The Labor-Management Reporting and Disclosure Act, 1959

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Justice Frankfurter wrote: "Legislation is the end of a process of understanding and not a firebell. All enduring political reform has three stages—investigation, education, and legislation."1 In the case of the Labor-Management Reporting and Disclosure Act of 1959 the stages preceding legislation—investigation and education—were largely contemporaneous, in the form of the hearings of the Senate Select Committee on Improper Activities in Labor and Management (the McClellan Committee). The hearings continued for a period of some two years and created a record of some twenty thousand printed pages.2 In addition, both the House and Senate Labor Committees conducted hearings on proposed legislation in the area of internal union reforms and in the domain of labor-management relations in the first part of 1959.3 The outcome of these hearings was the Labor-Management Reporting and Disclosure Act, 1959.4

Seen in the perspective of labor legislation over the past fifty years, the Act is most notable in the controls imposed on the conduct of in-

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2 As of December, 1959, the Select Committee on Improper Activities in Labor or Management Field of the United States Senate published 57 parts of hearings (covering hearings up to August 18, 1959) covering 19,914 pages.


4 Public Law 86–257 (September 14, 1959).

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ternal union affairs. From the days of the subsequently much debated antitrust legislation of 1890, to the no less controversial enactment of the Taft-Hartley Act in 1947, the federal labor law has never attempted to regulate the internal operations of unions, the conduct of their daily affairs, their financial operations, or the controversial question of worker rights against unions and union officials.\(^5\) The Labor-Management Reporting and Disclosure Act has done all of these by providing for a bill of rights for labor, and in provisions relating to union elections, trusteeships, the fiduciary responsibilities of union officers, disqualifications from holding union office, etc. Although unions are essentially private organizations, Congress has taken the view that like all other private associations, and especially because of their extensive statutory powers as bargaining agents under the National Labor Relations Act, as amended, unions are subject to regulation in the public interest and in the interest of union members.

The provisions of the Act dealing with internal union democracy will undoubtedly have an impact on the process of collective bargaining, particularly in the emphasis placed on the fiduciary responsibilities of union officials and union negotiators. They also deserve to be studied closely in the years ahead because of the very novelty of the legislative experiment. The present article is, however, limited to a discussion of the amendments to the Taft-Hartley Act, and will center attention on some of the problems likely to be generated by the amendments.\(^6\)

A general observation may be pertinent before surveying the particulars. The hardening of labor-management attitudes in the basic industries such as steel, auto, meat packing, and the docks, is a matter

\(^5\) In a limited way the Taft-Hartley Act did regulate internal union affairs. The Act required the filing of certain annual financial reports and statements covering the names of union officers, election procedures, compensation of officers, information concerning dues and fees which members are required to pay, etc., including an affidavit by certain union officers that they are not members of the Communist Party and do not believe in or teach the overthrow of the United States Government by force or by any illegal or unconstitutional methods. Labor-Management Relations Act, 1947 at §§ 9(f), (g), (h). These sections have been repealed by the Labor-Management Reporting and Disclosure Act, 1959 at § 201(d). For a discussion of these aspects of internal union control, consult: Levitan, Labor Under the Taft-Hartley Act, Current History, pp. 160-164 (Sept., 1959). For a discussion of state legislation regulating internal union affairs, consult: Aaron and Komaroff, Statutory Regulation of Internal Union Affairs, 44 Ill. L. Rev. 425, 631 (1949).

of record. A competent observer recently noted that the parties to the steel dispute "have become standard bearers in what amounts to an outbreak of class warfare—low voltage, non-violent, but nonetheless destructive in its implications for industrial democracy and an economy calculated to serve the consuming public." If this is a correct estimate of the situation, its significance for business cannot be lost. The need for more effective devices to settle labor-management contracts disputes is obvious. In addition, continued need remains for balancing the bargaining strength of labor and management, by legislation if necessary, despite solemn pronouncements of "less government in labor relations."

With but a few exceptions the 1959 amendments to the Taft-Hartley Act appear to strengthen management's hands vis-à-vis unions, and provide new rights for employers.

The major changes in the law benefiting business, and particularly small business, are: (1) extension of state jurisdiction over labor disputes; and (2) limitations on organizational and recognition picketing by uncertified unions, and prohibition of extortionate picketing. Other changes of benefit to management relate to: (3) banning of secondary boycott activities, with certain exceptions; (4) outlawing most "hot cargo" agreements, with special provisions for the construction and clothing industries. The unions can now look forward to: (1) extended voting rights for economic strikers; (2) legalization of prehire contracts in the construction industry; and (3) new seven-day union shop provisions for that industry.

The law extended the ban on certain payments to union agents and prescribed criminal penalties for employers who violate the law. The new Act also calls for quite considerable paperwork by businessmen, under the provisions for the reporting on financial dealings with unions, union officials and employees, with special provisions for small businesses.

Extension of state jurisdiction in labor disputes

Illinois, a highly industrialized state, does not to this day have a labor relations act or formal code of laws pertaining to the negotia-

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8 29 U.S.C.A. § 186(a), (b), (c) (Supp., 1959).
tion of wages, hours and other terms of employment. With the exception of an anti-injunction act, enacted in 1925, there is little statutory law regulating labor-management relations and no governmental agency is charged with the specific responsibility of preventing industrial unfair labor practices or unlawful economic pressures. The rights of the parties to a labor dispute—where such parties are not subject to federal law—are thus largely determined by common law actions in the Illinois courts.

Under Illinois common law there is no requirement that an employer recognize a union nor does the law require the employer to meet or deal with unions. The right to organize has, of course, been long recognized in this state and is protected. Collective bargaining agreements are legally enforceable in the courts. Clearly, the provisions of the National Labor Relations Act, as amended, requiring an employer to recognize the union representing the majority of his employees, apply only to businesses which “affect” interstate commerce. The question arises—how does a business determine whether it so affects interstate commerce?

A precise answer is not possible, for any time goods or supplies are shipped across state lines, a business affects and is, in fact, in interstate commerce. It is, however, possible to determine whether a business affects interstate commerce for the purpose of bringing the National Labor Relations Board into the dispute. The National Labor Relations Act empowers the N.L.R.B. to prevent any person from engaging in any unfair labor practice, as defined in the Act, affecting interstate commerce. As was noted by Chief Justice Warren: “By this language and by the definition of ‘affecting commerce’... Congress meant to reach the... full extent of its power under the Commerce Clause. ... The Board, however, has never exercised the full measure of its jurisdiction. For a number of years, the Board decided case-by-case whether to take jurisdiction. In 1950, concluding that ‘experience warrants the establishment and announcement of certain standards’ to govern the exercise of its jurisdiction... the Board published standards, largely in terms of yearly dollar amounts of interstate inflow and outflow. In 1954, a sharply divided Board... revised the jurisdictional standards upward.”

Concededly, these standards are arbitrary

and subject to change. Yet they do provide a fair degree of certainty at any given moment for determining the likelihood of N.L.R.B. intervention in a dispute situation.

Where the business, for example a small retail store, does not meet the monetary amounts stipulated in the Board standards, it follows that the employer is not subject to the jurisdiction of the N.L.R.B. The reverse is not true, however, since the Board may and, in the past, has refused to assert jurisdiction over certain employers or businesses regardless of the total annual dollar volume of business done. Hotels and motels were a case in point,\(^\text{12}\) and in two recent opinions the Board unanimously reaffirmed its policy of declining to assert jurisdiction over horse racing tracks.\(^\text{13}\) The Board, in such cases, takes the position that "the effect of such labor disputes is not sufficiently substantial to warrant the exercise of the Board's jurisdiction"\(^\text{14}\) or that while "the employer's operations are not wholly unrelated to commerce, and indeed they come within the scope of the Board's jurisdiction, we do not believe it would effectuate the policies of the Act to assert jurisdiction herein."\(^\text{15}\) Private hospitals are treated much like race tracks.\(^\text{16}\)

Non-assertion of jurisdiction by the federal labor agency, largely

\(^{12}\) Hotel Employees Local No. 255 v. Leedom, 358 U.S. 99 (1958). In a two-sentence per curiam opinion the Court held the N.L.R.B.'s "long standing policy not to exercise jurisdiction over the hotel industry as a class" arbitrary and beyond the Board's powers. The Board subsequently amended its jurisdictional yardsticks and now exercises jurisdiction over certain hotels.


\(^{16}\) Flatbush General Hospital, 126 N.L.R.B. No. 22 (1960). In declining to assert jurisdiction, the Board stated: "[W]e are of the opinion that the operations of this class of proprietary hospitals, although not wholly unrelated to commerce, are essentially local in nature and therefore, the effect on commerce of labor disputes involving such hospitals is not substantial enough to warrant the exercise of the Board's jurisdiction. Our conclusion that such hospitals are local in character rests primarily on the facts that they service local residents and that their operations are subject to close regulation by the states for the protection of the health and safety of their residents." N.L.R.B. Release R-668 (1960). The Board added: "[O]ur declination of jurisdiction over hospitals in this class will not leave their labor relations in a legal no-man's land, for Congress has specifically provided for State assumption of jurisdiction in situations where the Board does not assert its legal jurisdiction." Ibid.
dictated by budgetary considerations, did not, however, permit an employer in interstate commerce to seek relief in the state courts against illegal conduct which the N.L.R.B. chose not to terminate. The reason for this was the doctrine of "federal preemption." This doctrine is that to the extent that Congress has vested in the N.L.R.B. jurisdiction over labor relations matters affecting interstate commerce, it has "completely displaced state power to deal with such matters [even] where the Board has declined or obviously would decline to exercise its jurisdiction. . . ." In other words, state courts cannot intervene in labor disputes involving conduct which is either protected or prohibited under the National Labor Relations Act. The N.L.R.B. has exclusive jurisdiction over such disputes, whether it exercises or declines to exercise jurisdiction.

As was stated by the Circuit Court of Knox County, Illinois, in a case involving an automobile dealer who was in interstate commerce:

[The entire field of labor relations is preempted by Congress; it is preempted and the State Courts lack jurisdiction. The National Labor Management Act provides a comprehensive system for dealing with labor relations and dealing with unfair labor practices affecting interstate commerce. It is important that we do not lose sight of the fact that the businesses here involved are concededly businesses that affect interstate commerce.]

Even though conduct is clearly illegal under federal law, it cannot be dealt with by state court injunction or other remedy. A state court, generally speaking, may only intervene in cases involving:

[Mass picketing, picketing attended with violence, picketing attended with threats of personal injury or property damage to the public, the employer or employee threatening employees desiring to work with physical injury or prop-

17 This is the reason most often given. E.g., Member Murdock in Breeding Transfer Co., 110 N.L.R.B. 493, 515, 516 (1954). However, in Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957), the Court noted testimony given by the then Board chairman before a Subcommittee of the House Committee on Appropriations shortly before the 1954 changes in the N.L.R.B.'s jurisdiction, which testimony "indicates that its reasons for making that change were basically budgetary." Ibid., at 10, 11. The Court stated: "They had more to do with the Board's concept of the class of cases to which it should devote its attention." Ibid., at 11. The reference is to Hearings before the Subcommittee of House Committee on Appropriations, Department of Labor and Related Independent Agencies, 83rd Congress, 2d Session, 309, 315, 323 (1954).

18 Guss v. Utah Labor Relations Board, 353 U.S. 1, 3 (1957).

19 Puckett Buick Co. v. Int. Brotherhood of Teamsters, 32 Labor Cases 70647, at p. 93, 790 (Circuit Court, Knox County, Ill., 1957).
The court added, with apparent relief, that in such cases "a state court is not divested of jurisdiction by the preemptive doctrine, and if the facts of a certain case justify the exercise of a state's police power, a court should not hesitate to so exercise it." 21 However, in Illinois, as in other states, "[t]his rule is circumscribed by the rule that . . . even where there are disassociated acts which might bring into play the police power, an injunction should be denied unless it is a justifiable conclusion that these acts will be further repeated." 22

The practical consequence of the Board's refusal to enter the dispute was that a large number of smaller enterprises were effectively excluded from coverage and protection of the Taft-Hartley Act, as well as being outside the pale of state court protection. "How many labor disputes the Board's 1954 standards leave in the 'twilight zone' between exercised federal jurisdiction and unquestioned state jurisdiction is not known."

But in the "twilight zone" employer-employee relations were said to have reverted to an "unsupervised jungle where decisions go to the strong and ruthless." 23 The dissatisfaction with this state of affairs, evidenced by increased court litigation and rising demands for corrective legislation, is responsible for the elimination by Congress in 1959 of this "twilight zone" or "no-man's land" in labor relations. No longer will the size or volume of a business determine the availability of legal protection of a small business, or indeed, the availability of such relief to the employees of such enterprises. 24 The new law provides that: (1) the N.L.R.B. must assume jurisdiction over any dispute falling within its eleven jurisdictional standards of August 1, 1959; and (2)

20 Ibid., at 93, 790.

21 Ibid.

22 Ibid.


25 Note, however, that other considerations may continue to exclude certain types or classes of employers from coverage of the Labor-Management Relations Act. The new Section 14(c)(1) specifically states that the Board "in its discretion, may, by rule of decision or by published rules . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. . . ." However, in such cases state remedies will become readily available to the parties involved.
where the N.L.R.B. rejects a case because it does not fall within these standards any agency or court of any state or territory is free to assume jurisdiction. The language of the new law is specific in that it permits the N.L.R.B. to expand its jurisdiction but denies the Board the right to retrench from the jurisdictional grounds covered on August 1, 1959.

In order for a business to determine whether it is subject to the jurisdiction of the N.L.R.B. or whether relief should be sought in a state court two alternate procedures may be followed: (1) a business may apply to the executive secretary of the N.L.R.B. in Washington for a written opinion as to whether the Board will assume jurisdiction; or (2) "informal" advisory opinions on jurisdiction may be obtained speedily from a regional director of the N.L.R.B. Such informal opinions normally suffice, although they are not regarded as binding on the National Labor Relations Board.

While an Illinois employer is thus no longer left in a legal no-man's land in a labor dispute, an important question, not settled by the 1959 amendments, is whether the Illinois courts will apply federal or state law in their determination of a labor dispute. It would appear from the legislative history of the new Act that the state courts are free to apply state law in the adjudication of labor matters now coming before them in this State.

Due to the absence of a comprehensive labor relations code in

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28 The Senate version of § 14(c) (1), which was rejected in conference, provided, in part, that: "The Board may enter into an agreement with any agency of any State which is authorized by the law of such State to enter into and carry out such agreement whereby such agency is designated as the agent of the Board for the purpose of the exercise of jurisdiction within such State over classes of cases which are within the jurisdiction of the Board but with respect to which the Board finds that because such classes of cases are essentially local in character, the impact thereof on commerce is not significant. Any such agreement shall (A) provide for the delegation by the Board to the State agency of such of the powers and duties of the Board as may be necessary or appropriate to enable the State agency to exercise such jurisdiction, (B) require that, in exercising such jurisdiction, the State agency shall apply and enforce the provisions of this Act as interpreted by the Federal courts and the Board, and (C) provide that such agreement may be suspended or terminated by the Board at any time if the Board finds that there has been a failure on the part of the State agency to comply with the provisions of such agreement or with regulations promulgated by the Board with respect to carrying out of such agreement . . . " U.S. Senate, Labor-Management Reporting and Disclosure Act of 1959. Report together with Minority, Supplemental, and Individual Views, No. 187, 86th Congress, 1st Session, page 65 (emphasis supplied).
Illinois, and in view of the inconsistencies in present court decisions,\textsuperscript{29} gradual law making on an unprecedented level in the area of employer-employee relations may be anticipated. The courts will also have to solve numerous essentially administrative questions, such as are involved, for example, in the resolution of representation problems, involving elections and certifications. While the nature and effectiveness of the remedies to be evolved in the years ahead are still conjectural, the task before the Illinois courts is immense and will call for a thorough understanding and appreciation by the judiciary of the realities of modern labor-management relations. Whether the courts can meet this challenge without the assistance of the legislature remains to be seen.

\textit{Picketing—organizational, recognition and extortionate}

The right of labor unions to picket employers for recognition has a colorful, though hardly consistent, legal history. At the turn of the century the courts held that any peaceful picketing was illegal and could be terminated by injunction. One court observed that "there could be no such thing as peaceful picketing, anymore than there could be chaste vulgarity, or peaceful mobbing, or lawful lynching."\textsuperscript{30}

As time went on courts became less restrictive where picketing was not accompanied by violence, threats or intimidation. By 1940 the United States Supreme Court in \textit{Thornhill v. Alabama}\textsuperscript{31} held that picketing was no more than the exercise of the constitutionally protected guarantee of free speech, and that a state law forbidding peaceful picketing, engaged in for the purpose of dissuading persons from dealing with an employer, violated the constitutional guarantee of free speech incorporated in the Due Process Clause of the Fourteenth Amendment. The only exception to this sweeping rule was held to

\textsuperscript{29} Note particularly the unsettled law of picketing in this jurisdiction. Illinois courts have frequently stated that Bitzer Motor Co. \textit{v. Local No. 604}, Int. Brotherhood of Teamsters, 349 Ill. App. 283, 110 N.E.2d 674 (1953) stands for the proposition that picketing to coerce an employer to force unwilling employees into the picketing union is against public policy. Cf., Eckhardt \textit{v. Local No. 705}, 55 C 16466 (Cook County Circuit Court, Ill. 1956); Gray \textit{v. Bruss}, 31 Labor Cases 70,512 (Sangamon County Circuit Court, Ill. 1956). On the other hand, with the crystallization of the preemption doctrine the value of the Bitzer case became doubtful. Cf., Jersey County Motor Co. \textit{v. Local No. 525}, 21 Ill. App. 2d 38, 156 N.E.2d 633 (1959); Puckett Buick Co. \textit{v. Int. Brotherhood of Teamsters}, 32 Labor Cases 70,647 (Knox County Circuit Court, Ill. 1957).


\textsuperscript{31} 310 U.S. 88 (1940).
exist where picketing was accompanied by violence. In a case on appeal from the Illinois courts, decided the same day as *Thornhill*, the United States Supreme Court declared that picketing enmeshed with violence was not constitutionally protected and could be enjoined by state courts.\(^{32}\)

In the past ten years the courts have veered away from the blanket protection afforded peaceful picketing, for the "hybrid aspect of labor picketing came to haunt the Supreme Court more and more as the years went by and labor grew stronger and stronger. The Court began to realize that although the Constitution now protected the right of labor to bring its point of view before the public, the Constitution could not go too far in that it might be used to stifle the individual business man."\(^{33}\)

Justice Frankfurter summarized the Court's experience in these words:

Soon . . . the Court came to realize that the broad pronouncements, but not the specific holding, of *Thornhill*, had to yield "to the impact of facts unforeseen," or at least not sufficiently appreciated. . . . Cases reached the Court in which a State had designed a remedy to meet a specific situation or to accomplish a particular social policy. These cases made manifest that picketing, even though "peaceful," involved more than just communication of ideas and could not be immune from all state regulation. "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."\(^{34}\)

Capsuling years of court decision on picketing, Mr. Justice Frankfurter stated:

[\text{T}he strong reliance on the particular facts in each case demonstrated a growing awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than "publicity" and competing interests of state policy.\(^{35}\)

Dissenting Justice Douglas commented tersely: "The Court has now come full circle."\(^{36}\)

Although the Fourteenth Amendment alone no longer bars a state from enjoining peaceful picketing where such picketing violates a state law, the restrictive interpretation given the state anti-injunction

\(^{32}\) Milk Wagon Driver's Union v. Meadowmoor Dairies, 312 U.S. 287 (1941).


\(^{35}\) Ibid., at 290.

\(^{36}\) Ibid., at 295.
laws normally bars the employer from obtaining an effective remedy in a labor dispute. Further difficulties exist because of the continuing distinction made by some courts between recognition and organizational picketing. And to compound the vagueness of law and legal remedy, the doctrine of federal preemption altogether ousted the state courts from taking jurisdiction where the business enterprise was in interstate commerce.

Picketing is labeled "recognition picketing" where the sole purpose is to force an employer to recognize a union as the bargaining agent for his employees. Recognition picketing is resorted to by labor organizations without regard to whether the employees desire to join up or wish to be represented by the picketing union. Picketing becomes "organizational" when it is designed to induce the employees to join the picketing union. It is directed at the employees, although such picketing takes place in front of the employer's place of business, and affects the employer's business just as it would were the picketing of the recognition specie. Some courts have consequently ruled that picketing for organizational purposes was only "fictionally different" from picketing for recognition. Unanimity of judicial opinion here is glaring in its absence, and Illinois decisions are far from clear.

Thus, one Illinois Court held it unlawful for a union which represented no employees, to picket an employer for the purpose of coercing the employer into recognizing the union as the representative of his employees (recognition picketing). On the other hand, other courts found that where a union was picketing for the purpose of organizing the employees, no injunctive relief was obtainable. Furthermore, where a picketing union represents some employees, an injunction might or might not be issued by an Illinois court.

Federal preemption, as noted earlier, presents a further complicating factor. The Illinois Appellate Court recently ruled that "whether picketing is considered recognition or organizational, whether the activities of a union are condemned by the federal statute as an unfair labor practice or by it protected as permissible conduct—state courts may not exercise jurisdiction."  

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89 Simmons v. Retail Clerks Union, 5 Ill. App. 2d 429, 125 N.E.2d 700 (1955).
90 Jersey County Motor Co. v. Local No. 525, 21 Ill. App. 2d 38, 45, 156 N.E.2d 633, 636 (1959).
The Labor-Management Reporting and Disclosure Act has entered this legal morass by making it an unfair labor practice for a union to picket an employer who is in interstate commerce, or cause him to be picketed, or threaten to picket him for recognition, or to force the employees to select such union as bargaining representatives under the following circumstances: (1) where the union has picketed without petitioning the N.L.R.B. for a representation election "within a reasonable period of time not to exceed 30 days from the commencement of such picketing"; 41 (2) where the employer has lawfully recognized another union; and (3) where within the preceding 12 months a valid election has been conducted by the Labor Board. 42

The first provision outlaws both recognition and organizational picketing which continues for an "unreasonable time." The N.L.R.B. will have to decide what constitutes a reasonable period during which a union can engage in recognition or organizational picketing. Presumably a case-by-case approach will be followed. As was noted by Senators Goldwater and Dirksen: "The Board has had over 20 years of experience in determining similar questions in various questions which arise in representation cases, such as the percentage needed to obtain an election and the percentage needed to intervene in a representation case. We doubt that the Board would have any trouble laying out the ground rules for a 'reasonable period of time' . . . taking into account all the circumstances in a given case." 43

Spokesmen for Illinois businessmen were not altogether agreed on the desirability of the "reasonable period of time" provision. In testimony before the House Labor Committee, the Illinois Chamber of Commerce took the position that to permit such picketing to continue for a reasonable period "means that 'a little bit of hi-jacking is all right but you can't hi-jack too much'—a rather absurd theory upon which to base a congressional enactment." 44 The Illinois Manufacturers Association, in testimony before the Senate, stated that along with the other restrictions on picketing the amendments would "go

42 Ibid.
far toward correcting the evils of recognition and organizational picketing."\(^4\)

Where a union begins to picket for recognition or for organization, the N.L.R.B. upon being alerted by the employer must "forthwith . . . direct an election" to determine whether the union in fact represents the employees.\(^4\) The Labor Board will enter the case as soon as the employer or some other interested person (but not the union) has filed an "8(b)(7) charge." The Board is required by law to give priority to the employer charge of unlawful picketing and must seek injunctive relief in the federal district court upon finding that the picketing involved or threatened is for the purpose of forcing an employer to recognize an uncertified union or to force the employees to join the picketing union.\(^4\) The picketing thereafter must be entirely "educational" or "informational" and cannot have the effect of inducing any individual employee or other person in the course of his employment, not to pick up, deliver or transport any goods, or not to perform any services.\(^4\) A union may only engage, at this juncture, in "picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with"\(^4\) the picketing union.

Picketing for recognition or organizational purposes is also prohibited and constitutes an unfair labor practice where the employer has lawfully recognized another union, whether such union has been previously certified by the Labor Board or has been lawfully recognized without going through formal N.L.R.B. proceedings.\(^5\)

Finally, where the N.L.R.B. has conducted an election to determine

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\(^4\) Labor-Management Reporting and Disclosure Act, 1959 at § 704(d), 29 U.S.C.A. § 160(1) (Supp., 1959). However, the amended Section 10(1) of the Labor-Management Relations Act of 1947 provides that a restraining order shall not be available under Section 8(b)(7) "if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation [the Board agent] has reasonable cause to believe that such charge is true and that a complaint should issue." 29 U.S.C.A. § 160(1) (Supp., 1959).


the desires of the employees with regard to unionization, picketing to "re-educate" them also amounts to an unfair labor practice. At least twelve months since the date of the election (not the certification by the N.L.R.B.) must have elapsed before picketing may be lawfully renewed. The National Labor Relations Board, as in the past, will not conduct more than one election in a bargaining unit in any 12-month period.

The question for small companies in Illinois, which do not meet the minimum jurisdictional standards of the N.L.R.B. (companies, that is, solely in intra-state business) is what to do about these forms of picketing. Unless the courts clarify their stand on picketing as it affects such enterprises, the only avenue to an unambiguous declaration of Illinois public policy on this matter is an act of the state legislature. Past efforts in the direction of limiting recognition and organizational picketing in Illinois have been singularly unsuccessful.

Shake-down picketing or extortionate picketing for the "personal profit or enrichment of any individual... by taking or obtaining any money or other thing of value from [an] employer against his will or with his consent" is made unlawful and punishable under the new Act by a fine of up to $10,000 or imprisonment for not more than twenty years, or both.

**Secondary boycotts**

"Attempts to define the secondary boycott in a fashion which is at once precise and at the same time clear are usually ineffectual." Congress, in the Taft-Hartley Act, made no attempt to use the term nor to define it.

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53 The latest effort to pass an "anti-racket picketing bill" backed by some 90 Illinois trade associations and chambers of commerce was H.B. 1202 (71st General Assembly, Illinois, 1959). This bill would amend the anti-injunction act which is now in effect so as to outlaw picketing a place of business for recognition and organizational purposes where the picketing union does not represent a majority of the employees. The bill would permit a secret ballot election to be conducted by the State Director of Labor to determine whether or not a majority of the employees want to be represented by the picketing union. The bill does not require an employer to bargain with the union certified as representing the majority of the employees.
54 Labor-Management Reporting and Disclosure Act, 1959 at § 602.
Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of "secondary boycotts" and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in Section 8(b)(4)(A). The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. . . . Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited.56

Boycotts can be "primary" or "secondary." The "primary or simple boycott is one in which the aggrieved party resolves not to patronize a firm or firms or its product and appeals to its friends to withhold their patronage."57 A secondary boycott is usually "one in which, in addition to the above, coercion, loss of business, etc., are resorted to or threatened to cause third parties to sever business relations."58

Primary boycotts, labor relations experience shows, are of limited effect. However, secondary boycotts may be extremely effective. The need for prohibiting or at least limiting secondary boycotts proceeds from a recognition of their adverse economic effect on neutral employers and their employees. The section of the Taft-Hartley Act prohibiting certain secondary activities, "like the entire Taft-Hartley Act, was designed to protect the public interest, but not in the sense that the public was to be shielded from secondary boycotts no matter how brought about. Congress' purpose was more narrowly conceived. It aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers. . . ."59 As was pointed out by the Supreme Court: "From . . . considerations of what is not prohibited by statute, the true scope and limits of the legislative purpose emerge."60 The loopholes which were soon to become evident more than confirmed the fact that in 1947 no wholesale condemnation of secondary boycotts was intended by Congress.

Interpretation of the Taft-Hartley language by the courts revealed that all of the following activities were legal, although related to the prohibited acts:

57 Millis and Montgomery, Organized Labor, p. 583 (1945).
58 Ibid., at 583.
60 Ibid., at 99.
(1) Inducing an individual employee of a neutral employer to engage in any of the prohibited activities—the law outlawed only the inducement of a concerted refusal of employees;

(2) Inducing the neutral employer directly—rather than his employees—to cease doing business with the employer with whom the union had a dispute;

(3) Inducing the employees of neutral employers who were not subject to the Taft-Hartley Act. The Act, it will be remembered, does not apply to federal, state, or local governmental units, railroads or airlines. Boycotts by such employees were not reached by the secondary boycott ban of the 1947 legislation;

(4) Coercion of supervisors of employees, by threats or otherwise, to direct employees to refrain from working on goods from another employer;

(5) Accomplishing the same illegal purposes by requiring the employer to sign a hot-cargo agreement thus legalizing a refusal by employees to work on or handle materials destined for or shipped in from "unfair" employers.1

The 1959 amendments close all of these loopholes.2 Again the ban is not totally waterproof, in that it is still legal for a union to induce an employer to cease doing business with another employer, although it would be unlawful to threaten, coerce or restrain him from doing so.3 The "slippery line," to use Senator Humphrey's phrase,4 between threats and persuasion as drawn by Congress must ultimately be clarified by the courts. Although dictated by free speech considerations, the distinction is an unfortunate one, particularly in view of the fact that no distinction is made in the amended secondary boycott section between inducing or threatening employees. Neither is permitted.5

A type of secondary activity not mentioned heretofore involves appeals to consumers by means of a product boycott. The new secondary boycott regulations make it an unfair labor practice for a union to engage in such boycott involving the picketing of distributing or retailing businesses. The union may use means other than picketing or secondary inducements to boycott in order to publicize its dispute with a manufacturer.6


64 Congressional Record, p. 5580 (April 17, 1959).

65 Since the inducement and encouragement are outlawed, the more severe act of threatening employees to engage in prohibited activities must be deemed outlawed as well. 29 U.S.C.A. § 158(b) (4) (i) (Supp., 1959).

Hot-cargo agreements

Of particular importance to employers bargaining with the Brotherhood of Teamsters is the newly enacted prohibition of hot-cargo agreements. Similar agreements are legally entered into by contractors and unions in the building trades. Altogether these clauses have become "a part of the very fabric of collective bargaining" in a number of industries. By the insertion of such clauses in collective bargaining contracts, employers agree that they will not require employees to handle or work on goods or material going to or coming from non-union plants or "unfair" employers.

The 1959 amendments to the Taft-Hartley Act make it an unfair labor practice for employers and unions to make hot-cargo agreements, "and any contract or agreement heretofore or hereafter containing such an agreement shall to such extent be unenforceable and void." Unions, furthermore, cannot resort to secondary economic pressures to exact such agreements from unwilling employers.

Exemptions from the hot-cargo ban apply, however, in two industries. The construction industry benefits from a qualified exemption; the clothing and apparel industry from an absolute exemption. Thus the prohibition of hot-cargo agreements does not apply in the construction industry with respect to "the contracting or subcontracting of work to be done at the site of the construction..." This exception permits unions and employers in the construction industry to conclude voluntary agreements regarding contracting and subcontracting at the construction site. Senator John Kennedy, a Senate conferee on the Act, stated: "Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e) [the hot-cargo ban]."

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68 Note the special position of the building and construction trades under the new amendment. 29 U.S.C.A. § 158(f) (Supp., 1959).


71 Ibid.

72 Ibid. (first proviso).

73 Congressional Record, p. 16415 (September 3, 1959).
A difference of opinion exists between the legislators on the question whether agreements by contractors with respect to co-contractors, e.g., refusal to work with non-union co-contractors, are permissible. Senator Kennedy interpreted the exemption to be "applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them." Representative Barden, then chairman of the House Labor Committee, felt, on the other hand, that the exemption does not apply to "situations where there is no privity of contract between two or more contractors on a particular site, such as in the case of co-contractors, each having direct contracts with the owner."

The construction industry exemption also lacks clarity in another area. Conflicting comments have been made by the House and Senate conferees, soon after the enactment of the law, as to whether the exemption was meant to apply to work actually done at the construction site or more broadly to work which could be done there. Clearly, "these differing interpretations make a big difference as to what kinds of agreements unions and employers in the building industry can lawfully make."

Building trade unions cannot enter into agreements to exclude products manufactured in a plant for use in construction. The secondary boycott prohibitions also make it illegal for a construction union to exert pressures against neutrals to force an employer to agree to a hot-cargo contract. Nor can a union at the present time strike or picket to enforce such an agreement.

An absolute exemption from the hot-cargo provisions of the new law applies in the apparel and clothing industry. Employers and

74 Ibid.
75 Congressional Record (Sept. 4, 1959).
78 29 U.S.C.A. § 158(e) (Supp., 1959). "The right of labor unions representing employees in the apparel and clothing industry to refuse to work for a jobber or contractor who subcontracts parts of the process of production to nonunion subcontractors. This guarantee, the writing of which into statutory legislation was opposed by the House conferees for 2 weeks, is absolutely essential to the stability of these industries. The bill makes special mention of the industry because it has peculiar problems." Senator Kennedy, Congressional Record, p. 16414 (Sept. 3, 1959).
unions may enter voluntarily into such agreements and the garment and clothing unions may resort to secondary boycott practices to enforce these agreements. In this one industry, then, it is legal to picket, strike and boycott the employer to enforce "no-nonunion subcontracting" agreements. Collective bargaining contracts in the garment industry traditionally have provided that firms under contract with the union shall sub-contract only to firms similarly under union agreements. The explanation of this blanket exemption in the Labor-Management Reporting and Disclosure Act must be found therefore in Congressional recognition and approval of the fact that substandard working conditions in this particular industry have been largely eliminated by such contracts by putting the non-union "sweat-shop" operator out of business.

An interesting question pertaining to the applicability and effect of the 1959 hot-cargo ban relates to its effect on employee refusal to cross picket lines. The Labor-Management Relations Act of 1947 and prior legislation did not, of course, require an unwilling employee to cross a picket line at another employer's place of business, although such refusal gave his own employer the right to discharge him. Until recently the employer would have been prevented from so discharging the employee only where the employer agreed not to do so in the collective bargaining agreement with the union to which the employee belonged. The continued validity of such an immunizing agreement may well be questioned in the light of the broad prohibition contained in Section 8(e) of the amended Taft-Hartley Act.


80 The section specifically prohibits labor-management agreements whereby an employer agrees to cease doing business with any other person. The argument can be made that any agreement which gives employees the right to refuse their services under certain situations is no different from an agreement whereby their employer undertakes to cease doing business. On the other hand there is a proviso to Section 8(b) which provides that "nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter. . . ." 29 U.S.C.A. § 158 (b) (4) (Supp., 1959). A literal interpretation of this proviso is likely to lead to an opposite result. There also exists legislative history to support a literal interpretation, although it does not appear to be conclusive. Representative Cramer, Congressional Record (Aug. 12, 1959). The matter is likely to find an early resolution in the courts.
Rights of economic strikers

The Labor-Management Reporting and Disclosure Act is not devoid of "pro-labor" provisions. The amendment concerning the voting rights of economic strikers is a case in point. Under the Taft-Hartley Act employees on strike against their employer to force a settlement of economic demands could not, upon being lawfully replaced by new employees, vote in subsequent union representation elections. This provision of the 1947 law has now been repealed and such employees (although not entitled to reinstatement) may now vote "under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike." 81

The N.L.R.B. has already ruled that economic strikers discharged by an employer during a strike "for cause" (e.g., misconduct of a serious nature) will continue to be barred from voting. 82

In practical terms the effect of the new provision might well be that where the total number of employees in a company is small and the employer has made no attempt to carry on an informational campaign among the replacements, the vote of the displaced employees may carry weight in the determination of the bargaining agent. Where the election to determine the desires of the employees with regard to unionization is not held within twelve months from the date of the strike, economic strikers who have been replaced cannot, of course, vote pursuant to the 1959 amendment.

Special provisions for the construction industry

The Labor-Management Reporting and Disclosure Act contains three concessions to unions in the building and construction industry. First, the Act legalizes prehire agreements in the industry; second, the customary 30-day period at the end of which an employee can be required to join a union under a valid union shop agreement, has been cut down to seven days; third, the Act legalizes the hiring hall in the construction industry.

The Act accomplishes this by stating:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established . . . prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area.\footnote{88}

The Act specifically stipulates that these special benefits do not legalize discrimination against employees for nonmembership in a union; that agreements which would be invalid but for clause (1) of the above Section do not constitute a bar to an election petition properly filed under the Act; and, finally, that the new Section shall not be construed as authorizing the execution or application of agreements containing union shop clauses in states which have “right-to-work” laws prohibiting such clauses.\footnote{84}

These provisions reflect legislative accommodation to the facts of life in this industry and possibly in others. For in practice “many industries still operate under virtual closed shop conditions. The establishment of union hiring halls, the contractual provisions obtained from employers requiring notification to the union of job openings, and many other devices have been utilized by unions to continue preferential hiring arrangements ostensibly outlawed.”\footnote{85}

\footnote{88} 29 U.S.C.A. § 158(f) (Supp., 1959).  \footnote{84} Ibid.  \footnote{85} Abelow, Management Experience Under the Taft-Hartley Act, 11 Industrial & Labor Relations Rev. 360, 368 (April, 1958). Professor Clyde W. Summers stated: “The closed shop, closed union, and hiring hall—an inseparable trilogy—persist because of practical needs of both unions and employers. In industries where employment is short-term, seniority structures are impossible. Those workers who are established in the industry seek priority of job rights by requiring that new entrants wait until established workers are employed. . . . For the hodcarrier, the bricklayer, or the carpenter, the closed shop trilogy provides his substitute for seniority. The statute attempted to wipe out all this and substitute nothing [in] its place. This desperate need for job priority cannot thus be wished away with a wand of words.” Summers, A Summary Evaluation of The Taft-Hartley Act, 11 Industrial and Labor Relations Rev. 405, 409 (April, 1958).
CONCLUSION

Having reviewed the principal amendments to the Taft-Hartley Act by the 86th Congress there remains the question whether the Act as amended will be more successful in achieving the objectives of its framers than was the Taft-Hartley Act. The failure of the 1947 legislation, according to one prominent observer, was due to the imposition of social or economic values by legislation unaccompanied by a full recognition of the economic needs of the parties and the pressures which motivate them. Others have concluded that in its interpretation, rather than in its intent, the legislation was rendered ineffective.

Not to answer the question before us is, at best, an admission that the hindsight afforded by a dozen years of experience with the Taft-Hartley Act cannot be matched with foresight as to the 1959 amendments. At its worst, it is an admission that the efficacy of legislation can be gauged only by the yardstick of prospective experience. Consolation may perhaps be found in the familiar words of Abraham Lincoln who reminds us: "If we could first know where we are, and whither we are tending, we could then better judge what to do, and how to do it."