PROPER SUBJECTS FOR COLLECTIVE BARGAINING: AD HOC V. PREDICTIVE DEFINITION*

THE extent to which collective bargaining can increase in scope may largely depend on the legal protection it receives.[1] If the protected area is clearly limited by the courts to that existing in current industrial practice, the expansion may be slowed. But to the extent that the area is left undefined, legal precedent may follow industry practice into new fields.

Until recently, the phrase of the Wagner Act which defines proper subjects for collective bargaining had not been avowedly construed. Instead of looking to the words of the statute—"rates of pay, wages, hours of employment, and other conditions of employment" [2]—and ascertaining Congressional intent from the legislative history, the National Labor Relations Board and the courts had used extrinsic criteria to define the scope of mandatory bargaining, or had used none at all.

Without express interpretation of the Act, a wide variety of subjects had been held proper. Included under "rates of pay" and "wages," were such items as bonuses,[3] paid vacations and holidays,[4] and individual wage increases based on merit.[5] Such diverse subjects as personnel transfers and promotions,[6] plant rules,[7] and the closed shop[8] were explicitly held to be "other conditions of employment," while seniority[9] and the company's system of subcontracting work [10] were among the many subjects embraced

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* Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948).

1. Quite distinct, and beyond the scope of this Note, is the legal protection afforded a union when it resorts to its economic weapons of strike or boycott in order to achieve its demands after the collective bargaining process has resulted in an impasse. See, generally, TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING cc. 7–9, 14, 20 (1940).

2. 49 STAT. 453 (1935), 29 U. S. C. § 159(a) (1940), unchanged in this respect by the Taft-Hartley amendment, 61 STAT. 143 (1947), 29 U. S. C. A. § 159(a) (Supp. 1948).

3. Sullivan Dry Dock & Repair Corp., 67 N. L. R. B. 627, 631–2 (1946).

4. Singer Mfg. Co., 24 N. L. R. B. 444, 470 (1940), *enforced as modified*, 119 F.2d 131 (7th Cir. 1941), *cert. denied*, 313 U. S. 595 (1941).

5. NLRB v. J. H. Allison & Co., 165 F.2d 766 (6th Cir. 1948), *cert. denied*, 335 U. S. 814 (1948).

Apparently also in reliance on the words "rates of pay, wages," severance pay and pay to sick employees were held proper subjects in NLRB v. Knoxville Publishing Co., 124 F.2d 875, 882 (6th Cir. 1942).

6. U. S. Automatic Corp., 57 N. L. R. B. 124, 133–4 (1944).

7. Timken Roller Bearing Co., 70 N. L. R. B. 500, 502 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947).

8. Carroll's Transfer Co., 56 N. L. R. B. 935, 937 (1944). The closed shop is now prohibited, however, by the Taft-Hartley Act, 61 STAT. 140 (1947), 29 U. S. C. A. § 158(a)(3) (Supp. 1948).

9. Dallas Cartage Co., 14 N. L. R. B. 411, 418, 430 (1939).

10. Timken Roller Bearing Co., 70 N. L. R. B. 500, 518 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947).

by implication in this phrase.[11]

Only two subjects had been declared improper: the discharge of a supervisor,[12] and a union demand that the company cooperate to secure legislation favorable to the industry.[13]

Despite this conglomeration of decisions, the statute had not received full-dress construction until recently, perhaps because the appropriateness of a subject had usually been a subordinate issue in the cases.[14] Most of the opinions had merely asserted that the subject in question was proper,[15] and

11. The decision technique of including subjects under "other conditions of employment" by implication is a common one. *E.g.*, Inter-City Advertising Co., 61 N. L. R. B. 1377, 1384, 1385–6 (1945), *enforcement denied on other grounds*, 154 F.2d 244 (4th Cir. 1946) (changing work schedules); Washougal Woolen Mills, 23 N. L. R. B. 1, 10 (1940) (reinstatement of former employees); Hughes Tool Co. v. NLRB, 147 F.2d 69, 73 (5th Cir. 1945) (grievance procedure); General Motors Corp., 59 N. L. R. B. 1143, 1145, 1153 (1944), *enforced as modified*, 150 F.2d 201 (3d Cir. 1945) (changing from salary to hourly pay basis); Timken Roller Bearing Co., 70 N. L. R. B. 500, 521 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947) (providing spell hands for workers, and the number of employees in a mill); Hagy, Harrington & Marsh, 74 N. L. R. B. 1455, 1471 (1947) (future re-employment of laid-off employees); Montgomery Ward & Co., 37 N. L. R. B. 100, 108–9, 124–5 (1941), *enforced*, 133 F.2d 676 (9th Cir. 1943) (arbitration); Andrew Jergens Co., 76 N. L. R. B. 363, 365 (1948) (union security).

The size and composition of the shop committee was held a proper subject in Clayton & Lambert Mfg. Co., 34 N. L. R. B. 502, 524 (1941), criticized in Note, 51 YALE L. J. 496 (1942). But this decision appears to have been overruled insofar as it made limitation of the group from whom employees may choose their representatives a bargainable issue. The Oliver Corp., 74 N. L. R. B. 483, 486 and n.6 (1947).

In NLRB v. Sands Mfg. Co., 306 U. S. 332, 342 (1939), the Supreme Court ruled that it was an employer's duty to bargain about interpretation and modification of the collective agreement. But the Taft-Hartley Act, 61 STAT. 143 (1947), 29 U.S.C.A. § 158(d) (Supp. 1948), now requires neither party to bargain about modification of the agreement while it is in force. See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 274, 278 (1947–8).

12. NLRB v. Aladdin Industries, Inc., 125 F.2d 377, 390 (7th Cir. 1942), *cert. denied*, 316 U. S. 706 (1942).

The court in Hughes Tool Co. v. NLRB, 147 F.2d 69, 74 (5th Cir. 1945) appears to have ruled that the checkoff is not a proper subject. But this seems an aberrational holding. The decision apparently meant that the Act did not prevent an employer from checking off dues for a minority union, but it did not mean that an employer had no duty to bargain about a union demand that a checkoff provision be included in the contract.

13. Globe Cotton Mills v. NLRB, 103 F.2d 91, 94 (5th Cir. 1939).

14. *E.g.*, Timken Roller Bearing Co., *supra*, note 10, where the circuit court held that a company was not required to bargain about a union demand while it was being processed under the grievance procedure.

The first decision in which the appropriateness of a subject for collective bargaining was a central issue was National Labor Relations Board v. J. H. Allison & Co., 165 F.2d 766 (6th Cir. 1948), *cert. denied*, 335 U. S. 814 (1948). The holding, however, did not interpret the statute directly, nor did it add to existing bases for decision.

15. *E. g.*, NLRB v. Sand Mfg. Co., 306 U. S. 332, 342 (1939), where the Supreme Court assumed that the interpretation and modification of a contract are proper subjects;

the remainder had held the subject proper if it was "normally" the subject of collective bargaining,[16] or if it "vitally affected" the interests of the employees.[17] Since these amorphous criteria afforded virtually no basis for predicting whether a new demand would be called a proper subject, each decision had been *ad hoc*, and the mere addition of new subjects to the list failed to produce any increasingly precise interpretation of the Act.

In *Inland Steel Co. v. National Labor Relations Board*,[18] however, the statute was expressly interpreted and the precedent examined. In sustaining the Board's decision that a pension and retirement plan is a proper subject for bargaining, the Seventh Circuit Court of Appeals held that the plan was "wages" by construing that term to mean all "emoluments of value . . . which may accrue to employees out of their employment relationship."[19] Second, it found the plan to be included in "conditions of employment" by giving that phrase a broader meaning than mere "working conditions."[20] The court then employed the usual *ad hoc* technique, comparing the plan with other subjects already declared proper, and reasoning that no operative distinction could be drawn between them.[21]

The significance of this decision is less that it called pension plans proper subjects,[22] than that it may have started the development of an interpretation of the statute that would define the area of mandatory bargaining. While one of the grounds for decision was the similarity between the plan and other proper subjects, and while the decision might have been made on that ground alone, the main reliance of the court was on its own express interpretation of the Act. Although this interpretation was in no way restrictive,[23] growth of the definitive method of decision, in contrast to the *ad hoc* technique heretofore employed, may restrict expansion of the protected area of collective bargaining.

To the extent that this method of decision increases predictability, it

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NLRB v. Knoxville Publishing Co., 124 F.2d 875, 882 (6th Cir. 1942), where severance pay, paid vacations, and pay to sick employees were tacitly assumed to be proper subjects, since a refusal to embody existing company practices concerning them into a written agreement was held to be a refusal to bargain as to "rates of pay, wages, hours of employment, and other conditions of employment."

16. *E. g.*, Singer Mfg. Co., 24 N. L. R. B. 444, 470 (1940), *enforced as modified*, 119 F.2d 131 (7th Cir. 1941), *cert. denied*, 313 U. S. 595 (1941).

17. *E. g.*, Timken Roller Bearing Co. v. NLRB, 70 N. L. R. B. 500, 518 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947).

18. 170 F.2d 247 (7th Cir. 1948).

19. *Id.* at 250–1.

20. *Id.* at 251, 255.

21. *Id.* at 252–3.

22. For a discussion of pension plans as a proper subject in the light of the instant case, see Note, 43 ILL. L. REV. 713 (1948).

23. The court went so far as to say: "We do not believe that it was contemplated that the language ['rates of pay, wages, hours of employment, and other conditions of employment'] was to remain static." Inland Steel Co. v. NLRB, *supra*, note 18, at 254.

decreases administrative flexibility in dealing with new problems. Yet there is no evidence in the legislative history of the Act to indicate Congressional intent to define the area of mandatory bargaining in any greater degree than do the broad words of the statute.[24] It may therefore be inferred that Congress, perhaps feeling unable to foresee the demands that unions might make and the pattern of union-management relationships that might evolve, intended the Board to make its decisions without being burdened by specific limitations. Subsequent Congresses have apparently desired to retain that flexibility, for despite repeated attempts to persuade them to detail proper subjects for bargaining, they have declined to do so.[25] The same considerations are probably present in the Board's unwillingness to promulgate an inclusive definition, and the courts, removed one step further from the facts and lacking the expert knowledge of the Board, have been even less willing to make the attempt.[26]

Nevertheless, disagreement over the desirability of a predictive definition is so strong that it was the primary reason for the failure of the President's Labor-Management Conference in 1945.[27] Conflict focuses principally on the effect of such a definition on expansion of collective bargaining rather than on the value of predictability as such. Neither management nor labor is greatly prejudiced merely by lack of predictability, since a wrong guess will entail no loss. When in doubt, the union will probably assume that the subject is proper, and will file an unfair labor practice charge with the Board if the employer refuses to bargain.[28] If the Board decides that the subject

24. *See* Inland Steel Co. v. NLRB, *supra*, note 18, at 254; SEN. REP. No. 573, 74th Cong., 1st Sess. 13 (1935); H. R. REP. No. 1147, 74th Cong., 1st Sess. 20 (1935).

25. Several bills which attempted to limit the area of proper subjects have been amended to strike out the limiting provision, or have died in committee, *e. g.*, H. R. 5218, H. R. 5259, 77th Cong., 1st Sess. (1941) (attempts to define an area of exclusive management control); see CHAMBERLAIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL 152 (1948); S. 1171, 79th Cong., 1st Sess. §23 (1945) (same); see TELLER, MANAGEMENT FUNCTIONS UNDER COLLECTIVE BARGAINING 188 (1947); H. R. 3020, 80th Cong., 1st Sess. 10 (1947) (attempt to list proper subjects); see H. R. REP. No. 245, 80th Cong., 1st Sess. 22–3, 49, 71 (1947); 93 CONG. REC. 3548 (1947).

26. See Note, *SEC v. Chenery Corp.: A Case Study in Administrative Technique*, 62 HARV. L. REV. 478 (1949) for the factors involved in a choice between rule-making and adjudication as methods of administration. Although the NLRB is denied this choice by its lack of rule-making power, similar factors are involved in choosing between *ad hoc* and predictive adjudication.

27. See TELLER, *op. cit. supra* note 25, at 14, 15, 99–104 (1947).

In its separate report, the management members submitted a list of subjects upon which, in their opinion, bargaining ought to be required. At the end of this list was "and such other matters as may be mutually agreed upon." 3 PRESIDENT'S NATIONAL LABOR-MANAGEMENT CONFERENCE 50 (1945). This suggests a solution to the problem intermediate between a holding that a subject is proper and that it is improper. The NLRB could leave it to the parties themselves to determine the appropriateness of a subject by requiring them to bargain about whether a doubtful union demand is a proper subject. To date, however, this solution has not been adopted by the Board.

28. It is an unfair labor practice for an employer to refuse to bargain with the rep-

is improper, the union will not even have lost attorney's fees, since the prosecution is undertaken by Government counsel.[29] Management, on the other hand, will assume that doubtful demands are not proper subjects, and will refuse to bargain. If the Board holds that the subject is proper, the company will merely be ordered to cease and desist from refusing to bargain, and no penalty will attach unless the company violates the order twice thereafter.[30]

The main disagreement between management and labor concerns the possibility of limiting the area of legally protected collective bargaining. Fearing continued expansion, management favors a predictive definition of proper subjects since it might fix a limit beyond which the protection of the Act would be denied to unions.[31] Likewise foreseeing extension of its demands, labor opposes clear delimitation of the area of mandatory bargaining. The unions feel that definition now would be in the light of current practices, whereas decision made on an *ad hoc* basis will leave the process of definition flexible until opinion becomes accustomed to union participation in company decisions now regarded as within the prerogative of management.[32] Although in the *Inland Steel* case the predictive method of de-

representative of his employees. 49 STAT. 453 (1935), 29 U. S. C. § 158(5) (1940), as amended, 61 STAT. 141 (1947), 29 U. S. C. A. § 158(a)(5) (Supp. 1948). The charge may be brought by any person or labor organization. 29 CODE FED. REGS. § 202.2 (Supp. 1947).

29. 49 STAT. 453 (1935), 29 U. S. C. § 160(b) (1940), as amended, 61 STAT. 146-7 (1947), 29 U. S. C. A. § 160(b) (Supp. 1948). See Wolf, *Administrative Procedure Before the National Labor Relations Board,* 5 U. CHI. L. REV. 358, 369, 371 (1938).

30. Upon finding that a person has committed an unfair labor practice, the Board issues a cease and desist order. 49 STAT. 454 (1935), 29 U. S. C. § 160(c) (1940), as amended, 61 STAT. 147 (1947), 29 U. S. C. A. § 160(c) (Supp. 1948). If the order is not complied with, the Board may petition for court enforcement. 49 STAT. 454 (1935), 29 U. S. C. § 160(e) (1940), as amended, 61 STAT. 147-8 (1947), 29 U. S. C. A. § 160(e) (Supp. 1948). The third violation becomes contempt of court. See Wolf, *Administrative Procedure Before the National Labor Relations Board,* 5 U. CHI. L. REV. 358, 380-1 (1938).

If the employer wishes to argue that the subject is improper, he must, of course, make the necessary expenditures. Public counsel is not provided to defend either company or union against unfair labor practice charges. *Cf.* note 32 *infra.*

31. CHAMBERLAIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL 129-42 (1948); 3 PRESIDENT'S NATIONAL LABOR-MANAGEMENT CONFERENCE 47-50 (1945).

32. CHAMBERLAIN, *op. cit. supra* note 31, at 142-7; 3 PRESIDENT'S NATIONAL LABOR-MANAGEMENT CONFERENCE 43-6 (1945).

The provision of the Taft-Hartley Act requiring unions to bargain raises the possibility that there may be some subjects the union regards as being solely within its prerogative, which management would like to bargain about. To date, however, this possibility has not materialized. Moreover, it is unlikely to assume very great importance, since the statutory prohibition against interference by management in the rights of the employees to organize and select their representatives precludes bargaining on those subjects regarded by the unions as vital to their independent existence. 61 STAT. 140 (1947), 29 U. S. C. A. § 158(b)(3) (Supp. 1948); 49 STAT. 452 (1935), 29 U. S. C. § 158, as amended, 61 STAT. 140 (1947); 29 U. S. C. A. § 158(a) (Supp. 1948).

For an example of a case in which the Board apparently went a little too far into the

cision resulted in so broad a definition of proper subjects that it strengthened the union position, courts less sympathetic to labor's views may employ the same method to restrict the legally protected area of collective bargaining.[33]

protected area and permitted an employer to make demands which appeared to be an interference with his employees' rights, *see* Clayton & Lambert Mfg. Co., note 11 *supra*.

33. For the effect of the protection of the Act on labor's ability to extend its participation in management, see CHAMBERLAIN, *op. cit. supra* note 31, c.8.