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MANDATORY COLLECTIVE BARGAINING

By CHARLES H. WOODS

Some recent decisions, to be commented on in detail later, have lent a measure of confirmation to conclusions of the Staff of the *Stanford Law Review* set forth in the December, 1950 issue of that periodical:

> "Any extension of the concept of collective bargaining means that labor will have a stronger voice in managerial decisions."[1]
>
> "In union eyes, collective bargaining is not primarily an instrument of industrial peace. It is a device by which the worker can gain at least partial control of functions heretofore monopolized by management."[2]
>
> ". . . the unions are steadily usurping managerial functions."[3]

Whether these strongly expressed views are or are not sound, this article will not undertake to discuss.[4] Undoubtedly the cases above referred to came as a shock to many in management and caused them to fear that collective bargaining as a technique could from now on take only one direction, and that by way of extension into the realm which has gone by the name of "managerial prerogative." To many, the entire bargaining process came to be viewed with suspicion and distrust; and feeling arose that laws must be passed to curb the tendency. Others placed reliance on protective clauses in the agreement itself. Still others undertook with success to develop schemes of harmony and cooperation.

The purpose of this article is a very mundane one, close to earth. It is to examine the important cases which have been decided by the National Labor Relations Board on the scope, the extent and the intent of collective bargaining; to see, by example, how far the unions have actually sought to transcend and invade the traditional province of management; to observe the attitude of the courts as they have dealt with these Board decisions; and to permit at least some tentative conclusions as to future trends from past instances. That these conclusions, in the nature of things, can be no more than tentative must be recognized since the field is an ever-changing one. But the actual facts, based on the cases themselves, would legitimately seem to furnish ground for belief that the fears and suspicions of management are either exaggerated or unwarranted. The old days, when management was supreme, could act in all matters unilaterally, held no respon-

[1] Comment, 3 STAN. L. REV. 88, 96 (1950).

[2] *Id.* at 97.

[3] *Ibid.*

[4] A voluminous literature has accumulated on this subject. Especially noteworthy examples are NEIL W CHAMBERLIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL, DOUGLAS V. BROWN, MANAGEMENT RIGHTS AND THE COLLECTIVE AGREEMENT (1948); HILL & HOOK, MANAGEMENT AT THE BARGAINING TABLE (1945).

sibility except to itself are gone. The days when employees were content to talk and bargain over the traditional wages and hours likewise are no more. But the exact line of the law where right and wrong touch each other must be left to await the accumulation of a body of decided cases greater, and perhaps different, than we now have.

A. *A Bit of Background*

Since 1935 the basic concepts of federal policy with respect to labor-management relations have centered in the right of employees to organize and to bargain collectively.

> "To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to *wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder,* and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." (Emphasis added.)

The duty of the employer to bargain is spelled out in Section 8(a)5 and of the labor organization in Section 8(b)3:

> "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of 9(a)."

Likewise,

> "It shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer . . . subject to the provisions of 9(a)."

Section 9(a) provides in part:

> "Representatives designated or selected for the purposes of collective bargaining . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining *in respect to rates of pay, wages, hours of employment or other conditions of employment."*[5] (Emphasis added.)

To carry out its policies in respect to collective bargaining, Congress created an administrative agency, the National Labor Relations Board (hereinafter referred to as the Board) and vested it with great power and discretion.

The idea of collective bargaining was not invented by Congress in 1935. It can be found in operation in the 1820's. From there its course can be traced down through the years to the Civil War, the Spanish War, and to

[5] 49 STAT. 449 (1935), 29 U.S.C. §§ 151-166 (1949); 61 STAT. 136 (1947), 29 U.S.C. §§ 151-167 (1949).

the end of the century. Then we take up the skein with the findings of the United States Strike Commission in 1895,[6] the passage of the Erdman Act in 1898,[7] the Newlands Act in 1913,[8] the Clayton Act in 1914.[9]

In 1902[10] and again in 1915,[11] federal commissions made exhaustive studies leading to the conclusion that disputes between management and men were a prolific source of industrial strife and unrest. During World War I, President Wilson set up a War Labor Board, one of whose principles was "the right of workers to organize in trade unions and to bargain collectively."[12] Following the War came the Transportation Act of 1920,[13] the Railway Labor Act of 1926.[14] This act, as amended in 1934,[15] had as one of its cardinal principles "to provide for the prompt and orderly settlement of all disputes *concerning rates of pay, rules or working* conditions."[16] (Emphasis added.) Another was that "employees shall have the right to organize and bargain collectively through representatives of their own choosing."[17] Machinery was provided for adjustment of grievances, mediation and arbitration of disputes and, these failing, the appointment by the President of an Emergency Board. From the time of the appointment of the board and for thirty days after it made its report, no strike was to be permitted.[18]

In 1930 the Supreme Court handed down an epoch-making decision.[19] Note this brief excerpt from the opinion:

> "We entertain no doubt of the constitutional authority of Congress to enact the prohibition."

The justice is here talking about the statute's prohibition of interference

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[6] The commission appointed by President Cleveland following the Pullman strike.

[7] Act of June 1, 1898, 30 STAT. 424 (1898).

[8] Act of July 15, 1913, 38 STAT. 103 (1913). A Board of Mediation and Conciliation was established to mediate or arbitrate disputes in the railroad field.

[9] Act of October 15, 1914, 38 STAT. 730 (1914); put to sleep by Duplex v. Deering, 254 U.S. 443 (1920) until resurrected by U.S. v. Hutcheson, 312 U.S. 219 (1941). See Twentieth Century Fund, *Trends in Collective Bargaining* (1945); also Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071 (1837); Smith, *The Evolution of the "Duty to Bargain" Concept*, 39 MICH. L. REV. 1065 (1941).

[10] H.R. Doc. No. 380, 57th CONG., 1st Sess. (1902).

[11] *Commission on Industrial Relations, Final Report*; SEN. DOC. No. 415, 64th CONG., 1st Sess. 233, 234 (1915).

[12] NATIONAL WAR LABOR BOARD, PRINCIPLES AND RULES OF PROCEDURE (1919); TELLER, MANAGEMENT FUNCTIONS UNDER COLLECTIVE BARGAINING (1947), c. 3.

[13] Act of Feb. 28, 1920, 41 STAT. 456, tit. 3 (1920).

[14] Act of May 20, 1926, 44 STAT. 578 (1926).

[15] Act of June 21, 1934, 48 STAT. 1185 (1934).

[16] *Id.*, § 2(4).

[17] *Id.*, § 2, fourth paragraph.

[18] *Id.*, § 10.

[19] Texas & New Orleans R.R. Co. v. Bro. of Ry. & S.S. Clerks, 281 U.S. 548 (1930).

and coercion in connection with the choice of collective bargaining representatives:

> "Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. . . . The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. . . . The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing."[20]

This decision gave impetus and encouragement to those seeking a legal foundation upon which to establish the practise and procedure of collective bargaining for the whole of industry. The first manifestation of this purpose came with the passage of the National Industrial Recovery Act, with its section 7(a) reading in part as follows: ". . . that employees shall have the right to organize and bargain collectively through representatives of their own choosing."[21] Following the failure of this Act to function and to withstand the test of constitutionality,[22] came the Wagner Act.[23]

B. *The Problems*

The purposes for which employers and labor organizations are compelled to bargain in good faith are nowhere specifically defined other than by the use of the terms "rates of pay," "wages," "hours of employment" or "other conditions of employment." Nowhere are these terms given definite content, either statutorily or otherwise. What is within and what without cannot be ascertained from any one authoritative pronouncement, having application at all times and on all occasions and under all circumstances. Some questions on both sides of the line may be so clear as not to involve any possibility of dispute. If the union is asking for an increase from 17 cents an hour to 25 cents, surely that involves "rates of pay" and "wages," and collective bargaining processes must be pursued.

On the other side of the line there may be subjects which are just as clearly outside the pale of collective bargaining, which are solely the func-

[20] *Id.* at 570.

[21] Act of June 16, 1933, 48 STAT. 195 (1933).

[22] Schechter Poultry Co. v. U.S., 295 U.S. 493 (1935).

[23] Act of July 15, 1935, 49 STAT. 449 (1935). The difference between the wording of the Wagner Act and the Railway Labor Act in respect to the subjects of collective bargaining was commented on in Inland Steel Co. v. N.L.R.B., 170 F.2d 247 (7th Cir. 1948), *cert. denied* 336 U.S. 960 (1948).

tion and responsibility of management if private enterprise is to be preserved and the business is to succeed. The determination of financial policies, general accounting procedures, and prices of goods sold or services rendered to consumers would seem to fall within this class. But union leadership is not willing to go on record as categorically agreeing that any subject within the domain of labor-management relationship shall be automatically and definitely debarred from the scope of collective bargaining, while at the same time asserting generally that "the functions and responsibilities of management must be preserved if business and industry is to be efficient, progressive and provide more good jobs."[24]

Mr. Charles E. Wilson, who was a member of the President's Commission of 1945, then president of General Motors and now Secretary of Defense, gave testimony on this point before the Senate Committee on Labor and Public Welfare in 1947 when amendment of the Wagner Act, which led to the Taft-Hartley Act, was under consideration in the 80th Congress. He pleaded for a concrete specification and enumeration of items to be excluded altogether. He said:

> "Before the N.L.R.A. was passed, this issue does not seem to have been very important. Unions generally confined their negotiations with employers to the narrow issue of wages, working hours and other specific conditions of employment. . . . With the rise of industrial unions, under the N.L.R.A., a new concept of collective bargaining began to appear. For example, several years ago, the president of the C.I.O. proposed a plan for the re-organization of American industry on the basis of 'industrial councils' to be established in each business, in each industry.
>
> "In the Labor-Management Conference Committee[25] we attempted to reach an agreement with the representatives of the principal union federations as to the area in which management should make decisions on its own responsibility, without consultation with the unions and not subject to union veto. The union leaders were unwilling to make any agreement in this matter. However, the sessions served one very useful purpose. They brought out sharply and forcibly that there is a basic conflict on this matter that cannot be resolved by collective bargaining. Furthermore it is an issue which cannot be resolved within the present definitions in the N.L.R.A. because nowhere within that act is the subject matter of collective bargaining accurately delineated and the limits of the area of collective bargaining defined. The reference in the act to wages, hours of employment, working conditions and other conditions of employment can be stretched to comprehend almost anything that might indirectly and ultimately affect the employment of the individual workman. . . . Accordingly I propose that the N.L.R.A. be amended to specify that only rates of pay, hours of employment and the circumstances and conditions under which employees

[24] THE PRESIDENT'S NATIONAL LABOR-MANAGEMENT CONFERENCE, Nov. 5-30, 1945, BUL. No. 77, DEPT. OF LABOR, p. 61.

[25] See note 23, *supra*.

actually perform work come within the area of collective bargaining required by the Act; that not only are employers not required to bargain about any other matters, but that they will be protected legally in the event unions attempt, through strike action, to compel them to do so."[26]

That the position of the labor leaders was not merely arbitrary, dogmatic and unreasonable is indicated by a brief quotation from their statement at the Labor-Management Conference.

"The extensive exploratory discussions of the committee have brought forth the wide variety of traditions, customs, and practises that have grown out of relationships between unions and management in various industries over a long period of time.

"Because of the complexities of these relationships, the labor members of the committee think it unwise to specify and classify the functions and responsibilities of management. . . . It would be extremely unwise to build a fence around the rights and responsibilities of management on the one hand and the unions on the other. The experience of many years shows that with the growth of mutual understanding the responsibilities of one of the parties today may well become the joint responsibility of both parties tomorrow."[27]

Failing to get statutory relief,[28] many companies have been advised to try the expedient of negotiating a clause in their collective bargaining agreements defining the prerogatives of management. The legality of such a clause has been upheld.[29]

To illustrate, in the agreement entered into on March 20, 1953, between Rice-Stix, Inc. and Warehouse Union No. 688, article XI reads:

"The management of the company, including but not limited to the establishment of rules not in conflict with this agreement, the direction of the working forces, the right to hire, promote, suspend or discharge for cause, the right to relieve employees from duty because of lack of work or for other just reasons and to transfer employees from one department

[26] *Senate Committee on Labor and Public Welfare, Hearings,* 1947, pt. 1, pp. 437, 438. To the same effect, Forney Johnston for the National Coal Association.

[27] See note 24, *supra.*

[28] This is not to say that the passage of the Taft-Hartley Act did not immediately and importantly affect the collective bargaining process and proceduure. But it left the law where it was so far as defining the scope of collective bargaining is concerned. Globe Cotton Mills v. N.L.R.B., 103 F.2d 91, 94 (5th Cir. 1939). See Note, 61 HARV. L. REV. 1225 (1948).

For the general effect of the amended law see Witte, *The Effects of the Taft-Hartley Law on Collective Bargaining,* selected papers presented before the Graduate School of Business, Columbia University, 1952. See also Ruth Weyand, *The Scope of Collective Bargaining under the Taft-Hartley Act,* New York University 1st Annual Conference on Labor, 257 (1948). See also by the same author, 45 COL. L. REV. 556 (1945) and Note, 16 U. OF CHI. L. REV. 568 (1949) reviewing the *Inland Steel* case, *supra* note 23.

That the Board thought there was no change in this particular, see 13 N.L.R.B. ANN. REP. 58 (1949).

[29] Timken Roller Bearing Co. v. N.L.R.B., 161 F.2d 949 (6th Cir. 1947).

or duty to another, is vested exclusively in the company. This authority will not be used for purposes of discrimination against any employee."[30]

The Goodrich contract is a simple one:

"It is recognized that the operating of the various plants and the full direction of the working forces is the function and responsibility of the Company. The operation of the plants and the direction of the working forces shall not conflict with the provisions of this agreement or of any local supplementary agreement."[31]

United States Steel:

"The Company retains the exclusive rights to manage the business and to direct the working forces."[32]

And General Motors:

"The right to hire; promote; discharge or discipline for cause; and to maintain discipline and efficiency of employes, is the sole responsibility of the Corporation except that Union members shall not be discriminated against as such. In addition, the products to be manufactured, the location of the plants, the schedules of production, the methods, processes and means of manufacturing are solely and exclusively the responsibilities of the Corporation."[33]

The negotiation of these management contracts through the medium of collective bargaining raises an interesting question as to how far management itself may have gone toward establishing a precedent and thereby fixing the right of employees to negotiate and the right and duty of the Board to compel bargaining with respect to them.

Wholly outside the pale of this paper would be a discussion of the social, economic and political aspects of the impact of collective bargaining on managerial prerogatives.

C. *The Lawyer's Problem*

With no statutory guide or contract definition, where shall the lawyer go for light when asked by an employer or a labor organization whether or not they must bargain over a particular subject? The answer would seem to be to the course of the common law of court decisions and to the administrative law of Board decrees, particularly the latter. One does not have to wallow in the mire of "Administrative Expertise"[34] to recognize that the

[30] 5 CCH LAB. LAW REP. (4th ed. 1945) ¶ 59,941. See also the contracts on Lever Bros. and Ford Motor Co., *id.* at ¶ 59,926 and ¶59,923.

[31] *Id.* at ¶ 59,917; Bituminous Coal contract, *id.* at ¶ 59,914.

[32] *Id.* at ¶ 59,908.

[33] *Id.* at ¶ 59,905. Other specimen clauses are set forth in the appendix to TELLER, MANAGEMENT FUNCTIONS UNDER COLLECTIVE BARGAINING (1947). See Cox and Dunlop, *Regulation of Collective Bargaining by the N.L.R.B.*, 63 HARV. L. REV. 389, 405 (1950).

[34] See 15 FORD. L. REV. 19 (1946).

Board was created by Congress to carry out its policies; that it has a continuity of knowledge and experience which makes its conclusions authoritative and valuable, to be followed with confidence if supported by substantial evidence on the record considered as a whole.[35] What follows, then, consists of a reference to the more important Board opinions and the court decisions which enforced or denied them, with first of all a brief reference to *N.L.R.B. v. Jones & Laughlin.*[36]

To uphold the constitutionality of the Wagner Act in the light of the then recent decisions was quite a job. To mollify some of the lawyers who were living in yesterday, Justice Hughes thought it advisable to throw out a sop or two. Among others, this:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer from refusing to make a collective contract and hiring individuals on whatever terms the employer may *by unilateral action* determine. The Act does not interfere with the normal exercise of the right of the employer to select its employees and to discharge them."[37] (Emphasis added.)

Due process and the managerial prerogative were thus thought to have been carefully preserved.

This concession caused no end of embarrassment, until it was repudiated in *J. I. Case v. N.L.R.B.*[38] where it was said:

> "It also is urged that such individual contracts may embody matters that are not necessarily included within the statutory scope of collective bargaining such as stock purchase, group insurance, hospitalization or medical attention. We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practise. But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement."[39]

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[35] Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1950). For an exhaustive discussion of the cases and an interpretation of their meaning, see Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board,* 63 HARV. L. REV. 389 (1950). The conclusion is reached by these authors that the Board and the courts should not have "assumed" authority to determine what are and are not subjects of compulsory bargaining. This conclusion is not challenged by Findling and Colby in *Regulation of Collective Bargaining by the National Labor Relations Board—Another View,* 51 COL. L. REV. 170 (1951).

The decision of the Supreme Court in N.L.R.B. v. American Insurance Co., 343 U.S. 395 (1952) goes pretty far in the direction of the Cox-Dunlop viewpoint.

[36] 301 U.S. 1 (1937).

[37] *Id.* at 45.

[38] 321 U.S. 332 (1944).

[39] *Id.* at 339.

From the *Express Agency* case[40] note the following:

> "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."[41]

D. *Board and Court Decisions*

The cases cited here are for purposes of illustration only. For a complete and encyclopedic compilation, the reader must go elsewhere.[42]

On one point the cases are fairly clear and in substantial harmony: There can be no mandatory duty to bargain, either on the part of management or labor union, unless the particular proposal, by reasonable intendment, can be fitted into one or the other of the statutory terms. Unless the demand for collective bargaining shall be found to have some reasonable relevance to "rates of pay" or to "wages" or to "hours of employment" or finally to "other conditions of employment," then there is no violation of the law if the parties refuse to bargain; and they cannot be held to be guilty of an unfair labor practise. The quoted terms furnish the touch stones, the yardsticks, the exclusive measuring rods.[43]

Commenting briefly on two or three of the cited cases: Involved in the *Globe Cotton Mills* case were 15% increase in wages, adjustment of disputes and a demand to join with the union in seeking appropriate legislation. The court enforced the Board's order, except as to legislation.[44] In the *Knoxville Publishing Company* case, the court undertook to distinguish be-

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[40] 321 U.S. 342 (1944).

[41] *Id.* at 346.

[42] CCH LAB. LAW REP. (4th ed.); P-H COMPLETE LABOR EQUIPMENT AND AMERICAN LABOR CASES (A.L.C.); BUREAU OF NATIONAL AFFAIRS (L.R.R.M.).

For the many and interesting decisions of the National War Labor Board, reference will have to be made to the official reports of that Board. For an interesting and full discussion of the War Labor Board's decisions on "management rights," see Fairweather and Shaw, 12 LAW AND CONTEMP. PROB. 397, 407. See also Note, 36 MINN. L. REV. 109 (1951).

[43] In the Matter of Hughes Tool Co. et al., 56 N.L.R.B. 981 (1944), *enforcement granted,* 147 F.2d 69 (5th Cir. 1945); In the Matter of Montgomery Ward & Co. et al., 37 N.L.R.B. 100 (1941), *enforcement granted,* 133 F.2d 676 (9th Cir. 1943); In the Matter of Aluminum Ore Co. et al., 39 N.L.R.B. 1286 (1942), *enforcement granted,* 131 F.2d 485 (7th Cir. 1942); In the Matter of Rapid Roller Co. et al., 33 N.L.R.B. 557 (1941), *enforcement granted,* 126 F.2d 452 (7th Cir. 1942); In the Matter of Knoxville Publishing Co. et al., 12 N.L.R.B. 1209 (1939), *enforcement granted,* 124 F.2d 875 (6th. Cir. 1942); In the Matter of Hoosier Veneer Co. et al., 21 N.L.R.B. 907 (1940), *enforcement granted,* 120 F.2d 574 (7th Cir. 1941); In the Matter of the Boss Manufacturing Co. et al., 11 N.L.R.B. 432 (1939), *enforcement granted,* 118 F.2d 187 (7th Cir. 1941); In the Matter of Wilson & Co. et al., 19 N.L.R.B. 990 (1940); *enforcement granted,* 115 F.2d 759 (8th Cir. 1940); In the Matter of Globe Cotton Mills et al., 6 N.L.R.B. 461 (1938), *enforcement granted,* 103 F.2d 91 (5th Cir. 1939).

[44] 6 N.L.R.B. 461 (1938), *enforcement granted,* 103 F.2d 91 (5th Cir. 1939).

tween provisions of the proposed agreement with respect to wages, hours and other conditions of employment which existed at the time the proceedings before the Board were instituted and proposals respecting wages and hours which arose later.[45]

In the *Wilson* case,[46] the court used language which would seem to go a little beyond the basic test. The court said:

> "The Act obligates the employer to bargain in good faith both collectively and exclusively with the chosen representatives of a majority of his employees with respect *to all matters which affect his employees* as a class, including wages, hours of employment and working conditions."[47] (Emphasis added.)

To the same effect is *N.L.R.B. v. Barrett Company.*[48]

Collection of dues by a union from its members is not in its nature a matter for collective bargaining, said the court in the *Hughes Tool* case.[49] But notwithstanding this decision, the Board has held to the contrary[50] in the belief that whatever might have been the rule under the Wagner Act, it no longer held true under the Taft-Hartley Act.

In the *Rapid Roller* case,[51] proposed changes in and the proper interpretation of an existing contract were held to be proper subjects of collective bargaining.

Grievances

Although an individual employee has the right under section 9(a) of the Wagner Act to present his grievances to his employer (and the same is true under the Railway Labor Act),[52] still the subject is a proper one for collective bargaining and may be enforced, falling as it does under the heading of conditions of work.[53]

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[45] 12 N.L.R.B. 1209 (1939), *enforcement granted,* 124 F.2d 875 (6th Cir. 1942).

[46] 19 N.L.R.B. 990 (1940), *enforcement granted,* 115 F.2d 759 (8th Cir. 1940).

[47] *Id.* at 763.

[48] 135 F.2d 959 (7th Cir. 1943).

[49] 56 N.L.R.B. 981 (1944), *enforcement granted,* 147 F.2d 69 (5th Cir. 1945).

[50] In the Matter of U.S. Gypsum et al., 94 N.L.R.B. 112 (1952); Reed & Prince Manufacturing Co. et al., 94 N.L.R.B. 850 (1951). State courts have also differed. Shine et al. v. John Hancock Mutual Life Ins. Co., 76 R.I. 71, 68 A.2d 379 (1949); Chabot et al. v. Prudential Ins. of America, 77 R.I. 396, 75 A.2d 317 (1950); *contra*: Sanford v. Boston Edison Co., 319 Mass. 55, 64 N.E.2d 631 (1946).

[51] In the Matter of Rapid Roller Co. et al., 33 N.L.R.B. 557 (1941), *enforcement granted,* 126 F.2d 452 (7th Cir. 1942).

[52] E.J.& F. v. Burley, 325 U.S. 711 (1944), *aff'd on rehearing,* 327 U.S. 661 (1946).

[53] In the Matter of the Timken Roller Bearing Co. et al., 70 N.L.R.B. 500 (1946), *enforcement granted,* 161 F.2d 949 (6th Cir. 1947); In the Matter of Hughes Tool Co., 56 N.L.R.B. 981 (1944), *enforcement granted,* 147 F.2d 69 (5th Cir. 1945); In the Matter of the Arundel Corp. et al., 59 N.L.R.B. 505 (1944); In the Matter of U.S. Automatic Corp. et al., 56 N.L.R.B. 124 (1944); In the Matter of the North American Aviation, Inc. et al., 44 N.L.R.B. 604 (1942);

Hours of Work and Rates of Pay

The number of hours during which the employee shall work and his working schedule, including vacations, with or without pay, are within the scope of mandatory bargaining and unilateral action is an unfair labor practice. Among the matters included under this heading are seniority, promotions, opportunities for advancement, vacations, leaves of absence, sick leave, overtime, extra work, insurance and sick benefits, and "all other matters of employee welfare which are or normally would be fruits of the company's general personnel policies."[54]

Whether the lease and rental of company-owned houses is a proper subject for mandatory bargaining would seem to depend largely on the extent to which wages, hours of work, living conditions and other conditions of employment are involved.[55]

Safety and sanitary provisions,[56] arbitration of disputes,[57] issuing of manuals of rules[58] are all proper subjects for collective bargaining and will be enforced as such.

The employer's obligation to produce data on demand of the union for

In the Matter of Cities Service Co. et al., 25 N.L.R.B. 36 (1940), *enforcement granted,* 122 F.2d 149 (2d Cir. 1941); In the Matter of Hoosier Veneer Co. et al., 21 N.L.R.B. 907 (1940), *enforcement granted,* 120 F.2d 574 (7th Cir. 1941).

[54] In the Matter of Carlisle & Jacquelin, 55 N.L.R.B. 678 (1944). Other illustrative cases are: In the Matter of Hekman Furniture Co. et al., 101 N.L.R.B. 119 (1952), *enforcement granted,* 207 F.2d 561 (6th Cir. 1953); In the Matter of Crompton-Highland Mills, Inc., 70 N.L.R.B. 873 (1946); In the Matter of Libby-McNeill & Libby, 65 N.L.R.B. 873 (1946); In the Matter of General Motors Corp., 59 N.L.R.B. 1143 (1944); In the Matter of South Carolina Granite Co. et al., 58 N.L.R.B. 1148 (1944); In the Matter of U.S. Automatic Corp., 47 N.L.R.B. 124 (1944); In the Matter of Aluminum Ore Co. et al., 39 N.L.R.B. 1286 (1942), *enforcement granted,* 131 F.2d 485 (7th Cir. 1942); In the Matter of Great Southern Trucking Co. et al., 34 N.L.R.B. 1068 (1941), *enforcement granted,* 127 F.2d 180 (4th Cir. 1942); In the Matter of Neuhoff Packing Co., Swift & Co. et al., 29 N.L.R.B. 746 (1941), *enforcement granted,* 127 F.2d 30 (6th Cir. 1942); In the Matter of V. O. Milling Co., 43 N.L.R.B. 348 (1942); In the Matter of Singer Mfg. Co., 24 N.L.R.B. 444 (1940), *enforcement granted,* 119 F.2d 131 (7th Cir. 1941); In the Matter of George P. Pilling & Son Co. et al., 16 N.L.R.B. 650 (1939), *enforcement granted,* 119 F.2d 32 (3rd Cir. 1941); In the Matter of Inland Lime & Stone Co. et al., 24 N.L.R.B. 758 (1940), *enforcement granted,* 119 F.2d 20 (7th Cir. 1941); In the Matter of John J. Oughton et al., 20 N.L.R.B. 301 (1940), *enforcement granted,* 118 F.2d 486 (3rd Cir. 1940); In the Matter of Wilson & Co. v. N.L.R.B., 115 F.2d 759 (8th Cir. 1940); In the Matter of the Boss Mfg. Co. et al., 11 N.L.R.B. 432 (1939), *enforcement granted,* 118 F.2d 187 (7th Cir. 1941).

[55] Bemis Bro. Bag Co., 96 N.L.R.B. 728 (1953), *enforcement denied,* 206 F.2d 33 (5th Cir. 1953). The case of Hart Cotton Mills, 91 N.L.R.B. 728 (1950), *enforcement granted,* 190 F.2d 964 (4th Cir. 1951) is distinguished.

[56] In the Matter of Knoxville Pub. Co., 12 N.L.R.B. 1209 (1939), *enforcement granted,* 124 F.2d 875 (6th Cir. 1942).

[57] In the Matter of Boss Mfg. Co., 11 N.L.R.B. 432 (1939), *enforcement granted,* 118 F.2d 187 (7th Cir. 1941).

[58] In the Matter of Timken Roller Bearing Co., 70 N.L.R.B. 500 (1946), *enforcement granted,* 161 F.2d 949 (6th Cir. 1947).

the purposes of collective bargaining has been omitted from this discussion.[59]

Insurance, Welfare Benefits, Pensions

As promised at the outset, this citation of Board and court cases may well be concluded by a little more detailed reference to four cases, fairly recent. These cases involved important questions, were hotly contested, raised squarely the question of managerial prerogative and have excited a good deal of comment.

The *Allison* case:[60] During five years of collective bargaining, the company has been granting so-called "merit increases" unilaterally. The contract during these years set worth a scale of minimum wages, but did not mention the subject of merit increases. The union requested to be furnished a list of these employees and the amounts granted, in order that the union might negotiate concerning them. This the company refused to do, on the ground that merit increases were not a proper subject of collective bargaining but were an exclusively managerial function. The Board found no merit in this contention, and the court approved.

The *Inland Steel* case:[61] The Board sustained the Trial Examiner in holding that the company was guilty of an unfair labor practise under section 8(5) in failing and refusing to bargain with the union about the application or modification of the terms of an old age retirement and pension program. The program was originally established before the union was recognized and had several times since been unilaterally amended. A quotation from the Examiner's report should be of interest:

> "It is conceivable that the demands of employees may sometimes fall completely dehors the limits of employee interest. The Act does not seek to encroach on those prerogatives of the employer which give him a free hand to prosecute his business as he sees fit. . . . Our system of free enterprise must necessarily protect the employer in enjoying what is commonly termed his 'management prerogatives.' True it is that over the years during which the Act has been in existence, matters which formerly had been urged as purely 'management prerogatives' were, by judicial and quasi-judicial opinion, held to be matters which employees had the right, in the interest of industrial stability, to seek to attain by peaceable negotiation."[62]

The Examiner also noticed, but rejected, the contention of the com-

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[59] See a comprehensive treatment of this problem in 35 MINN. L. REV. 24 (1950).

[60] In the Matter of J. H. Allison and Co. et al., 70 N.L.R.B. 377 (1946), *enforcement granted,* 165 F.2d 766 (6th Cir. 1948); *cert. denied,* 335 U.S. 814 (1948).

[61] In the Matter of Inland Steel Co. et al., 77 N.L.R.B. 1 (1948), *enforcement granted,* 170 F.2d 247 (7th Cir. 1948). A petition for writ of certiorari was granted, 335 U.S. 910 (1948) but later denied, 336 U.S. 960 (1948).

[62] 77 N.L.R.B. 1 at 26.

pany based upon the Railway Labor Act; this point was stressed on appeal. The court considered it in the following words:

> "The company places great stress upon the bargaining language used in the Railway Labor Act of 1926 . . . on the theory that the instant act is in pari materia. It points out that numerous retirement and pension plans were put into effect by the railroads and that they were never subjected to the process of collective bargaining. . . . In this connection, we think it is pertinent to note that in the Railway Labor Act the bargaining language was quite different from that of the instant legislation."[63]

The *Cross* case:[64] The Board held the company guilty of unfair labor practise in refusing to recognize the union's right to negotiate with it concerning the terms of a group health and accident insurance plan. In a notable opinion by C. J. Woodbury, the Court of Appeals for the First Circuit upheld the Board and in the course of the opinion said:

> "At least, without attempting to mark the outer boundaries of the meaning of the word 'wages' as used in the Act, or attempting to enunciate a generalizing principle for the decision of future cases . . . we think it can be safely said that the word 'wages' in §9a of the Act embraces within its meaning direct and immediate benefits flowing from the employment relationship. And this is as far as we need go, for so construed the word covers a group insurance program for the reason that such a program provides a financial cushion in the event of illness or injury arising outside the scope of employment at less cost than such a cushion could be obtained through contracts of insurance negotiated individually."[65]

The *American National Insurance* case:[66] The company was held guilty by the Board because from the inception of the negotiations it took the position that it would not conclude any contract with the union unless it accepted the Respondent's so-called prerogative clause. This was held to amount to intransigence. The Court of Appeals refused to concur, and in this position it was sustained by the Supreme Court.[67]

E. *Conclusion*

Examination of Board and court decisions justifies certain observations.

The body of decided cases has not yet reached, and may never reach, the point where broad generalizations with respect to the scope of collective

[63] *Id.* at 54.

[64] In the Matter of W. W. Cross & Co., 77 N.L.R.B. 1162 (1948), *enforcement granted,* 174 F.2d 875 (1st Cir. 1949).

[65] 174 F.2d 875, 878.

[66] In the Matter of the American National Insurance Co. et al., 89 N.L.R.B. 185 (1950), *enforcement denied,* 187 F.2d 307 (5th Cir. 1951); *aff'd,* 343 U.S. 395 (1952), three judges dissenting.

[67] 343 U.S. 395 (1952). See discussion of this case in 52 COL. L. REV. 1054 (1952).

bargaining can be indulged in. As has been said, "collective bargaining is easier to defend than define" and "the collective labor agreement can only be described, not defined."[68]

Both the Wagner Act and the Taft-Hartley Act have conferred broad powers on the Board to determine from all the facts and circumstances of a particular situation whether a particular proposal is within or without the periphery of the terms "rates of pay," "wages," "hours of employment" or "other conditions of employment."

The so-called management prerogatives have not been seriously impaired by anything that the Board or courts have done so far, if by management prerogatives we would accept the illustrative items mentioned by the management members of the President's National Labor-Management Conference of 1945. Here we set forth, among others:

1. The determination of products to be manufactured, or services to be rendered.
2. The determination of the layout and equipment to be used in the business.
3. The determination of financial policies.
4. The determination of the management organization and the selection of employees for promotion to supervisory positions.
5. The determination of job content and safety, health and property protection measures, where legal responsibility of the employer is involved.[69]

Labor leaders, on the whole, have not evinced any great desire to take over a share in the duties and responsibilities of management, except as they bear fairly directly on the status, physical or spiritual, of the working man — recognizing that to share in management is to become a part of management, and thus weakening their relationship and influence of their members.

And finally, under the latest ruling of the Supreme Court as set forth in the *American Insurance* case,[70] the insistence upon a managerial prerogative clause as a counter proposal to the union's demand for unlimited arbitration is not *per se* an unfair labor practise under the Act.

F. *Another Look at the Lawyer's Problem*

The lawyer's problem, as viewed under subhead *C.* was conceived of as requiring him to get such light from precedent as he could and advising his

[68] Burstein, 3 LABOR LAW JOURNAL 902 (1951).

[69] See note 22 *supra*. See also Feldman, *The Right to Manage*, 1 LABOR LAW JOURNAL 287; *Impact of Collective Bargaining on Management Prerogatives*, a review of the Inland Steel case, *supra* note 23, 16 U. OF CHI. L. REV. 568 (1949); *Proper Subjects for Collective Bargaining: Ad Hoc v. Predictive Definition*, 58 YALE L.J. 803 (1949).

[70] American National Life Insurance Co. v. N.L.R.B., *supra* note 66.

client accordingly. But must the ultimate soundness of that advice be left to the later determination of a strike, or await the decision of the Board after the event? Was there no way of hastening the decision and avoiding the cost of error? Yes, said the United States Court of Appeals for the Seventh Circuit in the case of *Akron, Canton and Youngstown Railroad v. C. R. Barnes.*[71] There was a way, and that by invoking the procedures of the Declaratory Judgment Act.[72]

The circumstances were these. The defendant railroad unions submitted certain written proposals to the railroads in the course of negotiation of a new union contract. These included establishment of an insurance and welfare plan and free transportation for the affected employees and their families. The railroads took the position that these two subjects did not affect "rates of pay, rules and working conditions" as defined in the Railway Labor Act and refused to bargain in reference thereto. The unions, on the other hand, refused to bargain on any other proposals unless these two were included. And there the parties stood.

The various procedural steps prescribed by the Railway Labor Act were followed, leading to a strike vote and a decision by an Emergency Board appointed by the President. The Court quotes the Emergency Board as saying "that the questions as to whether the demands of the labor organizations for a health and welfare plan and for free transportation come within the language of the Railway Labor Act are questions which the Board does not feel it should attempt to answer. They are questions involving statutory construction and for the courts to determine."

Under these circumstances, the Court held there was a justiciable controversy, and a petition for a declaratory judgment would lie.

The case in which this decision was reached is still pending. The decision of the District Court dismissing the petition was reversed, but only by a majority. A strongly-worded dissenting opinion sharply challenged the majority action. The railroads are reported to have given in on one of the two points in controversy, to have bargained, and to have settled.[73]

So for the present the decision cannot be viewed as fixing the law with positive certainty, but only as pointing a way and holding out a promise.

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[71] Not yet officially reported, 26 LABOR CASES ¶ 68,618, 7th Cir., August 10, 1954.

[72] 28 U.S.C. § 2201.

[73] LABOR LAW REPORTS, Weekly Summary No. 317, August 26, 1954.