CAN ADMINISTRATION HANDLING OF LABOR PROBLEMS BRING INDUSTRIAL PEACE?

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The American bar has frequently criticized the ever-increasing use of administrative agencies to handle legal problems.[1] On the other hand, the bar itself has frequently been criticized by the lay public for its failure to expand legal machinery and legal concepts so as to meet a rapidly changing world. The bar, known for its ability to appraise honestly its own shortcomings, has often posed this question: "Would the administrative agencies be so frequently and consistently set up by law-making bodies if they did not supply a real need?"

I

The Labor Management Relations Act of 1947,[2] generally known to the profession and to the lay public as the Taft-Hartley Act, represents legislative effort to com-

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1. Pound, *Annual Survey of Law: Decisions of Courts Show Some Dangerous Trends*, 33 A.B.A.J. 1093, 1094 (1947). This legal scholar voices his fear in the following language: "Even more significant is the marked perponderance of public and administrative law—of determination by administrative agencies and officials, affecting everyday rights of individuals over the law applied by the Courts governing private relations. The *Survey* as a whole suggests Jennings' proposition that in the English-speaking world, public law is swallowing up private law. . . . But there are currents and counter-currents in the course of decision on matters of public law. On the one hand, there is a steady extension of the powers of the Federal Government. On the other hand, there is a steady giving up of or refusal to exercise the jurisdiction of the Federal Courts as permitted by the Constitution. In connection with the tendency to concede the widest power and freedom from judicial scrutiny to administrative agencies, this suggests a change in our policy in the direction of centralized absolutism."
2. 61 STAT. 136 (1947), 29 U.S.C. § 141 *et seq.* (Supp. 1948). For convenience this statute is sometimes referred to as the Taft-Hartley Act in this article.

bine both administrative and legal handling of the many serious labor problems confronting the nation today. The National Labor Relations Board, originally set up under the Wagner Act, and continued under the Taft-Hartley Act, exercises jurisdiction over industries engaged in interstate commerce through twenty-one regional directors who cover all the forty-eight states and the territories. Elaborate machinery is set up to assist the Board, including the office of the General Counsel, which investigates charges of unfair labor practices either by an employer or by a union, prosecutes unfair labor practices where complaints are filed, and takes steps to enforce or review orders of the NLRB by filing petitions in the United States Court of Appeals. Trial examiners preside at original hearings on petitions for the certification of a bargaining representative and at the trials of complaints based on unfair labor practices. At the conclusion of a hearing or trial, the examiner issues what is called a recommended order and, if no exceptions are filed with the Board within 20 days, this becomes the order of the Board. There can be no question but that Congress intended to make the procedures of the trial examiners as nearly as possible like the ordinary trial in a federal court, and Congress certainly intended to sever any personal relationship between the NLRB and the examiners so far as cases which are heard by the trial examiner are concerned. Section 4(a)[3] of the act provides as follows:

3. 61 STAT. 139 (1947), 29 U.S.C. 154 (Supp. 1948). These provisions of Section 4(a) were explained by the Senate Committee, S. REP. No. 105, 80th Cong., 1st Sess., as follows:

"One of the major criticisms of the Board's performance of its judicial duties has been that the members themselves, except on the most important cases, have fallen into the habit of delegating the reviewing of the transcripts of the hearings and findings of trial examiners to a unit of the general counsel's office called the Review Section. This means that after exceptions are filed and oral argument is scheduled, the Board members rely for their knowledge of the cases upon a memorandum submitted by one of the review attorneys. The memorandum sent to each member is identical and has been already reviewed and revised by the supervisory employees of this Section, even though they have not seen the transcripts or familiarized themselves with the briefs and bills of exception. Unless the final memorandum, therefore, differs from

". . . No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations."

It is thus to be noted that trial examiners under the Taft-Hartley law take on the functions of trial judges. Their rulings become the law of the case insofar as the NLRB is concerned, unless exceptions are filed, in which event the NLRB becomes the first court of appeal. If exceptions are filed, either party may appear before the Board and argue

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the trial examiner's report in major respects, the attention of the Board members may not be focused upon the sharpest issues in the case.

"After the Board has voted, it has also been the practice to assign to the Review Section the duty of preparing a draft opinion. Consequently, unless there is a dissent which one of the majority members sees fit to answer, both the decision and the form in which it appears are virtually a product of the corporate personality of this legal section. In other words, the Board, instead of acting like an appellate court where the divergent views of the different justices may be reflected in each decision, tends to dispose of cases in an institutional fashion. To that extent, the congressional purpose in having the act administered by a Board of several members rather than a single administrator has been frustrated.

"Since it is the belief of the committee that Congress intended the Board to function like a court, this bill eliminates the Review Section. In its place each Board member may have as many legal assistants of his own as is necessary to review transcripts and assist him in the drafting of the opinions on cases to which he is assigned. Since the Board's function is largely a judicial one, conformance with the practices of appellate courts in this respect should make for decisions which will truly represent the considered opinions of the Board members.

"A corollary to this reform relates to the Trial Examining Division. Tremendous responsibility rests upon the judgment of the individual trial examiner who is sent by the Board to the field to hear contested cases, appraise the credibility of the witnesses, resolve conflicts in testimony, make findings of fact and recommendations for Board decision. Under current practice, before a trial examiner issues his report to the parties, its contents are reviewed and frequently changed or influenced by the supervisory employees in the Trial Examining Division. Yet, since the report is signed only by the trial examiner, the Board holds him

the case. When the Board finally issues its order, either dissatisfied party may then have the order reviewed by the United States Court of Appeals, the functions of this court being as follows:

1. Determination of whether the Board has conducted a fair hearing.
2. Consideration of whether the Board's findings of facts are supported by substantial evidence.
3. Determination of whether the Board's conclusions of law are based on a preponderance of the evidence.
4. Determination of whether the Board's order is reasonably designed to effectuate the policies of the Act.

The United States Court of Appeals has wide jurisdiction, and a decree may be entered enforcing, modifying or setting aside in whole or in part the former order of the Board;

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out as the sole person who has made a judgment on the evidence developed at the hearing. In the first *Morgan* case, (Morgan v. United States, 298 U.S. 268, 480-481), one of the leading decisions on administrative law, the Supreme Court enunciated the following principle:

> 'If the one who determines the facts which underlie the order has not considered evidence and argument, it is manifest that the hearing has not been given. . . . The one who decides must hear.
> 'This necessary rule does not preclude . . . obtaining the aid of assistants. . . . '

"It would be difficult to think of a practice which does greater violence to this principle. Consequently, the committee bill prohibits any of the staff from influencing or reviewing the trial examiner's report in advance of publication, thereby obviating the need for reviewing personnel in the Trial Examining Division.

"Another questionable practice which the committee has considered has been the attendance of trial examiners at executive sessions of the Board when cases are being decided. Under its rules, the Board gives the parties adversely affected by the trial examiner's report an opportunity to appear by counsel before the Board to argue exceptions. The rules also permit opposing counsel to appear to defend findings in a trial examiner's report which represent his position in the case. It is therefore unfair to the parties to permit a trial examiner, after his findings have alternately been assailed and defended at public hearing, to make a final defense of his published determination behind the scenes. It would seem unnecessary to legislate in this matter at all (since the Board has it in its own power to correct these practices) if it were not for the fact that even the present Board has persisted in adhering to such unjudicial practices."

or, if additional evidence is thought to be material, the Court may remand the case to the Board for the hearing of further testimony and the making of new findings of fact. Failure to obey the order of the United States Court of Appeals results in contempt proceedings. From the Court of Appeals the case can be taken by either dissatisfied party to the Supreme Court of the United States.

From this brief outline of the essential working features of the machinery of the Taft-Hartley law, it will be seen that much of the legal machinery as known to the bar in federal court procedure is embodied in the Act. With one exception, the procedure is not unlike an ordinary civil suit in a federal district court involving a complicated issue of accounting which is referred to a special master, who takes evidence and reports his findings to the federal judge. Dissatisfaction by either party with the order or judgment of a federal district court results in an appeal to the United States Court of Appeals and then to the Supreme Court of the United States. The exception referred to is that the NLRB is, in effect, substituted for the federal district judge. In substance, Congress has said[4] that the NLRB shall conduct elections for bargaining representatives and shall adjudicate charges of unfair labor practice preferred by either an employer or a union, that the whole field of employer-employee relations as it is developing today is so large that it is necessary to have a special administrative board to handle the problem;[5] and that the NLRB shall, in

4. See 61 STAT. 136 *et seq.* (1947), 29 U.S.C. § 151 (Supp. 1948), findings and declaration of policy; 29 U.S.C. § 153, National Labor Relations Board; 29 U.S.C. § 157: "The Board shall have authority from time to time to make, amend and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter."

5. See Gwynne, *Administrative Procedure Act: A Warning Against its Impairment by Legislation*, 34 A.B.A.J. 8,9 (1948): "Nevertheless, it must be recognized that many of these agencies cannot be eliminated. They came into existence to render services that purely legislative and judicial bodies could not render. The development of commerce in England created problems that the common law Courts of the day seemed unable to handle. And so there grew up the law merchant—administered in separate informal tri-

addition to the administrative problems involved in representation and in unfair labor practices, strive for industrial peace at all stages and levels of the conflict. The Taft-Hartley Act also provides for a Federal Mediation and Conciliation Service,[6] a National Labor-Management Panel,[7] a continuing Joint Congressional Committee on Basic Labor Problems,[8] and special Boards of Inquiry for National Emergencies.[9]

It cannot be denied that industrial peace is one of the major domestic problems of our time. The struggle for balance between employee rights and employer prerogatives is in an unstable and rapidly developing stage.[10] The bar, the lay public, the employer and the employee can well ask themselves just how the conflicting interests can be reconciled, the rights of the contending parties fairly adjudicated, the labor unrest eliminated, and industrial peace eventually achieved. It is to be recognized frankly that no court, no administrative body, nor any presently enacted law is going to be satisfactory to employer and employee interests for many years to come, and that a process of trial and error is inevitable.

II

Would the Taft-Hartley act be improved if the NLRB continued its administrative duties but yielded its function of judicial interpretation of the Act and allowed the federal district courts to adopt, modify, or reject the trial

bunals. Equity law had a somewhat similar history. It is to the credit of the judges and lawyers of that day that they were able to recognize the need of these new principles of jurisprudence, and eventually to bring them within the orbit of the common law as then being administered. Thus the needs of a progressing civilization were met; the law was enriched; and the fundamental principles of due process were retained and developed."

6. Taft-Hartley Act, 61 STAT. 136 *et seq.* (1947), 29 U.S.C. § 172 (Supp. 1948).
7. 29 U.S.C. § 175.
8. 29 U.S.C. § 191.
9. 29 U.S.C. § 176.
10. See *The Developing Law: Management Prerogatives and Collective Bargaining*, 1 CCH LAB. LAW. JOURN. 3 (1949).

examiner's reports in the first instance—or, if not federal courts at the trial level, then perhaps, labor courts with judges of equal qualifications?

A brief history of important labor statutes preceding the Labor Management Relations Act of 1947 may throw some light on the question of whether an administrative body can best make judicial interpretations of Congressional enactments. The Clayton Act of 1914[11] was the first effort on the part of Congress to take recognition of the employer-employee relationship. Previously, in 1890, the Sherman Antitrust Act[12] had been passed by Congress to prevent unlawful monopolies, and the Clayton Act, which followed, expressly stated that labor organizations were not unlawful monopolies. Dissatisfaction with court interpretations began to develop on the part of labor leaders, it being claimed that the courts did not interpret the Clayton Act as favorably to unions as had been hoped and anticipated. The Norris-LaGuardia Act[13] (Anti-Injunction Act), which followed in 1932, recognized, expressly, freedom of association and self-organization, and the right of the employees to designate representatives to negotiate terms and conditions of employment. The real significance is that it marked the beginning of a policy on the part of the Federal Government to place its weight and prestige behind the employees' right of self-organization. The National Industrial Recovery Act of 1933[14] was an effort to affirm this right by requiring that every code of fair competition should contain this and other rights of employees. By executive order, a National Labor Board was established, consisting of an equal number of employer and employee members, the function of this board being to settle disputes arising out of the efforts of employees to organize and to bargain collectively through representatives of their own choosing. This Board met with little success, as it attempted to mediate in labor unrest, to hold elections, to certify bargaining represent-

11. 38 STAT. 730 (1914), 15 U.S.C. § 12 *et seq.* (1946).
12. 26 STAT. 209 (1890), 15 U.S.C. § 1 *et seq.* (1946).
13. 47 STAT. 70 (1932), 29 U.S.C. § 101 *et seq.* (1946).
14. 48 STAT. 195 (1933).

atives, and also to interpret judicially. The Board's obvious weakness was its effort to fill the judicial role and to enforce its own orders.

The National Labor Board was replaced by what was known as the National Labor Relations Board, established by Congressional Joint Resolution; however, this board, established in July, 1934, had little better success than its predecessor, and its functions came to an abrupt end when the Supreme Court held in May, 1935, that the National Industrial Recovery Act was unconstitutional.[15]

Following closely behind the declaration of unconstitutionality of the National Industrial Recovery Act, and in July of the same year, the National Labor Relations Act[16] was passed. This act is commonly known as the Wagner Act, and it is the immediate predecessor of the Labor Management Relations Act of 1947. The Wagner Act guaranteed to employees the right of self-organization, and collective bargaining through representatives of their own choosing. It provided for the certification of representatives of the employees, and prevented employers from engaging in certain enumerated unfair labor practices. Those who found comfort in the Supreme Court's holding that the National Industrial Recovery Act was unconstitutional expected that the Supreme Court would likewise strike down the Wagner Act. In 1937, however, the Supreme Court held that the Act was constitutional.[17] The Wagner Act became the center of a bitter controversy almost from its inception, and it was severely criticized as being contrary to established concepts of American justice and jurisprudence and to the right of every person to have his "day in court" before an impartial tribunal. It was pointed out that the Board made administrative rules under the Act, investigated charges of unfair labor practices on the part of employers, adjudicated the rights of the employer on bills of particulars and finally, having investigated the accusations, preferred

15. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947 (1935).
16. 49 STAT. 449 (1935), 29 U.S.C. § 151 *et seq.* (1946).
17. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352 (1937).

the charges, tried each controversy as a judicial tribunal, and entered the order in the case.

The defenders of the Wagner Act took the position that certain restrictions on employers were necessary in order to equalize bargaining power, and frankly stated that it was not expected that the scales of justice should be delicately balanced when an issue was presented between employer and employee. Between the enactment of the Wagner Act in July, 1935, and the passage of the Labor Management Relations Act of 1947, the American scene changed in many of its major aspects. The war years saw a series of strikes in the coal industry and the defiance of the National War Labor Board by John L. Lewis and the United Mine Workers of America. To meet this situation, Congress passed the War Labor Disputes Act,[18] which empowered the President to take over any industry where a strike would affect the war effort adversely. Membership in the two major labor organizations, the American Federation of Labor and the Congress of Industrial Organizations, was increasing rapidly.[19] Labor unrest became widespread and President Truman recommended that fact finding boards be established in emergency cases. After study, Congress enacted what was known as the Case Bill,[20] which, however, was vetoed by the President and the House of Representatives failed to override the veto. The Case Bill would have established a five-man mediation board, would have held unions liable for a breach of their contracts, would have outlawed secondary boycotts, and would have set up compulsory arbitration as to disputes involving public utilities. While the Case Bill never became law, it did indicate a stiffening attitude in the legislative mind. A bill of minor importance was passed by Congress known as the Lea (Anti-Petrillo) Act,[21]

18. 57 STAT. 163 (1943), 50 U.S.C. § 1501 (1946).
19. PHILIP TAFT, ECONOMICS AND PROBLEMS OF LABOR 431 (2d ed. 1948). This author says that in 1947 the AFL had 7,505,446 members, and the CIO claimed 6,000,000.
20. See, MALIN & UNTERBERGER, OPERATING UNDER THE TAFT-HARTLEY ACT 47 (1947), for a discussion of the Case Bill and its effect, despite its failure to become a law, on subsequent laws.
21. 60 STAT. 89 (1946), 47 U.S.C. § 506 (1946).

which sought to stamp out what was known as "feather-bedding," with particular reference to the radio industry, this Act declaring it unlawful to compel a radio station by force or threat to employ any person in excess of the number of employees needed to perform actual services.

The Congressional elections of 1946 found the Republicans in control of both the House and the Senate, and Representative Fred A. Hartley, Jr., and Senator Robert A. Taft jointly sponsored the bill which, after some several amendments, became known as the Labor Management Relations Act of 1947. The President vetoed the bill and the Congress promptly overrode the veto. The Taft-Hartley law, in its declaration of policy, finds that industrial strife is due not only to the activities of some employers but also to the certain practices engaged in by labor unions. The Taft-Hartley law again affirms the right of employees to engage in concerted activities, but pronounces that employees may refuse to engage in such activities. The proponents of the Taft-Hartley law claim for it that it will establish a power balance between employers and unions, will protect employee rights and will safeguard the public interests.

The NLRB under the Taft-Hartley law, as under the original Wagner Act, exercises the judicial function. Will this prove to be a fatal defect under the Taft-Hartley Act?

III

An interesting illustration of what has happened in the exercise of the judicial functions under the Taft-Hartley law is shown in the handling of Section 9(h) of the Act by the NLRB. In substance, this section provides that neither a petition for certification nor a complaint for unfair labor practices may be filed by a labor organization until the officer or officers of any "national or international labor organization" of which it is an affiliate or constituent unit have filed an affidavit or affidavits with the Board, to the effect that such officers are not members of the Communist party and are not affiliated with said party, and that such officer or officers do not believe in and are not members of and do not

support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.[22]

Until shortly prior to January 1, 1950, Mr. Philip Murray, the President of the CIO, had refused to sign the required affidavit. It is not important just why he refused to sign, although it is indicated that he desired to test the constitutionality of this part of the Act.[23] During the time when he refused to sign the affidavit, many petitions for certification and complaints of unfair labor practices were being filed by local organizations of national and international unions affiiliated with the CIO. In such cases the point was legally made that such petitions could not be processed by the NLRB.

As might be expected, the Board called on its General Counsel for an interpretation of Section 9(h). After giving the matter extended study, the General Counsel took the position that before petitions for certification and before complaints based on unfair labor practices could be processed by the Board in behalf of any union, such union, and the national or international with which it was affiliated, *and the parent organization,* had to comply with Section 9(h). The NLRB disregarded the opinion of its General Counsel on the matter and ruled in the case of *Northern Virginia Broadcasters, Inc.*[24] that parent organizations such as the AFL and the CIO, are not national or international labor organizations within the meaning of Section 9(h)

22. Sections 9(f) and 9(g) of the Taft-Hartley Act require financial reports and descriptions of procedures and Union Constitutions, and the NLRB takes the position that compliance with these requirements is a matter of administrative handling for the Board. It has been held that Congress may constitutionally attach these conditions as reasonably incident to the public policy sought to be promoted by granting the privilege. National Maritime Union v. Herzog, 334 U.S. 854, 68 S. Ct. 1529, 92 L. Ed. 1776, *affirming* 78 F.Supp. 146 (D.C. Col. 1948).

23. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960, 69 S. Ct. 887, 93 L. Ed. 839 (1949). The Court said that Section 9(h) of the Act was constitutional and, in addition to other points, discussed the question of whether Section 9(h) constituted a bill of attainder.

24. 75 N.L.R.B. 11 (1947).

and that the petitions of local unions might therefore be processed even though the officers of the parent organizations had not complied. Presumably, the General Counsel could have refused to issue complaints in cases where parent organizations had not complied, but, instead, he has handled the cases on the theory that the Board should be allowed to define its own jurisdiction.[25] The Board, in deciding the *Northern Virginia Broadcasters* case, held that the officers of the AFL were not required to execute the affidavits in order for an affiliated union and its locals to use the processes of the Board under the Taft-Hartley law, if the officers of the affiliated international union and of the local union had filed the required affidavits.

Labor Unions in the United States have developed along certain well-defined lines. The two great parent organizations are the AFL and the CIO.[26] Local unions, representing the rank and file of labor in particular industries and communities, are granted charters by what are known as national or international unions.[27] The national union is exactly like the international except as indicated by the name; the international union grants charters to locals beyond the territorial limits of the United States, for example, in Canada and Mexico. The national and international unions are in a measure autonomous; they are, however, federated or affiliated with one of the two large parent organizations. This affiliation is evidenced by a certificate of affiliation from either the AFL or the CIO, as the case may be, with each local and each national or international union having attached to its name the symbol "AFL" or "CIO." The AFL is the older of the two parent organizations, and was organized to include skilled crafts originally. The CIO was first a Committee of Industrial Organizations of the AFL. It was organized to increase the membership in unions, and proceeded along the line of industry-wide or-

25. For a full discussion of the relation of the General Counsel to the Board, see *The NLRB and Its General Counsel*, 1 CCH LAB. LAW JOURN. 83 (1949).

26. TAFT, *op. cit. supra* note 19 at 455, 461.

27. See, *Brief History of the American Labor Movement*, U.S. Dept. of Labor, Bureau of Labor Statistics (1947).

ganization. The work of this Committee met with such success that it became independent of the AFL and became a contemporary parent organization in a real sense. The AFL is referred to as representing horizontal organization, and the CIO is referred to as representing vertical organization in industry.[28]

The Board, in taking the position that only officers of the local and the national or international unions would be required to file the affidavits, did not consider that the parent organizations were *labor organizations* within the meaning of Section 9(h). It is to be noted that Section 9(h) does not say that each officer of a labor *union* must comply with the affidavit requirement, but says that each officer of a labor *organization* must comply with the filing requirment.

Section 2(5) of the Taft-Hartley Act, defines labor organizations as follows: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work."[29]

In this definition, Congress must have intended to embrace a broader organization than a labor union, and did apparently specifically and exactly include such parent organizations as the AFL and the CIO.[30] The Board in the *Northern Virginia Broadcasters* case took the position that "national or international labor organization" were words of art as developed in labor history and that Congress must

28. *Ibid.*

29. Courts have repeatedly held that because an organization may have functions other than those relating to collective bargaining or that these other functions may constitute the bulk of its activities, does not serve to remove the organization from the scope of the statutory definition. NLRB v. Matthews & Co., 156 F.2d 706 (3rd Cir. 1946); NLRB v. American Furnace Co., 158 F.2d 376 (7th Cir. 1946).

30. See, *Hearings before the House Committee on Education and Labor, on Bills to Amend and Repeal the National Labor Relations Act*, 80th Cong., 1st Sess., Vol. II, p. 555, Vol. III, p. 1337 *et seq.* (1947).

have intended to use these words as understood by the labor movement.[31] But the difficulty of this reasoning on the part of the Board is that Congress neither in Section 9(h) providing for the filing requirement, nor in Section 2(5), defining labor organizations, used the words "national or international *union*," to the contrary; the broader word *organization* was used throughout the Act.

The two parent organizations have many functions, including the organization of drives, political and legislative programs, and community, health and educational programs. Certainly the two parent organizations exist "in whole or in part" for the purposes specified in Section 2(5) of the Act.[32]

The objects of the CIO, for example, are stated as follows:[33] First, to bring about the effective organization of the working men and women of America regardless of race, creed, color or nationality, and to unite them for common action into labor unions for their mutual aid and protection; second, to extend the benefits of collective bargaining and to secure for the workers means to establish peaceful relations with their employers, by forming labor unions capable of dealing with modern aggregates of industry and finance; third, to maintain determined adherence to obligations and responsibilities under collective bargaining and wage agreements.

Strangely enough, the Board itself decided many times prior to the *Northern Virginia Broadcasters* case, that the CIO was a labor organization.[34] The Board apparently

31. There is pending, as of the date of writing this manuscript (Feb. 1950), a case in the United States Court of Appeals for the Fifth Circuit, NLRB v. Postex Cotton Mills, Inc., No. 12888. In this case one of the two issues is whether the CIO (parent organization) as well as the Textile Workers Union of America, CIO (local organization), would have to comply with Sec. 9(h) of the Act.
32. TAFT, *op. cit. supra* note 19 at 455, 456, 457, gives the functions of AFL as follows: settling jurisdictional disputes; publicity and information services; legislative action; education; organization; chartering and controlling city central labor unions and state federations of labor.
33. CONST. OF CIO, Art. II (1948).
34. Houston Press Company, 70 N.L.R.B. 660 (1946); Albermarle

recognized that in some instances the CIO was directly connected with local industrial unions and industrial union councils, and decided that in these situations where the CIO was itself desiring to use the processes of the Board under the Taft-Hartley law, it was a labor organization within the meaning of the Act.[35] The Board's decision in the matter of *American Optical Company*[36] is an oddity when taken in connection with its decision in the *Northern Virginia Broadcasters* case, as it is difficult to see how the same organization could sometimes be a labor organization and sometimes not.

The Supreme Court of the Unted States in the cases of *CIO v. McAdory,*[37] and in the case of *Alabama State Federation of Labor v. McAdory,*[38] both of which cases were decided in 1945 prior to the *Northern Virginia Broadcasters* case, expressly held that the CIO was a national labor organization. In passing on another part of the Taft-Hartley law pertaining to political contributions, the Supreme Court of the United States in effect held that the CIO was a labor organization within the meaning of Section 304 of the Taft-Hartley law.[39]

On the basis of the relationship between the parent organization and one of its affiliates, the facts appear to indicate clearly that a two-way interlocking control exists between what is called a national or international union and what is called a parent organization, such as the CIO.[40] There can be no doubt but that Congress, in placing Section 9(h) in the Taft-Hartley law, intended to rid labor organizations of Communist officers.[41] By requiring the filing of

Paper Mfg. Co., 70 N.L.R.B. 153 (1946); Volney Felt Mills, Inc., 70 N.L.R.B. 908 (1946); Hanson Clutch & Machinery Co., 70 N.L.R.B. 1021 (1946).

35. American Fruit Growers, Inc., 75 N.L.R.B. 1157 (1948); S. E. Evans & Son, 75 N.L.R.B. 811 (1948).
36. American Optical Company, 81 N.L.R.B. 453 (1949).
37. 325 U.S. 472, 65 S. Ct. 1395, 89 L. Ed. 1741 (1945).
38. 325 U.S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945).
39. United States v. CIO, 335 U.S. 106, 68 S. Ct. 1349, 92 L. Ed. 1849 (1948).
40. See CONST. OF CIO, Art. VII; CONST. OF AFL, Art. IV.
41. See Statement of Representative Madden, 93 Cong. Rec. 6542 (1947).

the affidavit, any such Communist officers would be immediately placed in the spotlight, and every union, up and down the line, would have to take steps to purge its own ranks and those of its affiliates. The question is immediately raised as to whether or not the national or international unions would have the power to rid parent organizations of Communist officers. The facts are well known as to the method of control in both the CIO and the AFL.[42] The officers and the executive council are elected at the annual convention of these organizations by delegates of the national or international unions. In the AFL, more than 90% of the voting power lies with the union constituents and affiliates, and in the case of the CIO the same situation exists as to the delegates from internationals and organizing committees. Thus it can be seen that Congress, in inserting Section 9(h) into the Act, did not place a burden on unions which they are not in a position to bear successfully. The parent organizations receive their income from the rank and file of the union membership, with a per capita payment.[43] Furthermore, recent conventions of the CIO have found it expedient to expel various unions from affiliation with the CIO.[44] The history of the two parent organizations are replete with examples of stringent supervision and control of their affiliates.

There would also appear to be but little doubt that Congress in enacting Section 9(h) intended to purge labor organizations at the highest level, such as the AFL and the

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42. See THE CIO—WHAT IT IS AND WHAT IT DOES, published by the Dept. of Research and Education of the CIO.

43. TAFT, *op cit. supra* note 19, at 459 says: "Revenue of the Federation is derived from a per capita tax upon all affiliated groups. National and international unions paid in 1947 a per capita tax of $ .03 per member per month. . . . In addition the AFL has the authority to make assessments on affiliated unions at the rate of $ .01 per member per week for a period not exceeding 26 weeks in any one year, when the interests of the AFL require it and when the available per capita income is insufficient."

44. In November, 1949, the United Electrical Workers were expelled from the CIO because they were violators of CIO policy.

CIO, from any Communist affiliations.[45] The officers of these organizations truly speak for labor and set the pattern in wage disputes and in other vital matters affecting the rank and file of union members. The officers of the parent organizations are in the best position to inflict the harm which Congress believed to be a real danger to the very existence of this country. It is of the greatest importance that the officers at the highest level be purged of Communist affiiliations. During World War II, the AFL Executive Council recommended to all AFL unions that a "no-strike policy shall be applied in all war and defense industries." This recommendation was promptly adopted by union officers, and there can be no question but that under this wise leadership labor contributed a substantial part in the winning of the war. Had the members of the executive council not been loyal, and had the council failed promptly to make this recommendation, the war effort could have been seriously impaired.

Notwithstanding this clear evidence of the congressional intent, the previous decisions by the Board itself, the decisions by the Supreme Court of the United States, and the clear-cut, unequivocal language in the statute, the NLRB made an interpretation of Section 9(h) which ran absolutely contrary to what would appear to be infallible guides in statutory construction.[46] Not only did the Board decide that the clause did not apply to the AFL and the CIO, but it went one step further and held that it was a matter of administrative determination as to whether or not any particular union had qualified under Section 9(h).[47] In effect, the Board was saying that it would not only place its con-

45. In Congressional debates the possibility of disqualifying many unions because of non-compliance of one officer was fully argued. See Statements of Senator Morse, 93 Cong. Rec. 5290, 6612 (1947).

46. Roscoe Pound in his *Annual Survey of Law*, *supra* note 1 at 1095, discusses the extent to which administrative interpretation may go. He says: "This type of 'extensive' interpretation reminds one of the saying of an English lawyer, speaking of interpretation clauses, that the type was a provision that 'whenever the word *cows* occurs in this Act it shall be construed to include horses, mules, asses, sheep and goats'."

47. Baldwin Locomotive Works, 76 N.L.R.B. 922 (1948).

struction on the meaning of the statute, but would also reserve the right to consider it an administrative matter and that litigants could not even question whether a union had complied with the filing requirements of the Act as this was not a subject about which parties had a right to litigate.[48]

Thus, in the case of *Baldwin Locomotive Works*,[49] decided in 1948, the Board held that the determination of whether a petitioning union has complied with the filing and registration requirements, is an administrative function of the Board not subject to litigation by the parties. In the case of *Lion Oil Company*,[50] also decided in 1948, an employer contended in a Board proceeding that a union's petition should be dismissed because the record did not affirmatively show that the union had complied with the affidavit requirements. Rejecting this contention, the Board held that the matter of compliance was clearly one for the Board to determine in any manner suited to the circumstances and that the Board would not permit attacks on the validity of affidavits in its own proceedings. The Department of Justice must prosecute allegations that affidavits have been falsified, since the enforcement of the criminal code is the function of that department.[51] In view of this stand on the part of the Board, if a petitioning union had not filed an affidavit for one of its officers, and the Board through error says that such an affidavit had been filed, the employer presumably would be absolutely barred from going into the subject and would be prohibited from making any showing of non-compliance.

Extracts from the *Northern Virginia Broadcasters* case show that the Board was not too happy in its decision. In the opinion it was said:

> "Our task is to determine the meaning of portions of Section 9 . . . (h) of the Labor Management Relations Act.
>
> ". . . In this case both the International Brotherhood of Electrical Workers and its Local 1215, which is the Petitioner, have

48. *Ibid.*
49. *Ibid.*
50. Lion Oil Co., 76 N.L.R.B. 565 (1948).
51. Craddock-Terry Shoe Corp., 76 N.L.R.B. 842 (1948).

complied fully with Section 9 (f), (g), and (h). As of today, the parent labor organization, the American Federation of Labor, has not done so. The question therefore is whether, under these circumstances, the Board has power to continue its investigation. The General Counsel, speaking through the regional director, has held that it does not.

"Candor, and a proper respect for the opinion of the General Counsel, requires us to say that there can be no categorical answer to this question. Although it is possible to extract a few quotations from the Congressional Record and the Committee Reports to support either viewpoint, such quotations all prove, on analysis, to be disappointingly peripheral in character."[52]

". . . The General Counsel in the performance of the duties committed to him by this Act, has interpreted the terms 'any national or international labor organization' literally to include the AFL and the CIO. Such an interpretation cannot be said to be without any legal support."[53]

Mr. Gray, a member of the Board, dissented from the majority opinion and said:

"In my view, the AFL clearly falls within the meaning of the statutory language 'any national or international labor organization of which it is an affiliate or constituent unit'."[54]

IV.

The question presented in this article is not new and has been considered by the Congress. The Ferguson-Smith Bill, introduced in 1947, would have created eleven new labor courts,[55] one for each of the judicial circuits and one for the District of Columbia. They would have had original jurisdiction of all cases arising out of collective bargaining agreements, and also the appellate jurisdiction specified in the Wagner, Wage and Hour, and Railway Labor Acts. These courts would have been composed of three judges—two lawyers, and one non-lawyer "qualified by training, experience and ability to perform the duties of his office." The

52. Northern Virginia Broadcasters, Inc., 75 N.L.R.B. 11 (1947).
53. *Id.* at 16.
54. *Id.* at 21.
55. S. No. 937, 80th Cong., 1st Sess., introduced March 19, 1947.

statutory provisions and rules applicable to the regular federal courts would apply as to practice, procedure, witnesses, pleadings and evidence, with special provisions designed to simplify issues and provision for exceptional promptness to meet the special needs of labor controversies. Senator Ferguson, in introducing his bill,[56] stated that the existing situation was intolerable, in that both employers and employees were uncontrollable in their disputes, and the frequency of these conflicts interrupted the nation's economic life. He also stated that labor controversies are the only ones still not subject to decision by the rule of law and left to the outcome of the struggle between the parties. As has been pointed out by leading writers,[57] the situation referred to by Senator Ferguson impairs the authority of the Government itself. No government can endure and command respect where employers or employees flout with impunity the statements of the President that their conflicts are threatening the welfare of the nation and where they refuse requests that they submit their differences to arbitration. A statement of President Woodrow Wilson is pertinent to this discussion:

> "The business of government is to see that no other organization is as strong as itself; to see that no body or group of men, no matter what their private business is, may come into competition with the authority of society."

The Ferguson-Smith Bill did not become law. Perhaps it was prematurely presented for enactment. Perhaps special labor courts are not the right answer. It may even be conceded that the great body of labor relations law has not been sufficiently developed to where the federal courts on the district or trial level can best handle the situation. No one, however, can doubt that the Ferguson-Smith Bill is based on sound premises and is aimed in the right direction. As Senator Ferguson said in connection with this bill:

> "Today our economy is so intermeshed, and both unions and industries have grown so big, that a single strike can paralyze

56. See Vickery, *Labor Relations Law: The Ferguson-Smith Bill to Create Labor Courts*, 33 A.B.A.J. 548, 549 (1947).
57. *Ibid.*

the nation. This situation has become intolerable. We cannot afford a national paralysis every few months simply because labor and industrial managers cannot agree. The time has come to settle these disputes on the basis of justice. The great principle of equal justice under law should be broadened to include labor management relations. We should subject industrial disputes along with all other disputes to the legal discipline of a civilized society and the machinery best suited to settle disputes and arrive at just conclusions is the courts."[58]

58. See Ferguson, *Why Labor Courts*, American Magazine, Feb., 1947; Vickery, *Labor Relations Law: The Ferguson-Smith Bill to Create Labor Courts*, 33 A.B.A.J. 548 (1947).

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