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THE NEW LABOR LAW: A VERY LIMITED MANAGEMENT VICTORY

HOWARD A. GLICKSTEIN and BERNARD D. GOLD***

THE adoption of the Labor-Management Reporting and Disclosure Act of 1959,[1] was not a far-reaching management victory. It fell short of enacting into law management's primary legislative program. Indeed, the bulk of the new Act, which regulates internal union affairs and the conduct of persons in the labor-management field, is concerned with matters which had been of only secondary concern to management. It is not surprising, therefore, that the impact of the new legislation on industry will not be entirely to management's liking.

In this article, two of the most significant areas affected by the new labor legislation are examined:

(1) Recognition and organizational picketing, and

(2) The effect on collective bargaining of the provisions concerning the rights of individual union members.

We will discuss management's legislative goals in those areas, the extent to which the goals seemed justified in the light of the nation's basic labor relations policies, and the probable impact on industry of the relevant provisions of the new statute.

RECOGNITION AND ORGANIZATIONAL PICKETING[2]

The restriction or prohibtion of recognition and organizational picketing has been a primary legislative goal of American management in recent years.[3]

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The views expressed in this article are those of the author and are not necessarily those of the Department of Justice.

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[1] 73 Stat. 519 (1959).

[2] Recognition picketing is generally defined as picketing which is aimed directly at the employer for the purpose of forcing the employer to recognize the union. When attempts are made to distinguish organizational from recognition picketing, the former is generally defined as picketing which is aimed at the employees for the purpose of inducing those employees to designate the union as their collective bargaining representative.

[3] In its testimony before the House Committee holding hearings on the 1959

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Prior to the passage of the new legislation, federal law restricted recognition and organizational picketing in only a few limited situations. In 1957, the National Labor Relations Board, in the *Curtis Bros.* case,[4] had held that recognition picketing by a minority union violated section 8(b)(1)(A) of the National Labor Relations Act.[5] The doctrines utilized in that case could have resulted in significant limitations being placed on minority union picketing.[5a] But by the time of the congressional debates on the 1959 statutes, the Court of Appeals for the District of Columbia had already rejected the N.L.R.B.'s view.[6] Reliance on the *Curtis Bros.* case seemed an extremely uncertain route for obtaining restrictions on picketing. Subsequent to the passage of the new law, the United States Supreme Court upheld the Court of Appeals' reversal of the *Curtis Bros.* case.[7]

Basic Labor Policy and Recognition Picketing

To what extent are restrictions on recognition and organizational picketing justified when such picketing is measured against the nation's basic labor relations policy?

The central theme of that policy stated in a single sentence is: "A majority of employees in an appropriate unit are free to decide whether or not they shall bargain with their employer through a labor union."[8] That policy requires that employees be permitted to make their choice free of economic coercion by employers or by unions. Ideally, the employee should make his decision after having listened to and evaluated the arguments for and against unions. The freedom to make a choice is an empty one if an employee is forced to his de-

legislation, the United States Chamber of Commerce placed the elimination of such picketing, at least by minority unions, first on its list of areas requiring legislative correction. Hearings on Labor-Management Reform Legislation Before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess. at 285-86 (1959). See footnote 22 infra. The National Small Businessmen's Association requested the prohibition of organizational and recognition picketing. Id. at 1469. The Commerce and Industry Association of New York supported legislation which would have outlawed such picketing except where it was carried on by a certified union. Id. at 707-12.

[4] Drivers, Chauffeurs & Helpers Local 639, 119 N.L.R.B. 232.

[5] 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1958).

[5a] A "minority union" is a union which does not represent a majority of the employees. The phrase "minority union picketing" is used to describe recognition and organizational picketing by such a union.

[6] Drivers, Chauffeurs and Helpers Local 639 v. NLRB, 274 F.2d 551 (1958).

[7] NLRB v. Drivers, Chauffeurs, Helpers Local 639, 362 U.S. 274 (1960).

[8] See, e.g., section 1(b) of the Labor Management Relations Act, 1947; section 7 of the National Labor Relations Act.

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cision through threats, economic coercion, or insufficient and erroneous information.

Where a majority of employees have chosen the union as their collective bargaining representative, picketing for recognition is perfectly consistent with basic national labor policy. This is true whether or not the union has actually been certified[8a] as collective bargaining representative.

It seems equally clear that picketing for recognition at a time when the union does not represent a majority of the employees is completely inconsistent with our labor policy and the employees' freedom of choice. Such picketing is nothing more than an attempt to force the employer, through the economic pressure generated by the picket line, to recognize the union in spite of the employees' wishes. Indeed, if the employer succumbed to the picketing and recognized the union, he would be committing an unfair labor practice.[9]

What of the situation in which the union claims that it represents a majority of the employees and the employer states that it does not believe that the union represents a majority? Assume for the moment that both parties make their statements in good faith. Allowing the issue to be decided by the relative economic strength of the union and the employer, as tested by the recognition picket line, might be justified if the government had not established a method for determining whether a majority of employees had selected the union.[9a] But where such a method does exist, attempting to compel recognition through economic pressure when the majority status of the union is in doubt, should not be permitted.

ATTEMPTS TO JUSTIFY RECOGNITION PICKETING

The arguments advanced against restrictions on recognition picketing fail to justify the allowance of such picketing except in certain limited situations. Union spokesmen point out that the certification procedures of the N.L.R.B. are often slow and cumbersome. An em-

[8a] The National Labor Relations Act contains a procedure whereby the National Labor Relations Board, after a union wins an election, "certifies" that the union is the representative of the employees.

[9] See Garment Workers' Union v. NLRB, 46 LRRM 2223 (D.C. Cir. May 19, 1960).

[9a] The method established by the government is the election procedure set forth in the National Labor Relations Act. A union which has a substantial following among the employees can obtain an election to determine whether it represents a majority of employees by filing a petition with the National Labor Relations Board.

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ployer may be successful in delaying an election for several months in order to gain time in which to undermine a union's majority status.

Where an employer's refusal to recognize a union is not based on a good faith doubt as to the union's majority status, but is for the purpose of delay, recognition picketing is justified. It is not always easy to determine whether the employer's expressions of doubt are made in good faith. However, that is a determination which the N.L.R.B. has been making for many years in deciding whether an employer has been guilty of an unfair labor practice in refusing to bargain with a majority union. The fact that the employer does not consent to a quick election has been considered a significant factor in determining that the employer is in bad faith. Unions receive further protection from delays in that the N.L.R.B. will order the employer to bargain with a union which has lost its majority as a result of employer unfair labor practices.[10]

In any event, the possibility that an employer might be able to persuade employees to change their opinion regarding the desirability of unionization, does not justify permitting recognition picketing where the object of the picketing is to force a union on the employees against the will of the majority.

Some union spokesmen contend that recognition picketing is justified, even where a majority of the employees do not want the union, in order to protect the working conditions of the employees of unionized competitors and in order to avoid "sweat shop" conditions in the non-union plant. Those making the argument are, in effect, advocating a labor policy very different from the existing one of free choice. Their reasoning would be justified under a national policy which stated, "All persons employed in industries affecting commerce must join a labor union." This country is not prepared to accept such a policy.[10a]

Basic Labor Policy and Organizational Picketing

The organizational picket line generates the same economic pressures as does the recognition picket line. The employees of other em-

[10] Franks Bros. v. NLRB, 321 U.S. 702 (1944).

[10a] At times, adherents of recognition picketing have argued that such picketing must be permitted because it is often indistinguishable from organizational picketing. The problem of distinguishing those two types of picketing is an extremely difficult one—so difficult, in fact, that any legislation enacted in the area should not attempt to distinguish between them. However, as we will show below, there are very few situations in which organizational picketing is justified where recognition picketing is not. In those few situations, mainly ones in which the picketing has no coercive effect, it could be permitted even though the union's object was recognition.

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ployers, including truck drivers, may refuse to cross the picket line; the physical demonstration may deter customers from approaching the premises and may upset employees and disrupt operations. The employer may be forced to cease its operations and the employees face the danger of losing their jobs, either temporarily or permanently. If an employee "selects" the union as his bargaining representative in order to avoid such pressures, he is not making the type of free choice contemplated by our national labor policy.

Furthermore, the fact that organizational picketing is unnecessary to, let alone inconsistent with, an exercise of employee free choice, removes any justification for permitting it to disrupt and destroy business. A businessman who is ready to bargain with any union chosen by a majority of his employees, and who does not interfere with their exercise of that choice, is entitled to be free of organizational picketing which disrupts his business. The disruption which his business suffers during an organizing campaign, even aside from picketing, is a sufficient contribution for him to make to the public policy.

ATTEMPTS TO JUSTIFY ORGANIZATIONAL PICKETING

Union leaders often maintain that organizational picketing is simply a method of informing the employees of the benefits of trade unionism, that true freedom of choice requires full information and full argument, and, therefore, that organizational picketing is consistent with our labor policy.

If a union's real purpose were to persuade employees by logic and reason, it would not use a picket line. The few words on the picket sign do not tell the employees of the picketed employer anything which they do not already know. In fact, picketing is a peculiarly inappropriate method for conveying factual information or for making reasoned arguments. In any event, if a union's real purpose were to inform and to argue it would not be handicapped by being restricted to the media of information used by other groups in society.

But, argue some, picketing is the traditional method by which union people have made their views known and expressed their grievances since the very beginnings of trade unionism. That argument is based on sentiment alone, and such sentiment affords no justification for permitting the disruption of legitimate businesses and the economic coercion of employees.

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It has been suggested that the disruptive effects of organizational picketing have been greatly exaggerated; that such picketing often has no effect on the running of a business. In the rare case in which that is true, where neither the intent nor the effect of organizational picketing is to prevent people from crossing a picket line, there is no policy reason for prohibiting organizational picketing. Management objections to the picketing are likely to be weakest in such cases.

Some defenders of organizational picketing are frank enough to concede that such picketing is designed to disrupt business. They argue that employees of other firms and customers are entitled to know which firms are nonunion so that those persons can decide whether or not they will deal with the nonunion firm.

Permitting full dissemination of information on all matters of public interest is, of course, a fundamental policy of our society. However, the picket line is peculiarly effective not because of the information which it disseminates but because it produces reactions completely independent of that information. Where the mode of communication rather than the message excites to action, the fundamental policy in favor of permitting free communication is inapplicable. As Mr. Justice Frankfurter, writing for the Supreme Court in *Hughes v. Superior Court,* 337 U.S. 460, 464-65 (1950), stated:

"But while picketing is a mode of communication, it is inseparably something more and different. . . . Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication."[11]

A prospective customer, or an employee of a supplier, might ponder the question of whether or not to enter a firm's premises when he reads in the newspaper that the firm is nonunion. But that same person, upon seeing a picket line, might well refuse to enter the premises without even reading the picket sign and without having the slightest idea as to the reason for the picketing.

The unions would be content to use other forms of communication if they were not seeking that very reaction. And, as stated above, organizational picketing which has the effect of causing consumers or employees of other firms to refuse to cross a picket line puts pressures

[11] For similar expressions by the United States Supreme Court see, e.g., Building Service Union v. Gazzam, 339 U.S. 532, 537 (1950).

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on the employees which are inconsistent with their freedom of choice in deciding whether to have a union represent them. Whatever decision may be arrived at concerning bona fide modes of communication, insofar as picketing is concerned the employees' freedom of choice and the employer's right to be free of interference must take precedence.

In summary, therefore, in order to have made the law of organizational and recognition picketing consistent with our basic labor policy, such picketing should have been forbidden except where a clear majority of the employees had chosen the union, where the employer had no good faith doubt as to the union's majority, or where the picketing did not have the purpose or the effect of interfering with the operations of the business. If such a statute had been enacted the impact on industry would have been significant. It would have become illegal to coerce employers or employees into recognizing or "selecting" a union through picketing.

The New Law

How far does the new labor law go in establishing limitations on organizational and recognition picketing which will effectuate basic national labor policy? What is the impact of the statute likely to be on industry?

The new law of organizational recognition picketing is now found in section 8(b)(7) of the National Labor Relations Act. That section states:

"(b) It shall be unfair labor practice for a labor organization or its agents—

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

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(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any 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, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b)."

The introductory language in 8(b)(7) makes clear that organizational and recognition picketing will be treated similarly under the new federal law. This was a necessary development. If recognition picketing alone had been barred, unions would have been able to generate precisely the same measures simply by calling their picketing organizational.

Subsections (A) and (B) of section 8(b)(7) provide, in effect, that organizational and recognition picketing are illegal where an existing collective bargaining agreement would be a bar to an election or where an election has been conducted within the past twelve months.

These two subsections, taken alone, will not have any widespread impact on industry. They apply only to specialized situations, and not to the typical case of organizational or recognition picketing.

Subsection (C) is of broader application, but falls short of placing adequate restrictions on picketing.

Subsection (C) does not prohibit picketing if the union files an election petition at the time it commences picketing. It is true that in such a situation the first proviso to subsection (C) and the N.L.R.B. rules adopted thereunder permit the employer to obtain a "quick" election if he files an unfair labor practice charge.[12] But even if the picketing union clearly represents only a minority of the employees,

[12] Rules and Regulations, Series 8, National Labor Relations Board, Subpart D.

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the picketing cannot be enjoined until after an election is held and the union continues its picketing in violation of 8(b)(7)(B). Although the time from the commencement of the picketing to the obtaining of an injunction will vary depending on the circumstances of the case, an employer must anticipate that it will take several weeks, at the very minimum, to obtain an injunction through the 8(b)(7)(B) route outlined above.[13] Therefore, when a minority union threatens to picket an employer in order to obtain recognition, the employer must choose between weeks of picketing or recognizing the union in violation of the N.L.R.A. Many firms may have to close their operations, some permanently, if they are picketed for several weeks. Only where the employer's refusal to bargain is not based on a good faith doubt as to the union's majority can such picketing be justified.[14]

In fact, recognition and organizational picketing, with their coercive effects, are peculiarly inappropriate after an election petition has been filed and during the election campaign. The statute would have made more sense if it had banned all such picketing upon the filing of a valid election petition, rather than permitting picketing because of the filing of the petition.

Under section 8(b)(7)(C) even if an election petition has not been filed, picketing is permitted for a "reasonable period of time not to exceed thirty days." It is not yet clear which factors will be considered in determining what constitutes "a reasonable period of time."[14a] The dominant factor should be the effect which the picketing

[13] Even where a picket line violates 8(b)(7) from the first day of its existence, a considerable amount of time may elapse before the picketing is enjoined. This is primarily because an employer cannot proceed directly in court to obtain a temporary restraining order. Only attorneys of the N.L.R.B. can petition the court, and they do so only after having conducted an investigation. Section 10(1) of the N.L.R.A. The picket line continues while the Board's attorneys investigate. Robert Abelow, in his statement to the House Committee on behalf of the Commerce and Industry Association of New York, footnote 3 supra, suggested a procedure whereby the federal courts would have the power to issue a temporary restraining order, upon the employer's petition and after hearing both the employer and the union, pending the Board's initial investigation.

[14] The issue of whether recognition or organizational picketing by a majority union is prohibited by 8(b)(7) is currently before the N.L.R.B. awaiting decision. See 46 Labor Relations Reporter 376. The N.L.R.B.'s Trial Examiners have not agreed on that issue. Their intermediate reports are summarized at Daily Labor Report 159 (1960) A-3. For a summary of some of the court decisions in this area, under the preliminary procedure of section 10(1) of the N.L.R.A., see 45 Corn. L.Q. 769, 781-83 (1960). As indicated previously the complete prohibtion of such picketing is not required by our national labor policy.

[14a] The courts which have considered this issue in a preliminary manner have had a variety of views. See collections of cases and analysis at 45 Corn. L.Q. 769, 788-89

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is having on the business. Picketing for thirty days might be justified if its only effect is to carry a message to the firm's employees. But picketing for even a single hour by a minority union is unreasonable if it shuts off deliveries of supplies and forces the firm to cease doing business.

Making the effects of the picketing the determining factor in deciding what constitutes a reasonable period of time is justified by the national policy of preventing coercion of employees and by a realistic appraisal of when the undesirable aspects of organizational picketing outweigh any justifiable ends.[14b]

Further serious doubts concerning the effectiveness of section 8(b)(7)(C) are raised by the last proviso to the section. This provides, in effect, that subparagraph (C) does not prohibit picketing for the purpose of truthfully advising consumers that an employer is nonunion, unless such picketing causes employees of other employers to refuse to perform services. This proviso may prove to be the language most difficult to interpret in the entire Act. It is inartistically drawn and is a major compromise of the Act's policy of prohibiting coercive picketing.

Picketing which advises consumers that a firm is nonunion, and which results in loss of business and possible loss of employment, has the same coercive effect on employees and employers as any species of effective organizational picketing. Therefore, such consumer picketing is not consistent with the national labor policy.

Beyond that, however, the proviso raises the danger that unions will be able to engage in organizational recognition picketing for unlimited periods of time, and without filing an election petition, so long as their picket signs meet the language of the 8(b)(7)(C) proviso. This problem is currently awaiting solution by the N.L.R.B. It has been treated in a variety of ways by the trial examiners and the courts.[15]

The problem is created by the fact that a union which pickets with signs that follow the wording of the second proviso to 8(b)(7)(C)

(1960), and McDermott, Recognition and Organizational Picketing Under Amendments to the Taft-Hartley Act, 11 Lab. L.J. 727, 732-33 (1960).

[14b] Compare the discussion in NLRB v. International Typographical Union, Civil No. 8136, D.C. Conn., Daily Labor Report 156 (1960) D-1.

[15] See, e.g., NLRB v. International Typographical Union, supra, and the cases gathered at 46 Labor Relations Reporter 378 and McDermott, supra note 14a at 735-38, which also contains a summary of the pertinent legislative history relating to the second proviso of 8(b)(7)(C).

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may have organization or recognition as one of its objects. This is clear in a case in which a union states to the employer that it desires recognition and will continue to picket with signs which are worded in accordance with the 8(b)(7)(C) proviso until it is recognized. The union constantly reiterates this demand while the picketing continues.

Picketing in such a situation should be held illegal, even if one of the union's objects is to advise the public. It has long been established doctrine under the National Labor Relations Act that where picketing has two objects, one of which is banned, the picketing is illegal.[16] The language of 8(b)(7) strongly supports the view that this doctrine was incorporated into the new section. 8(b)(7)'s introductory language states that picketing is prohibited where "an object" is organization or recognition—organization or recognition need not be the sole object. Compare this with the language of the proviso which exempts picketing only where "the purpose" is to advise the public. The practical effect of allowing the picketing in the case described above would be to permit organizational and recognition picketing in nearly all cases but those in which the effect of the picketing was to induce the employees of other employers not to cross the picket line. Organizational and recognition picketing which only affected the actions of consumers or primary employees would be permitted. The N.L.R.B. should not find the establishment of so complete a dichotomy in a proviso, ambiguously worded at best, tacked on to the end of a rather lengthy and detailed section.

Once having accepted that second proviso, picketing which has both objectives (advising the public and securing recognition) is unlawful under 8(b)(7), the critical question becomes an evidentiary one: What facts will justify a finding that the union has recognition (or organization) as one of its objects?

Suppose a union is picketing a retail store with signs which conform to the 8(b)(7)(C) proviso. The union has never demanded recognition of the employees and it states that it is not interested in organizing the employees. Customers refuse to cross the picket line. The owner of the store states that if the picketing continues he will either have to go out of business or beg the union to sign a contract with him.

The union attorneys have argued, with some success thus far,[17]

[16] See, e.g., NLRB v. Denver Building & Constr. Trades Council, 341 U.S. 675 (1951).

[17] See authorities cited in footnote 15 supra.

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that such picketing must be permitted. They state that if picketing is outlawed in this case there will be absolutely no case at all in which the proviso would be operative, since it can always be said that a union engaging in second proviso picketing has recognition as an ultimate objective. They further state that such picketing cannot constitute evidence of an illegal recognition or organizational object because the proviso expressly permits such picketing.

The unions' reasoning would open wide what should be a limited exception. In our view, picket signs which conform to the language of the second proviso can be evidence of an organizational or recognitional object. In the vast majority of cases such a finding would be in accord with the realities of industrial conflict. Moreover, the second proviso to 8(b)(7)(C) clearly provides that in order for picketing to come within the proviso something more is required than properly worded signs. If self-serving declarations on the picket signs were sufficient to legalize the picketing the phrase "for the purpose of" could have been eliminated entirely from the 8(b)(7)(C) proviso. The phrase is clearly more than surplusage and should be given effect. Therefore, the mere fact that the signs are worded in accordance with the proviso should not prevent such signs from being evidence of an illegal object.

This does not mean that there is no case in which the proviso would be operative. Suppose a union which has organized a substantial part of an industry finds that a nonunion competitor is underselling union shops. Business in the union shops is falling and layoffs have resulted. In order to reverse this trend, the union pickets the nonunion employer with signs which conform to the 8(b)(7)(C) proviso.

In such a case, the Board might well find that the union's sole purpose in picketing was to divert business to competitors and that organization or recognition was not an objective.[18]

The analysis presented above does infer a recognition or organizational objective from picketing with signs advising the public that an establishment is nonunion, and places a burden on the union to rebut that inference. However, placing that burden on the union is in accord with standard doctrines of statutory construction and evidence. But for the exception, the union's conduct would be illegal, therefore

[18] See Radio Broadcast Technicians, 123 N.L.R.B. 507 (1959), in which the Board made such a finding in an analogous situation.

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the union must establish that it comes within the exception. To establish this, the union must prove not merely that its signs are properly worded, but that its picketing is "for the purpose of" advising the public and does not have recognition or organization as an object.

Such an interpretation would help limit the scope of the proviso to those relatively few cases in which the union actually did not have organization or recognition in mind when it picketed. That interpretation would help bring the law of organizational and recognition picketing closer to consistency with our basic national labor policies.

IMPACT OF THE "BILL OF RIGHTS" ON COLLECTIVE BARGAINING

Titles I-VI of the new law are intended to regulate internal union affairs and the conduct of union officials and employers.[19] We will discuss the impact on collective bargaining of some of the sections of those Titles.

Background

There is little doubt that fostering union democracy was not one of the primary legislative goals of management. In general, when management expressed concern over the relationship of the union to its members, that concern took the form of proposals to abolish "compulsory unionism."[20] Much more basic were management's demands to curb excessive union power in the economic sphere. The testimony of management representatives before Congressional Committees usually made some reference to greater "union democracy" but concentrated primarily on other matters. Thus, Horace E. Sheldon, representing the Commerce and Industry Association of New York, told a subcommittee of the Senate Labor Committee that:

Frankly, we are disturbed over the tendency in many quarters to regard the labor problem as pretty largely restricted to the matter

[19] For additional discussion of Titles I-VI, see Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851 (1960); Dugan, Fiduciary Obligations Under the New Act, 48 Geo. L.J. 277 (1959); Hickey, The Bill of Rights of Union Members, 48 Geo. L.J. 226 (1959); Larson, The New Federal Labor Law, 14 S.W.L.J. 23 (1960); O'Donoghue, The Bill of Rights—Responsibilities of its Beneficiaries, 48 Geo. L.J. 257 (1959); Powell, The Bill of Rights—Its Impact Upon Employers, 48 Geo. L.J. 270 (1959); Smith, The Labor-Management Reporting and Disclosure Act of 1959, 46 Va. L. Rev. 195 (1960).

[20] See, e.g., Statement of William M. Miller, representing the Illinois Manufacturers' Association and Robert G. Kelly, representing the Chamber of Commerce of the United States, Hearings on Union Financial and Administrative Practices and Procedures Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 85th Cong., 2d Sess., 703, 840-43 (1958).

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of clearing up internal union administration, union finances, election procedures and the like.

We recognize certainly that these problems are very important, that the disclosures which have been made recently certainly do merit very careful congressional attention and appropriate action.

However, we hope that Congress' preoccupation with these areas will not preclude its giving very careful attention to then taking appropriate action on other areas which to us, really constitute the basic elements in the labor problem in America today.[21]

However, other spokesmen for management urged legislation which would assure union members full participation within their unions and which would safeguard union funds. The United States Chamber of Commerce, represented by Gerard D. Reilly, urged such legislation as two of its three recommendations to Congress.[22] In addition, the Chamber argued that union internal affairs should be no more free from public and governmental scrutiny than are the affairs of corporations.[23]

Some have assumed that the basis for management's interest in greater union democracy was the belief that a democratically run union would be a less formidable opponent. While this might have been the motivation of certain individuals, many in management sincerely believed that the labor union—an institution that so significantly and directly affected the lives of employees—should be sensitive to and expressive of the wishes of its members.

Certainly, the demand for greater regulation of internal union affairs was not inconsistent with this nation's basic labor policy. By 1959, legislation and case law had made clear that unions were entitled to certain privileges and immunities and subject to certain restrictions that were not afforded to and imposed upon other volun-

[21] Id. at pp. 861-62.

[22] The Chamber listed these three areas as requiring legislation: "1. Elimination of union pressures which have as their object tempting or compelling employers to deal with unions not of the choosing of their own employees. This would mean, of course, the establishment of effective remedies against secondary boycotts and organizational picketing.

2. Safeguarding the right of union members to participate in the internal policies of their unions, the election and recall of union officers, and freedom from the arbitrary imposition of union fines, penalties and other so-called disciplinary actions.

3. Protection of union funds through the imposition of fiduciary standards upon union officials and accounting and reporting requirements with regard to receipts and expenditures."

Hearings on Labor-Management Refund Legislation Before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess. at 285-86 (1959).

[23] Id. at 319-24.

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tary organizations.[24] It was obvious that labor unions could no longer claim exemption from governmental regulation on the ground that they were private voluntary associations such as the Masons or Knights of Columbus.[25] Furthermore, governmental assistance had played a major role in the labor unions' drive toward power and importance.

With the passage of the National Labor Relations Act in 1935,[26] labor organizations were afforded a preferred and protected position unlike that of any other voluntary organization. The Act permitted a labor organization representing a majority of employees in a bargaining unit to act as exclusive bargaining agent for all employees in that unit.[27] Additionally, the Act required employers to bargain with such a union and established an administrative agency—the National Labor Relations Board—which would enforce that duty.[28]

The National Labor Relations Act increased substantially the privileges already granted unions by such statutes as the Clayton Act[29] which protects trade unions from anti-trust prosecution and the Norris-La Guardia Act[30] which immunizes labor union activity from court injunctions, except in very limited circumstances. But, as an excess of corporate privileges had helped produce "robber barons" and ruthless and cut-throat competition, so the largely unrestrained power afforded labor unions resulted in flagrant abuses that cried for correction.[31]

[24] See Peterson, Landrum-Griffin; An Analysis, 11 Lab. L.J. 703, 704-06 (1960); Pound, Legal Immunities of Labor Unions (1957); Chamberlain, The Economic Analysis of Labor Union Power (1958).

[25] See Magrath, Democracy in Overalls: The Futile Quest for Union Democracy, 12 Ind. & Lab. Rel. Rev. 503, 522-23 (1959): "Unions can perhaps be loosely classified as voluntary organizations in the sense that they are, in common with all other organizations, distinguishable from the state. They can, however, hardly claim exemption from state regulation on the ground that they share the status of such voluntary organizations as the Rotary Clubs. Clark Kerr, writing of our age as one characterized by 'big unions, big corporations, and small individuals', puts the case for state intervention in pertinent terms: 'it is said, by some, that only the unions can scrutinize themselves; that it is not the proper business of anybody else because they are private, voluntary associations. The corporations said this once too and they were scrutinized. And the unions will be too'."

[26] 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1958).

[27] § 9(a), 49 Stat. 453 (1935), 29 U.S.C. 159(a) (1958).

[28] §§ 3-6, 49 Stat. 451-52 (1935), 29 U.S.C. 153-56 (1958).

[29] 38 Stat. 730 (1914), 15 U.S.C. 12-27 (1958).

[30] 47 Stat. 70(1932), 29 U.S.C. 101-15 (1958).

[31] See, e.g., Josephson, The Robber Barons: The Great American Capitalists 1861-1901 (1934); Lerner, America as a Civilization, Chapt. V (1957); Myers, History of Great American Fortunes (1936). The pressures leading to the new labor law are

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The enactment of the Taft-Hartley Act[32] in 1947 represented an attempt to curb certain abuses by imposing on unions duties and obligations correlative to the privileges and immunities already granted.[33] But this statute dealt principally with the external affairs of the union and avoided regulation of its institutional framework.[34] However, it was recognized by many that because of the preferred position afforded unions by the Government, the Government could not remain totally oblivious to internal abuses within labor organizations.[35] Following the disclosures of the McClellan Committee,[36] the demand for corrective legislation grew irresistible.[37] The result was the Labor-

described as follows in Feinerman, An Analysis of the Labor-Management Act of 1959, 35 Los Angeles Bar Bull. 35, 62 (1959): "The Labor Management Reporting and Disclosure Act of 1959 was passed by a Congress considered by labor representatives to be the most 'liberal' Congress elected in many years. In view of this fact, the enactment of the 'Labor Reform Bill' is an amazing testimonial to the power of public opinion. In the molding of public opinion, the importance of the televised McClellan hearings on racketeering in labor unions can not be overestimated. Public reaction to the exposures at these hearings was a vital factor in swinging many legislators from a 'con' to a 'pro' position on the proposed reform legislation."

[32] Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-38 (1958).

[33] The Act accepted the fundamental principle that an effective and equitable labor policy required that labor unions be held accountable for actions which violate the national labor policy. Thus, section 8(b) established certain union unfair labor practices and section 303 permitted damage suits against labor unions in certain situations.

[34] While the Act's principal purpose was to establish union unfair labor practices, certain of its provisions do affect internal union affairs. See, e.g., §§ 8(b)(2) and 302.

[35] Magrath, supra note 25. See also Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, 611 (1959): "The government which gives unions this power has the concomitant obligation to provide the safeguards against abuse."

[36] The Committee was under the chairmanship of Sen. John McClellan of Arkansas and was officially known as the Select Committee on Improper Activities in the Labor or Management Field.

[37] The background of the new law has been summarized by the Bureau of National Affairs as follows: "It was the disclosures of the McClellan committee that produced action on a labor control law by a Congress that nearly all election analysts a year earlier had labeled the most 'liberal' and the most friendly to labor since the 'thirties.' It was these disclosures that weakened the voice of labor unions, and strengthened that of business, in the intensive lobbying that accompanied consideration of the bill in both houses of Congress. And it was apparent public reaction to these disclosures, fanned by a powerful and dramatic appeal by President Eisenhower, that brought ultimate passage of a law considerably 'tougher' than the bills reported out by the House and Senate Labor Committees.

"The McClellan Committee looked into the activities of a dozen unions, but its major preoccupation was with the International Brotherhood of Teamsters. There is a parallel in the Act itself. While its impact extends to all unions and all employers, many of its provisions have 'Teamsters' written all over them. These include explicit rules as to eligibility of union members to vote and run for office in union elections; an entire Title of the law devoted to trusteeships; and an amendment to the Taft-Hartley Act making it unlawful to demand from the operator of a truck a fee (other than wages) for unloading or handling the truck's cargo." BNA, The Labor Reform Law 1-2 (1959).

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Management Reporting and Disclosure Act[38] with its vast array of controls over the internal affairs of labor unions.

UNION DEMOCRACY AND COLLECTIVE BARGAINING

Much has been written about the extent to which the principles of democracy are applicable to labor unions.[39] One writer has stated: "However unpleasant the reality, democracy is as inappropriate within the international headquarters of the U.A.W. as it is in the front office of General Motors."[40] Opposed to this view is the position of the American Civil Liberties Union: "Because unions have millions of members and vitally affect the economic well-being of millions of workers, the A.C.L.U. believes that democratic unions are essential to a democratic society."[41] With the adoption of the L.M.R.D.A., our national labor policy has moved in the direction of the latter view. The fostering and preservation of union democracy is today a basic part of our labor law.

The new law attempts to assure union democracy by granting to union members "a bill of rights,"[42] by safeguarding and regulating

[38] The Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959).

[39] See Magrath, supra note 25; Cox, supra note 35; Lipset, Trow & Coleman, Union Democracy (1956). Obviously, "democracy" means different things to different people. Harry Bridges has stated "that the organization and system of elections in Soviet unions are democratic." (N.Y. Times, Feb. 14, 1959). Elsewhere Bridges stated: "What is totalitarianism? A country that has totalitarian government operates like our union operates. There are no political parties. People are elected to govern the country based upon their records . . . . That is totalitarianism. If we started to divide up and run a Republican set of officers, a Democratic set, a Communist set and something else we would have one hell of a time." (Quoted in Lipset, Trow & Coleman, supra, at p. 5).

[40] Magrath, supra note 25 at 525. Cf. Affeldt, The Labor Bill of Rights—Its Impact Upon Personal Rights. 37 U. Det. L.J. 500, 518 (1960): "The state, a multi-purpose organization, with wide expanding and contracting powers, can afford to be tolerant in allowing a wide area for expression. The union, however, a single purpose organization, cannot afford to grant the same latitude of expression with possibility of destroying itself and failing in its responsibilities both to management and the community."

[41] American Civil Liberties Union, Democracy in Labor Unions 3 (1952).

[42] Title I, §§ 101-105. There has been some criticism of what the bill of rights failed to accomplish. Benjamin Aaron complains that the bill of rights does not include the right to join a union and to share equally the benefits of membership without regard to race. He states: "A review of the legislative history of the LMRDA leaves one with the depressing feeling that no major group of employers, unions, or lawmakers is ready to assume leadership in the drive to end so unjustifiable an inequality in our society."

Aaron, supra not 19 at 861. The bill of rights proposed by the American Civil Liberties Union did include a section dealing with equal treatment of members and the right to membership without regard to race. See Statement of Patrick M. Malin, Hearings on Union Financial and Administrative Practices and Procedures Before the

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union elections and candidates,[43] by imposing fiduciary obligations on union officers and agents[44] and by restricting union trusteeships.[45]

It is still too early to identify definitely any radical changes in union-management relations that may be attributed to the new law. But there have been some noticeable trends.

Even before the passage of the new law, one labor leader predicted that democratically run unions would produce "one hell of a time."[46] Management, too, was aware that when unions become less oligarchical they may become more difficult to deal with. Some critics have suggested that management would prefer to deal with autocratic union leaders than with leaders responsive to the wishes of the membership.

The rights guaranteed to union members by the new law are likely to result in an increase in industrial strife.[47] Shortly before the passage of the new law, an astute reporter of labor-management relations—A. H. Raskin of "The New York Times"—vividly described the effects that union democracy can have on collective bargaining. Mr. Raskin's comments on a 1959 teamster strike might well describe many collective bargaining situations that have occurred since the passage of the new law. Mr. Raskin stated:

The strike provides a reminder that increased union democracy

Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 85th Cong., 2d Sess., 1118 (1958).

A different criticism is made by Professor Peterson (supra note 24 at 710-11): "The great, and most crucial civil right conspicuously missing in the Landrum-Griffin bill of rights is the freedom not to join. Great numbers of union members are captives, who through a closed shop or union shop contract must join or lose their jobs. It is as if a firm had to join a local chamber of commerce or a state manufacturers association, or else go out of business. What the American trade union member needs, in other words, is not so much a bill of rights as an emancipation proclamation. His clear-cut freedom to join or not, or, having joined, to resign from membership, and still hold his job would make unions truly democratic in letter and spirit and without fanfare or government intervention."

43 Title IV, §§ 401-404; Title V, § 504.

44 Title V, § 501.

45 Title III, §§ 301-306.

46 See statement of Harry Bridges quoted supra note 39.

47 Cf. Aaron, supra note 19 at 906: "Contrary to the assumptions so often expressed by Congress, union members are frequently more radical and irresponsible than their leaders in the conduct of collective bargaining. The attempt to overcome a deficiency of democratic procedures by injecting massive doses of guaranteed new rights may result, for a time, in an increase of a primitive type of democracy, characterized chiefly by the disregard or overthrow of present leaders and the vigorous pursuit of collective bargaining demands formulated by local majorities without regard to the broader aims of their national organizations. The inevitable result will be more industrial strife, followed by more restrictive legislation."

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sometimes can have its painful side for employers and the public.

. . . the largest of the striking unions has taken to heart the maxim that the rank and file should be supreme in its own organization.

This is one of the most applauded precepts to come out of the rackets inquiry by the Senate Select Committee on Improper Activities in the Labor Management Field. But its virtues become somewhat cloudy when union officers and their rank and file watchdogs in collective bargaining indicate such fear of being accused of "selling out" that their demands never drop out of the stratosphere of unattainability.[48]

Increasingly, during the past year, the authors have noticed a changed attitude on the part of many union leaders. While, in the past, union leaders would often be willing to stand behind and strongly support settlements they had negotiated with management, today union leaders tend more often to refuse to take responsibility and to leave decisions to large negotiating committees. In fact, in one situation the union leadership would not even recommend to the membership a settlement which had been negotiated with and agreed to by a large negotiating committee.

The area of day-to-day grievance adjustment has also witnessed the effect of union leadership that constantly is required to look back over its shoulder. Many union leaders, fearful of criticism, now have a regular practice of carrying to arbitration all employee grievances, no matter how clear it may be that the grievance is totally lacking in merit.

Some commentators have even suggested that wildcat strikes might increase and that the no-strike clause will lose much of its effectiveness.[49] The likelihood of this occurring is somewhat lessened by section 102(a)(2) which permits the union "to adopt and enforce reasonable rules as to the responsibility of each member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

The "Bill of Rights" has increased the destructive potential of dissidents. Thus far it seems to have discouraged responsible union

[48] New York Times, April 21, 1959, p. 25, col. 1. See also Affeldt, supra note 40 at 523: "This law will, however, at least initially cause instability in labor relations."

[49] This results from the new law's guaranteeing to every union member the right to meet and assemble freely with other members. What if such meetings are called during working hours? See Powell, supra note 19 at 274-5: Tolan, Some Pitfalls for Employers, Under the 1959 Federal Labor Law, 11 Lab. L.J. 443, 446-7 (1960).

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leadership. It is still too early to predict how damaging these trends will become.[50]

Conclusion

In some areas, such as organizational and recognition picketing, the Labor-Management Reporting and Disclosure Act of 1959 will probably be of some help to management, though the statute falls far short of enacting into law those restrictions on picketing which management desired and which seemed to be called for by the nation's basic labor relations policies. Furthermore, many provisions of the new statute, the "Bill of Rights" for example, are not designed to produce any results which will be of direct benefit to industry and may well have a disruptive effect on collective bargaining.

[50] Cf. Aaron, supra note 47.

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