateral discontinuance by an employer of a 48-hour workweek without giving 60 days' notice was not a refusal to bargain where the issue of whether the action modified the contract (and hence violated Section 8(d)) had been placed before a court of competent jurisdiction by the employer's suit for a declaratory judgment, and the possibility of arbitration had not been exhausted.

These cases suggest that the NLRB will eschew the exercise of jurisdiction in any case where the aggrieved party has not exhausted whatever private remedies are available under the contract. However, in the *California Portland Cement* case, the Board held that the fact that the union filed a charge on the same day that it filed a grievance did not excuse the company from refusing to continue negotiations on the latter until disposition of the former. The Board then proceeded to decide several issues of contract interpretation on the merits.[16]

This decision seems to me to be wrong. Since the policy of abstention is based in part on the desirability of respecting the challenged party's right to stand on the grievance machinery as the primary forum, I can see the logic in the Board's taking jurisdiction at the instance of the aggrieved party upon a showing that the challenged party has refused to treat the matter as an issue submissible to contract procedures. However, where the threshold question is one of contract interpretation, I am unable to discern any compelling reason why the aggrieved party should not be required, in the absence of such a showing, to exhaust the private remedies as a condition of seeking a Board determination on the merits; nor do I see why the party whose conduct has been challenged should not be permitted

[9] *W. L. Mead, Inc.,* 113 NLRB 1040 (1955).
[10] Cf. *Knight Morley Corporation,* cited at footnote 1.
[11] See *United Mine Workers of America (Boone County Coal Corporation),* 117 NLRB 1095 (1957), 35 LABOR CASES ¶ 71,616, enf. den., 257 F. 2d 211 (CA of D. C., 1958).
[12] *Standard Oil Company of Ohio,* 92 NLRB 227 (1950).
[13] 95 NLRB 753 (1951). See also *Consolidated Aircraft Corporation,* 47 NLRB 694 (1943).
[14] 109 NLRB 930 (1954).
[15] 112 NLRB 779 (1955).
[16] *California Portland Cement Company,* cited at footnote 6.

to stand on his right to have the matter taken first to the private forum.

Indeed, a case can be made for requiring the aggrieved party, even where it establishes that the other party has denied that the matter is arbitrable, to exhaust the judicial remedies that are available to it under the *Lincoln Mills* doctrine [17] (or under state procedures) by bringing an action for specific enforcement of the arbitration agreement. While I can see some merit in this position, particularly in terms of reducing the Board's load, it seems to me upon reflection to push the exhaustion requirement too far.

The analogy to the doctrine of federal equitable abstention breaks down on this point. In cases involving the relationship between state and federal courts, the adjudicative machinery to which the federal court defers is established by the law of the jurisdiction to which comity is being extended, not by the parties to the controversy.

In cases involving the relationship between the NLRB and the arbitral forum, the adjudicative machinery to which the Board defers is established by the private agreement of the parties to the controversy, and it is to them (or at least to the one of them who desires to stand on the agreement) that comity is being extended.

If the party whose conduct is at issue desires to forego any right it may have under the agreement to private adjudication of the matter, considerations of comity disappear. There is little point in extending a courtesy which, by hypothesis, is not wanted.

Since a federal court will not stay an action for breach of contract brought under Section 301 if the matter at issue is not arbitrable,[18] it can be argued that the NLRB should, in the interests of uniformity, follow a similar course. Thus, whether the Board will take hold of the matter or relinquish or postpone the exercise of jurisdiction should depend upon its determination of the issue of arbitrability.

However, the analogy has weaknesses. The federal courts are under a statutory mandate designating them as the primary forum for the adjudication of private rights and duties created by the contract. The Board is subject to no such compulsion. It is not its function to give remedies for breach of contract in every case where jurisdiction lies.[19] Its task, in broad terms, is to effectuate the public policies of the act, and it has the power to exercise considerable discretion in determining how it may best utilize its limited resources to attain those objectives. Moreover, as pointed out above, one of the policies of the act is to respect the freedom of the parties to enter into private arrangements for the disposition of questions of contract interpretation.

Furthermore, if the Board gets into this business, there is a danger that it will involve itself in some of the same difficulties that have plagued the courts. Take, for example, the 1958 decision in the *Beacon Piece Dyeing and Finishing Company, Inc.* case [20] in which the Board apparently ignored the existence of the contract grievance procedure. The issue was: Did the employer commit an unfair labor practice by increasing workloads and granting a wage increase without notifying the union? The disposition of this issue turned on the answer to two questions: (1) Had the union waived its right to have the company bargain on the matter of workloads by dropping its demand for a restrictive provision in contract negotiations? and (2) Had the union waived its rights as to general wage increases by conceding in contract negotiations that management had the right to make merit increases?

Although the company was willing to submit these questions to arbitration, the Board went to the merits and held that the unilateral action constituted an unfair labor practice. It is possible to rationalize the Board's intervention at this point on the ground that the soundness of the union's position on the merits was so clear that there was no bona fide issue for arbitration. The thing that troubles me about this rationale is that it sounds suspiciously like the mischievous *Cutler-Hammer* doctrine.[21]

I am inclined to think that the wiser course is to require exhaustion of remedies

[17] *Textile Workers Union of America v. Lincoln Mills,* 32 LABOR CASES ¶ 70,733, 353 U. S. 448 (1957).

[18] *Markel Electric Products v. United Electrical Workers,* 22 LABOR CASES ¶ 67,391, 202 F. 2d 435 (CA-2, 1953). Cf. *Signal-Stat Corporation v. Local 475, United Electrical Workers,* 30 LABOR CASES ¶ 70,090, 235 F. 2d 298 (CA-2, 1956).

[19] *United Telephone Company,* 112 NLRB 779 (1955).

[20] 121 NLRB, No. 113 (1958).

[21] *International Association of Machinists v. Cutler-Hammer, Inc.,* 12 LABOR CASES ¶ 63,574, 271 App. Div. 917, 67 N. Y. S. 2d 317, aff'd, 13 LABOR CASES ¶ 63,931, 297 N. Y. 519, 74 N. E. 2d 464 (1947). (If the contract language does not require interpretation because it is unambiguous, that is, permits of only one tenable construction, there is no arbitrable dispute.)

in the types of cases under discussion. If the arbitrator dismisses the cause on the ground that it is not arbitrable, it is plain that adequate private procedures are not available for authoritative resolution of the question of contract interpretation. It follows, of course, that the NLRB should at this point take hold of the matter.

The same policy should obtain in cases involving the propriety of an employer's refusal to bargain over proposed changes in the "unwritten" terms of employment.

The question in these cases is whether the party resisting change has a duty to bargain over the proposal. This in turn depends upon an interpretation of the contract, that is: Does it contain an understanding that the term or condition at issue is not to be altered during the life of the document?[22] The party opposing change may, if he desires to stand on contract procedures, press for an affirmative answer on the grounds that (1) the term or condition is, despite the insistence of the other party to the contrary, embodied and integrated in the writing; (2) acceptance of the proposed change would conflict with the written terms of the agreement—for example, the "management rights" clause or a waiver provision; or (3) the scope of the agreement and the history of the negotiations which led to its execution support the inference that the parties intended to leave the matter *status in quo* for its duration.

These issues involve an interpretation of the contract and would, accordingly, be subject to the usual contract machinery. The abstention policy should therefore be applied.

Similarly, the policy should be applied in cases involving employer discipline for concerted conduct that allegedly violated the agreement, and union action allegedly in violation of the agreement. The former situation is illustrated by the 1956 decision in the *Knight Morley Corporation* case.[23]

There were three issues: (1) Was the walkout by buffers before the end of a shift, on the ground that their health was being endangered by malfunctioning blowers, a violation of the no-strike clause of the contract and unprotected concerted activity? (2) Was their discharge by the company an unfair labor practice? (3) Was the strike in protest over the discharges a violation of the no-strike clause?

The disposition of issues (2) and (3) depended upon the answer to issue (1). Issue (1) was submissible to the contract grievance machinery. Although the Board proceeded to decide it, holding on the basis of an interpretation of Section 502 of Taft-Hartley that the walkout by the buffers was not a strike and hence was protected concerted activity, the decision is consistent with the abstention policy. The agreement containing the grievance procedure had expired, and the employer had refused thereafter to bargain on the grievances.

The latter situation involves the Board's doctrine that a strike in violation of a contract is a refusal to bargain.[24] While the soundness of this position is subject to serious doubt on the ground that it involves the Board in the business of specifically enforcing no-strike promises—a job which Congress entrusted to the courts—the ob-

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[22] Case cited at footnote 8.

[23] *Knight Morley Corporation,* cited at footnote 1. This decision does, however, present a marginal situation. Moreover, it has one rather puzzling aspect.

In the first place, the fifth step of the grievance procedure did provide for "permissive" arbitration, that is, the parties had the option of seeking arbitration. At one point prior to expiration of the contract, both had attempted to arrange for arbitration but had been unable to agree on an arbitrator. However, the union might have pushed the matter further by invoking the contract procedure calling for a panel of three arbitrators, one named by the union, one by the company, and the third chosen by the two partisans. Since the union did not take this step, the Sixth Circuit, although it enforced the order on independent grounds, concluded that the Board had erred in holding that the employer had violated Section 8(a)(5) by refusing to bargain at large on the propriety of the discharge of the buffers since, said the court, the union's rights under the arbitration clause survived the expiration of the contract. (*NLRB v. Knight Morley Corporation,* 33 LABOR CASES ¶ 71,148, 251 F. 2d 753 (CA-6, 1957).) Since the company had taken the position after the contract expired that the grievances had expired with it, it seems to me that the Board was correct in taking hold of the case on the ground that the logic of the employer's position led to the conclusion that he was, in effect, denying arbitrability of the grievance.

In the second place, the Board did not actually decide the question of whether the walkout by the buffers violated the contract. It held, rather, that the walkout was caused by abnormally dangerous working conditions within the meaning of Section 502; was not therefore a strike in a statutory sense; and hence constituted protected concerted activity. The Sixth Circuit agreed with the Board on this point, concluding that the language of Section 502 exempting such conduct from the statutory definition of a strike made the presence of the no-strike clause in the contract immaterial. But query: Why was this so? Is it not possible that the parties intended, by executing the no-strike agreement, to give the term "strike" a broader meaning than the statute gives it?

[24] *United Mine Workers of America,* cited at footnote 11.

jection is irrelevant in the context of the present discussion.

The point is that the disposition of the unfair labor practice question turns on a point of contract interpretation: Did the strike violate the agreement? Accordingly, the abstention policy should apply.

The foregoing situations are all cases where the Board should on principle relinquish, rather than merely postpone, the exercise of jurisdiction. Where the arbitrator's findings of fact as to the conduct of the defendant and his conclusion as to the validity of that conduct under the contract will obviate any need to consider its validity under the NLRA, the Board should dismiss the charge.

However, this proposition is predicated on an assumption which may not always turn out to be well-founded: to wit, that the issue is arbitrable. Suppose, for example, that the exhaustion doctrine that I have suggested is applied, and the charge is dismissed. The arbitrator subsequently holds that the matter is not arbitrable. During the interim the six-month statute of limitations of the NLRA has run.[25] The aggrieved party then has no forum in which to seek disposition of the matter on the merits, except perhaps an action for breach of contract under Section 301. Accordingly, the wise exercise of discretion calls for the General Counsel to hold the charge without action, thus tolling the statute of limitations, until the issue of arbitrability has been settled.

If the matter is found not to be arbitrable, he should issue a complaint. If it is found to be arbitrable and an award is made on the merits, he should dismiss the charge.

Take, for example, a case where the company has refused to bargain over a proposed change in an "unwritten" term of employment on the ground that the union has waived its statutory right to have management bargain over the matter during the life of the agreement. If the arbitrator upholds the position of the company, the Board should wash its hands of the matter on the ground that the contract, as interpreted in the forum to which the parties have mutually agreed, negates the existence of any duty to bargain about the merits of the proposal.

I cannot, offhand at least, conceive of a situation involving the types of cases under discussion where the Board should not give force to the arbitral award. Even in the pre-Taft-Hartley Act *Timken Roller Bearing* case[26] (in which the Board paid little or no mind to the fact that the issues between the parties were submissible to existing grievance machinery) it decided, on the question of the propriety of the company's action in unilaterally revising and reissuing a manual of rules and instructions to the employees, that as a matter of discretion, it should not go to the merits since an arbitrator, at the instance of the union, had held that the company was within its rights in taking the action.

Abstention Policy—Second Type

The second proposition of the suggested policy of abstention is as follows: *The Board should not take hold of any issue of contract interpretation that is cognizable under the grievance and arbitration procedure of the agreement where the disposition of the contract issue may avoid the necessity for facing an unfair labor practice issue.*

Situations in Point.—The pertinent cases are those where an authoritative interpretation of the contract is necessary in order to determine whether or not an unfair labor practice issue is raised. They are controversies in which the question is: Does the contract, as interpreted and applied, authorize or permit conduct which either violates a statutory duty or invades a statutory right?

The basic policy underlying this proposition may be formulated as follows: Where an arbitrator's findings of fact as to the conduct of the defendant and his conclusions as to its validity under the contract *may* obviate any need to consider its validity under the NLRA, the General Counsel should hold the charge but take no action pending an authoritative interpretation of the contract. Otherwise he may raise an unfair labor practice question prematurely and gratuitously.

For instance, suppose an employee is discharged under a union security provision for failure to acquire or retain union membership. If the arbitrator holds that the discharge violated the contract, there is no necessity for facing an unfair labor practice question. On the other hand, if he holds that the discharge was permitted or required by the contract, the unfair labor practice issue must be faced. The situation is clearly one in which the Board should postpone the exercise of jurisdiction pending the disposition of the contract question.

[25] Sec. 10(b).

[26] 70 NLRB 500 (1946), enf. den. on other grounds, 12 LABOR CASES ¶ 63,793, 161 F. 2d 949 (CA-6, 1947).

However, the situation is not one in which the Board should necessarily give full force to the arbitral award. It should accept the interpretive gloss given the contract provisions by the arbitrator, but it does not follow that it should foreclose itself from finding that the contract as construed and applied violated the act. Indeed, it would seem that the Board must pass an independent judgment on that question.

The *Wertheimer* and *Monsanto Chemical* cases,[27] both of which involved the question of whether employee discharges pursuant to an agreement infringed upon Section 7 rights, illustrate the application of this principle. Arbitral awards become as much a part of the contract as if they had been written in *nunc pro tunc*.[28] If the arbitrator had held in these two cases that the discharges violated the agreement, there would have been no necessity for facing the unfair labor practice question.

Since, however, he held the other way, the Board had to face the issue of whether the contract as interpreted and applied conflicted with the statute.

I am not troubled by the fact that in the *Monsanto* case the Board ignored the fact that the discharged employee had agreed to be bound by the award, for the rights at stake were public, not private.

I do, however, have difficulty in reconciling the *Monsanto* decision with the decision in the *Spielberg* case,[29] where the Board accepted an arbitrator's judgment that four strikers were not entitled to reinstatement in part because they had participated and acquiesced in the arbitral proceedings. This seems to me to be a case in which the Board went too far in deferring to an arbitrator's award. While I think that it is sound policy for the Board to accept the findings of the arbitrator in such cases, I think it should evaluate those findings against the statutory standards rather than to eschew the exercise of jurisdiction.

Possible Exceptions

There are two types of cases to which the doctrine of abstention, as heretofore explicated, should not be applicable.

The first type concerns the question of whether a contract provision is invalid per se where the provision appears to be vulnerable to attack on its face—that is, it is not susceptible to an interpretation which will either avoid the unfair labor practice issue or save its legality.[30]

Here again, however, there is some danger that the Board will, in passing judgment on the question of whether the contract provision is subject to attack on its face, improperly intrude itself into the arbitral process. For example, in the *Standard Oil* case,[31] the employer unilaterally amended a group-insurance plan. It was manifestly clear to the Board that the language of the contract could not possibly be construed so as to find that the union had palpably and unmistakenly waived its right to have the employer bargain on the matter. But it was not so clear to the Sixth Circuit, which remanded the case for receipt of evidence on the question of whether the issue was submissible to the grievance machinery.[32] Once more, the analogous *Cutler-Hammer* doctrine raises its head. Accordingly, the Board should be chary about invoking this exception to the abstention policy.

The second possible exception is where the question concerns whether conduct constitutes a violation of the agreement, an unfair labor practice, or both. The situation in point arises when the contract duty and the statutory duty coincide, and the issue is: Does the contract as interpreted and applied vindicate a right or duty which parallels a statutory right or duty?

For instance, suppose that a contract prohibits the discipline of employees for engaging in union activity. An employee is discharged and grounds his grievance on an alleged violation of the contractual proscription, which happens to parallel the statutory duty set forth in Sections 8(a)(1) and 8(a)(3).

This is not a case where a determination of the contract question is either dispositive of the unfair labor practice question or necessary in order to decide whether an unfair labor practice question must be faced. It is a case where the issues are separable and independent. For an obvious example, the discharge of an employee may constitute a

[27] Cf. *Wertheimer Stores Corporation*, cited at footnote 1; *Monsanto Chemical Company*, 97 NLRB 517 (1951).

[28] *United Mine Workers of America (Westmoreland Coal Company)*, 117 NLRB 1095 (1957), enf. den., 35 LABOR CASES ¶ 71,616, 258 F. 2d 146 (CA of D. C., 1958).

[29] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

[30] Compare *NAACP v. Patty*, cited at footnote 4.

[31] *Standard Oil Company of Ohio*, cited at footnote 12.

[32] *NLRB v. Standard Oil Company of Ohio*, 21 LABOR CASES ¶ 67,000, 196 F. 2d 892 (CA-6, 1952).

breach of the contract but not be an unfair labor practice.[33]

On the other hand, the converse may be true. An arbitrator may conclude on the basis of his findings of fact and interpretation of the agreement that the employer, so far as contractual rights or duties are concerned, was entitled to discharge an employee. Such a decision would not, on the basis of the principles discussed under our second proposition, foreclose the NLRB from concluding (even though it accepted the arbitrator's findings of fact and conclusions as to the contract issue) that the discharge violated Sections 8(a)(1) and 8(a)(3).

A primary purpose of the abstention policy is to avoid gratuitous and premature decisions of unfair labor practice issues. In the situation under consideration the conclusions of the arbitrator as to the meaning of the contract are largely irrelevant to the determination of the issues before the Board. Hence, it can be argued that no useful purpose is served by postponing the exercise of jurisdiction. However, there is a good deal to be said even in this situation for applying the policy of postponing the exercise of jurisdiction pending exhaustion of the grievance machinery.

If the arbitrator finds that the discharge violated the contract and directs reinstatement of the employee with back pay, the NLRB would dissipate its energies by pressing ahead on the unfair labor practice issue.

Only if the arbitrator came out the other way would it be fruitful for the Board to proceed. Even then, I am inclined to think that the Board should, out of respect for the integrity of the private arrangement to which the parties had committed themselves, accept the arbitrator's findings of fact (and conclusions as to the meaning of the contract, insofar as pertinent) and adjudge the unfair labor practice issue accordingly.

[The End]

Interrelationships in the Interpretation of Collective Bargaining Agreements

By ROBERT A. LEVITT, Attorney, New York City

AT THE OUTSET I wish to compliment Professor Wollett on a very fine, carefully thought-out and thought-provoking paper.

I also wish to make it clear that I subscribe completely to Professor Donald Wollett's basic thesis that the NLRB should, in general, eschew the assumption of jurisdiction over issues of contract interpretation which are subject to grievance and arbitration provisions of a collective bargaining agreement where the resolution of the contract issue may avoid the necessity for an unfair labor practice charge. In fact, I would be inclined to go somewhat further than Professor Wollett. I would state as a general proposition that the Board should, wherever possible, refrain from asserting jurisdiction over a controversy during the life of a collective bargaining agreement where the parties themselves have established a private mechanism for resolving the dispute.

In the brief time allotted to me, I should like to elaborate on this matter and also to point out a few areas of disagreement between myself and Professor Wollett. Before doing so, however, a few general observations relevant to the subject of our discussion are in order.

First, we must bear in mind that the prevailing national view of the role of government in labor-management relations is that government should do everything within its power to encourage labor and management to work out their problems with as little government interference as possible. Volun-

[33] Cf. *Lodge 12, District 37, International Association of Machinists v. Cameron Iron Works, Inc.*, 35 LABOR CASES ¶ 71,671, 257 F. 2d 467 (CA-5, 1958).

tary arbitration is one of the principal vehicles through which this may be accomplished.[1]

It is also to be noted that the NLRB is an administrative agency and, as such, possessed of considerable discretion and flexibility. The act which it is charged with administering and the concepts embodied in it are not fixed, immutable or unyielding to the ever-changing and developing character of labor-management relations. I agree wholeheartedly with Archibald Cox and John T. Dunlop that the responsibility of the NLRB for "formulating rules of decision" does not require "shrinking a vital institution [collective bargaining] into a verbal concept."[2]

In fact it is the national labor policy, as specifically directed in the Taft-Hartley Act, to encourage execution of arbitration agreements and to provide adequate means for enforcing them. Section 203(d) declares:

"Final adjustment by a method agreed upon by the parties is hereby declared to be the appropriate method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

Section 301 gives further evidence of Congressional intention that adherence to contract grievance and arbitration procedures is consonant with the obligation imposed by Section 8(a)(5) of the act.[3]

Moreover, the legislative history of both the Wagner and Taft-Hartley Acts and diverse authorities as well support the proposition that the enforcement of collective bargaining agreements should be left to the mechanism set up by the parties themselves and the usual processes of law rather than to the National Labor Relations Board. As Messrs. Cox and Dunlop pointed out:

"The emphasis laid on collective bargaining contracts in the Wagner Act debates would seem to show that Congress did not intend the NLRB to disregard contractual undertakings in its administration of the Act."[4]

Similarly, when the Taft-Hartley Act was being considered by Congress, a proposal to confer authority on the Board to remedy alleged breaches of contract was deleted in conference, with the following observation:

"Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."[5]

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[1] In this connection, note the following excerpt from an address delivered by the outgoing president of the National Academy of Arbitrators, Paul N. Guthrie, entitled "Arbitration and Industrial Self-Government," which appeared in *The Arbitrator and the Parties* (proceedings of the eleventh annual meeting of the National Academy of Arbitrators):

"In our system the primary function of government in labor-management relations is to use its power and influence to foster and shape those conditions that will best contribute to the ability of labor and management to work out their problems under a system of industrial self-government of their own creation and under their own direction and control. . . . voluntary arbitration is an indispensable part of this system of industrial self-government."

[2] Their article entitled "The Duty to Bargain Collectively During the Term of an Existing Agreement," 63 *Harvard Law Review* 1097 (May, 1950), considers the question of whether or not the obligation "to bargain collectively," which is applicable when a contract is being negotiated, carries over into other phases of the parties' relations. The article then goes on to decry "a rigid concept of collective bargaining which imposes identical duties despite changing circumstances," and points out:

"The words of Section 8(a)(5) were chosen with the generality of constitutional provisions rather than the exactitude of corporate trust indentures. 'The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply an answer to the riddle.' . . . Thus Section 8(a)(5) 'generally has been considered to absorb and give *statutory approval to the philosophy of collective bargaining* as worked out in the labor movement in the United States'. . . . In administering the statute the NLRB must make the philosophy sufficiently concrete for day-to-day application, but the necessity for formulating rules of decision does not require shrinking a vital institution into a verbal concept.

". . . The labor movement has by and large accepted the view that contractual commitments concerning both substantive conditions of employment and procedural arrangements are to be honored until the contract expires. Collective bargaining therefore normally takes the form of negotiations when major conditions of employment to be written into an agreement are under consideration and of grievance committee meetings and arbitration when questions arising in the administration of an agreement are at stake. The emphasis laid on collective bargaining contracts in the Wagner Act debates would seem to show that Congress did not intend the NLRB to disregard contractual undertakings in its administration of the Act."

[3] "Section 301, which facilitates actions for breach of a collective bargaining agreement, also shows that insistence on following the contract grievance procedure does not violate Section 8(a)(5). . . . For it is unreasonable to suppose that Congress enabled an employer to recover damages caused by a union's failure to adhere to a stipulated grievance procedure and at the same time authorized the NLRB to prosecute the employer for refusing to deviate." (Cox and Dunlop, work cited at footnote 2.)

[4] Work cited at footnote 2.

[5] Conf. Rept. 510 on H. R. 3020, 80th Cong., 1st Sess., pp. 545-546, quoted by the Supreme Court in *Textile Workers Union v. Lincoln Mills*, 32 LABOR CASES ¶ 70,733, 353 U. S. 448, 452 (1957).

This thesis was particularly well put by Gerhard Van Arkel, General Counsel to the NLRB under the Wagner Act, as follows:

"This is not the place to examine the manifold advantages of a system of free labor—which means, precisely, freedom from Government control. If the mid-30s called for a degree of governmental intervention unknown to that point, *the need has largely dissipated.* The . . . members of the NLRB have shown a commendable tendency in various ways to diminish the degree to which the Government will assume responsibility for these decisions. . . . they can now make their greatest contribution by the adoption of policies *which respect orderly and settled collective bargaining relationships, the use of voluntary machinery . . . and the right of parties to make such agreements as they choose with a minimum of governmental supervision.*" (Italics supplied.)[6]

The present chairman of the Board, Boyd Leedom, espoused substantially the same views when he said:

"I believe that to as great an extent as possible employer and union should adjust their differences without seeking our [NLRB] help."[7]

It follows, in short, that the Board should step aside, wherever it is feasible to do so, where the parties themselves—through free collective bargaining—have established their own form of self-government which might dispose of problems with which the Board might otherwise have to treat—subject, of course, to such overriding considerations as the fact that the parties' alternative method of resolving their differences will not do violence to the national labor policy as expressed in the act and, particularly, will not compromise nor destroy the rights of individual employees. To put it somewhat differently, it would seem anachronistic for the Board to seek in the present matured state of labor-management relations to inject itself unduly at every stage of the relationship, especially when the parties have established their own *modus vivendi* for settling their controversies in the collective bargaining agreement. In the present milieu of labor-management relations, the Board should be primarily concerned with establishing bargaining units and such bargaining rules as will lead to collective bargaining agreements —what have been termed the "threshold problems" of labor-management relations. The Board should be increasingly less concerned with the relationship of the parties after agreement is reached, where the agreement itself provides an adequate machinery for resolving their disputes.

We will turn now to a few more specific comments concerning Professor Wollett's paper. While I agree completely with Professor Wollett's basic theme, we do part company somewhat when it comes to the matter of determining, and the matter of who is to determine, whether a dispute is "cognizable" under the arbitration provisions of the collective bargaining agreement, such as to call for Board abstention. Professor Wollett would have the Board inject itself more directly in determining issues of arbitrability, for he says: "Whether the Board will take hold of the matter or postpone the exercise of jurisdiction shoud depend upon its determination of the issue of arbitrability."

It seems to me that the arbitrability question arises in either one of two ways: The party charged with an unfair labor practice refuses to go to arbitration or takes the position that the issue is not arbitrable or, conversely, the party charged with an unfair labor practice contends that the issue is arbitrable.

In the first situation, Board abstention would put the charging party to the burden of going to court to compel arbitration and then, if the court should find the issue not arbitrable, return to the NLRB. While there may be situations where the Board might feel constrained to compel the charging party to exhaust its judicial remedies before going to the Board, such a procedure arguably, in many instances, imposes a large burden on the charging party. With respect to the second situation—that in which the charged party asserts that the issue is arbitrable—the better rule would seem to me to be that the Board should not arrogate to itself the question of determining whether the issue is arbitrable, but only whether or not the party asserting an arbitrable issue, as a defense to the charge, is acting in good faith. In this view, I agree with the following statement by Professor Cox:

[6] Van Arkel, "Twenty Years of the NLRB: Unit and Contract Bar Problems in Representation Cases," 16 *Ohio State Law Journal* 360, 379 (1955); Samoff and Summers, "The Effect of Collective Bargaining Provisions on NLRB Action," 8 *Labor Law Journal* 676 (October, 1957).

[7] Address delivered to the Chamber of Commerce of the United States in March, 1957. See also the statement by W. Willard Wirtz, former chairman of the National Wage Stabilization Board: "There is little need for Government intervention where the collective bargaining situation is established." (Chicago *Daily News*, November 17, 1955.)

"The NLRB should not attempt to resolve a controversy over the arbitrability of a dispute unless the party asserting the applicability of the contract procedure is acting in bad faith." [8]

It is recognized, of course, that in declining the assumption of jurisdiction in favor of arbitration where arbitrability is contested or questioned, the Board would be obliged to take cognizance of the very practical consideration that the act provides a six-month statute of limitations on unfair labor practice charges. Hence, where there is a real question as to arbitrability, the Board could toll the statute simply by issuing a charge and holding it in abeyance.[9]

Similarly, I do not quite share Professor Wollett's concern that the Board's relatively recent *Beacon* decision may portend any reversal of, or withdrawal from, the Board's developing philosophy of abstaining from taking jurisdiction in situations where the parties have provided alternative means of resolution by private agreements. It is a significant observation that *Beacon* can readily be distinguished, and, in fact, the Board in its decision took great pains to distinguish from *Speidel*. The Board apparently took the view that *Beacon* was a case in which the facts quite clearly showed that the employer had, in effect, conceded that the matter of workloads was a bargainable issue not covered by the collective bargaining agreement, yet refused to discuss the subject in bargaining which led to the current agreement. Moreover, after the current agreement had been executed, the employer simply proceeded unilaterally to increase work loads with corresponding wage increases, while apparently continuing to concede that the matter was not covered by the collective bargaining agreement. In short, without further elucidation by the Board, it does not seem appropriate to regard *Beacon* as any reversal of the long-time trend of Board decisions. At most, *Beacon* seems to constitute further evidence that the Board, as always, refuses to be bound by rigid concepts and employs an *ad hoc* approach to these problems.

I also would dissent, at least partially, from Professor Wollett's second major point, namely, that the Board should not take hold of contract interpretation questions that have been settled by arbitration, unless "applying the standards developed by the Federal Courts in actions to confirm or vacate awards . . . the decision would not be enforceable."

I believe that to as great an extent as possible employer and union should adjust their differences without seeking our [NLRB] help.
—Boyd Leedom, NLRB Chairman

It seems to me that such a standard would unduly restrict the Board. One can conceive of arbitration awards which may be so plainly contrary to the purposes of the act and do such violence to it that the Board should assert jurisdiction—though, admittedly, such cases are probably rare. Thus I would be inclined to go along with the Board's present policy in refusing to abstain from exercising jurisdiction in certain exceptional situations, such as cases where the conduct involved constitutes a flagrant disregard of the act; where both employer and union are arrayed against the individual employee and Board intervention becomes necessary to protect individual rights; where, in certain cases, the employee was not represented or was inadequately represented at the arbitration hearing; or where there is any indication that there has been collusion between employer and union or an "agreed decision" at the expense of the employee.[10]

I would conclude these brief remarks by referring to the particularly apt language of the United States Court of Appeals for the Sixth Circuit in *Timken Roller Bearing Company v. NLRB*, 12 LABOR CASES ¶ 63,793, 161 F. 2d 949 (1947):

"Though the duty to bargain is absolute, it may be channeled and directed by a contractual agreement. . . . the petitioner sought not to curtail the process but to utilize the contractual mechanisms for its prosecution. . . . If adjudication bases no sanctions on commitments made therein by the bargaining agent, it imparts futility to a bargaining process hopefully developing in the interest of industrial peace. If the law penalizes one party to the contract for standing on a bargain not itself violative of law, there may still be compulsion to bargain, but the virtue of agreement vanishes. It may well be that industry will concede much for a no-strike covenant and orderly grievance procedures. It may also result that it will concede little for promises, the performance of which may be insisted upon only at the risk of condemnation for unfair labor practices. The law, we think, does not compel such result." **[The End]**

[8] Cox, "Collective Bargaining During Contract," 63 *Harvard Law Review* 1108 (1950).
[9] See Note, 69 *Harvard Law Review* 731 (1956).
[10] Samoff and Summers, work cited at footnote 6.

Leadership and Membership in Local Unions

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THIS is a trial run of a scale of leadership influence in the local union. The values on the scale begin with strong individual leadership on one end, fusing into successively weaker expressions of leadership influence. The scale has two main segments, individual leadership and collective leadership. The raw material for the leadership values along the scale is derived from part of the sizable stock of local union case studies. Words like "scale" and "values" are used in a figurative meaning; there is no intent to suggest mathematical preciseness.

This paper is part of a general discussion dealing with the inter-relationships between public and private programs in the regulation of internal affairs of unions. My justification for discussing a topic that seems to be at several removes from this theme is that, I think, we need to know more than we do about prevailing private practice before we can sensibly talk about the public interest. As it is, this paper goes only part of the way in prevailing practice because it deals only with prevailing *democratic* practice.

I have been able to identify six main points of reference along the leadership scale: (1) the "charismatic" leader; (2) the ideological leader; (3) the leader as power "operator"; (4) the administrative leader; (5) collective leadership of one kind or another; and (6) effective control by the membership.

"Charismatic" Leader

The "charismatic" leader literally leads in a creative, imaginative way. By temperament he seeks the new because it is new and minimizes the old because it is old. He thinks in broad scope and magnitude. He is public-relations-minded, and thinks in terms of plan and program.

We have undoubtedly an authentic charismatic leader in the man identified by Maurice Neufeld as the "business manager" of Local 3 of the International Brotherhood of Electrical Workers in New York City.[1] It is generally known that the "business manager" is Harry Van Arsdale. "The most important single force within the administrative life of the union," writes Neufeld, "is the personality, human sympathy, historical perception, philosophy and energy" of the business manager of Local 3. Under his leadership the local has grown from 7,000 to more than 30,000 members.

The core of the local's interest is, to be sure, the classic job control of the craft union but with the difference in Local 3 that job control has been given new dimensions. Van Arsdale has created the "welfare union" which is breathtaking even in a simple listing: death benefits, pensions, disability pensions, supplemental pensions, hospitalization and surgery, serious injury benefit, tool and work clothes replacement benefit, convalescent home benefit, scholarship benefit, dental benefit, diagnostic and preventive services, a loan fund, housing projects and vacation expenses. "Yet," *Fortune* magazine comments, "the industry seems to manage the burden." Contractors themselves have been beneficiaries of the welfare union. A surplus in the administrative fund of the welfare plan was spent for a $10,000 life insurance policy for two principals of each of the 600 member firms and for assessments of the New York State Disability Fund, which are usually borne by the employers.

Charles Yale Harrison has said about Van Arsdale: "There are gaps in the man,

[1] Maurice Neufeld, *Day In, Day Out With Local 3, IBEW* (Cornell University, New York State School of Industrial and Labor Relations, 1955), p. 4.

in the human sense, but he is still basically a rank-and-filer. He thinks like his men and reacts like them, but with greater acuteness. He has the dedication of a crackpot, but he is enormously sane." [2]

The local meetings of Local 3 are, according to Harrison: "unbelievable . . . . There are long debates from the floor, with every man who has something to say getting his chance, items in the treasurer's report being challenged: '$600 for postage, that's a lot of money Brother Chairman, why can't we send postcards?'" It was "democracy carried almost to the point of tedium."

Van Arsdale "administers efficiently and often in a consciously ingenuous manner. His methods are controlled and tight. He surrounds these devices, however, with a democratic spirit of friendliness, openness, and genuine interest in individuals. The breath of freedom within the administration of Local 3 is, therefore, partly illusory and partly real." [3]

Another highly creative local union leader has been Harold Gibbons, director of the St. Louis Joint Council of Teamsters and currently executive vice president under James Hoffa. Gibbons' base is the several locals of retail, wholesale and warehouse workers in St. Louis. His labor health institute has been regarded as a pioneer and model of superior health care financed by a negotiated health and welfare plan.

Arnold Rose observes: "In December 1945 Gibbons received the CIO award for carrying out a no-discrimination policy. Among the activities for which the union received this award were: (1) Engaging in interracial sports in St. Louis' largest public park, thereby establishing a precedent which led to general use of the park's sports' facilities by Negroes. (2) Holding interracial banquets and balls in some St. Louis hotels, leading to a no-discrimination policy in at least one of them. (3) Employing Negro office girls. (4) Putting no-discrimination clauses into contracts with employers. (5) Standing firm against wildcat strikes called to protest the upgrading of Negros." [4]

When Rose asked a sample of the membership who they thought decided policies in the union, 20 per cent named the union's director—that is, Gibbons; 39 per cent named the steward's council; 30 per cent named the rank-and-file members, and 10 per cent answered that they didn't know.

Under Gibbons' leadership the union has developed ambitious programs in education, in small group organizations and in community and political participation. The general consensus was that Gibbons was the most powerful labor leader in the city of St. Louis.

A *New Republic* article on Gibbons reports that he earns $15,000 a year as secretary-treasurer of his home local, including his expense account. There has been criticism of Gibbons' "high living." His critics think he is "power mad," and Gibbons himself says, "Sure, I like authority —because it lets me get things done." [5]

Subsequent to the Rose study Gibbons was a specific subject of a McClellan Committee investigation. [6]

Arnold S. Tannenbaum and Robert L. Kahn describe another sort of charismatic leader. [7] The "Sergeant" local has 850 members and a long, militant history. At one of the regular union meetings of the local, "strong sentiment had been mobilized . . . for strike action in order to obtain desired concessions from management. The proponents of this view had spoken vigorously, and the attending members expressed agreement with their ideas. There was an obvious majority in favor of strike preparations. Opposition was relatively weak and came mostly from some of the local officers, who cautioned the members against rash action. Their appeal, however, was ineffectual. Finally, the president arose. He expounded in simple, eloquent and forceful terms the need for the members to stand behind the bargaining committee. The bargaining committee, he felt, could get exactly what they wanted *without* striking. Furthermore, the strike action advocated by some of the members would ensnare the union in some of the technicalities of the Taft-Hartley law. A ten-minute speech—listened to with great attention by the members—turned the tide and a voice vote completely supported the president's view."

[2] "Van Arsdale's Tight Little Island," *The Reporter*, April 11, 1950, p. 13.
[3] Neufeld, work cited at footnote 1.
[4] Arnold Rose, *Union Solidarity* (Minneapolis, University of Minnesota Press, 1952), p. 26 (footnote 20), p. 55.
[5] "Harold Gibbons—Hoffa's Left Hand," *New Republic*, September 9, 1957.
[6] United States Senate, Select Committee on Improper Activities in the Labor or Management Field, *Hearings*, Pt. 39 and Pt. 40, 85th Cong., 2d Sess., 1958.
[7] Arnold S. Tannenbaum and Robert L. Kahn, *Participation in Union Locals* (Evanston, Row, Peterson & Company, 1958), p. 28.

Ideological Leader

Further along the scale of personal leadership is the ideological leader. The ideology need not be, and increasingly is not, cast in the traditional Marxist mold. It is ideological in the sense that the leader has a conscious commitment to a large view of society, labor-management relations or the role of the union. The ideological leader has much in common with the charismatic leader in his disposition to move out ahead of the membership. But the ideological leader differs from the charismatic leader in that his reference for action is likely to be a well-thought-out philosophy. Where the charismatic leader moves on the basis of intuition, the ideological leader moves on the basis of the larger view of the situation. Like the charismatic leader, he believes that it is the function of the leader to lead, and to lead vigorously.

The National Planning Association's study of the relationship between the Hickey-Freeman Company and the Amalgamated Clothing Workers of America in Rochester provides us with an insight into one of these ideological leaders.[8] The leader here is Abraham Chatman, manager of the Rochester Joint Board of the Amalgamated Clothing Workers. (The "ideological" label is mine, not the NPA's.)

Sidney Hillman's philosophy of union-management cooperation has provided the foundation stone of Chatman's approach to the problems of the Rochester men's clothing market. The Amalgamated organization in Rochester is strong, and Chatman's position as joint board manager is "unchallenged." In the opinion of workers, company executives and union officers, Chatman "has retained his position through genuine popularity. . . . While many of the workers are aware that the leadership of their organization appears to be self-perpetuating, almost all vehemently asserted that this was the democratic expression of the membership and that no one, not even Abraham Chatman, could hold his office without rank and file approval."

What are the ingredients of the ideology in operation here? Essentially it can be characterized by what has come to be known as the Amalgamated's "industry" point of view. Union decisions nationally and locally are based on the health of the whole industry "rather than on temporary or local opportunities to gain a concession." The decisions may at times run counter to the sentiments of the rank and file "such as moderation in wage demands when costs are soaring, or strict adherence to a contract when, in the opinion of the workers, a strike or slowdown has been justified. And again the question must be raised: could a truly democratic organization maintain such a logical and reasoned course and still retain its effective unity? The answer here seems to be 'yes' and the reason is this: over the years the philosophy that only what is good for the industry can, in the long run, be good for the workers, has become thoroughly accepted by the membership."

Chatman's characteristic method of operation is illustrated by excerpts from the minutes of the joint board. For example: "Last week a group of pressers from Hickey-Freeman requested the office to secure an increase in wages for them. The manager informed them that such a move at the present time is impossible; however, when the time comes that it will be possible to secure increases in wages, it will be done for all members in general, and not for any individual group."

This occurred at another meeting: "Brother Chatman stated that because time and one half for overtime [this was in 1936] cannot be enforced in other union markets at the present time, due to uncontrollable causes, he proposed that we follow the procedure in other markets. He urged the Joint Board to be on guard and under these circumstances, not place this market at a disadvantage with other clothing centers because in the long run our membership pays the price for it. The Joint Board adopted the recommendation."

The ideological leader—as exemplified in Chatman—much like the charismatic leader, is concerned with effective identification and participation by the union member with his union. To this end he will press for better attendance at union meetings and involvement, not only in the local union, but in the larger labor movement as well. Educational and welfare functions of the union have a high priority on the program agenda.

"Operator"

The leader as "operator" is acutely conscious of what is required to remain in

[8] Donald B. Straus, *Causes of Industrial Peace Under Collective Bargaining* (Hickey-Freeman Company/Amalgamated Clothing Workers of America, Case Study No. 4) (National Planning Association, 1949), pp. 60 and following.

power and of the methods and tactics through which this is achieved. He tends to assess a situation both on its merits and on the implication of the situation for the balance-of-power forces. He puts a good deal of stock in his ability to keep things from getting out of hand in the local union and to contain rival claimants for position and prestige, who might by comparison reflect unfavorably on him.

The Rosens have provided many insights into this role of the leader as operator.[9] They base their observations on a study of 21 business agents on the staff of a regional union organization with about 40,000 workers "from many manufacturing crafts, and at all levels of skill." As the business agent sees his role, it is: "to represent his constituency, not passively, but in an active way by molding their behavior and beliefs and by actually initiating bargaining issues and selling them to the membership. . . . [He] makes it explicit that 'bread and butter' membership demands cannot determine completely the union's operations in collective bargaining.

"There is little place in his scheme of things for a short-sighted view born of emotion rather than of logic. . . . The business agent recognizes that he must be sensitive to the demands of his membership, but he has faith in his power to shape many of these demands along appropriate lines." He is conscious of the need "to have his finger on the pulse of the rank and file and to know not only what they want but how badly they want it." Since he can't see the rank and file personally, he builds up the shop stewards and the bargaining committee as channels of communication. The Rosens "frequently heard . . . such comments as these: 'You have to explain and teach (and often select) the stewards and committeemen so they will keep you informed and support you with the rank and file.' Conspicuous by its absence, however, is any mention of the stewards' or committeemen's *active* part in negotiations per se. Actually, in most cases, the bargaining committee plays only a supporting role.

"If the committee attempts to dominate the situation, pursuing its own interests or the specific demands of the membership, its action meets with strong disapproval from the business agents. Moreover, the business agents make quite a point of 'control of committee and stewards' in evaluating the competence of their fellow agents. The poor agent, in their eyes, is one who 'lets the committee get out of hand—loses control'."

Another example of the leader with a strong sense of power awareness is the business agent of a laborers local in Illini City: "Although the union met once a month and many issues were discussed, the business agent's recommendations were generally followed. His attitude was well typified by a statement that he wasn't one for letting one of his boys question his authority. It was either he or the steward (talking about a jurisdictional problem) and if he called a decision, the steward had better live up to it . . . 'It's the case of him or me—one of us goes down the road. If I'm right, as long as I'm business agent, that's that. If I happen to be wrong, then I have to let somebody else take my job'. In negotiations, the business agent usually worked by himself, without a committee, but all agreements were voted on by the membership."[10] The business agent in question had held office for 14 years, except for 2½ years when he was in prison.

A contractor whom the business agent dealt with sized him up like this: "You know it takes a certain type of man who is able to keep a bunch like that under control—especially when the union has men who aren't working. If there are 100 men out of work and an order comes in for six men, the 94 he doesn't send out will all hate him . . . ."

Another "operator" type in Illini City, the business agent of a painters local, expressed himself as follows: "'My men will do what I tell them. I don't order them either. I sell my men. A lot of business agents don't operate that way but I do. I sell my men on everything before I do it. I explain to them point by point what we ought to do and why. I don't give them orders, I give them reasons and I don't have trouble with them either. They will listen to me. That is part of my job, selling my men on the best deal. If you can't do that then you have got trouble. I don't know, maybe if I wasn't so independent I could be an international man, but taking a lot of that guff is too much for me'."[11]

[9] Hjalmar and R. A. H. Rosen, "The Union Business Agent Looks at Collective Bragaining," *Personnel*, May, 1957.

[10] Milton Derber and associates, *Labor-Management Relations in Illini City* (Vol. I, The Case Studies) (Champaign, University of Illinois, Institute of Labor and Industrial Relations, 1953), pp. 682-683.

[11] Work cited at footnote 10, at p. 571.

Although the contract provides for grievance machinery, it's the union business agent who makes the "basic interpretation of the contract." A member talked about the business agent's power in these terms:

"'Now [the business agent], he is honest. He won't spend money wrong nor has he kept any himself. He runs everything legal and he's honest, but the way I look at it there is just too much power and authority there for one man. It was voted to him—he came by it legal but it's wrong, I think. Well, here is where it is wrong. You take the assistant business agent—he's the president of the union and he's appointed as assistant business agent by [the business agent]. Then there's the girl in the office—she's appointed by [the business agent]. Why, they are both appointed by [the business agent]! He has the power to hire and fire them or hire and fire whoever else he wants. The next election I would like to see the rank and file vote on it. . . . By god, that's just what the companies used to do! I think that all should rest in the rank and file'." [12]

When the question of having a committee take an active part in the negotiations came up, the business agent opposed it and was successful in persuading the majority of the membership to vote down the use of a committee. However, as one member put it: ". . . we do vote on everything for final action and it isn't all his say." [13]

Administrative Leader

The impulse of the local union leader to act on his own power is further diminished, but by no means eliminated, in the "administrative" leader. His primary orientation is the job at hand. For example, the business agent in the construction industry is intrinsically a one-man job. The building trades business agent may view his dominant role as a power operator or as an administrator, and perhaps a combination of both. Here I am trying to distinguish the local union leader who, while accommodating himself to the one-man character of his job, seems to orient himself more toward the membership rather than toward his personal drive for control and power.

George Strauss has studied building trades business agents in 13 unions in a community of 400,000. He draws none of these distinctions or generalizations; nevertheless, if I read him correctly, it is possible to infer this validly from Strauss' account:

". . . The most secure business agents, politically, are those who campaign 12 months a year. Their contacts with members on the job and at meetings serve the dual purpose of revealing what the members want and of advertising the effectiveness of their own leadership.

". . . The business agent can satisfy only a few of the demands made upon him. In self-defense against these pressures he has two alternatives. The first is to establish a set, formal system of distributing job opportunities and other advantages. (This is often called 'going by the book' and corresponds to the formalized system of considering grievances utilized in some industrial unions.) The second alternative is to engage in out-and-out favoritism, to give the best plums to your friends, and to leave the crumbs for the rank and file. This is possible only when the agent has already strongly solidified his control of the union and has little fear of being kicked out. *None of the business agents studied enjoyed such power.*" (Italics supplied.)[14]

Strauss concludes "that the locals in this community were democratic, to the extent that the business agents were forced to be responsive to the desires of the members—with defeat looming if they were not. The degree of membership participation and interest was higher than is common in industrial unions of the same size." He hypothesizes that "the effectiveness of the membership controls was to some extent a function of the local's small size and cohesiveness."

That the size of the community need not be a determining factor in the exercise of membership control is suggested in the Seidman group's study of a plumbers local in one of the metropolitan centers in the Middle West, with a membership of about 4,000 journeymen and 400 apprentices. Seidman singles out the following comments from the rank and file concerning this local's business manager:[15]

[12] Work cited at footnote 10, at p. 572.
[13] Work cited at footnote 10, at p. 573.
[14] George Strauss, "Control by the Membership in Building Trades Unions," *American Journal of Sociology*, May, 1956, pp. 533 and following.
[15] Joel Seidman, Jack London, Bernard Karsh and Daisy L. Tagliacozzo, *The Worker Views His Union* (Chicago, University of Chicago Press, 1958), p. 56.

"We have a good organization now. We have democracy here. You can get up and speak without fear of reprisal. And that's always done. I've known steamfitters who had to leave the city because they became marked men who spoke against the leadership. This couldn't happen in our union. He [the business manager] is a different kind of fellow compared to what we had in the old days. . . . He believes in running the union with brains not brawn. . . . He cleaned up the union a long way from what it used to be.

"We all got a voice now; we can say what we like. It's not like the old days. If a guy tried to argue back with the leaders in those days, he'd get conked on the head with a spittoon. We didn't know how the money was spent and when you'd ask you'd more than likely get a beating in the alley behind the hall. Now it's not like that; we have our arguments and disagreements, but we discuss it and after it's decided we're all friends again."

Collective Leadership

When we get to the category which I have designated as collective leadership, we reach a major division point. Instead of the individual leader as the prime mover in the local union, we now observe leadership by a collectivity within the union. This is not to say that one leader may not be more important than other leaders, but the leverage for the exercise of power and influence comes from a group rather than an individual. Joint consent and participation of the leadership *group* is the dominant leadership characteristic here.

The tie that binds the collective leadership may be derived from common status interests involving (1) full-time paid leadership; (2) a strategic bargaining group; (3) ethnic kinship; (4) union old-timers; (5) a high-wage and skill group; or (6) a constitutionally authorized group. Finally, the leadership group may be bound together because nobody else wants the job.

The interest of the full-time paid leadership group in preserving its position against inroads by the volunteer shop leadership is what holds together the 21 business agents in a Midwestern joint board (described above as "operator" leaders, in a study by the Rosens, and here discussed in another work by them; I think the same group in this instance, however, can properly be used to illustrate two dominant tendencies in leadership style):

". . . The local unions have formal autonomy on purely local matters and, in this union, shop bodies have the final say on shop matters such as contract negotiations. (Shops and locals usually are not coterminous, and shop matters, therefore, cannot be a local union concern.) . . . It is the business agent assigned to the local or shop who makes recommendations to the unit and meets dissenting remarks or requests for clarification that come off the floor. Usually his recommendations are not solely as a result of his own thinking however. They tend to be either based upon established joint board policy (formal or informal) or to have been brought up at the business agents' staff meetings for discussion and decision in cases where policy is not clear. . . . The [business agents] group tends to reject any possible solutions to problems that would increase the authority of non-paid union officials even though a rejection of an alternative on this basis may have other undesirable effects." [16]

The influence of a key, strategically situated group within a larger group is another form which collective leadership takes. Local 3 of the IBEW is a case in point. Here we saw earlier the charismatic role of a union leader, where the power base of this union leader is derived from a key group of electrical construction journeymen in the local. As Neufeld observes, "All of the less skilled crafts and trades within Local 3 owe their organization, economic and social welfare, continued existence, and consequently, their administrative life to the power and good will of the electrical construction workers who have repeatedly voted special assessments upon themselves to aid their weaker brothers. These top craftsmen, in turn, give their undivided allegiance to their business manager when the votes are cast." [17]

Consciousness of ethnic kinship forms the basis of collective leadership in several locals investigated by Sayles and Strauss: "One local has been the scene of a seesaw battle between Italians and Irish ever since it was organized." A needle-trades local "was the scene of a long-term struggle between Jews and Italians." [18]

[16] Hjalmar and R. A. H. Rosen, "Decision-Making in a Business Agent Group," *Industrial Relations Research Association Proceedings*, 1955, pp. 290-291.

[17] Work cited at footnote 1, at pp. 4-5.

[18] Leonard R. Sayles and George Strauss, *The Local Union* (New York, Harper & Brothers, 1953), p. 216.

Where the leadership does not come from a dominant ethnic group it may continue in power only so long as it maintains a balance of support among dominant ethnic groups. "In two situations observed, rival ethnic groups were of equal strength. . . . the local president was elected from among the small minority of Anglo-Saxons. In each case the president's most difficult task was to avoid charges of favoritism by one group or another." [19]

Collective leadership is frequently exercised by the high-skill group, not so much as a result of a will to leadership by these groups as from the natural dynamics of the local union situation, which tend to push the skilled groups to the fore.[20]

Thus far we have been discussing extra-constitutional (not unconstitutional) factors in the location of power. There are local union situations, however, in which the reality of power conforms to the positions where the local union constitution has actually vested power. Most typically, this occurs in an executive board, the bargaining committee and the stewards, although local circumstances are likely to weight power in the direction of one group of leaders.

In a study of a Buffalo UAW local, Shister and Hamovitch observe that power over job problems is located in the president and the shop committee rather than the stewards. But "this power cannot be exercised without restraint. There are real and important limitations on the use of this power, for these reasons: (1) the factionalism in the organization; (2) the active interest in union affairs displayed by the membership—witness the relatively high attendance at union meetings." [21]

The constitutional allocation of authority seemed to be the real thing in the 200-member Illini City electricians local: "The active membership . . . had a strong voice in the organization. Committees were appointed by the president rather than by the business agent. Bargaining and grievance sessions of a general nature were conducted by committees rather than by a single individual. . . ." A comparable situation prevailed in the Illini City carpenters.[22]

At the farthest end of the scale of leadership we encounter the situation in which the leadership situation is fluid and where the mass of the membership effectively carries out its end of the democratic bargain. ". . . there seemed to be considerable evidence [in the Illini City Garment Workers situation] that almost anyone who wished to be a leader in the local could fulfill this desire. . . . A case in point is that of a worker who was fired after eight weeks at her first job in a garment factory. She was reinstated through the efforts of the union, and one week after her reinstatement she was elected steward and member of the union's executive board." [23]

Another highly fluid leadership situation is reported in the Textile Workers Union local in the American Velvet Company where the investigator found that "the membership is entirely responsible for actions of the union." There is constant turnover in the leadership not so much because of dissatisfaction but because "it is time to give someone else a chance." There have been eight presidents of the local in 13 years.

Membership meetings are well attended and lively, even after the "achievement of good employment conditions." The leadership is "intelligently questioned," and management proposals are subject to detailed debate.[24]

The seven local unions functioning in the Nashua Gummed and Coated Paper Company is another instance of where the "real locus of power . . . is in the membership." The membership exercises influence at various stages in the bargaining process: in drafting proposals, in instructing the bargaining committee and in the final approval of the contract. During protracted negotiations there are likely to be additional meetings. Officers and grievance committeemen are changed frequently, in one local by deliberate rotation. Membership attendance at meetings is average "yet on issues which affect the members more directly, such as approval of a proposed new contract, the membership attendance is greater" than 50 per cent.

There was general agreement that membership participation in these locals was

[19] Sayles and Strauss, work cited at footnote 18, at p. 217; see also Seidman et al., work cited at footnote 15, at pp. 70 and following.

[20] Sayles and Strauss, work cited at footnote 18, at pp. 143 and following.

[21] Joseph Shister and William Hamovitch, *Conflict and Stability in Labor Relations: A Case Study* (University of Buffalo, Department of Industrial Relations, 1952), p. 14.

[22] Work cited at footnote 10, at p. 683; see also Tannenbaum and Kahn, work cited at footnote 7, at Ch. VII.

[23] Work cited at footnote 10, at pp. 412-413.

[24] George S. Paul, *Causes of Industrial Peace Under Collective Bargaining* (American Velvet Company/Textile Workers Union of America) (National Planning Association, Case Study No. 11, 1953), pp. 18 and following.

"important and that it did not have the 'rubber stamp' quality found in some other groups." On several occasions the membership rejected tentative settlements and the negotiators were directed to "go back for more." [25]

A similar situation seems to obtain in the United Steelworkers local in the Lapointe Machine Tool Company where "the union's governmental processes are democratic in nature. There is ample opportunity for the expression of majority will and deep respect for the rights and opinions of the critical individual. These opportunities do not go by default. Members vote heavily on important issues and in elections for union offices, and many of them take a willing and active part in administering the union's day-to-day business. By all tests, local 3536 meets the standards of a democratic society." [26]

Concluding Thoughts

The aim here has been to lay out along a scale types of power interaction between leaders and members in the local union. Obviously these are not hard and fast types. In a real sense any given leader or group of leaders are likely to show all of these leadership qualities. The only claim that is made for this scale is that it seeks to locate the single most important quality.

All of the major points along the scale are consistent with the idea of democracy in the local union because, in every one of these situations (insofar as one can tell from the reports of first hand investigations), the ultimate sovereignty is effectively exercised by the membership.

There are two grounds for holding that all of the leadership values along the scale are consistent with democracy in the local union. First, reputable investigators studying the local situations at first hand have said they were democratic. Second, independent of such characterizations and relying on what we have in the way of facts in the accounts cited here, it is possible to say that these varying leadership styles are consistent with the *theory* of democracy.

This last brings us to the nature of democracy. The most penetrating analysis of the nature of democracy, I think, is that the British political scientist, A. D. Lindsay, in a most illuminating passage in his book, *The Modern Democratic State.* Lindsay is writing here, to be sure, about the democratic state; but it seems to me that his analysis is just as applicable to the democratic union:

"Democracy is not, properly speaking, government *by* the people. For the people, if we mean by that as we ought to mean, all the members of society in all their multifarious relations, cannot govern.

"Government involves power and organization, administration, and decision. Even a small public meeting cannot administer or organize. It can only express approval or disapproval of the persons who govern or of their general proposals. . . .

"It is essential to any sound democracy to recognize what part the ordinary public can take in the government of a state and what it cannot. Experience has shown abundantly that, if in the name of democracy you ask the ordinary member of the public to do more than he can or will in fact do, the result is a sham. We must, therefore, distinguish between the various processes by which the government of a country is kept responsible to public opinion from the highly technical and specialized processes of government itself." [27]

The local union situations that we have examined here have shown differences in the technical and specialized processes of union government. These differences turn on (with some exceptions) whether the locus of power is in the business agent or his equivalent, or in the working plant leadership. For most union situations there is little choice as to which it will be, because, as Van Dusen Kennedy has so perceptively analyzed the problem:

". . . the key role of the business agent in nonfactory unions is the product of all the employment and market factors which we have attempted to sum up in the term, 'nonfactory'. These conditions demand that a local union of any size have one or more full-time, salaried employees working out of the union office, performing a very wide range of functions, and exercising broad

[25] Charles A. Myers and George P. Shultz, *Causes of Industrial Peace Under Collective Bargaining* (Nashua Gummed and Coated Paper Company/Seven AFL Unions) (National Planning Association, Case Study No. 7, 1950), pp. 30-31.

[26] George P. Shultz and Robert P. Crisara, *Causes of Industrial Peace Under Collective Bargaining* (Lapointe Machine Tool Company/United Steelworkers of America) (National Planning Association, Case Study No. 10, 1952), p. 26.

[27] A. D. Lindsay, *The Modern Democratic State,* Vol. I (London, Oxford University Press 1943), pp. 281-282.

powers. By the same token, nonfactory employment conditions militate against the maintenance of an effective shop steward type of representation at the work level. The number of union members at each place of employment is usually quite small and the rate of turnover among them relatively high. The stratified management hierarchy which helps support a steward system in many factory situations is largely absent. Most of the crucial union business is conducted from the union office and is in the hands of the business agent. In the absence of large numbers in concentrated work groups needing frequent representation at the work level it is difficult to keep an effective steward system alive." [28]

The circumstances under which leadership must function in the nonfactory union tend to minimize shared power. The circumstances of factory unionism maximizes shared power. There is room, however, for wide variations within the individual-leadership segment and within the collective-leadership segment. And in some instances we have seen the impact of "cultural lag" on union leadership—that is, where the union grew its roots as a "business agent" oriented union, and continues to apply this pattern in a later period to its factory union situations.

All of this discussion adds, up to the following generalizations concerning internal union affairs:

There is more than one authentic expression of democracy in the local union, if democracy is meant to be relevant to ligitimate function.

When local union government is examined in the setting of legitimate function, the generating circumstance in the degree of shared power is to be found in "employment and market factors."

To the extent that public policy and opinion is concerned with union democracy, it must take into account the *diverse* ways in which human beings accommodate union government to the circumstances of the environment, and not be taken in by excessively romantic or idealized images of democracy.

There is an enormous stock of case study literature dealing with local unions which has not been tapped for purposes of generalization. I hope that this paper has suggested some of the possibilities of generalization.

[The End]

Interrelationships in the Regulation of Internal Union Affairs

By J. B. S. HARDMAN, Chairman, Inter-Union Institute, Inc.

MY REMARKS will be directed primarily to the concluding thoughts of Professor Jack Barbash's very interesting paper. However, I shall make a few side observations on the factual part of the paper.

Mr. Barbash has assembled impressive testimony, on the working of the democratic process in a number of local unions, which he considers weighty enough to justify a general conclusion that internal union democracy on the local level is in a state of robust health, leaving little more to be desired. I wish I were able to share the finding. My misgivings come along the following three lines:

(1) The several studies which Mr. Barbash cited and even "the enormous stock of case study literature" to be "tapped for the purposes of generalization" which he mentioned in the fourth point of his "concluding thoughts" are nonetheless too few and far between as compared to the numerical enormity of organized labor—18 million members, in nearly 100,000 local unions—

[28] Van Dusen Kennedy, *Nonfactory Unionism and Labor Relations* (University of California, Institute of Industrial Relations, 1955) pp. 19-20.

further complicated by the operational diversities of the unions. At best, these are examples and not "a sample." In fact, no effort was ever made to gather and study a representative sample of this vast variety of organizations, and that could hardly be done with the limited means at the researchers' disposal, at least at the present time.

(2) While I quite agree that the authors of the several case studies are "reputable, first-rate investigators," I would hesitate to make the end product of these investigations the basic material of over-all judgment. Statistical prowess and competence in getting, analyzing, and then generalizing the results of interviews and of observations made at occasional sittings-in at some meetings is not quite enough equipment for the tricky, exacting task of probing the inner life of unions. Most of the time the researchers are "being shown." It is the reverse of the Missouri technique. It will be noticed that most case studies are made in unions which have a mien for "good public relations." The studied unions are "putting their best foot forward," and they naturally enough keep the other out of sight.

The outside explorer is not invited into the recesses of union functioning. In point of actual fact, the union members who know something about their unions, may they be ever so much displeased with the ways things are done in their organizations, are rarely willing to speak their minds freely to inquiring outsiders. Unions still are on the defensive, and members and officers alike act in keeping with that mental state, and are guided by it, when they expose themselves to observation or engage in an audition. Indeed, one has to live with them to know them as they are. I do not say the academic studies are not useful nor helpful, but they are not enough so to be viewed as laboratory-tested material. The output could be of greater value if the respective researchers would precede their case studies by work in an industry for a couple of years and by getting themselves elected to some union office, perhaps. In the latter case, they possibly might find it more profitable to stay there than to engage in teaching. The unions would profit by adding trained competence to their own stock of shop-grown capabilities.

(3) Accomplishments of great things for the members of a union by a leader only prove that the respective man has done a good job, but in no wise prove that the union in the case is democratically run. The instance of Harold Gibbons is one in point. The virtues of the man's leadership cited by Professor Arnold Rose only shows that Mr. Gibbons' control of the union, by way of a picked coterie of henchmen maintained at all costs, has paid off well enough to the members. I do not know how well. Similarly, John L. Lewis, to cite the case of one of the most brilliant men of American unionism, has done extraordinarily well by the miners in the last 25 years. But his leadership is one of benevolent autocracy even as his leadership of the miners in the preceding 15 years was pure-and-simple rule-or-ruin machine control, with the miners' union virtually decimated in the process. Anthony Anastsia of the International Longshoremen's Association, to cite a case of a different breed, was recently making much publicity hay by showing the $750,000 union hall which he erected in his Brooklyn empire. True, there are first-rate facilities in the hall for members' relaxation and entertainment. "Tough Tony," in fact, gets big crowds to attend his local meetings to participate in his guided democracy. Many local unions of the kind led by officers with whom Senator McClellan so loves to converse are usually well attended. These officers want their members seen around if not necessarily heard, and the democratic process is not their worry.

Attendance at union meetings is no proof of actual participation. The latter, in turn, is significant only to the extent that it gets close to dealing with the heart of the union matter. The picture is not overbright on that score in enough instances to cause concern. I derive no pleasure from making such critical observation. I know of the forthright and advanced position taken, in the last several years, by the high command of the merged AFL-CIO in the matters of internal union democracy, ethics, and responsibility to the members and to the public. However, declarations of intent are not quite tantamount to realization of the ends pursued. While in many unions the democratic process makes its way, in ever so many others a great deal is to be done. I believe that friendly criticism is more likely than not to strengthen the position of responsible leaders and help them in their efforts to correct bad practices.

I am not bringing into this discussion the matter of racketeering and kindred evils brought to light by the McClellan Committee. That is poison, of course. I simply assume that determination of the honest and responsible leadership of the movement, aided by such legislation as may be enacted,

will cope with the crooks, the thieves and the double dealers. My concern is with the personally honest union leaders who had acted, in the past, complacently toward the evil in their midst, primarily prompted by institutional considerations. They tolerated a permissive measure of corruption by lower level officers in the hope that the bad men might perhaps mend their ways sooner or later because of suffering twinges of conscience; that national office auditors would catch up with their wrongdoings and cause them to cease and desist; or that "the cops" would go after them and get them out of the way. These optimistic expectations may have spared the national officers, in the meanwhile, the risks of causing local internal upsets, of perhaps disturbing an established workable union-industry relationship, and of weakening the entire union in consequence. Whether or not such happy ending eventually materilizes, in the meantime the "tolerable limits" corruptionists had succeeded in demoralizing the members, or enough of them to accommodate their operations. It is to be borne in mind that, except for outright stealing from the cashbox, union corruption is not a single-handed operation and requires three constituents to make the bargain. These are management; the union officers, and some of their colleagues acting as junior partners; and a contingent of influential members in the work places to shield the operation induced to "cooperate" for what that is made to be worth to them. The democratic process is thus sometimes demoralized at the roots in unions otherwise good and under national leaders who are themselves free from any taint of corruption.

Mr. Barbash knows the union field as few others do, and his knowledge has been acquired through direct, close and penetrating observation and partaking. I regret that he did not go in greater detail into that point of "legitimate function" of the union and did not make a competent assessment of the state of union democracy as measured by the degree or extent of their sharing in that function clearly identified. I know our views and understanding coincide and he would have done it greater justice than I can do it here.

Mr. Barbash said: "When local union government is examined in the setting of legitimate function, the generating circumstance in the degree of shared power is to be found in 'employment and market factors'." This is generally true. If one is not too squeamish about the niceties of the democratic process, it can be said that, by and large, the union members generally share in the making of decisions which affect their terms of employment. The officers need to consider the members' views since, in the last analysis, no leader can fully "deliver" on his contractual obligations to management under the union-management contract without at least the half hearted consent of the workers. The men on the benches can stall, slow down, and otherwise give expression to their displeasure with work terms. Few, if any, such union leaders who in other circumstances might have acted differently have tried in recent years to force upon union members unsatisfactory work terms. They did not deem it necessary to practice any such compulsions as with nearly full employment, except for last year's part-time recession, and the ready willingness of most industrial and business managements to throw in a wage raise as a steppingstone to a double-the-stake price upping. A measure of "shared power" in matters concerning market and employment factors has thus prevailed more or less.

Employment factors, though, are only a part, however vital, of the "legitimate function" of unionism. Present-day leadership of the labor movement goes far beyond that limited objective. The issue of union democracy and the interrelationships between private and public programs of union regulation in the present expanded and broadened unionism are far from being a settled matter.

The union enterprise, viewed historically, is a compound of a "set of beliefs," to use the term Professor Hoxie applied to what is essentially a *union faith,* on the one hand, and, on the other, of gathering economic and social power, which is the central driving force of unionism. That union faith is not a theoretician's invention. The urge for power accumulation is not a radical's snare. Both are hard facts of union life. Perhaps not too many unionists are clearly aware of these facts. Perhaps not all union leaders verbalize these facts in such terms. They all live them, though, regardless of whether they are conservative, radical or ideologically "know-nothing." Ever so many unionists might stumble over such words as "ethics" or they would surely be scared stiff if told of a "union philosophy." But in the simple words "this ain't right" they express for all that it is worth their binding norm of moral behavior. They won't scab, cross a picket line, sell the union for a mess of pottage or stab a union brother in the back. Some, of course, will, but even the

Twelve Apostles had a Judas in their midst. The labor man is more than merely an industrial GI. He is a human being, a socio-political animal, and a worker in overalls. His unionism is interrelated with his way of life. He is to be studied whole, if any part of him is to be understood right.

In passing, Mr. Barbash characterized the union performance as an effort "to accommodate union government to the circumstances of the environment." This, though, is only the administrative task of leadership in the two-pronged pursuit which is the primary assignment of unionism—to adapt itself to the circumstances of the enviroment and simultaneously to seek to modify the latter in the direction of the union aims. This two-directional pursuit is an integrated entity: the first without the other would be surrender, the other without the first would be domination. Neither would make for democracy. Mutual accommodation, which is the democratic operational mode, is also what labor seeks, as the setting in which working people can attain a life of equals —a democratic society of free men.

This view of unionism leads directly to the issue under discussion— internal union democracy and the question of whether its operation can be assured solely by the unions' self-policing efforts; by the bringing into play of supplementary outside, but voluntary, institutional setups; or by an imposition of legislative and/or governmental intervention. My own experience tells me that self-policing can be relied upon only where there really is no call for any policing. But a modicum of public intervention—not too much of it—needs to be held in reserve even there, just in case. Power is heady. The presence of a cop around the corner —an honest cop, that is—tends to have a sobering effect.

Not all union leaders accept the indicated broad concept of an interventionist unionism. Some union leaders view themselves as above all merchandisers of hired labor, all else merely being trappings to suit certain occasional situations. One may quarrel with such view, but it is legitimate in a way. However, a unionism which is but a labor employment exchange does not merit the broad grants of rights and certain immunities which our public policy accords to unions. Our discussion here is of unionism which conceives of itself as a constituent force in the social power structure of free, open-end American society.

Again, this view of unionism is not a quotation out of the "eggheads" dream text. Such arch "no-revolutionaries" as flamboyant James Caesar Petrilio and monolithic John L. Lewis went out for the most unorthodox device of setting royalties on music discs and on tons of coal to accommodate economic environment to the living needs of the musicians and the miners. They chose that course of action rather than to accommodate the miners and the music players to the deadening circumstances of their environment and, in the process, to put the union government out of business. The miners' life has been lifted out of the "lower depths" to the status of self-respect and freedom from recourse to charity. The employment factors were made to stand on their heads. Twenty-five years ago, the interventionist unionism of John L. Lewis saved the American union movement from its somnolent deterioration and brought it to active, many-dimensional living.

The Reuthers and the Meanys are leading today from their respective broad operational bases over a wider, farther-looking and farther-reaching scope of issues and expectancies than was hitherto the case. This unionism requires not the kind of a *kindergarten* democracy which is so often fed to the lower operational units of the pyramidal power structure of unionism. The members ought to be allowed to act as men and citizens in their organizations, or the latter will tend to become but footstools for potential Caesars in union garb. I do not propose that such is the prevalent state of affairs. I think, though, there is evidence of a need for that miraculous "ounce of prevention" which can obstruct the development of an illness which later may not be curable at all.

It is not proposed that the task can be performed by returning to the town-meeting pattern of democracy which, years ago, was suitable to serve union ends. This no longer would be good, with the broad and involved nature of present-day union problems. Also, in ever so many instances, the local unions have grown to count their members in the thousands. As Mr. Barbash quotes A. D. Lindsay: "Even a small public meeting cannot administer or organize."

Democratic government is materialized through a representative system; a separation of the legislative, judiciary and administrative or executive power; and a sensitive responsibility to public opinion. The unionist book of rules does not answer this description. There is no separation of powers, in the full sense of this concept, in union government, and in no real way can that

be developed in the circumstances of internal union life. Public opinion in a union may find ways of being privately expressed and prove to be in some measure effective. But that is often a matter of good luck due to the efforts of a democratically minded leadership in some instances or the chance absence of a strongly power-minded leader or it is achieved by the viligance of groups of alert members. There is little of institutionalization of democracy and no built-in protective devices against the antidemocratic trends of our time in unions, as everywhere else. Such is the need. How can it be met?

Dubious about the effectivenes of self-policing and suspicious of receiving too many gifts from legislative "Greeks," I am looking forward to a co-ordinate three-way approach to the task which so clearly and so urgently needs to be done. I visualize a cooperative effort involving, in addition to the basic work of the union leadership, the best resources of the interested and competent intellectual fraternity, and whatever a carefully devised system of governmental aid can bring to bear on the problem.

Union leadership needs to implement the codes of ethical practices by assiduously cultivating a climate in which ethical practitioners can thrive. The Kennedy-Ervin labor bill is meritorious, although it would appear better to keep the powers of the Secretary of Labor down. He is a political officer sensitive to those who can press hardest. Internal union conflicts, which involve defense of rights and power disputes of members and officers, would be better treated by especially created courts of intra-union relations. These courts should be very carefully devised as to their institution and operational ways in competent conferences of representative union leaders and appropriate government men. Cases should come before these courts after reasonable efforts had been made to settle the disputes within the unions. These courts should have no jurisdiction at all in labor-management disputes.

It is not too easy to sketch what the intellectual fraternity can do to help unionism and free society and, thereby, themselves, for a free society is their staff of life. This is largely an unchartered area of endeavor. The "eggsheads" have hitherto been propagandists or professionals or technicians. In neither capacity were they loved, but they were useful in their ways. In the current crisis of unionism, a more ambitious task lies open: to cooperate with the union movement and to help it broaden and intensify its "legitimate function" in democratic society. Nourishing or not, the engagement is certain to prove intellectually rewarding and socially significant. **[The End]**

The Public Interest in Internal Union Affairs

By SAR A. LEVITAN

The author is specialist in labor relations at the Legislative Reference Service, Library of Congress.

OUR SUBJECT concerns the interrelationships of public and private programs in the regulation of internal union affairs. Professor Jack Barbash has stated most persuasively that while there are many roads leading to the fulfillment of democratic rights of members vis-à-vis their unions, the means of achieving this happy state are already so complex that government interference would only add confusion. Moreover, he asserted, we need more information concerning union practices before we can suggest remedies for the correction of the evils, if any, that may exist.

I don't propose to rush in where angels fear to tread. But the fact that we don't know the exact chemical composition of an egg should not disqualify us from taking corrective action when it smells.

The real situation is even more complex than as has been presented by Professor

Barbash, since his presentation is limited to democratic unions only. There is a singular omission in his analysis of the typology of labor leaders, penetrating as that analysis is. I missed completely the type of so-called leader that has been revealed during the past two years by the McClellan Committee in 46 volumes of hearings. Occasionally, we may detect among Barbash's labor leaders a close cousin to the labor officials who have appeared before the McClellan Committee. But I submit that this type of labor official deserves recognition in any description of labor leaders.

Here is a sample picture of a labor leader and his organization as pictured by the findings of the McClellan investigations:

"The operations of Local 985 of the Teamsters Union, headed by Mr. Hoffa's associate William E. Bufalino, represents a most disgraceful type of unionism. As it now operates it is a leech preying upon workingmen and women to provide personal aggrandizement for Mr. Bufalino and his friends. This is true in both the coin-operated machine and auto-wash sections of this local, for nowhere in this hearing is there to be found one scintilla of evidence that Local 985 has done anything to help the wages and working conditions of its members in these industries. To the contrary, we have had testimony that members of Mr. Bufalino's local had their wages drastically reduced after they become union members and their employers signed contracts with Local 985." [1]

I also fail to find in Barbash's interesting paper the documented fact that in some cases the officials take over their organizations and, in the words of Senator McClellan, "run it and do what . . . [they] please with it." [2]

Granted that this type of leader is the exception and not the rule, we cannot ignore the fact that he does exist nor can we wish him away by our refusing to recognize his existence. On the contrary, we should take due notice of the evil. I believe that the public and the law can and must play a significant role in assisting unions to purge this type of leadership.

Genuine democracy cannot be expressed through the ballot box alone. There are many roads leading to the achievements of members' control over their unions. The situation is further complicated by the fact that management has occasionally displayed interest in internal union affairs. The feeling of suspicion of union officials and members about the pious concern of some managements in union democracy can be readily understood. Union factionalism can be used by antagonistic employers to disrupt union activity.

Nevertheless, I don't see that all this is a valid argument against the establishment of some elementary standards by which all unions should abide. Of course, we fully realize that governmental edict is not the most desirable substitute for democratic action and that rules imposed by law diminish the area of freedom of action. But apparently the choice before us is between relying upon remedial action by the government or continued domination of some unions by "little Caesars" and hoodlums. Experience has shown that expulsion from the AFL-CIO is no cure of the malaise and that too frequently the members themselves are helpless to rid their unions of racketeers. Only two unions have established outside bodies to protect rights of members.

The McClellan investigations, the Kennedy hearings in the Eighty-fifth and Eighty-sixth Congresses, and private research have gathered an impressive record upon which public policy can and should be predicated.

Unions have an important impact upon the livelihood of their members and upon the economic well-being of many persons outside the labor movement. Consequently, unions are sufficiently within the scope of public interest to justify governmental intervention to provide assurance that the organizations are properly managed and that the basic rights of union members are fairly protected. I believe that the union member is entitled to assistance from the government to guarantee him these rights:

(1) The individual has a right to express himself and to voice his opinions concerning the policies and administration of his union. This right is not too meaningful unless the union member is guaranteed protection and immunity from reprisals for expressing views which are in conflict with the interests of the leaders. As we all know, a number of unions have denied members freedom of speech. The government can help by providing an agency to which a union member may present his case against the union without fear of recrimination or

[1] United States Senate Select Committee on Improper Activities in the Labor or Management Field, release of April 15, 1959.

[2] Committee's hearings, as published, Vol. 33, p. 14253.

abuse and with a reasonable expectation that his just complaint will be properly evaluated.

(2) The individual member must have the right to choose his leader and representative for collective bargaining. In a number of instances the McClellan Committee has shown that this right does not exist. The requirement of election of union officials by secret ballot would go a long way toward remedying this wrong. In addition, protection could be provided by the establishment of an impartial agency authorized to investigate frauds in elections and to remove officials who obtain their positions through coercion, threats and frauds.

(3) The lack of freedom of communication leads to the need for corrective action basically applicable to national unions, but also significant to larger local unions. I am referring to the control and domination by an established union official of the means of communication of his organization, brooking no opposition by any "upstart" who may want to challenge his entrenched position. In such cases elections become a mockery. The law could guarantee union members who aspire to positions of leadership and who are properly nominated for such positions, the right to a reasonable opportunity to present their views to the membership through union channels of communications.

(4) A union member should have reasonable assurance that his rights as a union member will not be denied by a grasping international official, in some far-distant central national office, over whom the local member has little control. It is true that the practice of trusteeships or receiverships deserves more careful study than it has received thus far. But its extensive misuse by some unions warrants legislation to curb malpractices.

(5) The law should also guarantee the right of the union member to an accounting of expenditures of his union dues and other contributions to the union. The member might not be in a position to challenge the wisdom of some of the expeditures, but he would be given assurance that fraudulent reporting would be prosecuted.

(6) The union member is entitled to reasonable assurance that his union leader is not pursuing personal economic interests in conflict with duties as the member's representative in collective bargaining. A measure prohibiting such conflicts, properly enforced, would go far toward eliminating racketeers and corrupt officials from labor organizations, though it would not eliminate the evil altogether.

(7) Union members who insist upon security measures for their organization should not be allowed to deny qualified workers admission on the basis of color. I recognize that this infringes upon the freedom of association of union members. Nevertheless, in view of the recent decisions of the Supreme Court, it is my belief—possibly, prejudice—that union members should forego selectivity on a basis which is unconstitutional where government activity is concerned. Unions are not private clubs.

These are a few basic rights which I believe the law should guarantee union members. In most cases, such legislation would not interfere with normal operations of unions. Nor would it interfere with any democratic practices, no matter how diverse they may be. You will, of course, recognize that all but one of the above proposals are already embodied in the ethical practice codes adopted by the AFL-CIO, and in legislation currently pending before the Congress. It seems to me that if the proposals are worth being adopted voluntarily by honest labor leaders, the law would not be amiss in enforcing these provisions against union officials whose standards of conduct are suspect.

I submit that advocacy of these elementary provisions guaranteeing the rights of union members is not based upon a romantic concept of democratic processes. It is my belief, although it may be an old-fashioned notion, that certain elementary rights should be preserved in a free society. Unions, which are not necessarily voluntary organizations, should be obliged by law to observe democratic rights of their members.

Finally, Professor Barbash has suggested a more intensive study of literature dealing with local unions. I don't want to lose caste by opposing further research. I would, therefore, like to propose an alternate area of research which may be of greater immediate urgency and interest to the American labor movement.

I would urge an intensive study of the McClellan Committee hearings and other investigations of union corruption for the purpose of learning what has gone wrong in certain segments of the union movement and how members can convert the situation. For example, what motivates the apparent continued member support in some unions of exposed racketeers or Communists? Is

the acquiescence in corruption a product of fear, apathy or a broader erosion of moral fiber in our society? What is the impact of union security provisions, justified by the view that the unions are service organizations, upon internal union affairs?

This type of research may help us to determine whether further government regulation of internal union affairs beyond that proposed is needed in the interest of the members and the public. **[The End]**

PROGRAM OF THE SPRING MEETING

Boston, Massachusetts **May 1-2, 1959**

Friday, May 1

8:30 a. m. Executive Board Breakfast

10:00 a. m. Registration

12:00 noon Presidential Address, *The Persistence of Unemployment*
President William Haber, University of Michigan
Chairman: E. Wight Bakke, Yale University

2:00 p. m. Interrelationships in the Settlement of Jurisdictional Disputes
Chairman: David L. Cole, Arbitrator
Papers:
Interrelationships in the Settlement of Jurisdictional Disputes
David L. Cole
The Organizational Disputes Agreement, Industrial Union Department, AFL-CIO
David H. Stowe, Umpire of CIO Jurisdictional Disputes Contract
The National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry
Louis Sherman, General Counsel, IBEW

4:00 p. m. Interrelationships in Health and Medical Care Programs
Chairman: Herman M. Somers, Haverford College
Papers:
The Interrelationship of Public and Private Health and Medical Care Programs
Herman M. Somers and Anne R. Somers
Interrelationships in Health and Medical Care Programs
Lane Kirkland, Int'l Union of Operating Engineers

6:00 p. m. Cocktails and Reception

7:00 p. m. Main Banquet

9:30 p. m. Smoker

Saturday, May 2

9:00 a. m. Interrelationships in the Interpretation of Collective Bargaining Agreements

Chairman: Donald H. Wollett, New York University School of Law

Papers:

The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?
Donald H. Wollett

Interrelationships in the Interpretation of Collective Bargaining Agreements
Robert A. Levitt, Labor Counsel, Western Electric Co.

11:00 a. m. Interrelationships in the Regulation of Internal Union Affairs

Chairman: Jack Barbash, University of Wisconsin

Papers:

Leadership and Membership in Local Unions
Jack Barbash

Interrelationships in the Regulation of Internal Union Affairs
J. B. S. Hardman, Chairman of Inter-Union Institute, Inc.

The Public Interest in Internal Union Affairs
Sar A. Levitan, Library of Congress