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The Non-Communist Affidavit of the Labor Management Relations (Taft-Hartley) Act : Its Effectiveness and Legality

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THE NON-COMMUNIST AFFIDAVIT OF THE LABOR MANAGEMENT RELATIONS (TAFT-HARTLEY) ACT ITS EFFECTIVENESS AND LEGALITY

by

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LIFE

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His employment as a traveling salesman for a Chicago manufacturer was interrupted by the entry of the United States into World War II in 1941. The author then entered the U. S. Navy as an officer and remained therein until his release to inactive duty as Lieutenant Commander on June 30, 1947. In January 1948, he entered the U. S. Naval Intelligence Service as a civilian. He entered the Institute of Social and Industrial Relations in September of 1950.

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CHAPTER I

INTRODUCTION

Penetration of labor unions by Communists, fellow-travellers and all other types of subversives ranging in political shade from deep Red to light Pink has been a well-established fact for many years. Such a situation is so well known to the general public and has been accepted so thoroughly by the average person that, generally speaking, its insidious effect on, and threat to American autonomy has been disregarded. This particular problem is a knotty one since it involves the fundamental paradox of a democratic society that is unable to protect itself adequately against forces bent on its destruction without sacrificing the very principles upon which it has been built.

A. Historical Background

To fully understand the nature of the Non-Communist Affidavit--the device enacted into law as Section 9 (h) of the National Labor Relations Act as amended by the Labor-Management Relations Act, 1947 (Taft-Hartley Act)--and hereinafter referred to as the "Act"--it is necessary to delve into the historical background for such legislation. A fact that most present-day Americans would accept only with surprise is the announcement that the Non-Communist Affidavit is not new in principle. It has had antecedents in at

least three periods of American history. Further, these "antecedents" were enacted into law for generally the same purpose for which Secion 9 (h) was drafted.

Principal among these former regulations were laws enacted both by the Federal Government and by the Governments of the several States. These laws required denial of participation in the "recent rebellion" that characterized the Confederacy of the Civil War of 1960. Participation was in many cases defined to include "sympathizing with as well as actively aiding Confederate forces." No attorney could practice in a federal court before taking such an oath. No one could function as attorney, teacher, clergyman or corporate official. The affiant had to swear that he had never engaged in past conduct hostile to the United States, that he had never aided or abetted enemies of the United States or expressed any disloyal sentiment toward the United States.[1]

Again, and more in point, is the use by American Federation of Labor unions battling against Communist infiltration in the early twenties of a pledge not unlike that required by Section 9 (h). Such pledge read in part as follows: "I, the undersigned, do hereby promise and agree--that I will in no way affiliate with or give support, assistance or comfort to the Trade Union Educational League or to any similar or kindred organizations."[2]

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1 "Drive Against Left Wing in Trade Unions," Daily Worker, New York, II, December 25, 1925, mag. supp., 2.

2 David I. Shair, "How Effective is the Non-Communist Affidavit?," Labor Law Journal, I, 12, Chicago, September, 1950, 935-944.

Another forerunner is the Hatch Act passed in 1939 by a Congress anxious to free government service of disloyal elements. Each Government employee must have stated under oath that he is not a member of any organization that advocates the overthrow of the government of the United States by force or violence.[3]

B. What the Affidavit Aims to Combat.

The foregoing brief background for a consideration of the Non-Communist Affidavit was included mainly as an aid in understanding the true purpose for and the final aim of such Affidavit. In, and of itself, the fact that Communism had penetrated unions in the United States is of little significance to the unions themselves, apart from the fact that the success of such organization--known to be subversive--would, of course, trouble the mind of any patriotic union member. The real significance to the labor organizations themselves is the purpose for such Communist penetration--the idea in the minds of those members of the "Party" who have succeeded in invading the several unions and the eventual effect of such invasion.

The basic principle behind Communist interest in American Labor is not prompted by any need for an improvement in the status of the American workingman--nor is the general policy of the people who represent such interest directed toward the task of improving the bargaining position of any employee. The real objective is, as most of us should be aware, to promote

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3 Ellen D. Ellis, "American Civil Rights in a Revolutionary Age," Forum, CIX, Philadelphia, April, 1948, 96.

industrial unrest and strife between Capital and Labor.

With such a purpose in mind it is obvious that the Communist influence in labor is directed toward hurting the laboring man as much as possible so that an eventual "revolt of the masses" may be accomplished. Such a purpose is not new although it has been accorded new significance and recognized as a source of potential danger because of the strained relationship between this country and Soviet Russia.

C. Formation of the Communist Party

A brief survey of the Communists' career in United States unions provides an interesting backdrop for any analysis of the role of the Non-Communist Affidavit. The Communist Party of America held its first convention in Chicago, September 1-8, 1919. It grew out of a break between right and left wing socialists. It was at this time that the Party decided to create cells within existing unions. To implement this policy of penetration the Trade Union Educational League (TUEL) was formed and was headed by William Z. Foster.[4]

1. Activity within Labor Unions and the Principal Unions Affected

The formation of this organization and its parallel activity with that of the AFL created much difficulty and strife was almost constant until

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4 W. Z. Foster, "Party Industrial Methods and Structure," Workers Monthly, June, 1925, 35.

the TUEL (reorganized in 1928) ceased to function in 1935 when the Communists called for a united front with existing unions. During the same year a complex web of disagreements within the AFL brought the Congress of Industrial Organisations into existence.

It can easily be seen that this new parent federation was much easier to penetrate than was the AFL. However, although any reasonable and unbiased person would admit that Communist influence and control in the CIO was considerable, it is literally impossible to obtain agreement on the actual extent of such control and/or influence. A special House Committee on Un-American Activities in 1944 listed twenty-one unions in which "Communist leadership is strongly entrenched" noting that "They constitute a majority of all the unions affiliated with the CIO."[5]

During its formative years, the CIO had frequently welcomed the Communists. As a matter of fact, anti-communist tactics were employed by unions within the CIO generally only after the start of the cold war in 1947. Up until that time several union leaders who finally broke away in 1947 had marched arm-in-arm with Communist factions at earlier times. Most dramatic among the actions of those who broke away was the policy pursued by Joseph Curran, head of the National Maritime Union (NMU). In a "Report to the Membership" published in the Union paper The Pilot on July 5, 1946, Curran opened the attack by claiming that five hundred Party members were controlling the policies of a union of seventy to eighty thousand members. He

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5 "Investigation of Un-American Propaganda Activities," House Report No. 1311, 78th Congress, Second Session, 18-19.

charged the Communists with stuffing ballot boxes of union elections and forging and pre-marking ballots. He also said that the Party was placing organizers on the NMU payroll. In addition, Communists were under severe attack by many other unions affiliated with the CIO such as the United Automobile Workers; United Furniture Workers of America; Mine, Mill and Smelter Workers of America and the United Shoe Workers. In those unions where Communist control was too strong for internal attack, dissenters formed "Members for Democratic Action" groups and carried on the fight against the union from outside.[6]

This hostility between different elements within the CIO was translated into positive action by the exclusion at CIO conventions of the offending unions. At the Convention in 1946 prior to the enactment of the Taft-Hartley Act, the Convention adopted a "resent and reject" resolution against "outside"--presumably Communist--interference with its affairs. As a culmination of this development, two unions--the United Electrical Workers (UE) and the Farm Equipment Workers (FEW)--were expelled from the CIO at the 1949 Convention.[7] (Explusion of the FEW was because of its failure to merge with the UAW as ordered by the CIO--and for its subsequent mergence with the UE.)

2. Divisions within Unions Caused by Acceptance of Rejection or Communist Interference.

Since the time aforesaid, CIO investigatory committees have recom-

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6 Ellis, "American Civil Rights in a Revolutionary Age," Forum, CIX, 2.

7 "Final Proceedings, 11th Constitutional Conv., CIO, May, 1949, 6.

mended expulsion because of Communist control of unions or because of Communist affiliation. In the cases of several other unions these expulsions were carried out. Specifically, those purged from the CIO were the United Public Workers (UPOW); the Mine, Mill and Smelter Workers; the Food, Tobacco, Agricultural and Allied Workers (FTAW); the American Communications Association (ACA) and the United Fur and Leather Workers (UFLW). The last wave of expulsions occurred in those unions associated with the leadership of Harry Bridges of the International Longshoremen's and Warehousemen's Union and the Fishermen and Allied Workers of America.[8] The reason for the expulsion undoubtedly was because of the close connection between Bridges and the Communist Party.

D. Difficulty Encountered in Securing Legislative Enactment of Section 9 (h)

As a part of this section it should promote better understanding of the entire situation surrounding Section 9 (h) of the "Act" if we realize the difficulty encountered by Rep. Hartley and Senator Taft in guiding this particular passage through Congress and into law over the objections of President Truman and certain influential members of Congress. In his veto message of the Taft-Hartley Act, the President singled out Section 9 (h) for his most serious criticism, saying, "The only result of this provision would be to cause confusion and disorder which is exactly what the Communists desire--I

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8 David Levinson, "Left Wing Labor and Taft-Hartley," Labor Law Journal, I,14, Chicago, November, 1950, 1079.

consider that this provision would increase rather than decrease the disruptive effect of Communists in our Labor Movement."[9]

However, both Houses of Congress seemed unimpressed and enacted the bill by substantial margins. A study of the speeches from the floor of Congress plus comments by legislators made through the press and over the radio reveal that there were three principal reasons underlying support for Section 9 (h). Congress believed that (1) National security interests would be served by denying the extension of the Law's benefits to Communist-dominated unions. A serious danger was foreseen that, if our policy should run counter to that of the Soviet Union, Communist officers of labor organizations would promote disruptive strikes, (2) Communists should be blocked in their efforts to turn unions into political instruments and (3) Communist leadership and its attendant threat to the liberties of rank and file members would be weakened and this provision would encourage rightwing efforts to regain control.

This reasoning clearly shows that Congress as a whole believed that the motives which prompt Communists to engage in labor union activity are completely separate from any intention to aid the legitimate cause of Labor. In short, collective bargaining, to the typical American trade union leader, is a primary objective. On the other hand, to the relatively few union leaders who are not only deeply class-conscious, but also infected with the notion that sweeping and even violent institutional changes are necessary in

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9 New York Times, June 21, 1947, 4.

in order to obtain justice for the workers, collective bargaining is a makeshipt device for wresting maximum gains without regard for the impact of those gains on the fundamental framework of the economy. The Communist, since he is basically committed to the destruction of one party to the collective bargaining process--namely Capital--cannot accept collective bargaining as the ultimate goal.[10]

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10 Daniel H. Wollett, Labor Relations and Federal Law, Seattle, 1949, 35.

CHAPTER II

THE NON-COMMUNIST AFFIDAVIT--STATEMENTS AND INFORMATION TO BE FILED IN ORDER TO CONSTITUTE COMPLIANCE

It is obvious that machinery is needed to cope with those people who, in reality, seek to defeat the very purpose of the American Labor Movement by joining and eventually controlling the units of such movement--the individual labor unions. Undoubtedly, before defeating the aims of such persons, it is necessary that they be segregated from the mass of people influential in labor matters. Such segregation policy must proceed and become effective upon a showing that the persons to be eliminated have a common interest or general qualification that makes them what they are--enemies of this country and of the citizens of this country. Specifically, they are the enemies of their very fellow members (who are loyal Americans) in the unions with which they are affiliated.

A. Labor's Opposition and Reasons for Such Opposition

At this point in the discussion, we arrive at the provisions of the "Act" that seek to do just that--to determine those persons who are in the Labor Movement for a political purpose. Further than that, their purpose is not simply "political" in the innocuous sense, but it is counter to the best

interests of the union's membership and it has undeniable treason as its ultimate purpose. That common denominator which brands a man or woman as an enemy of this country by the very stated purpose of the organization itself is membership in the Communist Party. Section 9 (h) of the "Act", therefore, seeks to single out labor organizations whose officers are members of the Party and to place such labor organizations outside the group that may seek benefits under the National Labor Relations Act. Such provision is known as the Non-Communist Affidavit and it requires labor union officers to take an oath, under threat of criminal prosecution for perjury if such oath be false, to the effect that they have no affiliation with the Communist Party and that they do not believe in or support any organization that has for its ultimate purpose the overthrow of the United States government by force or by any illegal methods.

Considering the rather widespread bitter attitude of labor in general toward the "Act" it is undeniable that the NLRA placed certain restrictions on Labor's right to act and upon its methods of action in certain cases (viz. restriction against secondary boycott and jurisdictional strikes). However the compulsive power of the law asserted itself, in general, over the intended boycott and attempts to evade this law are now devious and do not follow the course of giving up benefits under the NLRA in exchange for non-compliance with the terms of the "Act".

B. The Importance of Exercising Control Over Subversive Element in Labor

In defense of the seemingly harsh terms of the Law and in disprov-

ing what opponents of the law assert, it would be well to explain why such a law is necessary and why, in the main and under present day conditions, it is not as unfair and unnecessarily coercive as its opponents would have the public believe. As has been pointed out before, Communist attempts to penetrate labor unions is not a new procedure nor is their reason for such penetration a new policy. It has long been the openly stated purpose of Communists, in general, to bring about a change in the economic and social order--a defeat of Capitalism that could mean only a defeat of democratic government as we have known it. It is upon such a clearly and often stated purpose that Communist activity in labor has proceeded. With this fact in mind, it is clear that such a purpose is treasonable and it is a source of wonderment that nothing has been done about such a situation thus far. World conditions, with Communism and Soviet Russia assuming importance and exercising tremendous power in world affairs, has poised a baleful threat over this country. Russia, the avowed enemy of capitalistic countries, takes little pains to conceal the fact that it considers the United States the principal bulwark standing in the way of Communist domination over the entire world. Such a situation made an absolute necessity of legislation to control Communist elements in this country. No longer can we disregard them and attempt to treat affiliation with Communism as mere political belief. The Communist Party in the United States is, in toto, clearly subversive and the difficulty in proving each individual member to be subversive should not be permitted to stand in the way of legislation so urgently demanded in the name of national unity, national preservation and even the individual preservation of life in the

It is upon this most solid ground that the proponents and advocates of the Non-Communist Affidavit seek to justify their position and also seek to prove or disprove the constitutionality of Section 9 (h).

C. Original Filing Requirements and the Present-Day Requirements

The requirements demanded in the matter of filing, generally speaking, forbade the Board to investigate a question of representation raised by a union or to issue an unfair labor practice complaint based on a union charge unless the union involved filed specific information with the Board. The information required was generally concerned with the filing of the union officers' names, titles, pay initiation fees for members, qualification for membership and several other bits of information not directly concerned with this title.

Originated in 1947 and revised in 1952 a new type of provision was added to these filing requirements and this addition became a part of the "Act" and was numbered as Section 9 (h). Its specific language is as follows:

> (1) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under Subsection (c) of this section and no complaint shall be issued pursuant to a charge made by a labor organization under Subsection (b) of Section 10 unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent until that he is not a member of the Communist Pary or affiliated with such party and that he does not believe in and is not a member of or supports any organization that believes in or teaches the overthrow of the United States government by force or by any illegal or unconstitutional methods. The provisions of Section 35A of the Criminal

Code shall be applicable in respect to such affidavit.[1]

At this point it is vital to note that the Board may not question the validity or truthfulness of the Affidavit when made.[2] It has held that no authority is granted to investigate the truth or authenticity of Non-Communist affidavits filed by union officers even in an instance where a filing union president has been convicted of perjury and conspiracy in falsifying his citizenship papers.[3] If anyone desires to show that false or fraudulent affidavits have been filed, he must look to the Department of Justice for prosecution under the Criminal Code.

It is important to note at this point that the ban on non-filing unions does not affect the individual members of those unions.[4] Their individual rights are not suspended during the period of their union officers' noncompliance and they, therefore, may file individual complaints and appear before the Board to protect their own individual interests.

2. Rights of Non-Complying Unions

Exact explanation of the rights of unions whose officers can not or will not execuite the Non-Communist Affidavit have been defined in a series

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1 61 Statutes 136, 146 29 U. S. C. Supp., Sec. 141, 159 (h).

2. National Labor Relations Board v. Highland Park Mfg. Co., 71 Supreme Court 758.

3 Alpert and Alpert (1950) 92 NLRB No. 127

4 Allied Chemical Corp. 78 NLRB 408 (1948)
United Engineering Co. 84 NLRB 74 (1949)

of decisions referred to in footnotes.

a. The non-filing union may have its name on the ballot in a decertification election, but it cannot be certified if it wins--the Board will merely announce the arithmetical results of the election.[5]

b. A non-filing union can continue as the charging party in an unfair labor practice case originally brought under the NLRA if the complaint was issued before the effective date of the amendments,[6] but the Board will not issue an order that will require the employer to bargain with a non-filing union.[7]

c. It can intervene in a representation case if it can show a contractual interest at the date of the hearing.[8] This intervention is not limited to showing the contractual interest. The non-filing union may intervene for all purposes, but of course it cannot be placed on the ballot.[9]

d. It can appear on the ballot when a petition is filed to remove the authority of the union to enter into a union shop contract.[10]

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5 Harris Foundry and Machine Co. (1948), 75 NLRB 118; California Knitting Mills (1948), 77 NLRB 574.

6 Mills Brothers Inc. (1948), 88 NLRB 622; NLRB v. Sandy Hill Brass and Iron Works, 47 ALC 1377.

7 Marshall and Bruce Co. (1947), 75 NLRB 90; NLRB v. Prosper Brozen, 48 ALC 776.

8 Precision Castings Co. (1948), 77 NLRB 261.

9 Bush Woolen Mills, Inc. (1948), 76 NLRB 618.

10 NLRB Asso. General Counsel C. M. Brooks in a speech before the Ninth Ohio Personnel Institute, Columbus, Ohio, May 12, 1948, NLRB Rel. R-80.

e. It can object to an employer's conduct in an election in a decertification proceeding.[11]

Through this very brief summary of the specific law relating to the subject, it is hoped that the reader can visualize and understand the situation generally--that he can at least partially comprehend the difficulties, pressures and complications that have confronted and will continue to confront the Board. It is because of the enormously complex nature of the field which is sought to be regulated by the Act that such regulation is difficult to administer and because of this complex and constantly changing field the "Act" itself must remain in a constant state of flux.

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11 Univis Lens Co. (1949) 82 NLRB 155

CHAPTER III

THE CONSTITUTIONALITY OF SECTION 9 (h)

Before any law can command a position of importance or any obedience on the part of those persons or organization which it seeks to regulate, it must first pass the test of constitutionality. Because Section 9 (h) attempts to place a burden on the freedom of labor union action in general by making the officers thereof file affidavits attesting to their Americanism and their individual lack of intent to undermine or subvert the government it is easy to see that serious objections to the constitutionality of such a measure could be posed. An orderly treatment of this question will be attempted--first--an explanation of the purpose and aim of this chapter and--second--the specific portions of the Federal Constitution that are claimed as violated and the explanations and decisions on each question.

A. Explanation and Purpose of This Section.

As a preface to treatment of the question of the constitutionality of Section 9 (h), it would be well to explain that such treatment and the authority cited for the opinions expressed will be confied to this portion of the thesis. However, legality and interpretation as determined by the Courts will be found elsewhere in this presentation. It is only because this particular point is of paramount importance that a separate section is devoted

to its consideration and to the arguments and the final decisions relating to the matter.

B. Portions of the Federal Constitution Claimed as Violated.

It is argued that the Non-Communist Affidavit is in contravention to the basic principles of the Federal Constitution and, specifically, that it violates the First and Fifth Amendments thereof.[1] Although, cases deciding the question of constitutionality in terms of the two amendments aforesaid are legion, an attempt will be made to list some of the more important decisions involved together with the question or questions each purports to solve.

1. Does the Requirement of 9 (h) Cover International Unions and Parent Organisations such as CIO and AFL?

Objection to constitutionality on the above point is on the basis that if Section 9 (h) were allowed to cover the wide range aforementioned, such section would then be not only too vague, but also too all-encompassing to stand the test of constitutionality. It would, it is claimed, be considered unreasonable and a violation of the Due Process Clause of the Fifth Amendment.

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1 "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press. . . .," Constitution of the United States of America, First Amendment.

"No person. . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law.," Constitution of the U. S. A., Fifth Amendment.

The Courts have decided, however, that the requirements embodied in Section 9 (h) are, in their broader sense, constitutional. Compliance, according to the weight of authority, will be by all branches and portions of the affected union and by all its direct affiliates.[2] The first decision in this matter, at the time it was rendered, was regarded as "purely academic" in the apparent belief that it would have little effect on practical application of the Affidavit. However, when lower courts honored the Supreme Court decision and commenced to invalidate union contracts (as far as the NLRA was concerned) the effect was near-chaos in labor-management relations. Ironically, even many contracts executed by the Automobile Workers Union under the direction of Communist-hating Walter Reuther were invalidated because of its affiliation with the CIO whose officers had not executed the Affidavit.[3] Senator Taft himself, in near-desperation over the destructive effect of this construction of Section 9 (h), attempted to have legislation enacted which would validate those contracts made inoperative by the construction embodied in the Highland Park Case.[4]

By way of explanation--the decision in the Highland Park Case was made in an effort to defeat attempts at "fronting"--instances in which parent organizations who could comply with Section 9 (h) would present grievances affecting non-complying locals or vice versa.

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2 NLRB v. Highland Park Mfg. Co., 71 Supreme Court 758

3 David I. Shair, "One More Year with 9 (h)," Labor Law Journal, Chicago, January, 1952, 37.

4 New York Times, August 1, 1951, 15.

The impact of this decision and the decisions following honoring and supporting it was very heavy. Not only were some four thousand union security clauses declared invalid,[5] but twenty-two cases were filed in one week of July, 1951, containing appeals from decisions already rendered. Orders "Vacating Decisions and Dismissing Complaints" were issued for these and many more cases of this type.

2. How far Can an Individual Assert His Personal Constitutional Right to Present a Matter to the NLRB Pertaining to Union Activity?

This point can, by its very nature, never be completely explained for each new case has its own circumstances and in each instance the court or administrative body must decide whether or not the individual has a personal right to present the instant grievance or to ask for the particular relief requested. Only by examination of authority can an idea be obtained concerning how far an individual may go in presenting a case under the assertion or pretext that his individual rights are involved.[6] Much of the support contained in decided cases is based upon individual rights as set forth in the Federal Constitution.[7]

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5 New York Times, May 5, 1951, 1.

6 Lane Wells Co. v. NLRB, 77 NLRB 1051
Granite Testile Mills Inc. v. NLRB, 76 NLRB 613
Cribben and Sexton Co. v. NLRB, 82 NLRB 1409
Ann Arbor Press v. NLRB, 188F (2nd) 917
Red Rock Co. v. NLRB, 187F (2nd) 76

7 Shair, "One More Year with 9 (h)," LLJ, 36.

3. Is the Pressure Exerted by 9 (h) on a Union to Get Rid of Its Communist Officers Constitutional?

Authority consulted on this point presented some rather involved reasoning. With the knowledge that an attempt at over-simplification could dissipate the astute argumentation involved, the following explanation is an attempt to simplify tempered by the need for adequate treatment.

First--it may be said that pressures have been placed on unions to rid themselves of Communist domination. What is not clear is whether Congress may make an officer's membership in or affiliation with the Communist Party a valid, Constitutional ground for persuading his union to remove him from office. In the absence of such "valid" reason, persuasion would be termed "unreasonable, arbitrary and discriminating" and, as such, in direct contravention to the First Amendment to the Federal Constitution because it would infringe unpon "freedom of association."[8]

Second--it shall be necessary to prove (in order to defeat the presumption of unreasonableness) that the membership in question constitutes a "clear and present danger" to the United States government.[9] Formally, in order to constitute "clear and present danger" the membership in the Communist Party must "bring about the substantive evils that Congress has a right to prevent."[10]

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8 House Report No. 245, 80th Congress, 1st Session, 30-39.

9 First formulated as a test by Justice Holmes in Schenk v. U. S., 249 U.S. 47.

10 "The Constitutionality of the Expurgatory Oath," Oregon Law Review, February, 1948, 85.

Third--does membership in the Communist Party or does the Communist Party itself tend to "bring about the substantive evils that Congress has a right to prevent?" In the light of all expressed Communist Party doctrine and also because of the fact that seven years of attempts to convict Communist Party members of "sedition" because of such membership had proved unavailing. (Although convictions were had of persons who were Communist Party members, it could not be proved that their membership was the guiding cause for their seditious behavior), it is, therefore, reasoned that membership in the Party does not so tend.

A final statement may serve to clarify the reasoning employed. The imposing upon members of the Communist Party of disabilities not placed upon adherents of other political organizations should require, as justification, a showing that a substantial threat to national interest necessitates such discriminatory legislation. Here, unfortunately, the author and the persons who compiled the impressive array of reasoning and authority must part company. It is their opinion--and they actually concede that the Communist Party once preached armed revolt--that such membership does not constitute a "substantive threat." This opinion is absurd and the reasoning which they employ to support such opinion is definitely faulty. For instance, just because the Courts have been unable to obtain convictions under the Sedition Statutes against individuals because of their membership is no definite proof that the organization itself is not seditious. To illustrate the specious character of the reasoning employed, this further quotation is cited--"it is doubtless possible for Congress to strike at many of the practices allegedly fostered by Commu-

nist officials in trade unions but it is not always possible to satisfy a Court that such practices result from Communist Party membership."[11]

4. Does Deprivation of the Right to Appear before the NLRB Constitute Legislative Punishment without Trial and thus Constitute a Denial of Due Process? (Fifth Amendment)

It should be rather obvious that appearance before the Board should not be considered as a substantive right.[12]

Further, although the Non-Communist Affidavit may be said to "penalize for belief"[13] such penalizing, reasonably, could not be considered unconstitutional. Although such punishment has never been before meted out, penalties have been pronounced and carried out for "advocacy"--in the absence of any vital national danger or threat. Such "advocacy" is merely the verbal or demonstrated assertion of belief. It would seem reasonable--especially in the light of the very real national danger involved--to invoke the laws of evidence and/or testimony of the person involved in order to determine his or her concealed opinion or attitude. The law of evidence is designed to enable the court and/or jury to determine the question at issue by means of legal interpretations to be gained from a given set of circumstances. The law dictates--

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11 J. D. Barrett, "Constitutionality of the Taft-Hartley Non-Communist Affidavit," Columbia Law Review, March, 1948, 253.

12 Inland Steel v. NLRB, 22 LRRM 2506
National Maritime Union v. Herzog, 21 LRRM 2648
American Communications Assn. v. Douds, 22 LRRM 2276

13 Barnet, "Constitutionality of the T-H Non-Communist Affidavit," CLR, 95.

through the rules of evidence--the evidenciary weight and the significance of each pertinent fact. This "fact" may be in the form of an act, a declaration or a situation--or, of course, multiple forms of the proceeding component parts. It is by this means that it is suggested that the court might determine from "evidence and/or testimony" exactly or substantially what is or was in the mind of the subject. As an illustration, a criminal court may convict for murder when the difference between murder and manslaughter (or for that matter, between murder and no crime at all) is simply what was in the defendant's mind at the time of the killing--and that which was in his mind may be adduced from extraneous circumstances.

5. Does Deprivation of the Right to Appear before NLRB Constitute a Denial of Due Process as Contemplated by the Fifth Amendment? (Equal Protection)

This question is more valid and requires more thought and more legal justification than does the preceding objection to constitutionality on the basis of "punishment without trial." It must be admitted that Communists are denied the equal protection of the law because of the Non-Communist Affidavit. The sole justification for such a denial must be based upon national interest. Briefly, accepting the argument that proof of the Communist Party's treasonable character is virtually impossible, it is contended that there is enough indication of such treasonable character to justify a denial of such protection under the "clear and present danger" test.[14]

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14 Z. Chafee, Free Speech in the U. S., Boston, 1948., 971.

6. Is the Non-Communist Affidavit an Unconstitutional Discrimination Against Unions?

At first, the answer would seem to have to be answered in the affirmative. However, simple examination of this statement and comparison with the actual so-called discrimination will reveal the specious character of the question. Specifically, the Non-Communist Affidavit is not a discrimination against unions in general but rather against Communist or Communist-led unions.

7. Decision of the United States Supreme Court Covering Many of the Foregoing Points.

As additional information concerning the various objections which might be raised on a Constitutional basis both the pertinent legal decisions and the dicta expressed in American Communications Association v. Douds, 339 U.S. 382, decided May 8, 1950, should be considered. The necessity for discussion at length in dealing with a case of this type was recognized by the members of the Court and, although the specific objections to Constitutionality that are dealt with in this decision are phrased somewhat at variance with the foregoing objections, the result arrived at is approximately the same. The "difference in phrasing" is only additional proof of the ethereal nature of objection and justification when dealing with that which may be referred to as a subject, as a variable subject or as a group of subjects. Because of the aforementioned "ethereal nature" of the subject matter, a simple, easily understood assessment of the value or validity of regulation of this type cannot be made. The most that can be achieved is a comparatively lucid explanation of the many facets involved and a reasonably comprehensive treatment of those

facets. It is believed that a consideration of the foregoing "Portions of the Federal Constitution claimed as violated" together with the related and pertinent portions of the following quoted case will serve to afford a conclusive decision concerning the Constitutionality of the "Act."

American Communications Association v. Douds, 339 Supreme Court 382 May 8, 1950; United Steelworkers of America v. NLRB, 2nd Region.

FACTS: This is an action by the American Communications Association, CIO, and others against Charles T. Douds individually and as Regional Director of the National Labor Relations Board, Second Region to restrain the holding of a representation election. A motion to dismiss the complaint was granted, the District Court, Southern District of New York[15] and plaintiffs appealed. A like issue was raised by the petition of the United Steelworkers of America and others to review and set aside an order of the NLRB. Petition in this case was denied and petitioners brought certiorari.

DECISION: (Majority) The Supreme Court decided that provisions of the Labor-Management Relations Act of 1947, 29 USCA par 159 (h), conditioning recognition of a labor organization on the filing of affidavits by its officers that they do not belong to the Communist Party and do not believe in the overthrow of this government by force or by unconstitutional methods, is reasonable and legal.

POINTS CONSIDERED: Political Strike It is considered that Paragraph 9 (h) is dealing with a matter which would, if allowed to persist, obstruct the free flow of commerce in an unconstitutional manner. What is more important than the obstruction itself is, of course, the reason for and the purpose of such an obstruction. The Court finds that, factually, the strikes that have been called by such leaders and for such reasons as Section 9 (h) contemplates and would, reasonably, be called in the future were principally not intended to benefit the worker or society in general but rather to further the policies of a "foreign Government." Such a strike is, of course, political in nature and would be used to impede national progress and the national defense effort in the event of war.

Appellants Contend that 9 (h) makes it impossible for those who cannot sign to become union officers and, therefore, denies fundamental rights as expressed in the First Amendment of the Federal Constitution.--

The Court admits that 9 (h) would make it difficult for such persons to

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15 American Communications Assn. v. Douds, 79 Federal Supp. 563.

become union officers but denies the impossibility of their doing so. However, the decision against this objection is placed on other grounds--to wit--Section 9 (h) "bears reasonable relation to the evil which the statute was designed to reach." This evil is, of course, the subversive use of the labor union.

It is contended that no "clear and present danger" exists which would justify the drastic methods employed by the terms of Sec. 9 (h).

The court cites an excellent and very pertinent statement by Mr. Justice Holmes in which Holmes stated that the provisions of the Constitution "are not mathematical formulas having their essence in their form--they are organic living institutions transplanted from English soil. The significance is vital not formal. It is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth."[16] In brief, it is the considerations that give birth to the phrase "clear and present danger" and not the etymological significance of the words themselves that is vital in the decision of questions involving liberties protected by the First Amendment. Stated in another way, it must be determined not that evil will result with relative certainty but rather that the circumstances or situation could bring about the substantive evils that Congress has a right to prevent.[17]

Section 9 (h) directly punishes for affiliations which are guaranteed by the rights of speech and assembly contained in the First Amendment.

The Court states that, althought the "Act" may tend to discourage it does not directly punish--nor does it suppress free speech or association --only insofar as that free speech or association may operate to directly harm the national interest.[18]

Statues touching the First Amendment must be construed more strictly. Expressed in another way the objection can be explained as contending that, though the political strikes can be deemed unlawful and thus prevented and punished, no steps can be taken to prevent them by removing those persons who are responsible. It is only reasonable to say that, because of the difficulty in ascertaining the true cause or nature of a strike and because of the tremendous importance of the free movement of commerce, such a requirement as that imposed by Section 9 (h) should

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16 Gompers v. U. S., 1914, 233 U.S. 604.

17 Schenk v. U. S., 1938, 249 U. S. 52.

18 Hague v. Congress of Industrial Organizations, 1939, 307 U.S. 496; Grosjean v. American Press Co., 1936, 297 U.S. 233.

be considered constitutional.

Section 9 (h) is unconstitutionally vague.--It is admitted that the terms "affiliated," "supports," "illegal or unconstitutional methods" are somewhat vague--however, the applicable standard is not one of wholly consistent academic definition but rather the practical criterion of "fair notice" to those to whom the statute is directed. When a person takes the oath, if he be in doubt he can state his actual connections and request a determination as to whether these connections constitute "affiliation" etc. within the purview of the law in question. He may also demonstrate in some other way that he is acting in good faith in the execution of the Affidavit--in which event he could not be successfully prosecuted.

Section 9 (h) is ex post facto law and it is also a bill of attainder.--Since it has been adequately demonstrated by practical application and by experience that a person need not remain ineligible under the terms of the law merely because he has been at one time ineligible, it is clear that punishment (if it can be considered such) is not for past action but only to prevent future subversive conduct. If a person executes the affidavit in good faith and continues to conduct himself within the boundries of proper conduct within the terms of the affidavit which he has executed, it is highly improbable that he could be punished. Considering the point that the Affidavit constitutes a bill of attainder it need only be said that no permanent punishment is provided and the person affected may, by changing his mind and his future conduct, become eligible.[19]

That portion of the Non-Communist Affidavit making it necessary for the affiant to swear that he or she does not "believe in" the Communist Party or in any organization contemplating the overthrow of the government is unconstitutional.

The Court is evenly divided upon the question of the validity of this phase of the Affidavit. Three judges decided in favor of the validity of all portions of Section 9 (h), and three judges decided that the "belief in" portion of the Affidavit constituted an invasion of Constitutionally guaranteed rights, and three judges did not participate in deciding this case. The principal points considered and the decisions rendered are as follows--

Those judges who consider the requirement to be reasonable, just and legal.

The three judges who favored the legality of the "belief in" portion of the Affidavit based their decision upon one ultimately definite but some-

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19 U.S. v. Lovett, 328 U.S. 314; Cummings v. Missouri, 4 Wall 327.

what abstruse and devious principle. What that principle is may best be explained through the use of some of the exact language of the opinion"-

"We must recognize, moreover, that the regulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas. We have been reminded that it is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within control."

The decision goes on to state "on the other hand legitimate attempts to protect the public not from the remote possible effects of noxious ideologies but from present excesses of direct active conduct are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights. In essence, the probable effect of the Statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by 9 (h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the delicate and difficult task to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of these rights."

The opinion further states that the "reasons advanced in support" are of considerable weight and that the Court, while it may declare an act or a law unconstitutional if it unduly infringes on Constitutional rights, it may not declare that Act unconstitutional "if it is clearly demonstrated that the public interest demands the passage and enforcement of such act."

<u>Those judges who consider the "belief in" portion of the Affidavit to be unconstitutional.</u>

Justice FRANKFURTER--concurs in the majority opinion on all points excepting the "belief in" question. Frankfurter states that this requirement should be considered unconstitutional because such a requirement "is to ask assurances from men regarding matters that open the door too wide to mere speculation or uncertainty." He believes that this part of the oath asks conclusions of men regarding matters which the Supreme Court itself may decide are Constitutional or not by no more than a single vote. He also declares this part of the oath is wrong in asking for disavowal of belief when such belief is a tenuous, inexact thing that may never be determined by extraneous circumstances.

Justice JACKSON--dissents also on the point of requiring a disavowal of "belief in." He bases his opinion on the fact that the disavowal requires a positive statement of disbelief and such statement could be made, reasonably, only if the affiant completely understood the Communist Party. Also, to punish a false statement of disbelief the Court would have to decide fine questions and make a decision of fact regarding a hopelessly ethereal matter--to wit--exactly what does the person under consideration believe. Justice Jackson states further that "the Constitution explicitly precludes punishment of the malignant mental state alone as treason." He cites the medieval punishment for "imagining the death of the king." Jackson is of the opinion that the American citizen is entitled to think whatever he likes and that he should never be punished for thoughts alone no matter how black they may be. To sum up, a verbatim quotation would seem to contain his thought in the matter--"The priceless heritage of our society is the unrestricted constitutional right of each member to think whatever he likes. Thought control is a copy of totalitarianism and we have no claim to it. It is not the function of our government to keep the citizen from error. We could justify censorship only when the censors are better shielded against error than the censored."

Justice BLACK--likewise offers a dissenting opinion on similar grounds--stating--"The freedom to think is absolute of its own nature and the most tyrannical government is powerless to control the inward workings of the mind." He goes still further saying "individual freedom and governmental thought-probing cannot live together, as the Court admits even today under the First Amendment 'Beliefs are Inviolate.'" Black cites several instances of punishment for thought that have taken place during recorded history and expresses the opinion that once this procedure is sanctioned in its present "mild" form, it would swiftly become more probing and freedom of thought would vanish. He also calls attention to the proscription against affiliation with a particular political party. He believes that such proscription could be easily extended to include "any political party." Closing his argument against the "belief in" provision Black states that to uphold such provision would be to ignore "ancient landmarks set up in our Bill of Rights. He quotes from Chief Justice Hughes in DeJonge v. Oregon, 299 U.S. 353, as follows.

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

The opinion of the author is definitely in line with the opinions expressed by the judges in this case. The "belief in" principle cannot be justified on a legalistic basis. It would appear that restrictions to be placed on "Party" members or sympathizers must, of constitutional necessity, take a different tack. (Possibly the outlawing of the Communist Party and all parties or organizations of kindred type.)

Further statements are made in the text of the opinion which are supported by argument. by a compendium of historical occurrences and by the actions of members of the Communist Party in the United States. It is stated (1) that the Communist Party in the United States is dedicated to and controlled by a foreign government (2) that the goal of the Communist Party is to seize the powers of government by and for a minority rather than to acquire power through the vote of a free electorate (3) violent and undemocratic means are the calculated and indispensable means to attain the Communist Party's goal and that (4) the Communist Party has sought to gain a hold upon the American population by acquiring control of the labor movement.

The foregoing statements and attendant proof are employed to justify the use of Section 9 (h) in the regulation of labor and to prove that such regulation is not done in a frivolous manner or without serious necessity. The decision itself is quite lengthy and the Court seems to go quite far afield in explaining the reasons for, the need for and the justification for its action. It is apparent from the verbosity employed that the Court realizes that this question is of great importance and the decision of this particular case could have far-reaching impact.

C. Summation

In addition to the foregoing possible objections that opponents of the Non-Communist Affidavit might raise there are innumerable additional possibilities for objection.[20] These protests, however, have not been deemed worthy of treatment--first--because they present no real meritorious objection and--second--because fault-finding of this type could be presented, varied, enlarged upon and complicated ad infinitum. Comparative treatment indicates a summary disposal of these points.

Finally, to the actual letter of the Federal Constitution must be added the spirit, the compelling force and the reason behind the wording of the Constitution. To demonstrate this spirit in the matter of subversive activity the reader might consider the case of Gitlow v. The People of New York decided by the Supreme Court of the United States in 1925. While the facts of this case are not exactly in point with the problem under discussion here, there is a marked similarity in that which is being attempted by the persons sought to be regulated. Since this particular case is one of those cases classified as "headlights" in the law by the law student and since it sets forth a principle in the law closely akin to the one under treatment its inclusion herein is necessarily indicated.

Gitlow v. The People of New York

FACTS: Benjamin Gitlow and three other persons were indicted in the New York State Supreme Court for "the statutory crime of criminal anarchy."

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20 "Vagueness," "Burden on Constitutional guarantees of right of association," "Oath not against overt acts but against words, desires and sympathies," Inhibits freedom of right to assemble," etc.

Upon their conviction the defense appealed to the United States Supreme Court on the ground that both the United States Constitution and the Constitution of the Sovereign State of New York guarantee freedom of speech and that the statute was--at least in this instance--an abridgement of that right.

Factually, it appears that defendants were "advocating, advising and teaching the duty, necessity and propriety of overthrowing the government by force, violence and other unlawful means." The principal media for such "advocating, etc." were composite writings entitled The Revolutionary Age.

Defendants do not oppose the contention that the writings are of the subversive nature charged, but place their whole defense on "freedom of speech" and contend that there is no proof of any concrete harmful result from publications aforesaid.

DECISION: Simply stated, the decision was to the effect that the New York Statute does not penalize the "Freedom of Speech" as contemplated by the Federal Constitution for that "Freedom" as expressed presupposes that the exercise thereof will not disturb the peace or attempt to subvert the government. By enacting the State Statute in question the Court said that the State Legislature had determined--justifiedly and in conformance with sufficient evidence--that utterances advocating the overthrow of organized and duly constituted government by force, violence or unlawful means are so inimical to the general welfare that they may be penalized by an exercise of the Police Power. Such exercise shall certainly not be considered to be in violation of the First or of any other Amendment or Article in the Federal Constitution.

In closing this section, it is desired to again stress the basic principle upon which the Non-Communist Affidavit can be justified from a Constitutional standpoint. It is hoped, rather, to justify the idea of a loyalty oath rather than to attempt a justification of Section 9 (h) as it now stands. This point is important in view of the wording of the Section, legally-speaking, and because it would be a comparatively simple matter to rectify or even redraft the Affidavit in such a manner as to avoid many of the objections and still have the oath retain its effectiveness.

CHAPTER IV

LEGAL HISTORY—RESULTS OF ATTEMPTS AT EVASION

Since it is believed necessary, as a proper explanation and treatment of the subject, to consider at some length the historical background, the past treatment of this specific problem and the need for Section 9 (h) it is only in this chapter that the main purpose of this paper will be set forth. That purpose is to explain how the Courts have dealt with organizations failing to comply with the terms of Section 9 (h).

For the sake of clarity and because this portion of the thesis represents an important phase, to wit, the actual operation of the Affidavit and its effectiveness as a regulatory influence on left-wing labor elements, it is necessary to set forth the pertinent portions of the various cases which decide this "effectiveness." Through this method the reader may see for himself what was decided and reach his own interpretation of the meaning of each individual decision. For the sake of brevity these verbatim citations will be used in explaining "Non-compliance" only since cases within this category comprise the overwhelming majority of attempts at evasion of the "Act."

The evasions or attempts at evasion will be treated under the two large groupings which comprise the general methods employed to circumvent the law--to wit--non-compliance and token compliance. Since the types and kinds of each of these two groups are multifold, it is not feasible or it is at

least not practical to break these two divisions into sub-groups representing each of the separate sorts of non-compliance and token compliance. It will be more informative and less confusing to adhere to the two main classifications only, and to divide the cases accordingly.

A. Non-compliance

Under this subdivision an attempt will be made to show the effect upon labor unions that non-compliance with the terms of Section 9 (h) will cause.

1. Federal Courts

a. International Longshoremans and Warehousemens Union, Local 6, CIO v. Sunset Line and Twine Co., U. S. District Court, Northern Dist. of California, April 7, 1948, 21 LRRM 2635

FACTS: The Labor Union in this case, not having complied with Sec. 9 (h) and therefore being unable to go before the National Labor Relations Board, sought injunctive relief in the Federal District Court against the employer (and damages also) for his refusal to bargain with the union in violation of the terms of the NLRA.

It was revealed that for approximately ten years the plaintiff had served as collective bargaining agent for the employees of the defendant. In 1947 when plaintiff sought to renew its collective bargaining agreement with defendant, said defendant refused to recognize plaintiff as the designated bargaining agent of its employees in violation of the provisions of the NLRA. It is contended that the defendant has allegedly conspired to violate the law by refusing to bargain, by importing strike-breakers, by intimidating pickets and by refusing to present their side of the dispute to the conciliation service when requested to do so by plaintiff.

PLAINTIFF'S CONTENTION: It is contended by the Union that (1) the NLRA does not provide exclusive jurisdiction in the NLRB to hear matters such as this one and concurrent jurisdiction may be found (by implication) in the Act. (2) The Court should seize jurisdiction as a matter of general

policy since, otherwise, plaintiff would be denied a remedy for very patent wrongs.

DECISION FOR DEFENDANT: The Federal Court does not have jurisdiction of such an action since the NLRA sets up adequate machinery within the Board's jurisdiction to enforce and preserve the union's rights. There is no need and no room for the District Court to assume jurisdiction.

b. Linde Air Products Co. v. Johnson, U. S. Dist. Court, Dist. of Minn, January 28, 1948, 21 LRRM 2272

FACTS: Plaintiff union brings representation proceedings under the State of Minnesota Labor Relations Act and the defendant employer applies to this court for temporary injunctive relief restraining the State Labor Conciliator from assuming jurisdiction over representation proceedings to determine bargaining agent of employer who is engaged in interstate commerce. Defendant contends that the state conciliator does not have jurisdiction and that defendant would suffer irreparable damages if required to submit to the conciliator aforementioned.

The Linde Air Products of Duluth, Minnesota is engaged in the interstate production and distribution of industrial gases and is, therefore, deemed to be engaged in interstate commerce. Defendant Johnson (United Elec. Radio and Machine Workers) had previously filed a representation petition with the NLRB--which petition was dismissed because the union had not complied with Section 9 (h) of the NLRA. It now has filed such petition with the Minnesota Labor Conciliator under the State Labor Relations Act.

DEFENDANT'S CONTENTION: Application for injunction is premature since plaintiff has failed to exhaust his administrative remedies and because plaintiff can raise all these questions on certiorari to the Minnesota Supreme Court to review any certification made by the State Labor Conciliator.

DECISION: For plaintiff--Minnesota State Labor Conciliator has no jurisdiction over a representation proceeding brought by the union under a State Labor Relations Act. NLRB has exclusive jurisdiction of this matter under NLRA even though that Board refused to act because union officials had refused to certify to their non-affiliation with Communism.[1]

c. Fay v. Douds, U. S. Court of Appeals, 2nd Circuit, N. Y., February 11, 1949, 23 LRRM 2356

FACTS: Local 475, UERMW, and the employer executed a contract on May 1,

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1 Bethlehem Steel Co. v. N. Y. Labor Board, 330 U.S. 767; Pittsburgh Railway Co. v. Div. 85, Amal. Assn. of Railway Employees, 53 A.(2nd) 891.

1947 making this local the exclusive bargaining agent for the employees in defendant's plant. On April 8, 1948, the United Automobile, Aircraft and Agricultural Workers of America sought appointment as exclusive bargaining agent also. In an election the latter union was certified and such certification was accepted by defendant. Local 475 thereupon entered a complaint that, since they were denied the right of appearing on the ballot, a new election should be held.

The Board should be ordered to hold a hearing at which the petitioning union could put in evidence material purporting to support their contentions and also that the Board be enjoined from holding an election without putting petitioning union's name on the ballot.

DECISION: Petition denied--the petition of the union has made no showing that the "contract bar" of the agreement between the union and the defendant had been lifted--as a matter of fact it appears rather clear that it had not been lifted and therefore the union could not hope to submit any worthwhile argument bearing upon negotiations. Also, since it is constitutional to decertify the union in a case like this one, it is also constitutional to deny such union a place on the ballot because to give it such a place could only, at most, cause the defeat of certification for the other union and therefore since certification of the petitioning union is impossible, no worthwhile purpose could be served by causing the name to be placed on the ballot.

2. State Courts

a. Fulford v. Smith Cabinet Co., Indiana Appellate Court, March 10, 1948, 21 LRRM 2540.

FACTS: Employer seeks injunctive relief against picketing by a union which is not eligible for certification because it has failed to comply with the filing and affidavit requirements of the NLRA. Evidence discloses that the appellee company manufactured and shipped radio parts from its plant in Salem, Indiana. In the spring of 1947 two non-employees started to organize the production workers. On August 19, 1947, a consent election was held and the union prevailed (Local No. 309, CIO, United Furniture Workers of America). Thereafter, the company refused to recognize the union until it was certified as the representative of said employees and the union refused to perform the steps necessary to certification. On September 4, 1947, this situation ended in a labor dispute and mass picketing followed.

APPELLANT'S CONTENTION: The Indiana Injunction Law forbids granting of injunction to an employer who has failed to negotiate, mediate or arbitrate the cause of the difficulty.

DECISION: Decision of the lower court affirmed--injunction granted--the Court is of the opinion that it is the plain intent of the "Act" that if a union is not eligible for certification it cannot compel recognition as the representative of the employees and it need not be recognized as such. Since the union's sole demand was for recognition as the representative of the production workers--upon which point it insisted but which the appellee was entitled legally and lawfully to refuse, there was nothing to negotiate, mediate or arbitrate. In short, the law cannot require the appellee to forego a clearly legal right.[2]

b. Scranton Broadcasters, Inc. v. American Communications Assn. (CIO), Pennsylvania Court of Common Pleas, November 7, 1947, 21 LRRM 2024.

FACTS: An injunction was granted to the plaintiff Scranton Broadcasters against the American Communications Association to prevent picketing and other actions of said Association intended to coerce the plaintiff into accepting this union as the bargaining for employees of Scranton Broadcasters. It can be taken as a matter of fact and must be considered to give weight and credence to the reasons set forth by the Court that the Union, should it be allowed to maintain this strike or other strikes of like nature, could absolutely paralyze radio--commercially--in the United States.

DECISION: For appellee--injunction stands--this case brings into consideration the actual damage that might be wrought were this union to do the bidding of the USSR. The Court makes the very logical assumption that, because officials have refused to sign the Non-Communist Affidavit that they are, as a matter of fact, taking instructions from Moscow, saying, "The Soviet Government is an enemy of the United States and has organizations working herein trying to overthrow this government. The officers of the defendant union will not even take oath that its members are not affiliated with the enemies of the United States."

The Court closes its argument by stating that the reasons for the Anti-Injunction Act sought to be invoked have mostly disappeared and "A strike under the guidance of any union unwilling to declare its allegiance to the United States should be enjoined."[3]

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2 NLRB v. Dahlstrom Metallic Door Co., 112 F (2nd) 756.

3 Citation of pertinent passage in the Federal Constitution as set forth in 21 LRRM 2026-7.

c. Cleland-Simpson Co. v. American Communications Association, Pennsylvania Court of Common Pleas, No. 11, November 11, 1947, 21 LRRM 2059.

FACTS: This is another attempt to invoke the State Anti-Injunction Act by a union which has failed to comply with Section 9 (h) and which is seeking to maintain a strike against a merchandise store (secondary boycott) in an effort to compel its owner to breach an advertising contract with the broadcasting station the union is striking against.

DECISION: This case is decided for Cleland-Simpson Co. on two grounds, the Court stating that (1) the Pa. Anti-Injunction Act does not apply to action by an owner of a store for an injunction to restrain a union on strike against another from picketing that store in an effort to compel the owner thereof to breach an advertising contract with the person against whom the union is striking. (2) A strike of employees of the broadcasting station and action in pursuance to its objects is unlawful where and when the strike is directed by a union which has failed to qualify as the bargaining agent under the NLRA because the officers of that union have refused to take the Non-Communist oath.[4]

d. Simons v. Retail Clerk's Union Local 770, California Supreme Court, April 8, 1948, 21 LRRM 2685.

FACTS: Plaintiff seeks restraining injunction to prevent picketing of his drug store by the defendant union. This picketing was begun because plaintiffs have refused to sign a closed shop agreement with this union recognizing it as the bargaining agent for plaintiff's eight retail clerks and two registered pharmacists. One of the results of the picketing was to interfere with interstate American Express shipments to the drug store. Plaintiff store petitioned the NLRB to determine if the union was the proper one to represent its employees and the NLRB rejected the petition of the employer on the ground that the union was not qualified to represent the employees because of its failure to comply with the terms of the NLRA.

Nevertheless, the union continues to picket the store of the plaintiff to gain a closed-shop agreement.

DECISION: Injunction granted—the courts have held again and again that when a strike has no genuine hope of success continued interference with the business of the employer is no longer lawful. The right of peaceful

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4 Alliance Auto Service v. Cohen, 341 Pac. 283; Carnegie Illinois Steel Co. v. United Steelworkers of America, 353 Pa. 420; Western Electric Co. v. UERMW, 353 Pa. 446.

persuasion presupposes an existing lawful trade dispute.--Here there is noe as the very objective the defendant union seeks to obtain, the "Act" prohibits it from attaining.

3. National Labor Relations Board and other Administrative Tribunals

a. Eau Claire Press Co.--Decision of the Wisconsin Employment Relations Board, November 3, 1947, 21 LRRM 1085.

FACTS: The Eau Claire Typographical Union brought a representation proceeding before the Wisconsin Employment Relations Board on the theory that the NLRB had refused to hear the matter because of the union's failure to comply with Section 9 (h) of the NLRA. The petitioner contends that the NLRB has relinquished jurisdiction by such action and therefore the State Board may now take cognizance of the matter.

DECISION: For respondent--jurisdictions of the NLRB and the Wisconsin Board are concurrent--however, the Wisconsin Board can assume such jurisdiction only in the absence of any action by the NLRB. Contrary to petitioners contention the NLRB did assume jurisdiction over this case and had merely refused to act because petitioner had not complied with the requisite formalities, adjudged by the NLRB to be necessary before it can take action in any case.[5]

b. In re Harris Foundry and Machine Co. v. United Steelworkers of America, February 11, 1948, NLRB, 21 LRRM 1146.

FACTS: The United Steelworkers of America in this case was certified following a consent election as the bargaining representative of the Harris Company's production employees. At the present time it is sought to be determined if a consent election can be held to determine whether the union still represented a majority of the employees.

UNION'S CONTENTION: Since the incumbent union has not complied with Section 9 (h) of the amended "Act" it has no standing before the NLRB and cannot be joined as a party to a hearing before that Board.

DECISION: To hold the consent election--to rule otherwise would be to place a premium upon non-compliance and to confer upon non-complying unions the power to immunize themselves against decertification proceedings by their very refusal to comply with the registration and filing

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5 Gerry of California v. International Ladies Garment Workers, 21 LRRM 2209; N.W. Pacific R.R. Co. v. Lumbermans Union, 31 A.C. 448.

requirements of the amended "Act." Encouragement would be given thereby to non-compliance contrary to the Congressional policy in amending the "Act." ("Under our policy it is still possible for this union to be certified under the 'Act' if, at the time it wins the election, it is then in compliance. Absent such compliance the Board would only certify the arithmetical results of the election.")

c. Magnesium Casting Co. v. United Steelworkers of America, NLRB, February 19, 1948, 21 LRRM 1179.

FACTS: Are much the same as the preceding case but in addition the union sought to tender evidence that the signatures on the petition for decertification were obtained by the employer through intimidation and spying activities.

DECISION: Decertification is not barred by the union's failure to comply with the affidavit and filing requirements of the amended NLRA.[6]

d. Beattie Manufacturing Co., April 27, 1948, 77 NLRB No. 361

FACTS: Petitioning union is demanding that the "shop clericals" should be excluded on the ground that they perform managerial duties and the employer seeks to include them and denies that their work is in any way managerial. In addition, the employer seeks to have the representation petition of the union dismissed because it does not allege compliance with Section 9 (h) and also because petitioner has failed to allege compliance in any of its subsequent pleading.

DECISION: Motion to dismiss denied--matter of compliance is one for the NLRB to determine in any manner suited to the circumstances. Since the official records of the NLRB indicate such compliance it is not necessary to allege it.[7]

e. Westinghouse Elec. Corp. v. UERMW, June 29, 1948, 78 NLRB No. 10

FACTS: The union opposes the entertaining by the Board of a decertification hearing intended to decertify the appellant as the representative union in the appellee's plant. The basis for the union's contention is that, since its contract provides for automatic renewal, that renewal

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6 Snow v. Nealley Co., 76 NLRB No. 53; Kraft Foods Co., 76 NLRB No. 77; Burry Biscuit Corp., 76 NLRB No. 98; Whiting Machine Works, 76 NLRB No. 153; Colonial Hardwood Flooring Co., 76 NLRB No. 150.

7 Lion Oil Co., 76 NLRB No. 88.

cannot be barred and thus decertification cannot be accomplished.

DECISION: Since the decertification proceeding is to take place before the automatic renewal date, the union can be decertified. The Board directs that a new election be held and that if UERMW does happen to win it cannot be certified anyway because of its failure to comply with Section 9 (h).

f. Oppenheim Collins and Co. Inc.--September 1, 1948, 79 NLRB No. 435

FACTS: The Interstate Department Store Employee's Union seeks to intervene in an election and petitions for a place on the ballot. It was revealed that they have no contractual interest in the proceedings and also that officials of the union have not complied with Section 9 (h).

DECISION: Petition denied--A non-complying union not alleging any contractual interest in proceedings is not entitled to a hearing under Section 9 (c) nor may it participate in an election thereunder. In addition, the constitutional guarantee of due process of law does not require that a hearing be held in such circumstances.[8]

g. Heyden Chemical Corp., September 7, 1949, 85 NLRB 1181.

FACTS: Appeal is made from a decision made by the hearing officer which allows non-complying Local 13,200, UMW, to intervene in a representation proceeding. It was discovered that the respondent union has a claim to a contractual interest in that it had received an extension of its contract by agreement with the petitioner and if such agreement were effective it would cover the present time. Petitioner claims that such extension is not operative because it was not approved by the War Department as was necessary.

DECISION: Petition denied--it is not necessary to prove that the respondent's contractual claim is a good one. It is sufficient for the purpose of allowing the union to participate in the hearing that it have a colorable claim to a contractual interest.

h. Schneider Transportation Co., January 16, 1948, 75 NLRB No. 870.

FACTS: Petition is made from a decision by the hearing officer to allow the Seafarers International Union, Great Lakes District, to intervene in an election when such union had not complied with Section 9 (h) and had not shown or even alleged a contractual interest in the matter at hand.

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8 Inspiration Consolidated Copper, 81 NLRB 1377

DECISION: Reversed--the respondent is not entitled to intervene in this matter when it cannot show even a colorable contractual interest and when it has not complied with the affidavit and filing requirements of the NLRA.

i. American Chain and Cable Co., February 17, 1948, NLRB, 21 LRRM 1269.

FACTS: Petition is made from a decision of the hearing officer allowing a non-complying union having a definite contractual interest only the opportunity to assert its contract in the representation hearing as a bar to an election.

DECISION: Petition granted--the hearing officer erred in limiting non-complying unions intervention to assertion of its contract since the issues in a representation hearing overlapping such a manner as to render it impracticable to limit the scope of intervention.

j. Baldwin Locomotive Works, March 23, 1948, NLRB, 21 LRRM 1263.

FACTS: Intervening union, Local B654 of the International Brotherhood of Electrical Workers (AFL), seeks to intervene (and has the support of the employer in its intervention) claiming its contract with the employer is a bar to an election. The election is being sought by petitioning union and that union seeks to join intervening union in the proposed election. Intervenor objects to this joinder, claiming it is prejudicial and unfair.

In this case, the intervening union, Local B654, has a definite contractual interest. The petitioning union protests that the ruling of the hearing officer denying petitioner full intervention on the basis that it was a "non-complying" union was incorrect--stating that it has been the policy of NLRA to allow a union full intervention in an election proceeding or in representation matters when it is shown that the union enjoyed an existent contractual relationship with the employer.

DECISION: Petition for full intervention denied--although it is true that full intervention is oftentimes accorded to a union in the position of the petitioner this Board believes that such a decision is proper only when full intervention is necessary in order to cover all the contentions of the petitioning union. In this case it is clear that all the contentions set forth in the intervenors rejected offers of proof were fully covered in testimony elicited by the employer and the intervenor's brief explores at length all the issues in the case. Under these circumstances, the hearing officers ruling was not prejudicial and, therefore, was not improper.

k. Newark Transformer Co., 76 NLRB 145, March 30, 1948.

FACTS: The Trans-Wire Employees Union appeals from a decision of the hearing officer the same or substantially the same as the decision in the preceeding case.

DECISION: Petition denied--although the union's petition is perfectly proper and their contention that full intervention should be allowed is undeniable it appears that, actually, the petitioning union was in no way prejudiced by the ruling that it had to confine its argument to a showing that it had a contract with the respondent--since this particular point represents the sole issue in the case. Since it would appear unnecessary to bring in anything else we find that although the decision, in itself, was probably not a proper one the petitioner was in no way damaged or hindered thereby and there appears to be no need to order the full intervention sought.

l. NLRB v. Clark Shoe Co, NLRB No. 4350, June 19, 1951, 25 LRRM 1425.

FACTS: Each of the officers of the Shoe Workers Union had executed a Non-Communist Affidavit as required by Section 9 (h) of the Act by March 3, 1948, when the union brought its petition for certification of representatives. However, the CIO of which this union is an affiliate did not comply until December 22, 1949. This charge filed by the local union is that respondent has failed to bargain collectively.

RESPONDENT'S CONTENTION:: Motion to dismiss because parent federation had not complied with the filing requirements of the NLRA at the time of the issuance of the complaint.

DECISION: For respondent--motion granted--Since the CIO parent federation is an organization of national influence its non-compliance with filing requirements must be held to bar the lodging of petitioners charge of unfair labor practice. Further, since the language of the "Act" stated that compliance is a prerequisite to the lodging of any complaint or petition, later compliance by the parent federation cannot validate the already invalid petition.

m. NLRB v. Happ Bros. Co., Inc., March 15, 1952, NLRB No. 13756, 26 LRRM 1357.

FACTS: Charges filed by an employee "fronting" for a non-complying union charged discrimination against petitioner and other employees. Employee was president of a local union affiliated with a national union whose officers had not signed Non-Communist Affidavits. This employee has filed as an "individual."

DECISION: Petition denied--the Board is without authority to act because facts indicate petitioner is "fronting" for the union and the law should not be interpreted so as to allow the union to do by artifice what it cannot do directly.

B. Token or Fraudulent Compliance--the Three Methods Employed

The foregoing cases, as indicated, all represent instances in which the labor union seeking help from the NLRB or attempting to bypass the NLRB and get help from either the Federal or State Courts, has not complied with the requirements of Section 9 (h) of the "Act." A perusal of these cases plus a considerable volume of other decisions, both in the State and in the Federal Courts, would indicate to even the most careless or casual student an unmistakable and unwavering determination on the part of the various Courts to make Section 9 (h) "stick." An effort is made to present a bulwark against further subversive inroads in the field of American labor and to prevent any technical evasion based upon actual non-compliance. In other words, the Courts are not indulging in any so-called "judicial legislation" in attempts to evade the actual purpose and intent of the provision but are obviously setting forth their best efforts to see the real purpose of this section fulfilled. This effort is all the more unmistakable because Section 9 (h) is, but its very nature, the sort of legislation that the Courts could easily "interpret" out of existence. In addition, the language employed also lends vagueness and an opportunity for loose interpretation.

Because of this obvious determination on the part of the Courts it is clear that other evasive efforts are necessary if Communist-infiltrated unions are to receive benefits under the NLRA. Therefore, the second portion

of this section will be devoted to a discussion of the methods now being attempted to effectuate a colorable or token compliance or to evade the consequences of non-compliance by technical or circuitous device. Resort to different methods has been only recent and it is obviously a last resort since non-compliance is the safest procedure from an individual standpoint. The reason for such procedure is basic--since a four to one NLRB majority in a decision involving the United Furniture Workers reminded persons desiring to establish falsification or fraud that they have recourse to the Department of Justice for a prosecution under Section 25 (a) of the Criminal Code (and the penalty for perjury under this Section is up to ten years in prison and/or up to ten thousand dollars fine.)[9] Forces seeking to escape the consequences of the Non-Communist Affidavit have found that the Courts as well as the legislatures are against them, and that their only further hope of evasion is to falsify or technically evade.

The three major techniques that have been adopted in attempts to circumvent Section 9 (h) are as follows (the only major unit adhering to the non-compliance technique now being the United Mine Workers.)

1. Resignation from the Communist Party

Mr. Max Perlow, Secretary-Treasurer of the United Furniture Workers initiated this trend by filing the required affidavit and then making the public announcement that he had not renounced his belief in Communist doctrine or his right to advocate such doctrine through "peaceful, constitutional pro-

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9 NLRB Release R-217 of July 21, 1949.

cesses." (His long-standing membership in the Party is a matter of public knowledge.) He made the further announcement that he "believed the teachings of the Party represent . . . the best expression of the hopes and aspirations of mankind to free itself from the mounting evils which threaten the world today."[10]

What seemed to be a flagrant violation of the spirit and intent of 9 (h) if not of its letter brought up the possibility of an NLRB or general counsel challenge to the Perlow affidavit. Mr. Denham took action that he said "seems to be the maximum extent to which this agency can go in a case such as this" by referring the affidavits of Perlow, President Morris Pizer and Director Emmet Marsh of the UFW to the Department of Justice. He stated "the Act does not direct or authorize either the General Counsel or the Board to police these affidavits or to pass on their truth or falsity. . . . We are required by the law to take the affidavits as they are submitted.[11] A four to one NLRB majority later echoed this opinion when it placed the Furniture Workers on the ballot for the first time since the enactment of the "Act."[12]

This action was followed by identical performances on the part of Maurice Travis, Secretary-Treasurer of the Mine, Mill and Smelter Workers and Donald Henderson of the Food and Tobacco Workers of America. Both of these people made statements concurrently with the signing of the affidavit or a

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10 New York Times, June 6, 1949, 7.

11 NLRB Release R-202, June, 1949.

12 NLRB Release R-217, July 21, 1949.

short time later that were at least contrary to the obvious "spirit and intent" of the "Act" and the General Counsel referred both their affidavits to the Department of Justice without recommendation.[13]

2. Manipulation of Union Offices

Since the Non-Communist Affidavt has only to be signed by "officers" of the union constitution-amending became a fad among left-wing unions in 1949 and 1949.[14] The United Shoe Workers furnished a test before the NLRB dealing with a constitutional amendment providing only two national officers for the union. Others remained in their old posts but without officer titles. In this case and confronted with the obvious objection on the part of management that the actual number of officers was greater, the NLRB made the following statement, "The contentions illustrate the possibility under existing law that unions, by abolishing officers under their constitutions but assigning identical duties to officials who shall no longer be identified as officers, may frustrate the congressional intent to drive Communists from positions of leadership in the labor movement. However, these considerations cannot properly deter the Board from prodessing a case when statutory requirements have been met."[15]

This attempt at token compliance was followed by similar action on

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13 David I. Shair, "How Effective is the Non-Communist Affidavit?", Labor Law Journal, Chicago, I, 12, September, 1950, 941.

14 "Spotlighting a Taft-Hartley Loophole," Business Week, New York, April 23, 1949, 106.

15 Craddock-Terry Shoe Corp., 76 NLRB 842, 1948.

the part of the United Retail, Wholesale and Department Store Union and by the United and Professional Office Workers Union. Here, however, what promised to be the safest and surest method of evasion struck a snag. Donald Henderson, former President, had sought to evade the necessity of signing by taking the non-officer title of "National Administrative Director." At the time he took the office, an announcement was made by the union's Executive Board that the new arrangement "well assured our members of his, Henderson's continued service as a leader of the union."[16] Others remained in their old posts but without officer titles. This statement, apparently, was too much, for the NLRB made its first challenge to the sufficiency of the Affidavits filed by a union by issuing a "show Cause" rule requiring three separate affidavits setting forth (a) the duties of the National Administrative Director, (b) the duties of the acting president and (c) a statement by Henderson setting forth his new duties accompanied by a statement that these duties have not in the past been performed by him as President or by any other officer of the union.

Because critical elections were forthcoming and it was essential that something must be done to qualify the union to take part in these elections, Henderson signed an Affidavit nine days later.

In addition and as a stop-gap against possible future use of this technique, the NLRB has amended its rules and regulations to provide for requiring affidavits from other members of the union if the Board believes,

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17 New York Times, August 4, 1949, 15.

after investigation, that the union had failed to list certain persons as "officers" in an attempt to evade the terms of the "Act."[17] This latter ruling would appear to have effectively killed any other attempts at token compliance via this particular method.

3. Ignoring the Communist Label

Being charged with following the Party Line by a Congressional Committee or a newspaper article and proving perjury in a court of law are completely different propositions. Realizing this fact, a number of the alleged left-wingers in top union jobs proceeded to sign the Affidavits. Thus it was up to the Department of Justice to prove any case it brought.[18] The cases cited in the preceding footnote show a definite tendency toward the validation and enforcement of the Affidavit through the efforts at prosecution of those who falsify such Affidavits. In addition, a recently decided case[19] set forth the specific functions of the Department of Justice in this matter. Also, it has been shown by a decision of the NLRB[20] that certification of a union may be denied or cancelled because of the falsification of affidavits

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17 NLRB Release R-268, December 2, 1949.

18 Shair, "How Effective is the Non-Communist Affidavit?", LLJ, I, 12, 935.; "Taft-Hartley Non-Red Oath Test," Business Week, New York, January 13, 1951, 90; U. S. v. Valenti, New Jersey District Court, June 29, 1952; Osman v. Douds, 339 U.S. 846.

19 UERMW v. Herzog, District of Columbia District Court, January 27, 1953, 31 LRRM 2301.

20 NLRB Release R-427, October 18, 1953.

by any of that union's officers. Thus, it now appears that merely signing the affidavits may serve to qualify the union--but only for a brief time.

CHAPTER V

CONCLUSION--SIGNIFICANCE OF THE LAW AND ITS FUTURE PROSPECTS

Although this paper is intended to represent a comprehensive treatment of the subject matter it must be understood that completeness should be considered from the standpoint of practicality. Penetration of the subject revealed an amazing profusion of authority. Legal opinions, statements by legislators and other government officials and magazine articles by persons with varying degrees of experience and capability in the field of labor law provide a tremendous fund of reference material. However, many of the opinions expressed are contradictory and poorly reasoned. These latter are excluded from mention herein. Many others, although good and in point are omitted because of the aforementioned profusion of data and opinion.

A very necessary element to a proper understanding of the Non-Communist Affidavit, its prospects and its importance, is the realization that embodied in this legislative enactment and its legal interpretations, is an obvious determination to combat the growing menance of patriotic disaffection. Subversive influences in labor present an open and constantly growing threat to our independence and freedom. It is not difficult to imagine the eventual result if these subversive influences are allowed to function without inter-

ference.[1]

With the full realization that scholarly treatment of a subject requires an impersonal attitude--still--the writer feels the necessity for making a personal appeal to anyone who may read what I have written. Partly because the length of this paper does not permit an exhaustive treatment of the subject and partly because of personal experience in dealing with the people against whom this legislation is directed, the writer feels an inability to properly impress upon the reader the significance of the material treated. There is every indication that the issue with "these people" has not yet really been joined. The subject is one which should command the attention of every patriotic American at least until such time as a change in the world situation removes the threat posed by Russia and by our own "red" labor union leaders.[2]

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1 Dicta in Scranton Broadcasters Inc. v. American Communications Association, Pennsylvania Court of Common Pleas, No. 8, November 7, 1947, 21 LRRM 2024.

2 "FBI Checkup of Non-Communist Affidavits," Business Week, New York, October 29, 1949, 104.; "Murray Finally Takes the T-H Oath," Business Week, August 6, 1949, 78.; "Loyalty Affidavits," Commonweal, New York, L, August 26, 1949, 483.

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