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COLLECTIVE LABOR AGREEMENTS UNDER ADMINISTRATIVE REGULATION OF EMPLOYMENT

I. PROBLEMS INVOLVING THE ENFORCEMENT OF AGREEMENTS UNDER THE NEW DEAL

The subject of legal enforcement of collective labor agreements, which has received previous notice in the literature,¹ wears a changed aspect under the National Industrial Recovery Act² and other "New Deal" legislation bearing upon employment. The Roosevelt Administration's measures for dealing with the status of employees of private business enterprise have consisted largely of the introduction of administrative controls.³ To a great extent these controls give effect to

¹ Clark, *Legal Effect of Collective Agreements* (1921) 12 MO. LAB. REV. 416; Fuchs, *Collective Labor Agreements in American Law* (1925) 10 ST. LOUIS L. REV. 1; Rice, *Collective Labor Agreements in American Law* (1931) 44 HARV. L. REV. 572; Christenson, *Legally Enforceable Interests in American Labor Union Working Agreements* (1933) 9 IND. L. J. 69; Note (1931) 31 COLUMBIA LAW REV. 1156; Note (1932) 41 YALE L. J. 1221.

² 48 STAT. 195, 15 U. S. C. A. § 701 *ff* (1933). The Act will hereafter be cited simply as N. I. R. A.

³ By administrative control is meant control by executive officials, making use initially of statutory facilities and powers conferred upon them, and ultimately—in the field of regulation here involved—of means of enforcement which require resort to the courts. The hierarchy of officials administering the N. I. R. A. is left to the President to prescribe. N. I. R. A. § 2. The President has seen fit to set up the National Recovery Administration both to aid in the promulgation of regulations and to secure compliance with them. This administration, however, has no powers of compulsion of its own. It is forced to rely upon conciliation, persuasion, threats, moral pressure, economic coercion, and the like. *Manual for the Adjustment of Complaints* (1934) 7 N. R. A. BULL. Actual enforcement is in the hands of the Department of Justice and the Federal Trade Commission. N. I. R. A. §§ 3(b), (c) and (f). Labor boards created under 48 STAT. 1183, 15 U. S. C. A. §§ 702 (a)-702(f) (1933), have power to make enforceable rules in aid of their investigations into disputes which are "burdening or obstructing, or threatening to burden or obstruct, the free flow of interstate commerce," as well as disputes involving N. I. R. A. § 7(a), *infra* note 6. They also have power to make such rules for the conduct of elections among employees to determine the choice of representatives for collective bargaining, and the power to compel testimony in connection with the conduct of such an election. The National Labor Relations Board, created July 9, 1934, by Executive Order No. 6763, is vested with these powers, as are a few of the boards in specific industries, notably the National Steel Labor Relations Board and the Textile Labor Relations Board, created by Executive Orders No. 6751, June 28, 1934, and No. 6858, Sept. 26, 1934, respectively. The machinery for settling labor disputes in the railroad industry rests upon an independent statutory basis. The National Labor Board, which preceded the National Labor Relations Board, did not have similar powers. See the Presidential announcement of Aug. 5, 1933, and Executive Orders No. 6511, Dec. 16, 1933, and 6580, Feb. 1, 1934, defining its functions. Numerous labor boards in particular industries, established by virtue of the N. I. R. A., continue to function without such powers. See the list in the report of the National Labor Relations Board for Feb., 1935. No attempt will be made in this article to treat of labor boards existing under the authority of state laws.

private arrangements of affected parties other than simple contracts of employment. These arrangements are promulgated as binding rules by the President, with or without modification. Outstandingly important among such private arrangements prior to the recent legislation were collective agreements between employers and labor unions. These have now⁴ been largely superseded in the formulation of primary employment standards by "codes of fair competition." These codes are proposed to the President by "trade or industrial associations or groups" without the participation of labor.⁵ Nevertheless collective bargaining for the establishment of further standards is afforded certain safeguards.⁶ The formation of collective agreements and the translation of their terms into statutory standards are encouraged by the N. I. R. A.⁷

⁴ At least until the N. I. R. A. expires of its own limitation June 16, 1935.

⁵ N. I. R. A. § 3(a).

⁶ N. I. R. A. § 7(a) provides: "Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting any labor organization of his own choosing. . . ." Since the employees' right to bargain collectively implies the duty of employers to deal with them, the latter are under the double duty of refraining from coercion and of meeting with employee representatives for the purpose of bargaining. The principal statutory means of enforcing these duties are proceedings in equity and prosecutions in the federal courts. N. I. R. A. §§ 3(c), (f). Both types of action must be instituted by the Department of Justice. As administered, the provisions of § 7(a) are proving to a large extent illusory. Testimony of Francis Biddle, Chairman of the National Labor Relations Board, before the Senate Finance Committee, reported in the *St. Louis Post Dispatch*, April 11, 1935, at 2A. The Department of Justice has proceeded to institute suit in only two of the 30 cases referred to it between July 9, 1934, and March 2, 1935. See also *United States v. Weirton Steel Co.* 7 F. Supp. 255 (D. Del. 1934), a suit in equity filed at an earlier date. The ambiguity of § 7(a) in regard to the representation of minority groups of employees in collective bargaining, moreover, makes it a center of controversy and throws doubt upon its interpretation by the courts. Nevertheless the moral suasion of the Act's pronouncements in regard to collective bargaining, together with the decisions of the labor boards created under the Act and the pressure from organized labor, seem to have resulted in a considerable increase in collective bargaining with independent labor unions and in a growth in the number of collective agreements concluded. *Union Progress* (1934) 41 AM. FEDERATIONIST 959; National Ind. Conference Bd. statistics summarized in Biddle, *Collective Bargaining under the Labor Board* (1935) 2 U. S. L. WEEK 527. Pronouncements similar to those in § 7(a) appear in § 2 of the Norris-LaGuardia Act, 47 STAT. 70, 29 U. S. C. A. §§ 101-115 (1932), but their sole means of enforcement rests upon the denial of injunctive relief in labor disputes, regardless of other equities, to employers who have failed to make "every reasonable effort" to effect settlements by negotiation. 47 STAT. 72, 29 U. S. C. A. § 108 (1932).

⁷ N. I. R. A. § 7(b): "The President shall, so far as practicable, afford every opportunity to employers and employees in any trade or industry or subdivision thereof: . . . to establish by mutual agreement, the standards as to maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy

Thus administrative application of statutory employment standards exists alongside of collective agreements, which continue to have such legal effect as the courts are disposed to give them, and to some extent the statutory standards coincide with existing agreements. In addition statutory aid is given to the process of collective bargaining. The administration of such aid involves the determination, among others, of the question of what constitutes legitimate bargaining in relation to past and proposed agreements.

Out of the situations thus brought before administrative agencies and courts, the following problems bearing upon the enforcement of collective labor agreements have arisen: (1) the validity of pre-existing agreements as against statutory labor standards; (2) the effect of existing agreements upon the legitimacy of efforts to bargain collectively in violation of their terms; (3) the effect of agreements which continue in force upon the administrative adjustment of labor disputes not involving their violation; and (4) the reconciliation of the statutory pattern of control with situations in particular industries which demand control by agreement. These problems will be considered in order. The question of judicial enforcement of collective labor agreements will not again be reviewed.⁸ The drafting of such agreements so as to produce desired legal effects will, however, be given brief attention.

II. THE VALIDITY OF PRE-EXISTING AGREEMENTS AS AGAINST STATUTORY LABOR STANDARDS

In view of the previous doubt with regard to the contractual nature of collective labor agreements,⁹ it is somewhat surprising to find them invested by "New Deal" agencies with a sacredness against impairment which does not attach to debts and mortgages¹⁰ or to negotiable "securities."¹¹ Such inviolacy, however, is recognized. During the summer of 1933 occurred the drive to procure the signatures of employers to the President's Reemployment Agreement, familiarly known as the

of this title; and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President. . . ." It is worthy of especial note that Presidential approval of a collective agreement under the foregoing provision involves the application of the standards established by it to others than the parties to the agreement. Thus its "normative" terms—that is, those which establish wages and employment conditions for the individual worker—are recognized as entitled to legislative force. See the writer's *Collective Labor Agreements in German Law* (1929) 15 *ST. LOUIS L. REV.* 1 at 8, 9-10, and *The French Law of Collective Labor Agreements* (1932) 41 *YALE L. J.* 1005, 1029.

⁸ This question has been the subject of discussion in the articles cited *supra* note 1.

⁹ See the articles cited *supra* note 1.

¹⁰ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398 (1934).

¹¹ *Norman v. Baltimore & Ohio R. Co.*, 55 *Sup. Ct.* 407 (1935).

P. R. A.¹² The "agreement" established maximum hours of labor and minimum rates of pay. It was further provided that the "compensation" of higher-paid employees should not be reduced by reason of the shortening of hours, and that their "pay" was to be increased by an "equitable" readjustment.¹³ It was later explained that while an employee previously paid by the day, week, or month would receive as much for the shorter day, week, or month, it was hourly wage rates already in excess of the minimum, rather than the earnings of those enjoying them, which were to receive the "equitable" "increase."¹⁴ Although in general an increase calculated to produce the same earnings as before would be equitable, "consideration must be given to other factors," including the "average rate paid in the industry," the competitive position of the employer, and the preservation of long-standing wage differentials.¹⁵ Having thus, in what was later to prove to be characteristic fashion, given an interpretation to the ambiguous sufficiently flexible to surround its application with severe conflicts of interest, the National Recovery Administration cast about for a means of minimizing the conflicts. Manifestly employers who were paying relatively high union wages would not lightly submit to an increase in rates of pay by reason of a shortening of hours. Neither would the unions accept forced decreases in the earnings of their members in order to spread employment. But, of course, most unions have collective agreements with employers which can be said to differentiate the legal position of their members and of the employer parties from that of other workers and employers. Accordingly it was announced that "Where an employer is bound by the terms of a contract with a labor organization entered into as the result of *bona fide* collective bargaining and he is unable to effect a change in such contract by agreement in order to comply with the terms of the President's Reemployment Agreement, he may certify his compliance with the President's Agreement with the following exception: 'Except as required to comply with the terms of an agreement in effect between the undersigned and (name of labor organization).'"¹⁶

Explaining the exception thus made in the shortening-of-hours program, Mr. Donald Richberg, General Counsel to the Administrator of the Recovery Act, was quoted at the time as saying, "We are faced

¹² The P.R.A. was proposed by virtue of N.I.R.A. § 4(a) whereby "The President is authorized to enter into agreements with, and to approve voluntary agreements between and among, persons engaged in a trade or industry . . . if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce. . . ."

¹³ P.R.A., par. 7.

¹⁴ P.R.A. Interpretation No. 20, N.R.A. Release No. 168, Aug. 3, 1933.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

with a flat fact. We can't abrogate contracts and we can't deny an employer who has a contract arrived at by collective bargaining the right to use the blue eagle."¹⁷ Viewing the P.R.A. as a contract,¹⁸ the explanation perhaps has reference to the American Law Institute's confidently announced proposition that "A bargain, the making or performance of which involves the breach of a contract with a third person, is illegal."¹⁹ Viewing the P.R.A. as a regulatory device, the explanation must have reference to the limitation upon governmental power imposed by due process of law. A more satisfying justification would rest the exception upon the absence of a need for governmental intervention in behalf of the members of labor unions which are carrying on actual bargaining with employers, who doubtless could effect their own shortening of hours in the course of time, or else upon the simple unwisdom of interfering with existing contract relations.

Echoes of the point of view thus expressed regarding the immunity of collective labor agreements from being superseded by statutory measures authorized after their conclusion, appear in the decisions of Division II of the Bituminous Coal Labor Board, established by the Bituminous Coal Code. This division of the Board has consistently held that agreements which preceded the National Industrial Recovery Act are immune from modification by act of the President. Thus neither the original Code nor the Presidential order of March 31, 1934, modifying certain of its wage provisions²⁰ were effective to modify wages and working conditions embodied in agreements prior to June 16, 1933, and not voluntarily altered by the parties.²¹ Agreements subsequently entered into stand, of course, in a different position.²²

¹⁷ Washington Evening Star, Aug. 3, 1933, at 1.

¹⁸ Cf. Note (1933) 33 COLUMBIA LAW REV. 1394: "Though patently designed to avoid constitutional difficulty, the use of language of 'contract' can be regarded only as an administrative device, and thus whatever dogma of contract law may be imported into the construction of Recovery Codes and Agreements must be limited in its application by a constant realization that governmental policy, rather than private contract right, is the true subject matter involved."

¹⁹ 2 RESTATEMENT, CONTRACTS (1932) § 576.

²⁰ FEDERAL TRADE & INDUSTRY SERVICE ¶ 12,754.

²¹ *In re* Hours for Hoisting Engineers, Aug. 31, 1934; *In re* Tonnage Rates in the Case of the Illinois Zinc Co., Aug. 20, 1934; *In re* Progressive Miners of America and Illinois Coal Producers' Ass'n, June 23, 1934; *In re* Wage Scales in Sahara & Wasson Mines in Saline County, Jan. 13, 1934; *In re* Wage Scale Agreement between Rex Coal Co. and Progressive Miners of America, Apr. 13, 1934 (2 cases).

²² Thus in the Alabama bituminous coal field an agreement was entered into between the operators and the United Mine Workers of America on March 16, 1934, establishing \$3.40 as the minimum wage for workers paid by the day. The executive order a fortnight later, amending the Bituminous Coal Code, fixed the minimum day wage in this area at \$4.60. On April 22 the order was amended to make the prescribed minimum rate \$3.80. Negotiations looking to a new agreement were thereupon begun. (1934) 39 COAL AGE 199. In Illinois the operators either saw fit or felt compelled to modify their statewide agreement which antedated the N.I.R.A., to conform to the executive order. *In re* Hours for Hoisting Engineers, Bituminous Coal Labor Bd. Div. II, Aug. 31, 1934.

III. EXISTING AGREEMENTS IN RELATION TO EFFORTS TO BARGAIN COLLECTIVELY IN VIOLATION OF THEIR TERMS

The view of collective agreements just outlined, which regards them as contracts immune from governmental impairment, would apply logically to indirect as well as direct impairment. Thus a group of employees who became dissatisfied with an agreement that antedated the National Industrial Recovery Act would be denied the aid of Section 7 (a) in their efforts to bargain collectively in violation of its terms. This conclusion has been applied with unflinching rigor by Division II of the Bituminous Coal Labor Board in cases growing out of the conflict in Illinois between the United Mine Workers of America and the Progressive Miners of America.

In August, 1932, an alleged collective agreement was entered into by District 12 of the United Mine Workers and the Illinois Coal Operators' Association. The agreement was concluded under great difficulties because of opposition on the part of many of the rank and file of Illinois miners to the reduced wage scale insisted upon by the operators and regarded as necessary by the officials of the union. In the end the agreement was imposed by the officials of the union upon the membership, although possibly ratified by the latter in a previous referendum in which many of the ballots that had been cast were not counted because they were stolen during the tally. Incensed by what they regarded as collusion with the operators on the part of their leaders, many Illinois miners withdrew from the United Mine Workers and formed the independent Progressive Miners' union. The new organization contended with the old for the control of employment relations in many of the mines of the state. In some mines it has never been recognized; in others it was informally recognized for a time by operators who later returned to the United Mine Workers; in still others it continues to represent the miners in their dealings with the employers. In numerous mines in the first two categories, the new union, ever since the effective date of the Bituminous Coal Code,²³ applying Section 7(a) to the industry, has claimed to be the actual choice of the workers as their representative in collective bargaining. In the meanwhile the United Mine Workers' state-wide agreement, which would have expired March 31, 1933, was extended in December, 1932, to March 31, 1935.

In the cases carried to the Bituminous Coal Labor Board the Progressive miners have contended, first, that the state-wide agreement was not entered into or extended validly under the provisions of the national and district constitutions of the United Mine Workers; second, that in

²³ Oct. 2, 1933.

any event it could not bind the workers at a mine where a majority were opposed to it at the time the operator sought to apply its terms; and, third, that when the Code became effective the employees at mines in which a majority preferred the Progressive Miners of America were entitled to have new negotiations entered into with that organization. The Board has declared the first contention to be beyond its competence and has rejected the last two contentions consistently.²⁴ On the second point it has asserted the complete freedom of employers, except under the National Industrial Recovery Act, to enter into collective labor agreements with anyone, whether representative of the workers then in their employ or not. And, on the third point, when such agreements have been concluded, they are contracts immune from such legislative impairment as would be involved in the forced substitution of conflicting negotiations with another organization. Section 7(a) is not to be so construed as to work an unconstitutional result. For: "The Constitution of the United States and the decisions of the highest courts under it for one hundred and twenty-five years have upheld the sanctity of contracts. In no instance has a court permitted the breaking of a private contract by legislative action or by executive or administrative action authorized either by state legislatures or the Congress of the United States. To invalidate this contract would be unconstitutional . . . for such a decision by this Board would be invalidating a private contract under the terms of an Act of Congress."²⁵

Thus are the courts outdone. It would serve no purpose here to cite authorities to show that the protection afforded to contracts by the Constitution is less absolute than the Bituminous Coal Labor Board supposes.²⁶ The more significant question for present purposes is whether Section 7(a) actually does not sacrifice pre-existing collective agreements to current freedom in the choice of employee representatives for collective bargaining. There appears to be no other direct authority upon the point.²⁷ A rationalization of the view that it does not, which is

²⁴ *In re* Peabody Mines 47 and 43, Division II, Bituminous Coal Labor Bd., Jan. 9, 1934; *In re* United Electric Coal Co., Cuba Mine and Freeburg Mine, *ibid.*, Mar. 12, 1934; *In re* Truax-Traer Coal Co., St. David Mine, Mar. 14, 1934; *In re* United Electric Coal Co., DuQuoin Mine, Mar. 14, 1934; *In re* Dorthill Coal Co., Mine No. 2, June 23, 1934. The Peabody decision was afterward affirmed by the National Bituminous Coal Labor Board. Its opinion, if one was written, is unavailable to the writer.

²⁵ *In re* Peabody Mines 47 and 43, Division II, Bituminous Coal Labor Bd. Jan. 9, 1934.

²⁶ See cases cited, notes 10, 11 *supra*.

²⁷ In regard to the freedom of the employer to bargain with employees as he pleases, except for the restraint imposed by §7(a), see *The Macauley Company and the Office-Workers' Union*, N.R.L.B. No. 220, Feb. 27, 1935, holding that §7(a) was not violated by coercive discharges of employees after the passage of the N.I.R.A., one month prior to the effective date of the applicable code. §7(a),

more satisfying than the one furnished by the Bituminous Coal Labor Board, would be to the effect that Section 7(a) applies only where collective bargaining—that is, negotiation of an agreement—is, or should be, undertaken. In the presence of an unexpired agreement such an occasion does not arise.

The Bituminous Coal Labor Board itself has not undertaken to uphold an unexpired agreement which the employer and his employees have abandoned, in the interest of the dispossessed union. Thus in the case of the Rex Coal Company the Board refused to interfere at the request of the United Mine Workers with the operation of a contract with the Progressive Miners' union which was in violation of the United Mine Workers' state-wide Illinois agreement, originally applicable to the Coal Company's operations.²⁸ The duty to abandon such an agreement where the employees clearly wish it is suggested by a recent decision under the Norris-LaGuardia Act, involving the same inter-union conflict in Illinois. The United Electric Coal Company, a party to the United Mine Workers' agreement, steadfastly refused to deal with the Progressive Miners' union, to which the employees at some of its mines had adhered. An attempt to reopen one of these mines with imported members of the United Mine Workers having met with mass picketing, the company applied to a federal court for an injunction. Equitable relief was denied upon the ground that the company's refusal to treat with the representatives of the Progressive Miners constituted a failure to attempt to settle the dispute by negotiation as required by Section 8 of the Norris Act²⁹ and that entry into the renewed state-wide closed-shop agreement in December, 1932, with reference to mines whose employees had shifted to the Progressive Miners, constituted an attempted denial of the right of self-organization to those employees in contravention of Section 2 of the Act.³⁰ It does not follow, of course, that the N.I.R.A. requires what the Norris-LaGuardia Act makes a condition of the issuance of an injunction, or that a *bona fide* collective agreement is no more

as its wording makes clear, has no application except to coded industries. *Harper v. Southern Coal & Coke Co.* 73 F.(2d) 792 (C. C. A. 5th, 1934). The P.R.A., however, incorporated its provisions and gave them "contractual" force as against assenting employers. See *In Re Gary Screw & Bolt Co. and Amal. Asso. of Iron, etc., Workers*, N.L.R.B. No. 203, Mar. 4, 1935.

²⁸ Division II, Bituminous Coal Labor Bd., Apr. 13, 1934.

²⁹ See *supra* note 6.

³⁰ The court maintained that bargaining by the company with the Progressive Miners would not have violated the agreement with the United Mine Workers because the agreement required the employment of members of the latter union only when they were available; and no members were available at the mine in question. The decision, however, would not have been different if breach of the agreement had been involved, for the reason that it was imposed upon the workers there. *United Electric Coal Companies v. Rice*, 9 F. Supp. 635 (D. Ill. 1934). See also *Fryns v. Fair Lawn Fur Dressing Co.*, 114 N. J. Eq. 462, 168 Atl. 862 (1933).

proof against subsequent alienation of the workers than one which is virtually imposed. But there is a wide gap between the reasoning of the court in this case and the absolutist views of the Bituminous Coal Labor Board.

According to the decisions of the National Labor Relations Board, the breach by one of the parties of a collective agreement made after Section 7(a) had become effective is not forbidden by the N.L.R.A., and requires renewed entry into negotiations by the other party. Collective agreements are the normal outcome of collective bargaining and willingness to effect such an agreement if terms can be agreed upon is essential to *bona fide* bargaining.³¹ Ordinarily such agreements should be in writing so as to provide with certainty for their duration and furnish an adequate memorandum of the terms.³² Their breach, however, calls for judicial³³ rather than administrative remedies, and the employer who breaks an agreement does not thereby violate Section 7(a). He must, however, help to assuage the wounds by further

³¹ *In re* Colt's Patent Firearms Mfg. Co. and Fed. Labor Union No. 19393, N.L.R.B. No. 248, Feb. 26, 1935; *In re* National Aniline & Chem. Co. and Allied Chem. Workers, Local No. 18705, N.L.R.B. No. 33, Oct. 3, 1934. In the latter case the Board quoted its own earlier decision in the case of the Houde Engineering Corp. and United Automobile Workers Fed. Labor Union No. 18839, Aug. 30, 1934, as follows: "Collective bargaining is simply a means to an end. The end is an agreement. . . . And, customarily, such an agreement . . . will have a fixed duration. . . . When it [§7(a)] speaks of 'collective bargaining' it can only be taken to mean that long-observed process whereby negotiations are conducted for the purpose of arriving at collective agreements governing terms of employment for some specified period." Accordingly the Chemical Company was held not to be complying with N.L.R.A. by posting wages and other conditions of employment which were claimed to accord with previous oral understandings with union representatives. See also *In re* Ely & Walker D. G. Co. and Wholesale House Workers Union, Local No. 18316, N.L.R.B. No. 32, Sept. 25, 1934; *In re* Atlanta Hosiery Mills and Am. Fed. of Hosiery Workers, Local No. 76, N.L.R.B. No. 133, Nov. 5, 1934. *In re* Connecticut Coke Co. and Gas House Workers' Union No. 18829, N. L. B. No. 265 (1934).

³² "While the failure to reduce an agreement to writing is not necessarily a violation of the law, the Board has frequently urged that this action be taken, as consistent with business expediency, common sense, and the general purpose of the statute to stabilize industrial relations upon a basis clearly expressed and mutually agreed upon. And the insistence by an employer that he will go no farther than to enter into an oral agreement may be evidence, in the light of other circumstances in the case, of a denial of the right of collective bargaining." Report of the N. L. R. B. for Feb., 1935, at 3. "The disadvantages of basing a business relationship upon verbal understandings are too obvious to require comment by this Board. The Pierson Company must realize that only a written agreement can give both parties the sense of certainty and security which is essential to lasting peace." *In re* Pierson Mfg. Co. and United Garment Workers of Amer., Local No. 247, N. L. B. No. 143 (1933).

³³ "The collective bargaining requirement in Section 7(a), if it did not contemplate the embodiment of mutually satisfactory terms in a legally valid agreement, would be empty of significance." *In re* National Aniline & Chem. Co. and Allied Chem. Workers, Local No. 18705, N. L. R. B. No. 33, Oct. 3, 1934.

collective bargaining.³⁴ It has not been held that a contract-breaking union is entitled to demand collective bargaining looking toward a substituted agreement, but the conclusion that it is seems to follow. The case of a new union, which had won over the members of another union that had an agreement, would seem to be somewhat stronger.³⁵

Thus the difficulty in upholding collective labor agreements in the face of the opposition of one of the interests involved is evaded by the country's chief administrative agency in the labor field. Probably the Board's theory is sound, notwithstanding possible conflict between the results arrived at by the application of the statutory provisions by administrative agencies on the one hand and by contract law on the other. It has not been suggested that the victim of a breach of a collective agreement need assent to a new agreement of a less favorable character. Labor arbitration boards to which disputes involving such breaches are submitted, including the National Labor Relations Board itself,³⁶ can be as zealous as they please in upholding good faith in the carrying out of collective agreements and in refusing to require the substitution of other agreements. The door is open for them, however, to ignore corrupt or collusive agreements, or agreements covering unwise periods of time, if the situation demands.

IV. THE EFFECT OF AGREEMENTS UPON THE ADMINISTRATIVE ADJUSTMENT OF LABOR DISPUTES NOT INVOLVING THEIR VIOLATION

Collective labor agreements commonly contain provisions for conciliation or arbitration of disputes arising between the parties during their continuance or with regard to their renewal. Failure to make use of the machinery established by such provisions is, presumably, a breach of agreement on the part of the individual or organization refusing. The question arises whether the creation of statutory agencies such as

³⁴ *In re Chicago Defender, Inc. and Chicago Typ. Union No. 16*, N. L. R. B. No. 126, Oct. 20, 1934: "The unions, of course, might not have consented to any of the company's proposals, and might have insisted upon a strict enforcement of the agreement. If the unions had taken this position, the company might thereafter have proceeded to enforce its will. In so proceeding it would have broken its agreement, with such consequences as follow legally from a breach of contract, but it would not have violated its duty under §7(a) to bargain collectively. A mere breach of contract is not in itself a violation of §7(a). The violation here consisted in not negotiating with the representatives of the employees for the purpose of endeavoring to effectuate mutually satisfactory changes in the terms of employment."

³⁵ Thus future agreements of the United Mine Workers with operators in Illinois will be subject to the hazard of invasion by the Progressive Miners of America, who will enjoy the aid of §7(a) in their insistence upon negotiations at any mine at which a majority of the employees have switched to the new union.

³⁶ The National Labor Relations Board, under §2(e) of the order creating it (see note 3, *supra*), may act as a board of arbitration in disputes submitted to it.

the National Labor Relations Board furnishes alternative modes of adjusting such disputes. If so, the integrity of the scheme of relations established by agreement is to that extent impaired. As previously noted, the Norris-LaGuardia Act denies federal injunctions to employers who have not made use of available means of adjusting disputes before appealing to the courts.³⁷ Undoubtedly these means include conciliation or arbitration machinery set up by agreement.

In this connection again, the door has been left open to flexibility in administration. "The National Labor Relations Board may decline to take cognizance of any labor dispute where there is another means of settlement provided for by agreement, industrial code, or law which has not been utilized."³⁸ Presumably in the normal case the Board will insist upon the use of machinery established by agreement; but circumstances may arise in which it will seem wise to disregard an agreement and substitute administrative settlement of a dispute. Violation of the agreement by such procedure will not ordinarily be involved, since submission of a dispute, except in a case involving Section 7(a), must be by both parties.³⁹ If, however, a dispute is local, its submission in the face of a national or regional arbitration or conciliation agreement might constitute a violation of the latter.

V. THE RECONCILIATION OF THE STATUTORY PATTERN OF CONTROL WITH CONTROL BY AGREEMENT IN PARTICULAR INDUSTRIES

Section 7(b) of the National Industrial Recovery Act,⁴⁰ as noted above, provides that the terms of collective labor agreements establishing wages, hours, and other conditions of employment may be given the same effect as the similar provisions of codes of fair competition, through their promulgation by the President. At the same time every

³⁷ 47 STAT. 72, 29 U. S. C. A. § 108 (1932). See *supra* note 6.

³⁸ § 4(c) of the order establishing the Board, *supra* note 3.

³⁹ *Ibid.* § 2(e). In a 7(a) dispute in which the Board's jurisdiction was invoked by one of the parties over the opposition of the other, it may be that the Board would be compelled to decline to act, if adjustment under a previous collective agreement were possible. In the now-famous Jennings case, in which the N. L. R. B. insisted upon using its discretion to decide a dispute notwithstanding the existence of an industrial board for deciding such cases under a provision of the applicable Newspaper Code, the National Recovery Administration, supporting the employer, contended that the word "may" in § 4(c) of the executive order establishing the N. L. R. B. means "must." The Board declined to accede to this argument. *In re* San Francisco Call-Bulletin and Dean S. Jennings, N. L. R. B. No. 195, Dec. 3 and 12, 1934. The President thereupon "requested" the Board to decline to undertake to hear or to review cases under such circumstances in the future. Letter of Jan. 22, 1935, FEDERAL TRADE & INDUSTRY SERVICE ¶ 8584. The letter refers only to the relation of the N. L. R. B. to boards established under codes. It has no reference to boards established by collective agreement.

⁴⁰ See *supra* note 7.

code of fair competition must provide "that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President."⁴¹ Where, therefore, the President decides to give statutory force to the designated terms of a collective agreement, it is not enough that he give approval in due form to the agreement itself. The appropriate code must also be brought into line.

In several industries where the strength of organized labor has demanded that the employment standards fixed by agreement become the primary standards for the industry, varying devices for reconciling codes with agreements have been employed. Thus in the building industry the code provides in advance for collective bargaining within geographical areas by "truly representative associations or groups of employers and employees," subject to approval of the terms agreed upon by the President under Section 7(b). Presidential approval of an agreement automatically incorporates its terms into the code.⁴² In the Coat and Suit Industry Code, following a schedule of minimum wages, similar provision is made for incorporating the provisions of future collective agreements into the Code.⁴³ In the Motion Picture Code minimum wages for various classes of organized employees are fixed at the union scales which were in force August 23, 1933, but no explicit provision for future collective bargaining is made. In the bituminous coal industry the actuality of collective bargaining is not made similarly apparent in the code, but the wage provisions of the latter are so manipulated as to give effect to the Appalachian Agreement between the United Mine Workers of America and the largest group of coal operators with which the union deals at one time. Thus a conference on code wages which was to have been summoned January 5, 1934,⁴⁴ did not meet until March 26 and did not function until contemporaneous negotiations for a new Appalachian Agreement had borne fruit on March 30. The following day the "conference" was informed of a Presidential order embodying the wage and hour features of the agreement in an amendment to the code, effective April 1, when the new agreement became operative.⁴⁵ Latter objections led to minor modifications for outlying bituminous coal areas.⁴⁶ General Hugh Johnson, Administrator of the N.I.R.A. at the time, was quoted afterward as saying that the ideal situation with respect to unionization prevails in the bituminous coal industry, "where you have a

⁴¹ N.I.R.A. §7(a) (3).

⁴² Construction Industry Code, art. III, § 1.

⁴³ Coat & Suit Industry Code, art. V, § 2.

⁴⁴ Bituminous Coal Code, art. V, par. g.

⁴⁵ (1934) 39 COAL AGE 150, 152, 157, 197.

⁴⁶ *Ibid.* 196, 199. See *supra* note 22.

partnership between workers and management."⁴⁷ The "partnership," quite clearly, functions alongside the code arrangements rather than as a feature of them.

As respects administration of code provisions, some codes admit labor to participation through representation of a union upon the code authority.⁴⁸ In the Bituminous Coal Code, collective agreements are given effect in this connection, through a provision that all disputes affecting employment shall be settled, if possible, by agencies established under such agreements.⁴⁹ Controversies which cannot be adjusted in this manner are to be submitted to the divisional Bituminous Coal Labor Boards. These boards themselves, although named by the President, are selected from nominees of "organizations of employees" and of the code authority, with neutral chairmen.⁵⁰

The integrating of control by agreement with control under codes of fair competition obviously is facilitated where employee organization is on an industrial rather than a craft basis. Even in the construction and motion picture industries, where it is collective agreements with craft unions whose terms are assimilated to the codes, the several unions are largely confined to the industries concerned. It would be much more difficult, for example, to incorporate the agreements to which the Machinists' Union is a party into the codes of all of the industries in which the members of the union are employed. The difficulty of the union's participating in the administration of the labor provisions of numerous codes would be even greater.

Even more obviously, local and regional unions within an industry would be incapable of participating in control on a national basis unless they could in some way be federated. Mutually hostile unions dividing the field would create an impossible situation. In this connection, of course, the principle that, if any attains a majority,⁵¹ only that union or other representative of the employees in a given bargaining unit, so chosen by majority vote, will be recognized, is conducive to preventing complexity in organization. It is worth inquiring whether the other administrative decisions applying the collective bargaining provisions of

⁴⁷ N. Y. Times, May 3, 1934, at 4.

⁴⁸ Coat & Suit Industry Code, art. VI, § 1.

⁴⁹ Art. VII, § 5(a).

⁵⁰ *Ibid.* §§ 5(b), (e).

⁵¹ This principle was developed by the N. L. B. and has since been consistently applied by the N. L. R. B. as essential to effective self-organization and collective bargaining, without which the right conferred upon employees by § 7(a) would be meaningless. *In re Denver Tramway Corp. and Amal. Ass'n of Street & Elec. Ry. Employees*, Div. 1001, N. L. B. No. 149 (1934); *In re Houde Engineering Corp. and United Automobile Workers Fed. Labor Union No. 18831*, N. L. R. B. No. 12, Aug. 30, 1934; N. L. R. B. Rep. for Feb., 1935, at 3.

the N.I.R.A. tend to promote craft or industrial, local or regional or national unionization.⁵²

The principle of freedom of choice in the self-organization of labor has been taken to forbid favoritism by labor boards, no less than coercion by employers, in the choice between craft and industrial unions.⁵³ Where a conflict arises between unions or the employer resists bargaining with a union upon the ground that it does not represent an appropriate group of employees, the labor board to which the controversy is brought necessarily must arrive at a decision. It does so, under the practice which has developed under the N.I.R.A., in the light of historical factors, the identifiability of the group from the standpoint of skill or common economic interest, and the like.⁵⁴ There can, of course, be no question about all of the employees of a particular enterprise constituting an appropriate group where no competition with a more inclusive or a less inclusive union is present; but the door is open to craft as well as industrial unions. Under present statutory provisions, no other result is possible. The issue waits upon the organizing activities of unions.

The labor boards have preserved a similar openness of mind as between the workers in a particular plant or establishment on the one hand and all of those in the service of a given employer on the other hand.⁵⁵ The National Labor Relations Board, however, has committed itself to the proposition that under no circumstances can the employees of a particular employer be controlled either in their decision whether or not they will bargain collectively or in their choice of a bargaining agency by the will of some wider craft or industrial group into which they fit; nor is an employer bound by Section 7(a) to deal with a union which is not the choice of his own employees.⁵⁶ There seems, however, to be no ob-

⁵² The conflict between independent unions and company unions, which has given rise to so many disputes under the N. I. R. A., is not pertinent at this point. The possible forms of independent employee organization are the subject in hand. On this point and others which follow, see Note (1934) 34 COLUMBIA LAW REV. 1529.

⁵³ Biddle, *Collective Bargaining under the Labor Board*, *supra* note 6, at 540.

⁵⁴ *In re* Detroit Street Ry. Comrs., Motor Coach Operators' Ass'n and Amal. Ass'n of Street & Elec. Ry. & Motor Coach Employees, Local 26, N. L. R. B. No. 170, Oct. 24, 1934; *In re* United Dry Docks, Inc., and Int. Ass'n of Mechanic Welders, Local 13, N. L. R. B. No. 190, Nov. 6, 1934; *In re* Indiana Brass Co. and Metal Polishers' Int'l. Union, Local 24, N. L. R. B. No. 262, Feb. 9, 1935; *In re* Ely & Walker D. G. Co., No. 32, Sept. 25, 1934.

⁵⁵ *In re* Gordon Baking Co. and Bakery Wagon Drivers' Union, Local 51, N. L. R. B. No. 248, Oct. 3, 1934; *In re* Employees of the Shell Oil Co., Los Angeles, Calif., Petroleum Labor Policies Bd., No. 119, Mar. 5, 1935. Compare *United Electric Coal Companies v. Rice*, 9 F. Supp. 635 (D. Ill. 1935), in which it appeared that a majority of the employees at all of the company's mines taken together preferred the United Mine Workers.

⁵⁶ "The . . . duty of employers to bargain collectively . . . is a duty resting upon the individual employer to negotiate with the chosen representatives of his own

jection to a union's intrenching itself in power over as wide an area as it can bring under one agreement, by means of a "closed shop" clause in the agreement; for a provision in an agreement for the discharge of union members who do not pay their dues has been upheld.⁵⁷ Concurrence in this position by the courts is, however, highly doubtful.⁵⁸

The National Labor Relations Board's view, confining compulsory collective bargaining and the area of choice of a collective bargaining agency to the producing enterprise which is under one ownership, does not follow necessarily from the language of Section 7(a). The language of the section is general,⁵⁹ requiring simply that "employees" shall be free and not subject to coercion at the hands of "employers." The matter might have been left to be determined in each case upon the facts, as perhaps it will be notwithstanding the cited decision,⁶⁰ which involved simply the question of whether a single employee could enforce a demand that a craft union bargain in his behalf. In an industry, such as the coal industry, in which agreements covering a wide area have prevailed for a long period and continue to be desired by the majority of workers in a producing area, it is at least arguable that a minority of workers in a given establishment is entitled to be represented in the collective bargaining for the area, especially if no other organization is the choice of the majority in the establishment in question. Even if another union or a company union commands the allegiance of the majority of

employees. The largest possible unit of such guaranteed collective bargaining is thus all the employees of a single employer, though it is possible, of course, for associations of employers by mutual consent to make a single collective agreement with a union representing all of their employees." *In re Hildinger-Bishop Co. and Indep. Projectionists & Stage Employees Union*, N. L. R. B. No. 86, Oct. 25, 1934.

⁵⁷ *In re Quinlan Pretzel Co. and Pretzel Workers' Union*, Nat. Lab. Bd. Release No. 4863, May 5, 1934. The N. L. R. B., while declaring an exclusive arrangement with a company union to be illegal, has not committed itself fully in regard to closed shop agreements with independent unions. *In re Tamaqua Underwear Co. and Amal. Clo. Workers of Amer.*, N. L. R. B. No. 27, Aug. 6, 1934. It has, however, held that workers entering an employment to which a closed shop agreement then applied had consented to its provisions and could not question its validity under § 7(a). *In re Bennett Shoe Co. and Jean R. Reynolds*, N. L. R. B. No. 159, Dec. 10, 1934. This doctrine of estoppel in regard to a question of law sounds strangely technical when uttered by an administrative body.

⁵⁸ It has been urged that § 7(a) forbids closed shop agreements by virtue of its provision that every code shall prescribe "that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining . . . a labor organization of his own choosing." The closed union shop in effect makes it a condition of employment that employees and applicants for jobs refrain from joining any other union than the favored one. Judicial decisions have conflicted. Note (1934) 43 YALE L. J. 625; McNatt, *Organized Labor and the Recovery Act* (1934) 32 MICH. L. REV. 780; Draper, *Collective Bargaining under the N. I. R. A.* (1934) 6 ROCKY MOUNTAIN L. REV. 169; *Farulla v. Freundlich*, 152 Misc. 761, 27 N. Y. Supp. 70 (1934), FEDERAL TRADE & INDUSTRY SERVICE ¶ 8522.

⁵⁹ See *supra* note 6.

⁶⁰ *In re Hildinger-Bishop Co.*, N. L. R. B. No. 86, Oct. 25, 1934.

workers there, it may well be that effective bargaining in the remainder of the area demands that the establishment in question be brought under the same control.⁶¹ There seems to be no good reason for foreclosing such questions in advance. Their wise determination, and especially the maintenance in proper cases of industry-wide control by agreement, to supplement or supplant code control of labor standards, calls for no less realism than the decision of lesser questions affecting single enterprises.⁶²

⁶¹ The need of extending the provisions of collective agreements to parties who do not enter into the contracting organizations voluntarily, in order to prevent subversive competition, has shaped the law and the practice in regard to collective agreements in important respects. It lies behind § 7(b) of the N. I. R. A. and the corresponding provisions of the former German law. See *supra* note 7. The desire to prevent inroads into control which has been established, as well as the need of assuring support to a contracting union, accounts in large part for the closed union shop. Fuchs, *Collective Labor Agreements in German Law* (1929) 15 St. Louis L. Rev. 1, 29; Fuchs, *Protection of the German System of Controlling Employment by Collective Agreement* (1932) 17 St. Louis L. Rev. 221, 228. An interesting instance of an attempt to extend the effectiveness of a collective agreement beyond the parties to it is afforded in one of the decisions of the N. L. B. In a collective agreement which the Board formulated, it was provided that agreements which the union might make with employers who were not parties to the principal agreement must be filed with the impartial chairman established by the agreement. The chairman was directed, if he "shall decide that such contract is grossly unfair to the members of the Association (of employers)," to "order such adjustments made as by him are deemed equitable under the circumstances." The adjustments, it is made clear, are to be in the agreements reviewed and not in the principal agreement. Legally, no doubt, the impartial chairman in such cases would be ordering the union to break "unfair" contracts with third persons, leaving the consequences, if any, to fall upon it. Actually, the collective agreement formulated by the National Labor Board was an attempt to legislate for the entire present and future unionized portion of the industry. *In re Full Fashioned Hosiery Mfrs. of Amer., Inc., and Amer. Fed. of Full Fashioned Hosiery Workers*, N. L. B. No. 46 (1933).

⁶² The operation of control by agreement, with administrative measures in support, is best exemplified in this country in the railroad industry. Envisaging collective bargaining and collective agreements as normal mechanisms, the successive Railway Labor Acts have provided for the mediation and arbitration of disputes. Provision has been made for the enforcement of arbitral decrees as judgments. Submissions, until recently, were wholly voluntary. June 1, 1898, c. 370, 30 STAT. 424; 38 STAT. 108 (1913), 45 U. S. C. A. § 125 (1928); 41 STAT. 472 (1920), 45 U. S. C. A. § 140 (1928); 44 STAT. 577 (1926) 45 U. S. C. A. 151 ff (1928). Recently disputes over the application of agreed rates of pay, rules, or working conditions have been made arbitrable upon the petition of one party as well as of both parties. 48 STAT. 1189, 45 U. S. C. A. §§ 153 (i), (p) (1934). Previously no distinction was made between arbitrations under specific clauses of agreements and arbitrations looking to new agreements. On the significance of this distinction see Phillips, *The Function of Arbitration in the Settlement of Industrial Disputes* (1933) 33 COLUMBIA LAW REV. 1366. Freedom in the choice of representatives for collective bargaining is secured to employees in terms similar to those of § 7(a), but enforcement, impliedly afforded since the adoption of the Act of 1926, is by direct judicial proceedings. *Tex. & N. O. R. Co. v. Brotherhood*, 281 U. S. 548 (1930); *Myers v. Louisiana & A. R. Co.*, 7 F. Supp. 92, 97 (W. D. La. 1933). Agreements are made between the unions and particular railroad systems, but basic standards are established by regional and national arrangements. See *Conductors, Trainmen & Yardmen and Southeastern Train Service Conference Committee*, Oct. 5, 1922. The famous Adamson Act, of course, established such standards by legislative action. *Wilson v. New*, 243 U. S. 332 (1917).

VI. THE DRAFTING OF COLLECTIVE LABOR AGREEMENTS WITH
REFERENCE TO ENFORCEMENT

It is apparent from what has gone before that collective labor agreements are devices for controlling employment relations which operate in conjunction with other means of control. To some extent, these other means aid in the enforcement of collective agreements and, to some extent, tend to impair the carrying out of their terms. Enforcement varies for the two types of provisions commonly included in collective labor agreements. These are, on the one hand, the provisions establishing wages, hours, working conditions and other features of the individual worker's relation to his employer and, on the other hand, auxiliary provisions for the enforcement of standards by conciliation or otherwise, and for carrying on certain affairs of mutual concern, such as the conduct of an employment office or the formulation of a succeeding agreement.⁶³

Observance of the employment standards established by agreement is, of course, aided by their promulgation as statutory or code standards backed by penal sanctions and other legal processes. It is weakened by statutory support for collective bargaining in violation of agreement, which may be demanded by affected employers or employees. It is both weakened and strengthened by the adjustment of disputes by official labor boards, which have discretion to permit the parties to disregard agreements in the interest of free collective bargaining but, in all probability, have also a strong disposition to uphold such agreements.

Observance of the auxiliary provisions of collective labor agreements is aided by statutory or code provisions which direct attention to the desirability of adhering to them, such as provisions which call for the use of conciliation or arbitration machinery existing by virtue of agreement, in preference to official agencies. To the extent, however, that statutory provisions encourage the abandonment of collective agreements by unilateral action prior to their expiration, the observance of auxiliary terms, like the observance of terms which establish employment standards, is weakened.

The operation of the foregoing factors is not greatly affected by the contractual or non-contractual nature of collective labor agreements. Whether ordinary legal sanctions are available to uphold such agreements or whether these agreements are merely pacts with more or less moral force, they can be and are made use of and given increased or

⁶³ The distinction between the two types of provisions, known in Germany as normative and obligatory provisions respectively, is much more definitely recognized in French and German legal discussion than in this country. Fuchs, *Collective Labor Agreements in German Law* (1929) 15 ST. LOUIS, L. REV. 1, 9; Fuchs, *The French Law of Collective Labor Agreements* (1932) 41 YALE L. J. 1005, at 1016.

diminished effectiveness by the indicated statutory measures. A collective labor agreement, for these purposes, is recognizable by virtue of the parties who enter into it and the functions it is intended to perform in the control of employment. But the availability of contractual remedies in its enforcement probably depends in large measure upon the form in which it is cast.

Despite the assertion of the N.L.R.B. that definite agreements capable of legal enforcement are essential to collective bargaining,⁶⁴ a considerable number of these agreements in the past have been so drafted as to exclude legal enforcement. A dated list of wage rates and conditions of employment, signed or unsigned by the negotiators, can scarcely furnish a foundation for a future lawsuit to compel its observance. Even where the published scale is said, without more, to be "agreed to" for a period of time,⁶⁵ it is doubtful whether a contract has been created. The agreements on the railroads between the carriers and the unions usually include few or no clauses beyond wage and hour provisions and detailed working rules. Although signed by representatives of the managements and the unions, and sometimes said to be "agreed to," these schedules seldom contain contractual language. Sometimes the provisions are referred to as "rules" which have been "negotiated in conference." Still more informal has been the practice of the Cigarmakers' International Union, which has simply published "bills of prices." Employers hiring union members and receiving the union label impliedly undertake to pay these "prices."⁶⁶

Such agreements, to be sure, may be effective to supply the terms of employment in individual contracts of hire which, expressly or im-

⁶⁴ See *supra* note 33.

⁶⁵ Boston Typographical Union and Employing Printers' Assn. of Greater Boston, Apr. 1, 1924. In Chicago Typographical Union No. 16 and the Franklin Assn. of Chicago, Oct. 9, 1923, the union and the Association agreed "upon the above and foregoing scale of prices, which is hereby promulgated for the guidance of the members of their respective organizations."

These agreements and the others herein cited, unless otherwise indicated, are on file in the office of the United States Bureau of Labor Statistics. Through the courtesy of Mr. Ralph Rauth and others of the staff of the Bureau, the writer has been enabled to examine a considerable number of these documents. Significant portions of many of these agreements are reproduced in Bureau of Labor Statistics Bulletins No. 468 (1928), No. 448 (1927), No. 419 (1926), and No. 393 (1925), which are devoted to setting forth their provisions. Formal portions, however, are for the most part omitted. These bulletins also contain brief descriptions of the manner in which such agreements are negotiated, both in general and within particular occupations and industries. The fullest general account is in B. L. S. Bull. No. 468, at 1.

⁶⁶ B. L. S. Bull. No. 468, at 66. The same legal effect, or lack of effect, perhaps was produced by the "Contract of the Journeymen Barbers' International Union of America, Local Union No. 138, with the Bosses and Proprietors of the City of East St. Louis, Illinois" of May 1, 1923, whereby "I the undersigned Proprietor" made all the promises contained in the agreement.

pliedly, are made with reference to them. Thus the agreement establishes a usage which ordinarily is incorporated into individual contracts but which is not compulsory upon the parties to these contracts.⁶⁷ If this is the sole effect sought after, there is no reason why the draftsman should not say so in some such terms as the following: "The wages and working conditions hereby established will constitute the understood terms of employment in the establishment (or establishments) of the employer (or employers), and it is the mutual expectation of the parties hereto that these terms will not be departed from during the period for which they are hereby announced." Even where the agreement contains auxiliary provisions to be observed by the negotiating organizations, there seems to be no reason why the wording cannot be limited to a declaration of mutual intention, thus avoiding the possibility of unwanted future litigation.

When, as usually is the case,⁶⁸ the parties to an agreement wish to lay down legally binding terms, the prime essential to clarity is the maintenance of the distinction between the provisions establishing employment standards and those which are of an auxiliary nature. An agreement may be limited to one or the other type of provision or it may contain both, as most agreements do.

Where an agreement contains only employment standards and is not merely with a single employer, its enforcement against individual employers is facilitated by the provision that individual employers shall sign either the original contract or subsidiary contracts with the union embodying its terms. Without a compensating undertaking on the part of the union to procure the observance of the terms of the agreement by

⁶⁷ This is the effect most often given to collective labor agreements in the reported American cases applying them, even where the agreements have assumed contractual form. Christenson, *supra* note 1, at 86.

⁶⁸ In the overwhelming majority of the agreements examined by the writer, the language of contract has been employed in an apparent effort to make mutual promises of the most solemn character. Occasionally the earnestness of the effort to achieve binding force borders on the pathetic. Thus the parties may "enter into, ordain, establish and agree to" a wage schedule and conditions of employment (form of agreement, San Francisco Chauffeurs' Union No. 265, Int. Brotherhood of Teamsters, 1921), and in witness thereof the president of the union may affix the name of the union, by himself as president, and the secretary-treasurer affix the official seal of the union; and the employer may sign, execute, deliver and seal the same (form of the Auto-Livery Chauffeurs' Union, Chicago Local No. 727, Int. Brotherhood of Teamsters, 1923). It is not uncommon for the agreement to be made "for and in consideration of" the hackneyed "sum of One Dollar each to the other in hand paid, receipt whereof is hereby acknowledged" (form of N. Y. C. Laundry Drivers', Chauffeurs' & Helpers' Union, Local No. 810, Int. Brotherhood of Teamsters, 1924; form of Mattress and Bed Spring Makers' Union of Greater N. Y., Local No. 33, Upholsterers' Int. Union of N. A., 1927). With greater extravagance, an agreement in the motion picture industry raised the sum to \$5. Washington, D. C. Local No. 161, Amer. Fed. of Musicians, and theater owners, Sept. 19, 1927.

employees, it is difficult to find consideration for the employer's promises. The attempt may be made, however, to bind the individual employees through the negotiators of the agreement as agents.⁶⁹ The individual employers and workers could not actually be prevented by the agreement from entering into inconsistent contracts of employment, but any who did so would become liable in damages to the other parties to the collective agreement and might even be enjoined from concerted efforts to maintain inconsistent employment standards.⁷⁰ The furnishing of a bond or of cash security by the employer to secure his compliance with an agreement is sometimes required.⁷¹ Occasionally liquidated damages are agreed upon.⁷²

Frequently the attempt is made to bind the members of the contracting organizations to all of the terms of a collective agreement indiscriminately. Thus the Appalachian coal agreement of 1934 is "made . . . between" certain operators and named operators' associations "on behalf of each member thereof" and the United Mine Workers and 11 district unions, for themselves "and on behalf of each member thereof."⁷³ In another instance "This agreement, between each and all the members of the Shoe Workers' Protective Union of Haverhill, Massachusetts and such other persons as shall become members of said Union during the term of this agreement, party of the first part," and the members of the Haverhill Shoe Manufacturers' Protective Association, "party of the second part, . . . Witnesseth."⁷⁴ The effectiveness of

⁶⁹ In its decision in *In re H. C. Frick Coke Co. and United Mine Workers of Amer.*, N. L. B. No. 127 (1934), the Board, in order to avoid compelling the coal mining companies controlled by steel corporations to deal with the union itself, prescribed a form of agreement between each company and named union officials, "representing the employees . . . who elected them as their representatives and such other employees as may authorize them to represent them." See also *In re Hall Baking Co. and Bakery Drivers' Union Local No. 264*, N. L. B. No. 184 (1934).

⁷⁰ "The entering into any arrangement or agreement between the party of the first part (employer) and a member of the party of the second part (union) shall be considered a breach of this agreement on the part of the party of the first part." Form of Sign, Scene, & Pictorial Painters' Local Union No. 639, Cleveland, Ohio, Apr. 1, 1927, B. L. S. Bull. No. 468, at 53.

⁷¹ Form of Manhattan House Wreckers' Local Union No. 95, B. L. S. Bull. No. 468, at 47; form of N. Y. C. Laundry Drivers', Chauffeurs', and Helpers' Local No. 81, Int. Brotherhood of Teamsters, 1924.

⁷² Chicago Exec. Council, Int. Hod Carriers, etc. Union and general contractors, Jan. 1, 1927, B. L. S. Bull. No. 468, at 44.

⁷³ (1934) 39 COAL AGE 200. See also Cleveland Local No. 874, Int. Union of Steam & Operating Engrs. with employers in the sewer, paving, and excavating industries, May 1, 1927, B. L. S. Bull. No. 468, at 36.

⁷⁴ Agreement of Jan. 1, 1924. The agreement of Sept. 6, 1919, between the Actors' Equity Assn. and the Producing Mgrs. Assn. contains similar language. What perhaps was intended as even greater care to bind the union's members was used in an agreement of April 10, 1920, between four silk ribbon manufacturers of greater New York and local unions of the Amal. Textile Workers of N. A. It was provided that the agreement should be ratified by a two-thirds vote of all of the

thus seeking to bind individual members of contracting organizations depends, of course, upon the capacity of the latter to represent their members.⁷⁵ If membership forms in the various organizations are properly devised, a chain of authorizations and ratifications of the acts of individual negotiators, if not of the organizations as such, can undoubtedly be built up which will bind the members to the collective agreements which the organizations negotiate. If a union or employers' association is willing to incorporate, this result can, of course, be facilitated.

The duty to promote the observance of the employment standards and other terms of employment contained in a collective agreement frequently is imposed upon the contracting organizations either in general terms or in a clause which specifies the measures to be taken. In this manner direct legal and administrative sanctions are reinforced by auxiliary contractual obligations. Thus, after providing for the settlement of disputes between employer and employee by arbitration, a recent printers' agreement prescribed that "In the event that either party to the dispute refuses to accept and comply with the decisions of the arbitrator, all aid and support to firm or employer, or member or members of the union refusing such acceptance and compliance shall be withdrawn by both parties to this agreement. The act or acts of such employer or member of the union shall be publicly disavowed and the aggrieved party to this agreement shall be furnished by the other party hereto with

members of each local proceeding by secret ballot. "In addition thereto, the weavers in the particular shop of each of the employers signing this agreement shall similarly denote their acceptance of this agreement by authorizing three representative weavers from each shop to sign this agreement on behalf of the weavers they represent." Weavers who voted against acceptance of the agreement would be bound, presumably, by a subsequent assent manifested by their remaining in the employ of an establishment in which the agreement prevailed. Some such theory is required to reconcile two of the principles announced by the N. L. B. with the proposition that collective labor agreements should be legally binding, if this proposition contemplates legal force for these agreements as against individual employees. The principle of majority rule (*supra* note 51) operates in conjunction with the principle that the choice of representatives for collective bargaining shall be by secret ballot and that the employer is not entitled to know the identity of the employees who are members of an independent union that has been chosen to represent them. *In re* U. S. L. Battery Corp. and Battery Workers Fed. Labor Union No. 19130, N. L. B. No. 206 (1934); *In re* Union Overall Mfg. Co. and United Garment Workers of Amer., N. L. B. No. 192 (1934); *In re* Eagle Rubber Co. and United Rubber Workers' Fed. Lab. Union No. 18683, N. L. B. No. 219 (1934); *In re* Bear Brand Hosiery Co. and Branch 66, Amer. Fed. of Hosiery Workers, N. L. B. No. 263 (1934). The fact that workers remain at work after an agreement has gone into effect is the only certain basis and as respects dissenters the only possible basis upon which to regard them as bound.

⁷⁵ The argument that members of an unincorporated association stand in a legal relation to the organization as an entity is convincingly stated in Chafee, *The Internal Affairs of Associations Not for Profit* (1930) 43 HARV. L. REV. 993, 1007-1010. No reason appears why the association cannot act as agent for its members if that is part of its purpose and no public policy forbids.

an official document to such effect."⁷⁶ In more general terms, "The International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, through its official representatives, whose names are signed to this agreement, contracts and agrees upon the part of its organization to procure the faithful carrying out of this agreement and contract."⁷⁷

Some agreements do not include employment standards at all, but contain only terms which are designed to promote in some manner the relations of the parties to employment within a trade or industry. Arbitration agreements are a typical example. By such agreements the contracting organizations agree to establish and maintain the necessary machinery of adjustment and to promote its use or to employ it themselves in the settlement of future collective disputes. The obligation to use the machinery may or may not be imposed upon individual employers and workers.⁷⁸ Other types of provisions that are not intended to enter into individual contracts of employment are exemplified by closed shop clauses,⁷⁹ undertakings by the union to furnish employees when called upon,⁸⁰ restrictions upon work by the employer,⁸¹ prescriptions regarding the qualifications of foremen,⁸² reservations of the privilege of the union's shop steward to enter the employer's premises,⁸³ formulations of the union's duty to admit members,⁸⁴ and prohibitions of strikes and lockouts.⁸⁵ Provisions which have a similarly auxiliary pur-

⁷⁶ Printers' League Sec., N. Y. Employing Printers' Assn., and N. Y. Printing Pressmen's Union No. 51, Jan. 1, 1928, reproduced in Brown, *Joint Industrial Control in the Book and Job Printing Industry*, B. L. S. Bull. No. 481 (1928) at 226. In another agreement the union is required to fine any member \$10 for his failure to give notice of intention to quit his job and also must prevent his working under the union's jurisdiction until the fine has been paid. Anniston, Ala., Typographical Union No. 419 and Consol. Pub. Co. of Anniston, June 1, 1927. See also Metal Polishers' Int. Union, Local No. 113, and Mfg. Jewelry Concerns of Rochester, N. Y., May 1, 1927, B. L. S. Bull. No. 468, at 108; Comm'l Telegraphers' Union of N. A. and United Press Assn., Int'l News Service, & Universal Service, Inc., Aug. 8, 1924.

⁷⁷ Form of Local No. 9, Milwaukee, Wis., 1926. See also Int. Ladies' Garment Workers and Assn. of Dress Mfrs. of N. Y. City, Feb. 3, 1927, B. L. S. Bull. No. 468, at 77.

⁷⁸ Closed Shop Div., United Typothetae of Amer., and Int. Typographical Union, 1917.

⁷⁹ Form of Retail Clerks Int. Protective Assn., B. L. S. Bull. No. 468, at 66.

⁸⁰ B. L. S. Bull. No. 468, at 2.

⁸¹ *Ibid.* at 3.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Brick & Clay Workers of Danville, Ill., B. L. S. Bull. No. 491 (1929) at 473, providing against admission of members not satisfactory to the employer; Concord, N. H. Branch, Granite Cutters' Int. Assn., and Concord Granite Mfrs. & Quarry Owners' Assn., Apr. 1, 1928, providing that persons "otherwise eligible" will be reinstated in the union at a fee of not more than \$200.

⁸⁵ Lake Carriers' Assn. and Marine Cooks' & Stewards' Union, Apr. 1, 1906; Associated Builders of Chicago and Chicago Branch, Journeymen Stones Cutters' Assn., May 31, 1923.

pose, but which are the obligations of individual employers and workers as such and which consequently enter into contracts of employment, may also be included in an agreement. The following are examples: prohibition of an employee's quitting in protest against the presence of non-union employees;⁸⁶ provisions for payment by employers and employees into unemployment insurance funds;⁸⁷ provisions for the shortening of hours in slack times to spread employment;⁸⁸ and the check-off of union dues.⁸⁹

Obviously precision in the working of collective agreements is furthered by language and arrangement of terms within the agreement which bring out clearly what parties are bound by the various terms.⁹⁰ Conversely it creates confusion to define the terms "association" and "union" to include the members of the organization as well as the organizations themselves and then to bind the association and the union as thus defined to all manner of obligations.⁹¹ It is equally confusing to refer to the contracting organizations as employer and employee respectively⁹² or to designate the agreement a contract of employment⁹³ or to state that the union agrees to "work for" the employer.⁹⁴

Actual enforcement of the obligations of unions and employers' associations by legal action against them turns, of course, upon their capacity to contract and to become parties to actions. The legal development whereby such capacity is being conferred has been traced by others.

⁸⁶ Associated Builders of Chicago, *supra* note 85; Actors' Equity Assn. and Producing Mgrs.' Assn., Sept. 6, 1919; signed also by the Amer. Fed. of Musicians and the Nat'l Alliance of Theatrical Stage Employees & Moving Picture Mach. Operators, and containing the following clause: "No member . . . (of either union named) shall refuse to perform services for any Producer because of the presence in the cast or production of a theatrical performer or performers not a member or members of the Equity Association."

⁸⁷ B. L. S. Bull. No. 541 (1931), at 674-5, contains an account of unemployment insurance schemes established by collective agreement.

⁸⁸ *Ibid.*, at 710-717, outlines "spread the work" schemes contained in collective labor agreements.

⁸⁹ *Ibid.*, at 402, gives a general account of the check-off. Typical provisions from collective agreements are reproduced in Bull. No. 468, at 114, 124, and 91. In the last-cited instance the usual precaution of requiring individual authorization by each employee is omitted.

⁹⁰ Well-worded agreements are exemplified by Boston Elevated Ry. and Div. 89, Order of Ry. Telegraphers, Apr. 30, 1927; Cincinnati Typographical Union No. 38 and Cincinnati Daily Newspaper Publishers' Assn., May 1, 1909; N. Y. Typographical Union No. 7 and New Yorker Staats-Zeitung & New Yorker Herold, July 10, 1918.

⁹¹ Chicago Coal Merchants' Assn. and Chicago Local No. 704, Coal Teamsters', Chauffeurs' & Helpers' Union, Jan. 2, 1925.

⁹² Ohio Cut Stone Co. v. Amherst, Ohio, Local, Journeymen Stone Cutters' Assn. of N. A., Mar. 1, 1927.

⁹³ Newspaper Publishers' Assn. of N. Y. City and N. Y. Typographical Union No. 6, Jan. 1, 1924.

⁹⁴ Form of Int. Broom & Whisk Makers' Union, 1927; form of New Haven, Conn., Typographical Union No. 47, Jan. 1, 1918.

It has progressed sufficiently far to enable the point to be assumed here.⁹⁵

Adherence to the language of contract and the creation of arrangements which can be enforced according to the rules of contract law is most difficult in agreements which are intended to be effective over a wide area, involving parties whose relations to each other are not clearly defined. Thus the former agreements covering the central competitive field of the bituminous coal industry were compacts negotiated by numerous employer interests with the union, signed by a number of individuals from each state on behalf of all of the operators in the state, apparently without formal authorization from many of those supposed to be represented.⁹⁶ These agreements were then translated into more formal contracts between the union and particular operators or associations. It is even more difficult to assimilate to the category of contract the agreements among more or less numerous parties which from time to time are reached in the presence of the President or other high official, and announced in the form of press releases.⁹⁷ In such "agreements" as these, the phrase, "It shall be unlawful" for the parties to engage in violations, would be more appropriate than in the agreements of limited scope into which such language occasionally creeps.⁹⁸

VII. THE TENDENCY TOWARD CONTROLLED COLLECTIVE BARGAINING

It is apparent from the treatment which collective labor agreements have received both in their formulation and in their application, that the competing values of stability and adaptability in the arrangements governing employment have been maintained in rather unstable equilibrium. Assuming that controlled labor standards are to prevail for a period of time in a given economic area, and that these are to be established by agreement, it nevertheless remains a question whether they should be relatively rigid or flexible, and whether or not the union which

⁹⁵ See Sturges, *Unincorporated Associations as Parties to Actions* (1924) 33 YALE L. J. 383; WITTE, *THE GOVERNMENT AND LABOR DISPUTES* (1932) c. VII; FRANKFURTER & GREENE, *THE LABOR INJUNCTION* (1930) 82-85. To a large extent, the members of unincorporated associations which are not permitted to sue or be sued in their own names may become parties to actions upon association contracts by means of the device of class suits by or against representatives of the members. Wheaton, *Representative Suits Involving Numerous Litigants* (1934) 19 CORN. L. Q. 399.

⁹⁶ This series of agreements is reproduced in BLOCH, *LABOR AGREEMENTS IN COAL MINES* (1931) Appendix I.

⁹⁷ In its decision in *In re H. C. Frick Coke Co.*, N. L. B. No. 127 (1934), the N. L. B. refers to an understanding at an earlier stage of the controversy between the United Mine Workers and the owners of "captive" coal mines. While an agreement reached at this stage in the presence of the President, according to the Board, "was never formally executed . . . it is conceded . . . that the press release correctly stated the agreement among the parties."

⁹⁸ Cincinnati Mailers' Union No. 172 and Cincinnati Daily Newspaper Publishers' Assn., June 8, 1925.

contributes to their maintenance should be made secure in its position. The benefits attaching to stability of standards⁹⁹ and security for unions suggest the need of contracts which are capable of enforcement in court and which will be upheld by administrative agencies under all circumstances. The limitations upon the ability to foresee the future, on the other hand, as well as the danger of abuses in the conduct of labor unions and employers' associations as against their members, suggest that ways to modify collective arrangements be left open. If flexibility is furthered by making collective agreements non-contractual,¹⁰⁰ legal sanctions are largely¹⁰¹ withdrawn unless statutory support is provided.

The solution offered under the N. I. R. A. presents a mild formula for resolving the dilemma thus presented. Collective agreements should be drafted as contracts and under normal circumstances enforced as such by judicial and administrative means. Where conditions warrant, the standards of employment contained in such agreements should be translated into statutory standards by administrative action. Discretion might be reposed in appropriate administrative agencies to which disputes are submitted permitting the abandonment of agreements by unilateral action as well as by mutual consent where conditions clearly call for a new start in the collective control of employment.¹⁰² It might be suggested in addition that contract remedies be withdrawn with reference to agreements whose abandonment has been administratively sanctioned, in order to avoid conflict among governmental agencies. With the duty imposed upon employers to bargain collectively serving as a foundation for the foregoing measures, legal support for collective control of employment is carried to appreciable lengths.

Further steps in the direction of legal backing for collective bargaining and collective agreements inevitably suggest themselves. The following may be mentioned: imposition of a duty on the part of labor unions to negotiate before precipitating strikes; creation of an industrial "court" with exclusive jurisdiction of labor disputes, including actions

⁹⁹ These benefits include both security for the worker and greater certainty in regard to labor costs on the part of the employer.

¹⁰⁰ Flexibility in employment standards can be secured within the framework of a binding collective agreement by providing for frequent adjustments through the use of prescribed machinery. The position of the organizations forming the agreement, of course, remains unchanged.

¹⁰¹ Non-statutory sanctions are not necessarily withdrawn entirely. In so far as statutes do not eliminate the injunction as a remedy in labor disputes, the granting of injunctive relief in particular controversies might turn upon the relative good faith of the parties in observing a collective agreement, whether or not the agreement was a contract.

¹⁰² The willingness of the N. L. R. B., in applying § 7(a), to tolerate the abandonment of collective agreements goes beyond the suggestion here noted. See note 33, *supra*. Despite the Board's position in this regard, its attitude as an arbitrating agency, as has been pointed out above, is not necessarily affected.

to enforce collective agreements, subject to a minimum of judicial review; extension of the classes of cases in which a complaint by one party would invoke official proceedings such as arbitration; and statutory control of the methods of labor organizations charged with the duty of establishing employment standards in conjunction with similarly controlled organizations of employers. Several of these steps involve an increased reliance upon collective agreements and a simultaneous strengthening of governmental control. Each step in such a progression calls for discussion upon its merits. There is no inevitability about any of them. Opposition to the entire tendency in regard to collective bargaining reflected in the N. I. R. A. however, must be predicated either upon a desire to restore small-scale economic production, upon a policy of furthering the exclusive control of employment by employers or by labor, or upon a simple disbelief in the ability of the democratic state to maintain a reasonable balance between contending economic interests under capitalism. The alternatives, if the latter view be taken, are anarchy, public ownership of producing enterprises, and political dictatorship over economic activity.

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