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UNION SECURITY: A STUDY OF THE EMERGENCE OF LAW*

LOUIS L. JAFFE †

I

The struggle of organized labor for the union shop has challenged government with baffling problems of policy and law. The solution emerging in this time of national crisis warrants study; it will strongly influence the permanent structure of industrial government; and the process of evolving the solution is a drama of the birth of law incomparable in its compression, its power, its pulsating actuality, and its ultimate significance. My colleague, Professor Lenhoff, trained in the continental tradition and learned alike in European and American labor law, when I told him of my study, commented genially and without any intention to disparage, "Ah, but that's not law; it's politics".¹ Yet in the recent *Little Steel* case in which the National War Labor Board granted the labor unions "union maintenance", the practical and shrewd employer member, Mr. Roger Lapham, dissenting, said,

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* Professor William G. Rice, Jr., and the author of this article have prepared a report on the work of the National Defense Mediation Board which is now available in mimeograph and will soon be issued by the Bureau of Labor Statistics. It will be referred to as REPORT NDMB. The report as printed will have appended the text of all "Recommendations" and Opinions, as well as histories of all cases. These are not appended to the report as mimeographed. These opinions are at present available only in mimeograph at the offices of the present War Labor Board. The same is true of the "Directive Orders" and Opinions, Panel Reports, etc., of the War Labor Board. The cases will be referred to by name and docket number, *e. g.*, for Mediation Board cases, MB No. —; for the War Labor Board, WLB No. —. Where decisions have been summarized in the Labor Relations Reporter, a citation to that service has been included.

† A. B., 1925, Johns Hopkins University; LL. B., 1928, S. J. D., 1932, Harvard University; Member of the California bar; Professor of Law, University of Buffalo, School of Law; author of *Investive and Investigation in Administrative Law* (1939) 52 HARV. L. REV. 1201, *The Individual Right to Initiate Administrative Process* (1940) 25 IOWA L. REV. 485, and other articles in various legal periodicals.

1. Professor Powell had a similar experience with Professor Redlich, similarly a former professor of the University of Vienna. MY PHILOSOPHY OF LAW (1941) 278.

"Continued action of this sort by an agency of the government has the effect of law, albeit not on the statute books".

Llewellyn and Hoebel have shown us recently in their *The Cheyenne Way* the process whereby in a primitive, tightly integrated society the patterns of law emerge out of the totality of social behavior, born of the exigency of the moment and through the moment carrying forward the play of force upon force; a unity moving glacially through an infinite succession of syntheses. It is this process heightened by the freshness and excitement of contemporaneity which is at work before our eyes. Crisis and crushing need are telescoping the process, crowding all its sprawling elements into high relief so that it comes to us with the deceptive clarity of a laboratory demonstration.

The task of solving the problem of union status has fallen principally upon boards set up by the President under Emergency and War Powers; in the anxious, vacillating days before Pearl Harbor, upon the National Defense Mediation Board; and now, in the war, upon the National War Labor Board. It is not easy to locate or define the jurisdiction of these agencies in the formal legal-constitutional sense. On September 8, 1939, the President declared the existence of a national emergency which made available statutory powers conditioned on such a declaration, and any further powers which the Constitution might confer on the Executive, though what they might be in the absence of war or rebellion there is little in or out of the books to tell us.² The great spurt of armament production in 1940 stimulated labor to seek a new level of wages and led to the increase in strikes which is a typical incident of rising production. This alarmed those in charge of the defense program. It threatened the schedules. It intensified recrimination between labor and anti-labor forces. The need and urgency of a war program already divided the country into hostile, denunciatory groups; the labor quarrel was an opportunity for mutual charges of obstruction. Into this disheartening struggle for a unified public opinion the President threw a new Executive Order,³ this time setting up a National Defense Mediation Board with authority to mediate labor disputes. The Board was required to handle such disputes as were certified by the Secretary of Labor to be obstructing the production or transportation of equipment or materials essential to national defense and to be beyond adjustment by the conciliators of the Department of Labor. By mediation is meant a process wherein third persons seek to persuade the parties voluntarily to agree. It is

2. See the treatment of this problem in Note (1942) 55 HARV. L. REV. 427, 507-518.

3. EXEC. ORDER 8716, March 19, 1941, 6 FED. REG. 1532 (March 21, 1941); see *Labor in Wartime* (1942) 9 LAW & CONTEMP. PROB. 371 *et seq.*; Note (1942) 40 MICH. L. REV. 1041.

a formal process only in the sense that the mediator is invested with authority to approach the parties in the name of government, and that the parties may, at will, make themselves continuously available for persuasion. It was this process (set up, to be sure, under the most august auspices) which the Executive Order appeared to provide. Subsection 2 (b) authorizing the Board to arrange for arbitration did not carry the scheme any further since arbitration would be no more than an agreement arrived at by mediation. But the bridge from voluntarism to compulsion was subtly foreshadowed in Subsection 2 (d).

"To investigate issues between employers and employees, . . . , conduct hearings, take testimony, make findings of fact, and formulate recommendations for the settlement of any such controversy or dispute; and make public such findings and recommendations whenever in the judgment of the Board the interests of industrial peace so require."

Persons devoted to classification did not know whether to call this mediation or arbitration. It was mediation plus exposure to a public opinion possibly hostile to the recalcitrant who refused to accept the announced recommendations. Even in "pure" mediation rumor might serve to brand a party as obstructive; this did more: it gave the winning side approval of its claim by high authority. On the other hand, it was arbitration minus the pledge to abide the issue. What it meant beyond such dangling definition would have to wait the Board's performance and the public's response.

The Board was organized on the familiar tripartite member basis: public (3), labor (4), employer (4), all appointed by the President. Later there were many alternate members, but in matters brought before the full Board where a roll-call was asked decision was made by the eleven regular members or by alternates only for absent members. In ordinary course, a case was handled by a division or *ad hoc* panel, one member (either regular or alternate) from each class, the labor men being of the federation to which the union in the case belonged (if any).

The first Board died because it was unable to evolve a policy on the union security issue for which it could win acceptance. The Board's professed credo was voluntarism, an appeal to interest and patriotism. Its chairman, William H. Davis, was fond of quoting Plato "that the creation of a cosmos out of chaos is a series of victories of persuasion over force". "To me," he has said recently, "it is a very inescapable fact. I often think that I would like to escape it, but I am firmly convinced that, though you can protect a created situation, perhaps, by force, you cannot create by force." But the words "persuasion" and "force" are capable of many meanings in practice. It is not the least

interesting question in connection with the work of these Boards what the words have meant and to what extent the Platonic dictum is a workable ideal. The question bears crucially upon practice in a democracy beset by hostile forces within and without. But it will be giving away no secret if we anticipate our conclusion that the solutions are being compounded of persuasion *and* force. Whether, to the extent force has entered in, there is no creation suggests further questions of attribution, of measuring, of definition upon which the ordinary layman would not venture. He sees only that such and such a thing is or is not being done, and if it *is*, he concludes that there has been creation. The Platonic dictum is too severe and single to be acceptable to ordinary understanding, to that relaxed observation which goes by the name of common sense; on a superficial view, at least, force seems so often to reach its immediate objective however it may color the character of the achievement and the possibility of perpetuating it. Indeed, Mr. Davis in humorous appreciation of the paradox, frequently says in an aside: "Except for rape". But does not the exception destroy the validity of the proposition as a universal? However conceived, the baby will be very tangible though in the one case it may have to grow up in a less friendly school. It occurs that much of our modern legislation in the very field of labor relations has more than a smattering of rape. The Wagner Act has been at least a "shot gun wedding"; it may never quite outlive its antecedents, but we all entertain hope that once the parties get to know each other the future will move more and more on the desired level of persuasion. I do not wish to be captious concerning a conception which embodies so much of high and matured wisdom, above all for the practice of solving labor difficulty. But we cannot fully understand what has happened unless our analysis faces reality as we are given to grasp it. The dictum recoiled upon the Board itself when the Board forced union maintenance upon the employers in order, as it said, to foster peaceful and stable relations; the employers making the point that such a relation could not be sired by compulsion. Yet Mr. Davis is right to emphasize the primacy of persuasion; he can by intensity of conviction and good-will instill himself and his staff with a sense of community for all those over whom his jurisdiction extends. He can cultivate a reluctance to violate the psychology of cooperation unless all else fails and emergency seems to demand a minimum result. The Board's procedure in its initial approaches was true to the ideal of persuasion,⁴ but open-eyed understanding of the process could hardly put out of view the power to

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4. This procedure is described in detail in the Report on the Board mentioned above.

recommend as one of the circumstances conditioning the mediation process. The parties understood that recommendations unheeded might arouse public anger. Though such pressure is probably no different in kind from other motives for agreement, the Board went further and induced the President to seize the plants of recalcitrants. To enforce obedience by plant seizure is to govern by force ("sanction") in the same sense as the imposition of a fine.

It has been observed, not without a bitter sarcasm, that if the activity of this Board and its successor be indeed sanctioned; it is only against the employer. It might, of course, be said that in the nature of the case there can be no command directed to employees or union; normally there will be no more than failure to grant all or part of a demand. Such a determination is *self-enforcing* as is the refusal of relief to a plaintiff, and the purposes of a *legal system* are as significantly secured in this way as in any other. But the point can be made that a union may be commanded to embody certain terms in an agreement and by implication at least to work (rather than strike) at those terms; indeed, that interpretation is the heart of the matter. The history of law and legislation has shown that not even in war times is it easy to find sanctions against a strike: the larger the strike, the more futile its repression, which is, of course, no more than an illustration of a general social law.⁵ President Wilson (following Churchill's example in England) did, however, threaten workers who struck against a decision of his War Labor Board with a Work or Fight order; *i. e.*, a cancellation of their deferred draft status and of their employability in any war production.⁶ The device was effective and the present War Labor Board has hinted at its use.⁷ In one case before

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5. During the last war the English Munitions of War Acts (1915) made a strike in violation of a compulsory arbitration award punishable at the rate of 5 s. per day, and the Defense of the Realm Act (DORA) made incitement to strike (obstruction of munition manufacture) a very serious crime. Yet, after the passage of the Munitions Act there continued to be as many, and by 1917, more strikes. The government only occasionally prosecuted under the Act, resorting instead to negotiation. In the famous Clyde strike, directed at government military and industrial policy, the government exercising powers under DORA deported nine leaders to distant parts. The strike lasted one week; the leaders were not returned home for fourteen months. In 1917 the Minister of Munitions, Winston Churchill, threatened certain strikers with conscription. "Trade union opinion," says M. B. Hammond, "throughout the country on the merits of the strike was divided and after a few days most of the men returned to work." For an account, see M. B. HAMMOND, *BRITISH LABOR CONDITIONS AND LEGISLATION DURING THE WAR* (Carnegie Endowment 1919) c. IX. It has been observed by W. Jett Lauck of the English experience that no statute making strikes illegal will entirely prevent strikes, though the presence of a penal law may prevent union strikes and serve as a reminder of public opinion. In a large strike only a few may be punished and are then regarded as victims. *BRITISH INDUSTRIAL EXPERIENCE DURING THE WAR*, Senate Doc. No. 114, 65th Cong., 1st Sess. (1917) 1067-8. See Lenhoff, *Traits and Trends of War Labor Law* (1942) 2 LAWYERS GUILD REV. 25, 28.

6. No. 132, Bridgeport case. See REPORT: NATIONAL WAR LABOR BOARD (1922) 25, 36 (Letter of the President to the strikers).

7. General Cable Co. and International Brotherhood of Electrical Workers, WLB No. 247, 10 LAB. REL. REP. 788 (1942).

union shop and union maintenance that the question of formulating a policy was important or controversial. In a number of respects the Mediation Board proceeded upon the basis of well-understood principles, though they may not have been made explicit. One of the principles of the first War Labor Board was the recognition of labor's right to organize and to bargain collectively. Since this principle had been enacted into law, it was, of course, equally a principle of the Mediation Board. The Board accepted as binding the provisions of the NLRA together with the interpretations of these provisions by the NLRB. Furthermore, the Board refused to permit one party to a collective agreement to open up an existing contract during its life unless the other party agreed. The present War Labor Board has generally adhered to that rule,¹⁴ although in the recent *United States Steel Corporation* case¹⁵ it departed from it significantly in order to standardize wage conditions throughout the steel industry; thus the technicalities of contract yield to the inexorable march of uniformity. The principles of the War Labor Board (1917) provided that in fixing wages, hours, and conditions of labor regard should always be had to labor standards, wage scales, and other conditions prevailing in the localities affected, and that minimum rates of pay should be established which would insure the subsistence of the worker and his family in health and reasonable comfort. These are principles which have since then been enacted into law or so thoroughly accepted that inevitably they would be and have been applied by the Mediation and present War Labor Boards.

It was on the issue of union security that the first War Labor Board did formulate and the National Defense Mediation Board is believed not to have formulated a principle or to have acknowledged earlier decisions as precedent. In the case of the first War Labor Board a conference of employer and employee representatives had

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14. As in *Postal Telegraph Cable Co.*, and *Midland Steel Products Co.* and *United Automobile Workers*, WLB No. 85, 10 LAB. REL. REP. 505 (1942), in both of which was stressed the great value to labor of maintaining the integrity of collective bargaining agreements.

15. WLB No. 364, 10 LAB. REL. REP. 888 (1942). The collective bargaining agreement called for a twenty-day notice to reopen its terms. The notice was not given until July 21, 1942. The raise was nevertheless made retroactive to February 15, 1942. The Board based its decision on the proposition that wages including retroactivity of changes had been uniform in the steel industry for twenty years; that its *Little Steel* award was retroactive to dates ranging from February 6-10, and a radically different date here would produce inequality entirely contrary to the expectation of everyone; failure to give notice was due simply to the union's feeling that there was no need of it, since the *Little Steel* award would be determinative. The decision is an interesting instance of the general drive of our system toward larger uniformities independent of contract. But more recently in a case involving a subsidiary of the Steel Corporation, the Board held that the contract was too clear to be ignored and more significantly that its wages did not follow Steel and there was no expectation to that effect. *Tenn. Coal, Iron and Ry. Co.*, WLB No. 465, 11 LAB. REL. REP. 248 (1942). See, further, note 37, *infra*, and accompanying text.

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agreed upon a set of principles prior to the establishment of the Board.¹⁶ Among these principles was one providing that strikes or lockouts should not be resorted to for turning an open into a closed shop, or the reverse; that the union shop if established should continue; and that employer refusal to grant a closed shop was not to be deemed a grievance. It was understood that this commitment was given in return for the principle which had not until then been accepted that employers should not in any way interfere with the right of the workers to organize and to bargain collectively through chosen representatives. No such agreement preceded the formation of the Mediation Board. It was at first the opinion, at least of the majority of the members, that the Board itself, being primarily a mediatory board, could not consistently adopt a set policy upon a matter concerning which there was basic disagreement between employers and employees. To some extent this attitude was a true reflection of the mediatory nature of the Board. It was emphasized by the fact that all recommendations of the Board with a few exceptions were made by panels. This permitted the equities of each case and the talents of particular Board members to play a greater part in the decision than if it were controlled by generalities. It made it possible to secure agreements based upon concessions which would not have been forthcoming if a set policy had blocked the way. The mediatory nature, however, of the Board's process did not fully explain the refusal to adopt an explicit principle for union security claims since the Board was also semi-arbitral in character. The tripartite composition of the Board explains much. It had not only to solve the controversy before it, but to do it without disaffecting the Board members. The difficulty arose when it was called upon to take positions which seriously offended one or the other group and which could not be fortified by a reference to well-established governmental policy.

But talk of precedent, it will be said, has no place here. Precedent is for justiciable controversies of which these are none. Precedent implies the power and the duty to govern by rule. There must exist a matter as to which, given the state of morals, or of public opinion, or the balance of social forces, it is possible to state a rule. If the sum to which these forces add up is fairly clear, then custom or constitution endows the courts with the precedent function; if not so clear, the arithmetic will need the legislature whose function after all is precedent-making in even a more absolute sense. The legislature may not have a duty to follow, but it does have the power to make precedent; and for the end in view the difference is simply as to when the precedent

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16. REPORT NWLB (1921) 32. For the work of the Board, see Gregg, *The National War Labor Board* (1919) 33 HARV. L. REV. 39.

is first conceived to have been in operation. It is hardly to be denied that the Mediation Board was neither quite a court nor again a legislature; and labor controversies were somewhere just beyond the pale of the justiciable. It was not inherently impossible to formulate rules for the solution of labor controversies: regarding the right to bargain collectively, that had been done; regarding hours, wages, and union security, it had not been done at that time. As to some of these items the economic system demanded flexibility, and as to others no force had been powerful enough to write the rule it wished.

II

The National Defense Mediation Board foundered on the issue of "union security." This phrase of somewhat recent coinage is used loosely to describe a variety of formal devices which strengthen or secure the hold of a specific union over its membership or potential membership. Organized labor has traditionally sought the closed shop under which the employer could hire only persons already union members. Criticism of the monopoly implications of the device led to a modified form: the union shop under which the employer is free to employ whom he wishes but the employee must within a specified time become a member of the union. Early in its history the Board recommended a "closed shop". Thereafter it never recommended it again. It fell back instead on a more recent innovation whereby employees who were members of the union at a given time must remain members for a given period: "union maintenance". This was granted in some cases, refused in others. The United Mine Workers then asked for the union shop. It was refused; the CIO members withdrew, and the Board collapsed. Let us examine this history in more detail.

In the relatively early *Bethlehem Steel Company Shipbuilding Division* case,¹⁷ the Board "recommended" the closed shop. In this case, upon the insistence of the government, all of the Pacific coast shipbuilders agreed to uniform wage standards and abolition of strikes. Practically all except Bethlehem, which employed 20% of the workers, agreed to the closed shop as well. The closed shop thus served in a degree as a *quid pro quo* for the forced agreement on wages and thus appeared to implement the government's policy of a uniform wage. Probably even more important, at least in our context, was the fact that the Board still looked upon its function as exclusively mediatory. It had reason to believe that the employer would accept a public recommendation for a closed shop. This enabled it to state in all sincerity that it was seeking simply for a just and workable solution in the case at hand. It would not, could not, be a precedent since it was not

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17. MB No. 37, 8 LAB. REL. REP. 614 (1941).

adjudication, not the application of a rule to the facts, but negotiation of a *modus vivendi* for this unique situation. At least the labor members so insisted, and were in this joined by the public members in answer to argument by the employer members: that this was a precedent for government imposition of the union shop, and that a mediatory board without law-making authority, without Congressional declaration either general or specific should not establish a policy which altered so fundamentally the structure of industrial organization.

For a time after *Bethlehem* the Board was able to avoid the heart of the issue. In the spirit of the Chairman it struggled valiantly with the minds and souls of the parties to bring them into mutual accommodation. It had some success in settling a number of controversies with the novel formula of union maintenance. This formula seemed a brilliantly inspired device to reconcile an insoluble conflict, a positive preservative of the *status quo*. On the one hand, it did not force upon the employer the closed shop; it left him free to hire whom he chose, since a new employee need neither be in nor join the union if for any reason he did not wish to do so. On the other hand, by requiring those employees who were members of the union to remain members it protected the union from disintegration. It must be kept in mind that the union was being asked to forego its ordinary weapon of protection: the strike. This device then appealed as in essence a kind of well-balanced bargain, as a regulation which froze rather than altered the balance of power. Chairman Davis might well argue that if it were forced upon an employer it did no more than "protect a created situation". Yet, of course, it did restrict the employer's power to retain a worker; a power which might previously have been exercised for the valid reason of retaining an efficient worker or the discredited and not avowable reason of favoring those who would break with the union. It seemed then, for a time, that the Board might solve its great problem by the union maintenance formula.

Even so the Board proceeded cautiously feeling its way from case to case. Where union maintenance was recommended, special reasons were assigned. The protest of the employer members that a policy was being determined was met always with the reply: this Board neither knows nor makes precedent; it suggests only to the parties a fair basis of agreement. The employer members insisted that an appeal to specific considerations, at least where embodied in written opinions, inevitably built up a just expectation of future recommendation. In the meantime the panels were at their work. In the *North American Aviation* case,¹⁸ the officers of the national union had not objected to

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18. MB No. 36, 8 LAB. REL. REP. 661 (1941).

the use of troops to break the strike. The indirect effect had been greatly to weaken the local union. There was an urgent need for reviving the union in order to assure stable labor relations, and the quarrel between local and national leadership made it doubtful whether the national leadership could restore it without the assistance of the maintenance of membership clause. In the *Western Cartridge* case,¹⁹ it was clear to the panel that the employer had persistently fought unionization even during the course of proceedings before the NDMB so that the union, deprived of a strike weapon, would have been disabled from protecting itself against the employer's activities. Finally in the *Federal Shipbuilding* case,²⁰ the union by agreeing to the Atlantic Coast Zone Standards of wages, hours, and working conditions had in the interest of stabilization limited its importance to workers and given up its right to strike at the very time that, due to the rapid expansion of the shipbuilding industry, a great number of new workers were being introduced without trade-union experience. It was thought that in such a situation a maintenance of membership clause was necessary to enable the union to protect its organization.

It was obvious to the lawyer, wise in the common law, and to the student of society that, however flexible, however capable of deflection, here was emerging a pattern of reasoned judgment bearing significant formal and functional resemblances to the law. A controversy arose, a great organ of government brought the parties before it, facts were roughly got together (the basic facts were usually obvious), a case stated, arguments heard, and judgment given. The judgment was attributed to the facts—which implied that whether articulate or not, there was a premise or a group of premises which made the facts relevant to the conclusion. The premises as we can grasp them are obviously of the sort which seek to reconcile opposing forces, to fashion for these forces a coherent plan along which they may move harmoniously together without either sacrificing too much of what is felt essential to its form and function. This type of regulation, both because of its character and its source, will be felt as close to if not completely law. There might still remain a question whether it will prevail, whether it will be accepted without demanding a test of the jurisdiction purported to be exercised, and of its ultimate sanction. If it prevailed without such a test, many would be inclined to say it was something less or quite distinct from law, though it might parade in the garments of the law and do the service of the law; even if it prevailed after a test, the vagueness of the powers exercised, the lack of a precise delegation of jurisdiction plus the still exceedingly flexible ("polit-

19. MB No. 44, 8 LAB. REL. REP. 779 (1941).

20. MB No. 46, 8 LAB. REL. REP. 820 (1941).

ical", it would be said) character of the criteria might still leave the fastidious categorian unconvinced of its specifically "legal" character. If it did not prevail at all or only here and there against the more vulnerable (those who depended on government contracts) it could hardly muster as regulation and would not yet have reached law's estate.

The first test came when the Federal Shipbuilding Corporation, a subsidiary of the United States Steel Corporation, refused to accept the union maintenance recommendation. The Board was forced to consider more objectively and precisely the nature of its activity. From the shadowy and fruitful realm of broker plenipotentiary, must it emerge into the clear, sharp light of lawgiver? The employer members sought to impale the insistent employee members and the anxious public members upon the horns of doctrinal dilemma. If the Board appealed to force, then unless it was prepared to exercise power on the basis of sheer whim it must evolve criteria; it must set standards of relevance; in short, it must make law. But the hammering out of major policies which impinge on otherwise established rights, the making of law, is for Congress.^{20a} The reply never quite met these arguments head on. The appeal was simply to realities which pressed upon and oppressed the public members. Production must go on; the unions must be given something if they were not to strike, or friction were not to reduce productivity. The Board or eventually the President might, of course, have let the issue mature into violence and be carried before Congress, and so have accepted the major premise of Congress as the law-maker. But it appeared that the Congressional forces or, more profoundly, the forces which they represented were at an impasse: a sufficiently powerful group was unwilling to yield to the unions, yet afraid openly to oppose them. If the formal law-making organs cannot or will not function in crises, what are the alternatives? There is admission of defeat or there is finally martial law. This sterile solution might indeed be preferred by those who stood for the least possible change in the structure of industrial relations: better temporary substitution of emergency power (it would be secretly felt) than a declaration purporting to attribute obligations not previously recognized. Is Congress, then, the only law-maker? The courts have been at their cryptic job of legislation this many a year; of course, it will be said there inheres in them that mystical essence, jurisdiction. But did not the President have an available jurisdiction? Legal research,²¹ it is true, has been unable to establish any clear statutory authority for com-

20a. See the recent advertisement of Montgomery Ward protesting the WLB's union maintenance order. *N. Y. Times*, Nov. 18, 1942, p. 17.

21. Note (1942) 55 *HARV. L. REV.* 427, 511-518.

mandeering these plants at least in the "emergency" period before December 7. Section 9 of the Selective Service Act²² did authorize it in case of a "refusal" or "wilful failure" to manufacture goods for which there was a "compulsory order", but it is not obvious that a refusal to put in force certain employment terms is a "refusal" or "wilful failure" to manufacture, unless it be said that the likelihood of a strike makes it such. Specific legislation to cover the situation was rejected by Congress. The Executive orders taking over the plants of North American, Federal Shipbuilding and Air Associates²³ refer simply to powers "vested in me by the constitution and laws of the United States, as President of the United States and Commander-in-Chief of the Army and Navy". The power might be found in the power of the Commander-in-Chief to requisition material needed for the army, though the argument is strained. But given Congressional silence and a wide-felt sense of public urgency, the power seems, if not to rest, at least to receive pragmatic verification in its exercise and the consequent public acquiescence. Such power, it may be hazarded, might contain the magic seed from which "law" grows. It will be objected again that the bare power is to take over plants, not declare law. Yet, is he who exercises power to be condemned because he explains the reasons for his actions, because he seeks therein to realize, to embody his conception of what is right? Let it not be thought there was so much high talk as this. The Board simply asked the President to take over the plant of the Federal Shipbuilding Corporation. The end, however, was not yet. A sanction paradoxically is no assurance of the effectiveness of law. If too many employers were recalcitrant, the taking over of their plants would not be workable. If the law-making energies are too much absorbed in enforcement, the whole effort is likely to be abortive. It is another way of saying that the proposed rule has got too far beyond the complex of power and custom upon which law must rest.

We cannot say what would have evolved had not the *Captive Mines* case come first to cut the ground from under the Board, and then by a startling reversal Pearl Harbor to set it upon higher ground. The aftermath of the *Federal Shipbuilding* case itself was humiliating fruit for the well-intentioned Board. The Navy was put in charge. When union spokesmen demanded that the Navy agree to put the maintenance provision into practice, Chairman Davis said in the presence of the Secretary of the Navy that questions of enforcement would be referred to the Board. Some union complaints against defaulting members were referred to Chairman Davis, but what he told the Navy to do was

22. 54 STAT. 892 (1940), 50 U. S. C. A. app. § 309 (Supp. 1940).

23. EXEC. ORDER 8773, 6 FED. REG. 2777 (1941); EXEC. ORDER 8868, 6 FED. REG. 4349 (1941); EXEC. ORDER 8928, 6 FED. REG. 5559 (1941).

never revealed. Meantime, the Navy kept its tongue in its cheek. Thus the provision for union maintenance was not enforced, and in the end the plant was returned to the Corporation free of commitment though not of the Nemesis which was finally to prove irresistible. In the meanwhile, the Board made no further recommendations for union maintenance except in one case in which it was mistakenly led to believe that it was acceptable to the employer.

The *Captive Mines* case²⁴ was the check-mate of the *Federal Shipbuilding* case and brought the game to full stop. Here it was the union power which destroyed the whole tenuous, elusive frame of reference. John L. Lewis had recently secured union shop agreements with nearly all the commercial operators in the bituminous coal industry. The steel industry guarded its captive mines from this final capitulation which the steel industry as a whole had spent decades in resisting; it feared the closed shop in its mines, as an opening wedge. The union already had large majorities in most of the Captive Mines, though not in all.²⁵ The position of the union was: we are entitled as of right to the union shop and if we are not given it we will strike. In the face of this there could hardly be a pretense of mediation and the question of the nature of the Board came more acutely into issue than ever before. The Panel had recommended arbitration and the union had said "no". A strike took place despite the pleas of the President,²⁶ and after maneuvers behind the scene the President announced that the parties had agreed to submit the case to the full Board for its recommendations. There was no agreement to abide by the recommendation. The Board met in an atmosphere tense with the silent fury of giants at issue. Here

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24. Bituminous Coal Operators and United Mine Workers, MB No. 20B, 9 LAB. REL. REP. 287 (1941).

25. *Ibid.* Approximately 90% of bituminous was mined in union shops; 95% of the miners were members of the United Mine Workers. In a few cases UMW membership in a mine was less than 50%; and in a few, miners were members of AFL unions or unaffiliated unions.

Bituminous Coal Operators, Case No. 20A, involved a mine in Kentucky which had a contract with the Progressive Mine Workers, who were twice successful in an election. The United Mine Workers protested the election, and the conduct of the NLRB officials. When one-half the workers reported at the mines they were greeted with about 1,000 shots from the surrounding hills. One person was killed and 28 houses destroyed. The NDMB found itself incapable of bringing peace to this mine. The eventual "arbitration" awarding the UMW the union shop must have settled this controversy *inter alia*.

26. John L. Lewis replied to the President: "If you would use the power of the state to restrain me, as an agent of labor, then, sir, I submit that you should use that same power to restrain my adversary in this issue, who is an agent of capital. My adversary is a rich man named Morgan, who lives in New York. . . . In the interest of settlement, I would be glad, Mr. President, if you concur, to meet with you and my adversary, Mr. J. P. Morgan, for the forthright discussion of the equities of this problem."

To this the President replied in part: "Whatever may be the issues between you and Mr. Taylor or you and Mr. Morgan, the larger question of adequate fuel supply is of greater interest and import to the national welfare. For the third time your Government, through me, asks you and the officers of the United Mine Workers to authorize an immediate resumption of mining."

it was thrown into the arena hardly knowing whether it was umpire or victim, naked of any equipment viable for the job; already forewarned that if it decided against the union, it would probably decide nothing; and if for the union, that its decision would be put down to coercion. The controversy had thus burst the bounds of the justiciable, at least in terms of the Board's resources. Doubtful political judgment threw upon the Board a load so likely to jam its machinery; a judgment symptomatic of a dangerous impasse and failure in the law-making organs.

The unions and the labor members in earlier cases had always insisted that a recommendation for union security would create no precedent. Here they whirled sharply around and insisted that the case was governed by the *Bethlehem Shipbuilding* case; but they grounded their claims of right more deeply in the situation itself: in their great majorities in the mines, in the union shop pattern in all except the Captive Mines, and in their asserted power by strike to make the pattern universal. It was a powerful case, the facts overwhelmingly impressive, the spokesman at that time still the foremost symbol of labor's force and aspiration. It was just this overwhelming force which offended and alarmed the Board. If a man is appointed ostensibly to judge and to exercise choice and then told he has no alternative, he is apt to avoid the ignoble imputation by saying "no"; and he may believe, not without reason, that he is answering for more than himself. There was alarm and anger at what seemed a defiance of the whole society. Was the *Bethlehem* case distinguishable? Of course every case is, but were the distinctions significant? In the *Bethlehem* case the government itself had pleaded for and finally forced on the union uniform wage terms; the closed shop—agreed to by all employers except Bethlehem—might be looked upon as a *quid pro quo*. Some of the Board members were disturbed at the monopoly implications in the later case. Whereas in the *Bethlehem* case the closed shop would not exclude non-union members from many other building trades jobs, union shop in the coal mines would cover practically all the jobs available to the men in the question. This issue as to whether requiring union membership by governmental edict violated still valid tradition was to continue to be a source of trouble. But there is a point, I think, which lies deeper than the likenesses or differences of the two cases. The *Bethlehem* case was decided by a Board still mediation-minded; the labor members were correct, I believe, in arguing at that time that it would not be a precedent. Since it was known that Bethlehem would accept the recommendation, the case remained psychologically within the frame of mediation. With the *Federal Shipbuilding* case, the "Age of Inno-

cence" was over. Having used force there, the Board was committed to force. Using force, it was driven by the notions which prevail in our polity to justify its action as deriving from a sufficient principle; not, of course, one which was merely defensible in the abstract, but one which took into account all of the factors relevant in making law, including its own obscure authority. The principle of the *Federal Shipbuilding* case, if it had one, was that if a union in need of the protection of the strike weapon gave up that weapon, protection for it should be devised by the Board. The Mine Workers refused union maintenance as useless and unnecessary; it needed no protection; it demanded rights. In their dissenting opinion Philip Murray and Thomas Kennedy, both officers of the Mine Workers, stated that the case had not been considered on its merits and meant that despite every circumstance "the traditional open-shop policy of the anti-labor employers must prevail . . . The precedent had already been established in the *Bethlehem Steel Company* case. Without reason, without logic, without argument the claim of the United Mine Workers of America is denied." Although they believed in mediation, they said they found it impossible any longer to place confidence in the Board. The next day they, and shortly thereafter all other CIO members, resigned.

The public reaction to the decision rejecting the claim for a union shop revealed the profound difficulty of fixing the frame of the Board's action, of ascertaining the criteria by which the decision was to be judged. The most troubling argument against the Board's action was that it had failed to give the union what it had the power to get. This might mean that the Board had committed a politic blunder, since the union would in any case *take* the union shop and it would be better politics to appear to give it. This was in fact more or less what finally happened. The President was unwilling to risk a strike and the taking over of the mines by the military. He proposed arbitration to John L. Lewis who refused, and then, after the names of the arbitrators were revealed to him, accepted. But the argument may rest on more than the narrow ledge of momentary expediency; it may express the general philosophy that the law represents the underlying equation of economic force; that if the display of force is to be foregone, its probable gains should in justice not be denied. But this assumption is undemonstrable and unworkable. We are sure, of course, that force works in and through government and law, but the only test of ultimate force would be to withdraw government and law and let him win who can. Short of that there is no instrument which measures power, no slide-rule which translates a given force into a given law. It was just this appeal to arms which the Board was to foreclose and of necessity

must foreclose by some conception transcending the unknowable dictate of force.

A government which as a matter of principle laid itself open to be played upon by the assumed dominant force of the moment would have only fear for its mentor and chaos for its destiny. Force, of course, always lies behind, and if its claims are too completely ignored, it will redress the balance by an appeal to arms; but government and law, particularly as embodied in democracy, seek constantly for ideal conceptions which moderate forces toward a mean. I think the Board acted constructively in maintaining and building up in face of overwhelming power the principle of its union maintenance recommendations. If a more narrow expediency must for the moment prevail, as it often must, there were others better suited who could act as it dictated. It is in one sense a question of the division of function, for I do not suggest that in such situations notions of expediency are inappropriate. Ultimately all government including judiciary rests on shorter or longer views of expediency; the longer view is aptly called principle as against the shorter. In all government functions there are those great deep pockets of discretion into which expediency may reach its hand, and success depends on the accuracy with which the organization gauges its function in terms of sensing, creating, and acting upon appropriate long and short term considerations. Though certain types of activity presumptively fall within one or the other class, there are no rules for intermediate situations as our story will show. Mediation may or may not contain the germ of adjudication. Much depends on the time, the occasion and the mediator. At the same moment the President's Emergency Board under the Railway Labor Act was striving to recommend to the railway industry an acceptable wage settlement. At its first try it failed to satisfy the unions which threatened to strike. It reconvened at the President's insistence and found a more acceptable answer. It was apparently deeply embarrassed. It explained that its first decision was arrived at by processes of reason conformable to its "quasi-judicial", "fact-finding" function.²⁷ It would be improper

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27. The Board in its report stated that it had originally acted as a "quasi-judicial body" called on to "weigh the pleadings, the evidence, and the arguments presented by the parties, and on the basis of the record to make recommendations that not only would be fair as between the parties, but would also serve to broaden public interest. . . . An emergency body, when assuming a quasi-judicial role rather than a role as a mediator, should not permit such considerations of expediency to dictate a recommendation which it would not feel warranted in making purely on the merits of the case.

"Public officers, however, when called upon by parties to help them settle a controversy by the process of mediation, cannot ignore the acceptability of any proposed settlement to the particular party which has the greatest economic power to enforce its demands in a labor dispute." The Board believed that if there had been time a new board should have been appointed, so different is the role of fact-finding and a quasi-judicial tribunal from that of mediator. SUPPLEMENTARY REPORT TO THE PRESIDENT BY THE EMERGENCY BOARD (1941) 7-9.

for it to have allowed "expediency" to change a decision which was otherwise according to its view of the merits. Its second action was as mediator, it explained: here the ultimate economic force of the parties might be considered; the Board concluded that it would have been better, however, for another body to have mediated, as was finally done in the *Captive Mines* case. One may question whether there were any long term criteria, principles, or what you will which should have led the Emergency Board to insulate a wage dispute from immediate views of expediency. Of the merits of that controversy I do not feel competent to judge. The Board thought that there were at stake long term considerations of the industry wage structure. Similar motives moved the Mediation Board in the *Captive Mines* case. The Board, as the sequel will show, evolved a workable principle for the time ahead.

III

The coming of war made industrial peace more urgent but easier to win. The President called together a conference of industrial and labor leaders under the chairmanship of William H. Davis. They agreed to the tri-partite principle, though there were voices which said that it was no longer a time for accommodation and that the new agency should be entirely of public members. However the conferees could not agree on the union security problem. The employer members said it should not be within the new Board's jurisdiction. The President broke the impasse by saying he was glad to note that there was agreement on a Board with jurisdiction to settle *all* labor disputes, and sent the conferees home. The employer members announced that they would accept the President's "direction". A conference spokesman said that the employer members had indicated beforehand that they would, if necessary, accept whatever the President directed.²⁸ This so-called "agreement" raises again, in connection with the very germ of the whole arrangement, the issue between persuasion and force, and reveals once more how difficult it is to analyze the situation in those terms.²⁹ It is enough, I believe, that some method of settling disputes was imperative and that no other method was offered. The Board unanimously asserted its jurisdiction; but it is rather unfair and somewhat ironical to claim for the jurisdiction whatever merit consent may

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28. N. Y. Times, Dec. 24, 1941, p. 1, col. 1.

29. Long ago Aristotle was troubled by the question of when action was involuntary. He arrived generally at the conclusion that any willed exercise of the faculties was voluntary (at least in the absence of ignorance of the facts) for purposes of ethics, since no action was taken entirely without causing facts (motive). See *NICHOMACHEAN ETHICS* BOOK III. Of course such a statement is perhaps evasion of our problem, since it might be thought merely to restate it in terms of different types of motives, *e. g.*, to avoid governmental penalty, to be thought a nice man, etc.

be thought to bestow. Indeed, I would say that part of the significance of the method is that in some measure it has proceeded irrespective of consent; this feature is notable among others which work together to give to its results their specific character.

The formal procedure of the War Labor Board is similar to that of the Mediation Board,³⁰ yet certain aspects reveal a significant difference. Thus though panels still hear and make recommendations, the decision is made in every case by the full board. This emphasizes the adjudicatory as opposed to the mediatory factor in the present procedure. It increases the likelihood of working up a basically uniform if still flexible policy. Occasionally the litigants and the members seek rhetorical advantage by characterizing the Board's activity as a continuation of the collective bargaining process. In *Little Steel*, the Board, asserting its jurisdiction over all questions of wages and union security, said:

"In wartime, there is no basis for questioning the power of the President to order what amounts to compulsory arbitration for the settlement of any labor dispute . . . which threatens the war effort. The President, having entrusted this duty to the National War Labor Board, it follows that those who challenge a decision of the Board, challenge the war powers of the President."³¹

It would be a gross mistake to suppose that the Board no longer seeks to persuade the parties to come to an agreement, or to overlook the fundamental qualification that the Board is a tripartite organization so that the process of persuasion must be carried on within the Board as well. But it is now clear that beyond the point where persuasion fails to convince the parties or a minority of the Board an enforceable order will issue.

With this secure sense of the plenitude of its power, how has the Board handled the problem of union security? It will be recalled that the Mediation Board groped its way toward the intermediate position of the union maintenance formula and was then crushed between the antagonists. Two of the four public members came over to the new Board. We are already familiar with the philosophy of Chairman Davis, with his inexhaustible drive to find an acceptable *via media*. Frank P. Graham, President of the University of North Carolina, is a democrat, a modest and earnest man, and a practical philosopher of the mean. To these two public members were added Wayne Morse,

30. For a description of the procedure see Poole, *The National War Labor Board* (1942) 28 A. B. A. J. 395, 466.

31. *Bethlehem Steel Corp. et al. and United Steel Workers of America*, WLB Nos. 30, 31, 34, 35, 10 LAB. REL. REP. 675, 680 (1942).

trained in the habits of mind of a law school professor, and George Taylor, for many years impartial arbitrator of the collective agreement in the silk hosiery industry. These were all men favorable to the claims of Labor for an increased stake, an expanded vote in the system, yet inclined toward accommodation and mediation. I stress the character of these men; however much we are abstractly or propagandistically committed to a notion of the inevitability of mass forces, our moral apprehension still fastens on the individual as a responsible and valuable factor in social construction. Lecky well states this feeling: "A healthy civilization implies a double action—the action of great bodies of men moving with the broad stream of their age, and eventually governing their leaders; and the action of men of genius or heroism upon the masses, raising them to a higher level, supplying them with nobler motives or more comprehensive principles, and modifying, though not altogether directing, the general current."³² The men of the Mediation Board had wrestled with souls by day and by night to bring employer and worker together under the sign of union maintenance. Broadly speaking, it was this solution which now prevailed, sanctioned by the increase in presidential power and in the public apprehension of emergency. Some solution there must be and this solution, being in the field, won in part by default and in part by its brilliant reconciliation of opposed forces and principles.

The War Labor Board has never yet granted the closed or union shop to a union which had not already previously secured it. And though it has stated that it has no absolute rule against it,³³ it seems for all practical purposes to have rejected it.³⁴ In a recent case^{34a} the company was ordered to continue the closed shop provision in the just expired contract, lest change in the *status quo* induce restlessness which would interfere with production. The President, commenting on the *Captive Mine* case, stated that government would never compel any one to join a union, and went so far as to suggest that government coercion

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32. 2 THE RISE AND INFLUENCE OF RATIONALISM IN EUROPE (1897) 372. Professor Llewellyn in his comprehensive outlining of the forces that go into law-making, *The Normative, the Legal, and the Law Jobs: The Problem of Juristic Method* (1940) 49 YALE L. J. 1355, 1389, expresses the same conviction: ". . . I grow as clear that some individuals in key-positions and at key-moments have tremendous shaping power as I do that mass-reactions of the 'growth'-sort may have their own lines of semi-irresistibility. . . ." Neither the "Great Man Theory" nor the "Volkgeist" is exclusive; the extent of stress at any one moment depends on the interest and purpose of the observer.

33. In *Caterpillar Tractor Co. and Farm Equipment Workers*, WLB No. 63, 10 LAB. REL. REP. 642 (1942), Dean Morse in his concurring opinion says noncommittally: "The Board in turn has analyzed each case on its merits and to date it has not been satisfied that the evidence presented in any case has justified its directing the establishment of a closed or a union shop."

34. Lloyd Garrison, Panel Member, so states in *United States Rubber Co. and United Rubber Workers of America*, WLB No. 180, 10 LAB. REL. REP. 722 (1942).

34a. 15 *Clay Sewer Pipe Mfrs.*, WLB No. 349, 11 LAB. REL. REP. 404 (1942); *cf.* case cited note 36a, *infra*, and commented on in the text.

would not be compatible with accepted standards of freedom. Whether or not this puts the matter too high, it has seemed clear that employer and even general public resistance is too great to make the national emergency the occasion for so radical a shift in the balance of industrial forces. To this extent there has been acceptance of the employer argument that Congress alone is adequate for such a change in the law.

The now characteristic form of the Board's union maintenance formula appeared in the *Marshall Field* case,³⁵ the first case in which it ordered union maintenance. It contained a form of the so-called "escape clause" which provided that an employee need not maintain union membership unless he personally elected to do so at the time of the beginning of the agreement. This clause was in itself a notable triumph of reconciliation.^{35a} Employer resistance to the union shop and to the lesser union maintenance has always stressed the fact that these devices coerced the individual employee; this employer concern for his employee's freedom of action has excited much ironical comment. Furthermore, it has been observed in reply to the employer argument that an employer who voluntarily enters an agreement for a closed shop similarly limits his employee's freedom. But a negotiated agreement may be the result of the union's superior power; that the employer under such circumstances limited his employee's freedom of action does not necessarily justify government in compelling him to do so.³⁶ In a recent case an employer refused a closed shop to the CIO though he granted it for the previous three years to the AFL. The panel in imposing union maintenance considered the escape clause inappropriate but the Board nevertheless granted it.^{36a} There is here in question the application of governmental force which may consider equities independently of the particular individual need or advantage. The President himself had said that government would require no one to join a union. Narrowly considered it would seem immaterial in terms of some assumed ideal of personal freedom whether the indi-

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35. WLB No. 10, 10 LAB. REL. REP. 109 (1942).

35a. It is interesting that the escape-clause was first adopted upon the suggestion of an employer by NDMB in one of its last cases. *Hammond & Irving*, MB No. 111.

36. Member Graham, however, accepts the argument. He puts it this way in *Carnegie-Illinois Steel Corp. et al. (U. S. Steel Corp.)* and *United Steel Workers*, WLB No. 364, 10 LAB. REL. REP. 888 (1942), in connection with an order for the check-off:

"Those who hold that the freedom of the worker is protected in peace time by a corporation's own agreement to compel its workers to join a closed-shop union and to accept the compulsory binding check-off cannot hold that it is a violation of freedom in wartime for the War Labor Board to ask corporations, on the basis of this record, to accept the less security for the union as provided in the voluntarily accepted maintenance of membership and the voluntarily accepted check-off."

36a. *Pioneer Gen-E-Motor*, WLB No. 220, 11 LAB. REL. REP. 13 (1942); but cf. *15 Clay Sewer Pipe Mfrs.*, WLB No. 349, 11 LAB. REL. REP. 404 (1942), in which a company was ordered to *continue* the closed shop though it may have been with the *same* union.

vidual is coerced by his fellows or by government; indeed many prefer the latter as more disinterested. But the specific facts of the moment might reveal that government force will be a sanction of private force rather than a moderator. The issue of personal freedom, however, involved in union maintenance is comparatively narrow since by hypothesis the employee has already chosen to join the union and has assumed the obligations of solidarity inherent in the relationship. Freedom as a going value is not regarded as inconsistent with the obligation of contract, though concepts drawn from the realm of the practical and at times from the realm of ideals represented by the 13th Amendment have set limits upon the specific enforceability of commitments involving close human relationship. But no one has ever denied that there may be sanction by way of penalty for breach, which in this context would be loss of employment. A marginal contention is that the contract of union association does not pledge the member to fidelity as a condition of being permitted to continue employment. It is true that there are no such words in the bond, but it is an avowed objective of unionism to secure the union shop and it is not strained to regard membership as consent to the union objectives. What then is the theory and justification of the "escape clause"? The answer is that the clause was almost entirely an effort to win over the employer members. "If", said Roger D. Lapham, dissenting in the *Federal Shipbuilding* case, "the contention is correct that members of a union intend to be so bound by virtue of joining a union, what then can be the possible objection to giving each of them an opportunity to express his wishes?" The labor members thought that the objections were considerable. In the *Walker-Turner* case concurring they said:

"Any decision which the Board makes, be it on wages, or grievance machinery, or overtime payments, will be contrary to the wishes of the employer or the union or both. This Board has no qualms about making decisions in regard to any and every condition of employment, except that of union security. There is no justification for any distinction. The primary question in each case must be: what settlement, in view of all the circumstances is most likely to bring about maximum production of war materials in a given plant? Having arrived at a decision dispassionately, we cannot permit ourselves to be deflected by philosophical discourses on the subject of voluntarism."

But the answer to this somewhat cavalier way of putting the matter is that the subject of voluntarism is anterior to arriving at a decision however dispassionate; clearly there is nothing inconsistent with the binding force of a Board decision contrary to the parties' wishes and a regard for what the decision will require of unrepre-

sented parties. Behind the objections of the labor members is the conception of union solidarity and effectiveness; the notion of the mandate given to the leadership to build up the union. The disruptive tendencies of referenda are accentuated where a hostile employer may offer advantages to doubters and opportunists; it is natural and proper for the leadership to stress as the limit of membership control the majority rule concept rather than individual self-determination. The "escape clause" reaffirms an individualistic notion of the collective bargaining agreement which the majority rule of the Wagner Act has done much to dissipate. We have already seen evidence of the tendency toward standard employment terms, toward equality rather than individual choice, though it is preeminently in this matter of membership that the issue still hangs in balance.³⁷ "The record is clear", says Dean Morse in the *International Harvester* case, "that the union maintenance plan proposed by the public members in this decision would be vigorously opposed in peacetimes because in the eyes of labor it would involve unjustifiable governmental encroachment upon internal union affairs." It is for these reasons that the labor members sacrificed something in principle if not in present fact in agreeing to the "escape clause" in order to win the employer members; I say not in present fact because very few employees have availed themselves of the "escape clause". This might be offered as proof of the fairness and acceptability of the maintenance clause as far as the employee is concerned; but it may be offered as well to demonstrate that in this moment, at least, the industrial society can without danger of disintegration offer its members a choice, thus stimulating responsibility in both the members and the leaders. To be sure there is also Member Lapham's explanation that the member "even if he really wants to, will find it difficult to resign from his union. There is an old saying 'You're in the army now'."³⁸ The Board has recognized the possibility of "coercion" of

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37. Cf. VEBLEN, *THE THEORY OF BUSINESS ENTERPRISE* (1904) 335: "The revision of the scheme [of economic life] aimed at by trade-union action runs, not in terms of natural liberty, individual property rights, individual discretion, but in terms of standardized livelihood and mechanical necessity." Professor Lenhoff similarly notes the trend toward standardization in his article, *A Century of American Unionism* (1942) 22 BOSTON U. L. REV. 357, 369, 373, but he is more positive than Veblen in that whereas Veblen was content to "*épater le bourgeoisie*" by announcing this disagreeable fact as inevitable without seeming to take sides, Professor Lenhoff regards the majority rule concept of the Wagner Act as a great and distinctive political achievement. In Europe, he points out, labor was never given a similar power of self-determination, and standardization, if accomplished, was done by executive decree, thus emphasizing the fatal habit of the European executive toward aggrandizement.

Other issues of standardization versus voluntarism versus contract, etc., have been noted at p. 281.

38. *International Harvester Co. and Farm Equipment Workers*, WLB No. NDMB 4, 4-A, 89, 10 LAB. REL. REP. 279 (1942) (carried over from NDMB; decided by WLB).

the employee by the union and has unanimously written into some of the agreements clauses against coercion.^{38a} It may seem surprising that the labor members have without protest allowed these clauses to be formulated, since it has been a point of labor policy to resist legislative formulation of any coercive notion which could be used to qualify the union's legal position. The objection, however, was said to be due not to the principle but to the possible hostility of an enforcing agency which acting on a reference so difficult to define could question many standard union tactics. In so far as the Board itself or its nominee is designated the judge of coercion, its good faith could not be questioned by its own members.

If the "escape clause" went to some lengths in reaffirming the American credo of individualism, it did not for a time accomplish its purpose of winning the employer members to the union maintenance clause. In the *Walker-Turner* case and in the *International Harvester* case, the "escape" was more limited. In the former an arbitrator might permit a resigned member to hold his job on continuing to pay dues; in the *International Harvester* case, the acceptance of the clause was conditioned on majority acceptance but the individual was given no option. In these cases employer hostility and inter-union strife led the Board majority to reject the possible disruptive tendencies of individual choice. But finally in a group of cases led by the *Ryan Aeronautical* case,³⁹ the Board reviving the "escape" in a new form won over two of the four employer members. In the *Marshall Field* form only members who elected were covered; in the present form all are covered except those who withdraw. Member Lapham, concurring, continued to sound a doubting note. He explained his affirmative vote as due to the adoption of the personal "escape clause". Yet he raised again the point that Congress alone was competent to lay down a rule fundamentally altering the labor relation; he maintained that the unions in return for power should be "willing to accept the corresponding responsibility and regulation that goes with it".

These doubts flared once more into dissent. In the *International Harvester* case Public Member Morse, falling naturally and soothingly into the old and no longer persuasive rhetoric, said, "It does not follow that this plan will establish any precedent to be applied in other cases".

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^{38a} The Board has found it necessary recently to warn unions and employers against interfering with the free choice of the employee to resign from the union, either by specific pressure or by a union rule.

³⁹ WLB No. 46, 10 LAB. REL. REP. 537 (1942). The Marshall Field formula of affirmative individual acceptance was again applied in *Dallas Mfg. Co. & Golden Belt Mfg. Co. and Textile Workers' Union*, WLB No. 151, 11 LAB. REL. REP. 68 (1942), on the ground that it was the customary form in the Southern textile industry; it was combined with the check-off.

But as Member Lapham foresaw, in almost every case the Board came to grant the maintenance clause. Here and there the Board upheld panel decisions refusing it because of the newness of the union, lack of need, or lack of employer hostility.⁴⁰ However, in the most important cases the maintenance clause was given.⁴¹ In some of the cases instances of employer hostility to unionism were said to determine the need of the union for maintenance, or if evidence of employer hostility was lacking, it was enough that the employees feared it.⁴² In the *Little Steel* case the situation in that respect was ambiguous. Of the historic hostility of the Industry as a whole there could be no question, but the panel found that at least after certification of the Union in 1941, the four companies (Bethlehem, Republic, Inland, and Youngstown) had negotiated in good faith; union membership ran from 70% to 75%. The panel found as to Inland that since a strike in 1937 which ended without a contract, the company had met regularly with the Union's Grievance Committee and in good faith attempted to adjust and settle all grievances brought to its attention. The panel believed that there was evidence of a policy of opposition by all four companies, but "no new anti-union practices have had their inception during the past two years". The opinion of Member Graham is not afraid to ride the horns of dilemma for a new view. "Not only does the record show that this Union is worthy of security and responsibility, but the history of unionism in the Steel Belt in general and the fears remaining from experiences in Little Steel in particular make necessary and wise more definite provisions for the freedom and security of the union." But the repentance of the companies points not to refusal of the maintenance provision as unnecessary, but rather provides a "solid groundwork for a voluntarily accepted pending maintenance of membership

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40. As in *Bower Roller Bearing Co. and International Union*, WLB No. 12, 10 LAB. REL. REP. 106 (1942), *Remington Rand and United Electrical etc. Workers*, WLB No. 44, 10 LAB. REL. REP. 312, 752 (1942), *Arcade Malleable Iron Co. and Steel Workers Organizing Comm.*, WLB No. NDMB 84, 10 LAB. REL. REP. 379 (1942), and *White Sewing Machine Co. and United Electrical etc. Workers*, 10 LAB. REL. REP. 382 (1942). However, in these cases the panel granted a "voluntary, revocable" check-off.

41. In *International Harvester Co. and Farm Equipment Workers*, WLB No. NDMB 4, 10 LAB. REL. REP. 279 (1942), referendum on maintenance was granted over the contrary recommendation of the majority of the panel, employer members and public member Professor I. L. Sharfman, who noted (a) this was the first contract; (b) CIO had won over AFL by a small vote. Further progress should be secured in the company-union relationship by "the educational process and . . . not . . . be the result of government compulsion." The Board replied, "It is imperative that the War Labor Board design the framework of cooperation . . . in order to minimize the possibilities of further inter-union struggles and in order to stabilize and increase war production in the company's plants."

42. *E. g.*, *Phelps-Dodge Corp. and International Union, et al.*, WLB No. 114, 10 LAB. REL. REP. 600 (1942). Suspicion of the employer and the disruptive presence of inter-union rivalry are the reasons given in the panel report. The Board wrote no opinion.

and check-off as definite assurances of good will and mutual cooperation for all-out production to win the war."

In the *Caterpillar Tractor* case, Public Member Morse angrily scolded Industry Member Lapham for going back on union maintenance after he had called upon the Board for the "escape clause" and won it as the price of his adherence. Member Lapham in turn became very angry at being lectured by Member Morse: "Labor leaders still demand privileges and favors because they have given up the right to strike. This is plain bunk, with a capital 'B'. What citizen has a right to strike in a war for his country's existence?" Lapham's more particular objection was his belief that the Public Members were granting maintenance in practically every case in which it was demanded regardless of the so-constantly iterated statement that the recommendation in one case was not a precedent for any other. This, to be sure, was nothing more than Lapham professed again and again to foresee. Somewhat contradictorily he objected in earlier cases to the Board's singling out employer hostility as a reason for maintenance: it is not up to the Board to judge between good and bad employers, he argued. But the argument was directed to showing that Congress should determine the criteria for granting "privileges", if such there were to be. In the *Caterpillar* case, Lapham pointed to the fact that the Union was young, had never before had a contract, had won by a narrow margin over a competitor and faced an employer with no particular evidence of union hostility. Such a union apparently could not in Lapham's judgment lay claim to special position by reason of its own merit of established responsibility or the company's demerit of attacking the union. But Morse countered with the reply that the case was not unlike the *International Harvester* case (in which Lapham said he would favor the recommendation if it had an "escape clause") and so inevitably fell back on precedent. Furthermore he now emphasized that "though acting in entire good faith, the company has held the Union at a distance and has not dealt with it so as to remove from the minds of its employees any notion that the Company was hostile to the Union and was unwilling to treat with it fully".

In the *Little Steel* case the employer members charged that these various reasons were a subterfuge and that the search was for the formula by which maintenance of membership is to be required rather than for the question of whether union security should be granted in any case. Dean Morse vehemently denied these charges in his concurrence in the *Caterpillar* case. The cases reaching the Board, he said, were all "difficult cases" which had defied settlement, in a large proportion of which there was ill feeling; if union maintenance would not

enhance production, it would not be given. Then, in a warning which may explain Member Lapham's heat, he continued, "It may not be amiss to point out to employers who still seek to keep alive the union security controversy that the American people may grow weary of their tactics".

Member Lapham's charge suggested the following possible formulations: the Board grants the union maintenance not only where the Union needs it to preserve its status, but in certain additional cases for the bald expediency of buying the good will of the demanding union; or the Board grants it in all cases, to appease the unions; or because it favors the principle of unionism. That such expediency enters into the total seems highly likely. In some degree it is this factor which may be implied when the uniqueness of each case is stressed. If our study is taken to show that something approaching a rule of law is evolving, to forget that it is still evolving would be distorting the picture. The powers at the President's disposal, if broad, are vaguely defined, are as much a sphere of influence as a jurisdiction. Presented with a conflict of forces which defy measurement and analysis, the President must somehow produce a result which first of all advances the war effort; gives some expression and not too much offense to the ideas which the conflicting forces represent; and which gives some extra meed of recognition to the objectives of those with whom he is allied and from whom he draws his support. If it were the fact that the Board grants union maintenance in every case (in so far as universal) it would indeed be a rule of law, although it might be dictated by love or fear of the unions.

In the more general vindication of its union maintenance policy, the Board does rely on a philosophy which would come near to making it universal. Certainly it goes beyond the case of employer hostility. This, as Dean Morse says, is the usual case; in some cases the Board, unwilling or unable to make an invidious finding, relies on the union's expressed apprehension. A recent case shows that this is but one type of a more general class. In the *United States Rubber Company* case, the relations between union and employer were friendly, but the re-conversion of the plant reduced pay, temporarily at least, and threatened to hold up the readjustment of schedules for some period. It was feared the men might drop out of the union in disgust. The union through no occasion of its own making was likely to lose strength. Membership maintenance was necessary to its security. This then is the larger principle: that a union should be protected against the loss of its present strength whether from employer hostility, rival unionism, unfavorable employment conditions bringing the union into discredit,

or other cause. In part the principle is based on an idea of what is due to the unions which "have weakened their bargaining power by voluntarily forfeiting the right to strike". It was this reasoning which so disgusted Member Lapham, who argued, that since no one has a right to strike when his country is in danger, no one gives up anything in agreeing not to strike. Though technically a strike would not be in violation of law and so there is in Hohfeldian language still a "privilege" (if not a "right") to strike, there is little doubt that the public today would not regard a strike as morally "right"; it would thus be unfortunate to treat union security as a price owing for the "voluntary forfeiture" of a "right" to strike. Though psychologically this *quid pro quo* factor can never (whatever the crisis) be completely absent in the calculus of rewards and punishments which the law provides to keep the social structure intact, there are reasons for the policy which rest on a higher plane.

The union is the prime organization through which a majority of the workers seek to realize their strength, to express their total personality as it is involved in the industrial process, and to function effectively in the government of industry. Thorstein Veblen long ago indicated that such organization was inevitable. "Those who move in trade unions are", he said, "however crudely and blindly, endeavoring, under the compulsion of the machine process, to construct an institutional scheme on the lines imposed by the new exigencies given by the machine process".⁴³ The public members accept the trade union as Margaret Fuller accepted the universe because, as Carlyle said, "Egad, she'd better!" There is a job to be done. It can be done only through the tools, the instruments, and the organization of those tools and instruments which are the material and the inner life of the industrial process. It will be said that the unions are not completely established, that if they were there would be no question of security, and that the war emergency is being exploited to advance their interest much beyond what is inevitable. But they are fighting for status, and this fight, which as Veblen suggested is almost instinctive, will from the nature of the situation go on despite exhortation; it lies deeper than any formulation in terms of a right to strike or the qualification of such a right in time of war. These organizations pushing up toward the light demand their place in the sun by the very reason that they are becoming an integral factor in the social structure, by the very reason of their inherent representativeness. They are among the great norm creating institutions which press upon the society for the rules and the

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43. THE THEORY OF BUSINESS ENTERPRISE (1904) 336.

sanctions to give adequate expression to their function.⁴⁴ Lee Pressman arguing for the CIO in the *Little Steel* case, said that if the unions felt secure, they could devote their energies to production rather than membership campaigning. This is at least the hope of the public members as it must be the hope of the public in general. Unions possess a potential for coordinating and organizing the efforts of their members; the psychology and the philosophy of the unions may for good or bad condition the temper of its members and even of the whole industry. It is this potential which the Board is seeking to harness to the public purpose by diverting it from intramural uses. Public recognition of the union and protection of its status entitle the public with good conscience to demand responsible cooperation.

In the *Borg-Warner* case⁴⁵ the panel refused maintenance because of the absence of differentiating circumstances. "A majority of the Panel are in favor generally of maintenance clauses as matters of industrial practice and Board policy. . . . At the same time, we are of the opinion that at present any general policy in favor of maintenance clauses must be stated by the Board itself." Thereupon but without opinion the Board ordered the union maintenance clause. Is there now then *sub silentio* a "general policy"? It was in the *Borg-Warner* case and the *S. A. Woods* case,⁴⁶ that some, at least, of the employer members, including Lapham,⁴⁷ finally gave up their opposition, since "nothing constructive could be gained by continually voting no as a matter of principle", though even they still dissent, when as in the "*Little*" and "*Big Steel*" cases, maintenance is coupled with a non-revocable check-off.⁴⁸ In their opinion the *U. S. Rubber* case,

44. Cf. the theses of Julian Huxley in a recent article, *Living in Revolution* (1942) 185 HARPERS 337:

First, The war is the symptom of a world revolution.

Second, There are certain trends of the revolution which are inevitable. Within nations, they are toward subordination of economic to non-economic motives; . . . and toward greater social integration.

Third, During the present war both military efficiency and national morale are positively correlated with the degree to which the inevitable trends of the revolution have been carried through.

Seventh, . . . This releases the latent dynamism of the nation and the social system.

45. WLB No. 135, 10 LAB. REL. REP. 795 (1942).

46. WLB No. 160, 10 LAB. REL. REP. 793 (1942).

47. A good many still dissent in the absence of special circumstances. It is understood that employer panel members are under great pressure to maintain an attitude of dissent.

48. However, in *Golden Belt Mfg. Co. and Textile Workers' Union*, WLB No. 151, 11 LAB. REL. REP. 68 (1942), member Lapham voted for a check-off tied to a union maintenance clause. The latter was exceptional in that it required affirmative individual adherence (the *Marshall Field* formula). There is not yet a sufficient course of decision to predict Board action on the check-off. In *Little Steel* the check-off had figured spectacularly in the dispute. There had been picket-lines, violence, etc., in attempts to collect dues. The problem of dues collection in such vast plants is very difficult. It was this feature of disruption which was primary in the decision to grant the check-off (which was not, of course, applicable unless membership was elected). Having granted it in *Little Steel*, the pattern was inevitably followed in *Big Steel*. It

"fixes a pattern applicable to all employees. But it is yet to be determined if such a pattern will be applied in favor of all unions, whether they be responsible or irresponsible." Thus the new ground of union maintenance is conceded by some of its more influential opponents; there is at least an armistice which recognizes it *de facto*. Whether in the general peace it will become *de jure* depends on the outcome of a much vaster struggle. In the meantime the new battle ground is this issue of union "responsibility" and "irresponsibility".

Member Lapham in the dissents⁴⁹ which followed his first dubious concurrence complained that if the unions were to be given "privileges", they must accept responsibilities. They have, said he, consistently denounced any legislative attempt to regulate their activities. The Board when it grants union maintenance should require the following to be filed:

1. Copy of constitution and by-laws
2. Names of officers
3. Amount of dues and initiation fees
4. Statement of receipts and expenditures

And furthermore that there be "incorporated in the collective agreements, an undertaking by the union that it will not during the life of the agreement make, assume, guarantee, repay or participate in any contribution, subscription, pledge or other financial obligation to any political party or candidate for public office". The avowed reason for the clause was to protect the union members from the dissipation of their funds, though it was not suggested that the members have any choice as to the inclusion of the clause. Most of this was substantially the proposal of the Vinson bill which failed to pass Congress. To Lapham's suggestion Dean Morse replied: "In other words the position of the employer members . . . admits to asking the War Labor Board to legislate certain regulations upon unions which Congress

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has since been denied in *American Magnesium Co. and United Mine Workers*, WLB No. 33, and *Aluminum Company of America and Aluminum Workers of America et al.*, WLB No. 64, 10 LAB. REL. REP. 862 (1942), *Norma-Hoffman Bearings Corp. and United Electrical Workers*, WLB No. 120, 10 LAB. REL. REP. 892 (1942)—in the first two cases over labor member protest. The dissenters referred to the vast size of the Aluminum Company's plants. They noted the cases cited in note 40 *supra*, in which at least the voluntary, revocable check-off had been granted. But in all these cases it had been proposed more or less in lieu of union maintenance and at a time when the union maintenance clause was not yet granted as of course. In the *Golden Belt* case mentioned above in this footnote, the check-off was granted as a feature of union maintenance on the stated ground that it was customary in the industry (Southern textile); furthermore, the check-off applied only to individuals affirmatively electing (though it was not revocable for the life of the agreement), whereas in *Little Steel* it applied unless membership were given up.

49. *E. g.*, *Carnegie-Illinois Steel Corp. et al. (U. S. Steel Corp.) and United Steel Workers*, WLB No. 364, 10 LAB. REL. REP. 888 (1942).

failed to do. . . . It is the opinion of this writer that the position they have taken is highly improper and constitutes a proposal which exceeds the functions and purposes of the War Labor Board."⁵⁰ And in the later *S. A. Woods* case, Chairman Davis, using words no doubt intended to bring a blush to the cheek of the employer members, argued that to extend a continuing control over a labor union ". . . would be to indulge in the worst vice of administrative tribunals—an attempt to extend jurisdiction beyond the frame of reference under which the tribunal acts. The decisions of the board made under its executive order to finally determine labor disputes should certainly be confined to provisions which establish contractual obligations between the parties to the dispute".

This categorical argument must have afforded the employer members some wry amusement if nothing more, since it was just the argument of exclusive legislative competence which they had opposed to the grant of union maintenance. But the grant of union maintenance is more immediately referable to the settlement of an industrial dispute than is the collateral regulation of the union. Granting that "the frame of reference" had not the fixity and precision implied, it still may be maintained that one is closer to the core of the reference than the other. Yet the public members themselves have not taken too literally the argument of their "incompetence". In the same decision Chairman Davis points out that "as a matter of practice the board requires a submission of the constitution and by-laws of the union". In the *Walker-Turner* case the Board makes a great deal of the character of the union. It notes that admission to the union is regardless of race, color, or religion; that the officers are elected annually by secret ballot; that the initiation fee is at the moment only \$2.00 and the dues \$1.00 per month; that an accused member is entitled to an impartial trial by the Local on stated written charges, with appeal to the General Executive Board and from it to the Convention. It may be said that to note the existence of these facts does not imply regulation; they are relevant facts which lie at hand to demonstrate that the union is a representative and democratic organization close to its membership and that it may fairly be granted the maintenance clause. Even if the "frame of reference" is conceived most narrowly as no more than will promote production, the good character of the union entrusted with worker morale is relevant, and, as the Board now holds, a condition of granting maintenance, though some of the Labor Members have recently argued that past irresponsibility is only one more

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50. *Caterpillar Tractor Co. and Farm Equipment Workers*, WLB No. 63, 10 LAB. REL. REP. 642 (1942).

reason for maintenance.⁵¹ In the recent *Monsanto Chemical Company* case,⁵² the Board gave content to the responsibility concept by denying maintenance to a union which struck in the face of the general no-strike agreement, a decision useful as demonstrating both the Board's good faith and as providing a deterrent to strikes. In the *Walker-Turner* case, however, the order of the Board provided also that "the present dues and initiation fees of the union shall not be increased except by the International organization". This provision is essentially a "regulation" of the union, though in form it is a term of the contract and sets a limit on the employer's duty to discharge a delinquent member. The labor members objected to this:

"No complaint was raised in regard thereto, or any mention made of the possibility of future disputes on this score. Thus fortuitously to regulate the internal affairs of a union is an act which has grave implications and may create endless difficulties."

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There are some who question whether, if the Board is to wield governmental force, responsibility should be diluted by the dual allegiance implied in the tripartite scheme. The scheme can hardly be made to appear more palatable on the ground that it is largely pretense: that is to say that decision is made by the public members with the votes of either one or the other bloc; nor is that answer likely to satisfy those who demand that the exercise of public authority be governed by an assumed lofty disinterestedness for the public members may have to blunt the sharp edge of their judgment to secure the vote of at least one or the other bloc. Where policy has been established and clearly formulated in rule or principle, there is no justification for introducing interest representation into the role of judge or administrator. Assumedly, interest has already had its day in the earlier (legislative) stage and to introduce it as a deliberate factor at the judging state is to reopen the settlement. Insofar as the activity of the War Labor Board is concerned with principle, it has been a working toward rather

51. In *Aluminum Company of America and Aluminum Workers et al.*, WLB No. 64, 10 LAB. REL. REP. 862 (1942), in which the majority postponed the grant of maintenance in the Cleveland plant pending an investigation as to the cause of plant disharmony. The purpose, argued Reeve and Kennedy, of union maintenance is to promote harmony; hence it is immaterial why there is disharmony. "If the union leadership is found to be demagogic and irresponsible, a union security clause is certainly desirable because all experience in management-union relations demonstrates that demagogues breed on insecurity."

52. WLB No. 292, 10 LAB. REL. REP. 896 (1942). In the more recent *General Chemical Co. and Federal Labor Union*, WLB No. 267, 11 LAB. REL. REP. 95 (1942), the clause was denied subject to the understanding that, upon petition from the union six months hence the matter may be reopened. In *General Chemical Co.*, WLB No. 274, 11 LAB. REL. REP. 309 (1942) time for reopening to be approximately three months from date of order. The rule will not be followed where the strike was not instigated or condoned by local or international leadership. *Worcester Pressed Steel Co.*, WLB No. 142, 11 LAB. REL. REP. 211 (1942).

than from principle; at the crucial stage its activity has been legislative. Legislation is basically a creative synthesis of multiple interests; though traditionally the interests have not been formally recognized in the legislative process, they have been represented in fact both in the lobby and on the floor. Much recent legislation makes a place for interest at the administrative (sub-legislative) level, and it is at least arguable that such overt participation is more responsible than that of the lobby. Furthermore, for many of the issues before the War Labor Board no legislative principle could be found. This was true until recently, at least, for the wage issue. The prevailing wage, the wage relationship to a key industry, the change in the cost of living, the income position of the employer, and the prestige and power of the union were relevant criteria, but their application hardly added up to a tight, authoritative answer. Inside the Board, as outside of it, the process was essentially collective bargaining with a superimposed referee. For this purpose, interest representation, as the organization of so many arbitral boards makes evident, is logical if not necessary.⁵³ Where unanimity could be secured, the results commanded additional prestige, and it has been surprising to what extent interest groups have felt the detachment bred of public responsibility and so been won to a unanimous consent. Where agreement has fallen short of unanimity, public members have had at least the advantage of more intimate insight into the limits of tolerance and allegiance on either side. In *Captive Mines*, these limits were transcended, perhaps unavoidably given the issue and the time. Today the task is much easier; the limits much broader. But, however broad, however ill-defined or unacknowledged, limits do exist, and an understanding of these limits is still useful to the public members. The unions won the maintenance clause in face of persistent employer dissent, but that dissent did not go entirely unheeded in the settlement. Then there came a time when the need for a rule of limitation in wages became urgent, when suddenly what was pre-eminently a bargaining, non-justiciable issue, cried out for legislation. The rule of *Little Steel* was voted out this time with employer members applauding and labor dissenting. No doubt both of these moves could have been made by a "disinterested" public authority; the later one was probably inevitable. Nevertheless, in my opinion, it has been at least of moral and political value that the result as a whole is the work of a tripartite Board. This will be obvious for the matters that have been decided unanimously, but it applies as well to the rest: that each of the dissenting groups won an advantage at

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53. Cf., however, the views of the recent President's Emergency Board discussed *supra*, at pp. 291-292 and in note 27 *supra*.

the expense of the other has served to commit each group to the validity of the whole and to engage its efforts in securing the consent of its constituency.

CONCLUSION

The country, its survival as a democratic society, as a unique integration, is threatened by hostile forces. To survive it needs nothing so much as to function superlatively as a going concern. This is possible only if its citizens, those who fight and for whom there is fighting, are carried on to the highest levels of technical and spiritual cooperation. But how shall it be done when the society itself is in transition, when it is part of the very crisis of survival that these men: farmers, workers, engineers, entrepreneurs, bankers and professionals are struggling among themselves to establish or maintain their status? The new society is being born in part out of the rape of the past by science and mechanical invention. It is harnessed to the dynamo of a ruthless rationalism which organizes all forces accordingly as each contributes to mechanical production and reproduction. Against this violence of rationalism, against its gigantic coordination of men and machines, the older traditions struggle for preservation and metamorphosis. The previous age had raised high the standard of individualism, of personal adventure idealized in the name of freedom. This freedom, particularly as it serves personal interest, has seemed the most precious portion of our heritage; it has been sensed as the meaning of our custom, of our institutions, and of our law. Thus in freedom's name and in the many forms and interests which tradition has come to identify with it, there is being waged a mighty battle. Some see it as a struggle of annihilation in which the old freedom, freedom itself must eventually be the loser. Americans—sanguine, experimental, practical, but withal enamored of the meaning and even more of the promise of their tradition—look for a new integration, a transformation of the tradition into forms which are in organic relation to the new industrialism. Such a process at worst is civil or foreign war, or both at once, but at the least it will involve some violence born of fear and aggression, the destruction of some vested interests, the personal humiliation of many, and the ending of old abuse and the beginning of new.

The struggle of the unions for status is at the heart of this vast process, and there is no aspect of the great movement now remaking our society which is not reflected in it. The fundamental premise of our political practice insofar, at least, as it is positively creative, is "gossip" (in the word of T. V. Smith): unabated, unhurried and generous compromise in the direction of each and all of the customary

demands which have effective asking power. Now we are in crisis. We function as nature and our tradition make us. Idle are the complaints of those who in the name of crisis ask for a truce on human nature. We continue to gossip and ask for more; we try to be good disinterested fellows, but there are limits, and the fault in any case seems to be with others rather than with ourselves. Under such circumstances our leaders cajole and threaten; if they are good leaders, they seek to retain our traditional practice insofar as it is revered and serviceable for in so doing they appeal to and nourish the genius of the society.

The labor struggle seemed for a breathless moment to bring us up against the terrible peril of an impasse between two of the most powerful organs of our society: the capitalist and the labor organizations. The former appealed to the older tradition of freedom, to the liberty to contract or not to contract as interest dictated, to a structure of relations in which the essential instrument of society was the adventuring individual. The latter appealed to powerful current realities; the coalescence of economic energies into great aggregates sired upon the machine by large de-personalized financial power, covering the whole society with units so inclusive, so integrated with each other that personal adventure was of less and less relevance either as social motive power or individual opportunity. Out of this grew the impetus for labor organization as the power of labor to face the power of capital, as opportunity for individual participation and individual power. Here opposed to each other were forces either of which could do each other great damage, either of which could threaten the security of the whole society. These forces demanded recognition according to the nature and aims of their organization—the one having it already in abundant measure and fighting against diminution, the other hammering against the citadel of vested forces. It was and is a time of fearful danger because the opposing forces are obstinate and the obstinacy is profoundly reflected in the vital organs of government; in the highest organ of formal policy-making, the national legislature, there was gossip but no compromise. Yet the need for policy, for law, was dreadfully imperative. Our constitutional scheme narrowly considered does not endow the executive with original legislative authority, but the President as delegate-extraordinary of Congress, as Commander-in-Chief of the Army and Navy, and finally as President of the United States has a certain floating power. Power tends to create law, to seek its expression in sanctioned relationships. This is the lesson of the National Defense Mediation Board and the War Labor Board. These Boards created law in part through the pre-eminent power and

claim of the nation symbolized in the President, in part through the sovereign spell of persuasion. This law was modest as befitted the questionable parentage of its progenitors. The tradition was honored in the breach, for if the employer was forced to modify the principle of hiring and firing, yet the new relationship was limited at least to those workers who voluntarily accepted it. Thus the principle of union organization and leadership secured a new level of sanction: to prevail upon the worker to join, the union must rely on its own devices, but this victory would become by force of law its more than temporary acquisition.

One last word: the public members often write that their sole concern is to keep production going, to win the war; where union maintenance will do this, then and only then will it be granted. Surely this is not the whole reason. It is not at all obvious that any one intangible is necessary to maintain production. If it were perfectly clear to any rational being, we ought to grant that Member Lapham would admit it. There are many ways to organize production; the public members would organize it in a way which gives due recognition to the just claims of the underlying forces as they see them, to the emerging pattern of society as it appears in the realm of their conscience. Member Graham, speaking for the public members, expressed this most explicitly. In *Ryan Aeronautical*, he said:

"From the logic of considering each case on its merits, there evolved through the case system itself a pattern of decisions on union security. The work of both Boards, fortunately under the same chairman, has been characterized by a relentless search for a reconciliation of stability and freedom, a fusing union security and individual liberty in the midst of a world war."

In *Little Steel* he comes back to the theme, presenting it this time in a large historical progression almost Hegelian in its pattern: "The freedom of human beings to organize in autonomous groups has been won through long struggles in the fields of religion, politics, business and labor." In each of these fields humanity has sought to realize itself against hostile forces in a characteristic organization: the Church Universal against the Empire, Parliament against the King, and the Corporation against the medieval Feudaries. "The struggle of industrial workers to organize and win the reluctant recognition of legislative bodies, the courts, and the corporations, is the latest chapter in the democratic struggle of human beings for autonomous organization around a great human need."

This is more than patching up the trouble, more than keeping the machine going with whatever will work for the moment. Trouble

and need bring power into action, but solution is always a little more than mere ceasing of trouble. It is hard to imagine a case so obvious that there will not be a choice of patches, and choice implies an attitude toward what should be. Here is choice based on broad, bold premises; here is the conscious intention to mark out the ways of the future according to a half-seen vision of justice and right.