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There is no statute of the State of Montana which requires an employer to recognize a union as the exclusive bargaining agent for the employees in his establishment, nor is there any instrumentality of the State which is empowered to determine such a representation question. Indeed, because of the State's lack of a labor relations act, a union which has lost its entire membership might be successful in a War Labor Board proceeding in securing the enforcement and continuation of a prior union shop agreement.

The only Federal agency which may act in a dispute over the issue of representation arising in the State of Montana between a labor organization and an employer involved wholly in intrastate commerce is the National War Labor Board. Whether the Board will assume jurisdiction in such a case seems to have been definitely decided, and in recent months, the Board has defined the extent of its jurisdiction in this field.

The authority of the National War Labor Board stems both from Executive Order of the President (Executive Order 9017 of January 12, 1942) and statutory enactment—the War Labor Disputes Act of June 25, 1943, popularly known as the Smith-Connally Act, 57 Stat. 163. While the authority of the National Labor Relations Board under the Wagner Act, 49 Stat. 449, is dependent upon the commerce clause of the Constitution, the War Labor Disputes Act derives its authority from the War Powers of the Congress and distinctions between interstate and intrastate commerce are not germane to its exercise. *(Hirabyoshi* v. *U. S.* 320 U. S. 81, 63 S. Ct. 1375, 87 LE 1774 (1943); *U. S.* v. *MacIntosh,* 283 U. S. 605, 51 S. Ct. 570, 75 LE 1302 (1931); *Schenck* v. *U. S.,* 249 U. S. 47, 39 S. Ct. 247, 63 LE 470 (1919); and *Hamilton* v. *Kentucky Distillers Co.* 251 U. S. 146, 40 S. Ct. 106, 64 LE 194 (1919). See also *J. Greenebaum Tanning Co.* 10 W. L. R. 527 (194).

Section 7(a) (1) of the War Labor Disputes Act provides that the War Labor Board shall have jurisdiction over any labor

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dispute which has "become so serious that it may lead to substantial interference with the war effort." State boundaries have no part to play in a determination based upon this test for the war powers of Congress carry no such restriction.

Under the Act, the Conciliation Service of the Department of Labor is empowered to certify to the National War Labor Board those labor disputes which may lead to substantial interference with the war effort and which cannot be settled by collective bargaining or conciliation. (Section 7 of the Act). Such certification is accepted as conclusive by the Board on the question of its jurisdiction. *(J. S. Bache and Co.,* 15 W. L. R. 58 (1944).

The War Labor Board, in its early days of operation, did not have a clearly defined policy regarding the handling of representation questions in those cases where the union had neither been recognized by the employer nor certified by a state labor relations board but where a dispute had been referred to it by the United States Conciliation Service in accordance with the above procedure. Thus, the various Regional Boards sought a formula by which the rights of the parties could be protected, the needs of war production met, and stable industrial relations established. In some cases, elections to determine the majority bargaining agent were ordered. In a case involving a California employer, *Lacey Milling Company,* Case No. 111-2988-D, (unreported), (1943), a Regional War Labor Board directed that an election be held within fourteen days of the date of the board's order to determine the bargaining agent. An election was held and a majority of the employees in the unit voted in favor of no union and no contract resulted. In a similar case, *Austin Co.* Case No. 4264-D, (unreported), (1943); another Regional board appointed a hearings officer to conduct an election. As a result, the board certified three unions as the bargaining agents for their members and ordered the company to bargain collectively.[1] On review, the National Board sustained the regional board's action.

As more and more labor disputes arose over representation issues concerning employers in intrastate operations, it became

[1]This technique, that of ordering the parties to bargain, (in interstate cases), was later determined to be an invasion of the province of the National Labor Relations Board, and subsequent cases limit the order to specific issues and provide, generally, a time limit of thirty days in which the parties may have to negotiate further. *Fred A. Snow Co.* 17 W. L. R. 241 (1944) Section 7 of the War Labor Disputes Act provides: ". . . the Board shall conform to the provisions of . . . the National Labor Relations Act . . . and all other applicable provisions of law. . . "

apparent that the War Labor Board would be gradually, yet increasingly, entering a field where hitherto most state legislatures had not seen fit to enter and where the Board would exercise powers akin to those of a statutory labor relations board. After a period of uncertainty, in a series of cases, the National Board announced that "where no applicable labor relations law (state or federal exists) and where the dispute is solely one of representation, the Board will decline jurisdiction." *Savannah and Atlanta, Georgia Laundries,* 14 W. L. R. 11 (1944). In the *Simon J. Murphy Case,* 14 W. L. R. 7, (1944), the Board, speaking through its Chairman, William H. Davis, said:

> "Where the National Labor Relations Act is not applicable, the War Labor Board cannot involve itself in the determination of questions of appropriate unit or questions concerning the conduct of elections and the determination of the results of elections over objections. Such determinations are for the period preceding collective bargaining; the work of this board is, in the main, tied in with the period subsequent to negotiations, when collective bargaining has broken down. Our experience has been that action by the War Labor Board taken in the period when a union is unrecognized or uncertified has not generally avoided recurring difficulties between the parties."

The Board's most compelling reason for declining to accept jurisdiction in these cases was predicated largely on a desire to be relieved from the administrative burden which it felt would thereby be imposed. It is questionable, however, whether the failure of the Board to continue to decide all labor disputes, including intrastate representation cases, proved to be sound, and it was generally considered that the Board had abdicated part of its responsibility for the settlement of war-time labor disputes. A natural result of the policy was that a great many actual labor disputes were without a forum, and a dangerous loophole for war-time strikes was created. In this connection, the statement made by Dean Wayne L. Morse, former public member of the War Labor Board in the *Reuben H. Donnelly* case, 7 W. L. R. 198, (1943), is noteworthy.

> ". . . the maintenance of a sound domestic economy is essential to the war effort. A threatened strike or lockout in any community in the land is bound to disturb and disrupt the economic life of the community. . . Hence it is the opinion of the War Labor Board that it would indeed be unrealistic for it to attempt to classify labor disputes into two main categories, namely, those which affect the prosecution of the war and those which do not."

In July of 1944, the National War Labor Board passed a resolution concerning the exercise of its jurisdiction over intrastate representation questions. It was made clear that "the board will normally exercise its jurisdiction over these cases only when the Union involved has demonstrated that it represents a substantial number of employees concerned. . . The Regional Board to which such a case is assigned may conduct whatever further inquiry into the question it deems necessary or appropriate." *Resolution on Intrastate Cases* (17 W. L. R. liii). The Board makes it clear that it "will accept the Union only as the representative of its actual members and will issue no order which would require the employer to recognize or bargain collectively with an unrecognized and uncertified union as the exclusive representative of all its employees."

Thus, in a number of recent cases, both on a regional and national scale, the Board, having found that a Union represents a substantial number of employees, has thereupon fixed the terms and conditions of employment which shall thereafter exist between the parties. *Tygart Limestone Co.* 18 W. L. R. 49 (1944); *Weber Milk Co.* 17 W. L. R. 361, (1944); *Brooklyn Central YMCA,* 17 W.L.R. 249. (1944); *Cape Giraudeau Merchants Assn.,* 15 W. L. R. 3 (1944). In these cases, the problem before the Board has been fairly simple. The Union, during the time the case is in the hands of a conciliator of the United States Conciliation Service or later may be required to produce evidence as to its actual membership. Although it is still an unsettled question, and the Board has not been called upon to specify an exact figure, it has been indicated at least administratively, that the statement, "a substantial number of the employees concerned" will be construed to mean at least thirty per cent of the employees in the appropriate unit. In order, however, to insure uniformity with NLRB practice, the Board will probably set this figure at over fifty per cent.

Thus, if a Union can demonstrate through its membership records, sworn statements, a cross check, or another acceptable method that it represents a total of at least a third of the employees in the unit, the Board may fix the terms and conditions of employment which will obtain for the employees involved. Generally, this device works to the advantage of the Union, for it unquestionably aids organization and limits to a considerable degree the freedom of action of the employer. In many instances, the Union is able to secure more concessions, and even Federal law and procedure will now operate to assist the Union. For example, if the employer wishes to secure approval of a voluntary wage or salary adjustment under the Wage

Stabilization Act (Act of Congress of October 2, 1942), for those employees not represented by the Union but in the same bargaining unit, the signature of the Union's representative may be required on the form 10 application, and the employer must inaugurate any wage increase strictly in accordance with the wage stabilization division ruling which prohibits any discrimination against the Union.[3]

Contrast this then with the situation in a State where a labor relations act is in force. There, the question of majority representation becomes important, and the so-called "thirty per cent rule" has no application. Unless a majority of the employees in the bargaining unit vote in favor of the particular union, no contract or terms of employment results. This concession, though minor, indicates that the War Labor Board has not found it expedient to relinquish too great a portion of its jurisdiction over intrastate cases and it has found it necessary to reassert jurisdiction it attempted to relinquish.[4]

A second situation arises in those intrastate cases where the employer has extended recognition voluntarily to the Union, or has, by virtue of economic means the Union had at its disposal prior to the no-strike pledge, entered into a signed agreement. Again, in these cases, usually no inquiry is made into the number of employees actually members of the Union. The basic test is whether or not the War Labor Board will permit an employer to withdraw from a labor agreement which

[3]On this precise point, i. e., whether or not the War Labor Board will permit an unrecognized, uncertified union to join in a form 10 application for a wage adjustment filed by the employer, the WLB Manual of Operations is silent. The Regional Boards have generally held that the facts in the particular case are controlling. In two recent cases in the Tenth Region (California, Arizona and Nevada), both unreported, Cases 10-15261, *Barker Brothers*, and 111-13084, *Hale Brothers*, both retail establishments in intrastate commerce, the Regional Board held up action on form 10 applications despite the fact the union in each instance was unrecognized. The basis for the Regional Board's action appeared to be that they would not permit the employer to take unilateral action on a matter affecting union organization and conditions of employment where the union could demonstrate it possessed more than a substantial number of the employees involved and where a dispute case was certified to the War Labor Board by the U. S. Conciliation Service.

[4]It should be borne in mind, however, that the Board will only prescribe appropriate terms and conditions of employment and as the resolution of July 12, 1944, (op. cit.) points out: . . . "Will issue no order which would require the employer to recognize or bargain collectively with an unrecognized and uncertified union as the exclusive representative of all employees. Thus, on issues such as check off and union security, and even including the board's war-time formula of maintenance of membership, the board has indicated it will not act. See *Weber Milk Co.* (op. cit.) and *Brooklyn Central YMCA*, (op. cit.)

he has previously entered into. The Board's resolution states: "In the absence of substantial evidence to the contrary, the Board will act on the presumption that the status of the Union has not changed and will recognize the Union's exclusive right of representation as established in the prior collective bargaining agreement." What will serve as "substantial evidence" again depends on the facts of each case. Thus, in *Abraham's Markets,* (111-10972), (1944), unreported, a Regional Board (subsequently affirmed by the National Board) directed the employer to abide by the terms of a collective bargaining agreement wherein the employer had voluntarily extended recognition to a union. The majority opinion states:

> "It may be argued that in view of the fact that the Union represents none of the employees presently employed by the employer, this should militate against the Board's accepting jurisdiction. To follow that course would clearly be an unrealistic step for it would permit this employer who has consistently refused to carry out the terms of his contract to benefit thereby during this war-time emergency."

Thus an employer may be ordered to continue in effect for the duration of the present emergency a union contract despite the fact that he can demonstrate that the Union no longer has a single member employed in his establishment and that he is engaged solely in intrastate commerce. (See also *Basha's Markets* 17 W. L. R. 407, (1944) where a similar conclusion was arrived at on the basis of the Board's resolution on intrastate commerce).

The explanation of this, of course, is that if by his own action, the employer has failed to follow the terms of his contract and has discriminated against union members, the War Labor Board considers that the interests of stable war-time labor relations require that he be denied the right to be freed from what he may term the burden of a union shop contractual provision. The War Labor Board has reiterated over and again that it will continue in effect a union or closed shop if such existed contractually prior to the no-strike pledge and that it will not order such a provision where the parties have not reached agreement and included it in their contract.[4]

[4]See Harvill Aircraft Die Castings Corp. 6 W. L. R. 334 (1943) as affirmed by Weber Showcase and Fixture Co. 12 W. L. R. 142, (1944). "The National War Labor Board, in its basic policies, holds that the Government will not use its sanctions during this war to establish or disestablish the union shop. By this decision, notice is now given to both workers and management, beyond future misunderstanding or appeal, that no company can take advantage of the Board's standard

Thus, it can be seen that the National War Labor Board is actively engaged in attempting to decide numerous types of intrastate labor disputes to which the jurisdiction of the National Labor Relations Board does not extend. Despite this fact and the fact that most state legislatures have not passed legislation providing for the handling of representation questions, the WLB finds itself in the position of performing a necessary but controversial function. The conclusion seems inescapable that for the duration of the emergency the WLB will be forced to continue its work in this field and if present indications continue one may expect an increase in the number of cases considered under the so-called "substantial number" rule. We may also conclude that in certain respects the policy of the Board amounts to an invitation to unions to bring to the WLB disputes over questions which have traditionally been the subject of negotiations and disputes which except for the war, would be considered beyond the power of a Federal agency to attempt to adjudicate.

Whether this same trend will occur in Montana is problematical, but if it does, the machinery of the Federal government will be found ready and one may expect that the application of the WLB rules will result in some advances for unions which thus far have been unable to secure recognition.

provision for union security to reduce the provision for the union shop to the provision for maintenance of membership, hereafter also for the so-called interim employees and that no company can take advantage of the no-strike pledge to throw out a union shop previously established by agreement between the parties."