A Critical Review of the Jurisdictional Standards of the National Labor Relations Board Prior to the Enactment of Section 701 of the Labor-Management Reporting and Disclosing Act of 1959

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A CRITICAL REVIEW OF THE JURISDICTIONAL STANDARDS OF THE NATIONAL
LABOR RELATIONS BOARD PRIOR TO THE ENACTMENT OF SECTION
701 OF THE LABOR-MANAGEMENT REPORTING
AND DISCLOSING ACT OF 1959

by

Martin J. Burns

A Thesis Submitted to the Faculty of the Institute of Social and Industrial
Relations of Loyola University in Partial Fulfillment of the
Requirements for the Degree of Master of Social
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LIFE

Martin John Burns was born in Chicago, Illinois, November 10, 1927.

He was graduated from Leo High School, Chicago, Illinois, June 1945, from Loyola University at Chicago, February, 1951, with the Degree of Bachelor of Science in Commerce, and from the Law School of Loyola University at Chicago, June, 1962, with the Degree of Juris Doctor.

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.  INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>Legal jurisdiction of the National Labor Relations Board</td>
<td></td>
</tr>
<tr>
<td>and the federal pre-emption doctrine--Scope of thesis--Source materials.</td>
<td></td>
</tr>
<tr>
<td>II. THE LEGAL LIMITS OF THE BOARD’S JURISDICTION</td>
<td>3</td>
</tr>
<tr>
<td>Passage of the National Labor Relations Act--Hesitancy of Board to</td>
<td></td>
</tr>
<tr>
<td>proceed in early years--Supreme Court decisions interpreting scope of</td>
<td></td>
</tr>
<tr>
<td>Board’s legal jurisdiction.</td>
<td></td>
</tr>
<tr>
<td>III. THE EXERCISE OF JURISDICTION ON A CASE TO CASE METHOD</td>
<td>8</td>
</tr>
<tr>
<td>Jurisdiction further extended by Court decisions--Board begins to</td>
<td></td>
</tr>
<tr>
<td>decline to exercise its jurisdiction--Effect of declination in certain</td>
<td></td>
</tr>
<tr>
<td>industries.</td>
<td></td>
</tr>
<tr>
<td>Establishment of standards in October 1950--Problem of retroactive</td>
<td></td>
</tr>
<tr>
<td>application of standards--Application of standards to construction and</td>
<td></td>
</tr>
<tr>
<td>hotel industries--Revision of standards in 1954--Reasons advanced for</td>
<td></td>
</tr>
<tr>
<td>revision--Views of dissenting Board members--Effect of disagreement</td>
<td></td>
</tr>
<tr>
<td>of Board members--Analysis of statistics used by Board.</td>
<td></td>
</tr>
<tr>
<td>V. 1954 TO 1959 -- DEVELOPMENT OF A &quot;NO-MAN’S LAND&quot;</td>
<td>25</td>
</tr>
<tr>
<td>Explanation of federal pre-emption doctrine--Supreme Court decisions</td>
<td></td>
</tr>
<tr>
<td>holding states may not act if Board declines to assert jurisdiction--</td>
<td></td>
</tr>
<tr>
<td>Attempts by Congress to remedy situation--Increased appropriation for</td>
<td></td>
</tr>
<tr>
<td>Board--Revision of standards in 1958--Further Congressional attempts</td>
<td></td>
</tr>
<tr>
<td>to eliminate &quot;no-man’s land.&quot;</td>
<td></td>
</tr>
<tr>
<td>VI. ANALYSIS AND CONCLUSIONS</td>
<td>34</td>
</tr>
<tr>
<td>Original intent of Congress as supported by Supreme Court decisions--</td>
<td></td>
</tr>
<tr>
<td>Legislative history of Taft-Hartley Act--Analysis of court decisions</td>
<td></td>
</tr>
<tr>
<td>supporting position that Board</td>
<td></td>
</tr>
</tbody>
</table>
may properly decline to exercise jurisdiction—Analysis of Section 9 (c) of the Act—Congressional attempts to clarify Board’s jurisdiction—Practical difficulties of exercising jurisdiction—Possible solutions to problem.

BIBLIOGRAPHY ............... 51
CHAPTER I

INTRODUCTION

No comprehensive study of the participation of the United States government in the field of industrial relations is complete without detailing the legal jurisdiction of the National Labor Relations Board and the Board's exercise of that jurisdiction. For the federal government cannot constitutionally act through the Board unless Congress has the authority to legislate in this field. In addition, the Board as an administrative agency may only act in accordance with the intent of Congress as set forth in the pertinent legislation.

A related legal problem arises because of our dual system of government. Under the federal pre-emption rule as prescribed in Article VI, Par. 2 of the Constitutions and developed by the United States Supreme Court, Congress may legislate in a particular area in such a manner as to deprive the states of power to legislate in the same area.

This thesis is intended to present a history of the legal jurisdiction of the Board and the exercise of, or failure to exercise, that jurisdiction. More particularly, it is intended to analyze whether the Board can legally decline to exercise its legal jurisdiction and thereby create a "no-man's land" where the Board does not exercise jurisdiction and the states cannot legally act because of the federal pre-emption rule. Such a "no-man's land" has
resulted from the Board's jurisdictional policies and has caused great concern to almost everyone interested in this field.

Many individual aspects of the problems treated herein have been the subject of prior analysis, particularly in law review articles. However, no prior work in this area has the scope of this thesis, and the writer believes that such an over-all view is essential to an understanding of the issue. Events occurring in the 1950's are directly tied in with other events which took place in the 1930's and/or 1940's. This is especially true when the legal concept of precedent is involved.

The basic source materials used were the reported decisions of the Board concerning its jurisdiction, the federal court decisions relating thereto, the annual reports of the Board, the legislative history of the statutes involved, law review articles and other papers and works relating to this subject.
CHAPTER II

THE LEGAL LIMITS OF THE

BOARD'S JURISDICTION

The signing by President Franklin D. Roosevelt on July 5, 1935 of the National Labor Relations Act\(^1\) inaugurated a new era in industrial relations. The act defined the right of self-organization of employes in industry for the purpose of collective bargaining and provided methods by which the federal government could safeguard this right. The National Labor Relations Board was established to hear and determine cases in which it was charged that this legal right was denied or abridged, and to conduct elections to ascertain the chosen representatives of employes.

The Act limited the jurisdiction of the Board to the investigation of questions "affecting commerce" concerning the representation of employes (Section 9 (c) ), and to the prevention of unfair labor practices, enumerated in Section 8, "affecting commerce" (Section 10 (a) ). Section 2 (6) of the Act defined "commerce" to mean

\[
\text{trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.}
\]

The term "affecting commerce" was defined in Section 2 (7) to mean in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

This particularization of the Board's jurisdiction was occasioned by the constitutional limitation of Congress' power to regulate commerce among the several states and to pass laws necessary and proper for carrying into execution this power. It was intended that the Board's authority be co-extensive with this federal power in the Constitution, but it is doubtful that anyone was aware of how extensive this power would prove to be. In its early years the Board was careful to proceed only in those cases as to which it believed the courts would sustain federal jurisdiction. The Board was of the opinion that labor situations involving "retail trade or other purely local business" plainly fell outside of the federal power under the commerce clause. Up to October 1, 1936, there were 1,551 charges and petitions filed with the Board. Of this number, 153 had been dismissed by the Board and the regional directors before the issuance of a formal complaint, and 343 were withdrawn before federal action. At least seventy-one of the 153 dismissed were because the Board did not consider that commerce was affected within the meaning of the Act, and many of the 343 cases were withdrawn because of advice by the regional directors that the Board would not take jurisdiction for the same reason.

The Board's hesitancy to proceed was well founded at that time. While the

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2 U. S. Constitution, Article I, Section 8.


4 Ibid., p. 136.
federal courts sustained the Board's legal jurisdiction in cases involving interstate motor-bus transportation, telegraph, press associations, motor truck transportation and similar industries directly related to interstate commerce, the lower federal courts generally held that the power of Congress under the commerce clause did not extend to relations between employers and their employees engaged in manufacture or local production. It was not until April 12, 1937 that the Supreme Court in three decisions upheld the Board's legal jurisdiction over producing or manufacturing enterprises which, in connection with their operations, receive or ship in interstate commerce a substantial part of their raw materials or manufactured products. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1; N.L.R.B. v. Fruehauf Trailer Co., 301 U. S. 49; N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U. S. 58.
The decision in each case was supported by the five justices, with the remaining four justices dissenting. In Jones and Laughlin the majority states that interstate activities which have a close and substantial relation to interstate commerce so that their control is necessary to protect commerce from burdens and obstructions can be regulated by Congress.

It is . . . apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practices involved.5

The Court went on to hold that the activities of the employer were on a national scale, and thus, Congress could regulate its industrial relations in order to protect interstate commerce from the consequences of industrial war.

These cases established that

neither size, interstate ramifications, relative position in the industry, character of the commodities produced, nor number of employees involved, is a controlling factor in determining whether the act may be constitutionally applied to a given manufacturing or producing enterprise. 6

The test of the Board's jurisdiction was, rather, whether a cessation of operations caused by industrial strife would substantially interrupt the flow of interstate commerce.

Two years later, in 1939, the Supreme Court was presented with the question of whether the Act was applicable to employers, not themselves engaged in interstate commerce, who operated a relatively small business of processing materials which were transmitted to them by the owners through the channels of interstate commerce and which, after processing, were distributed through such channels. Expressed differently, the question was whether an employer's operations must be large enough to be of national importance in order to come under the Act. The Court upheld the jurisdiction of the Board. 7 The Court stated that it did not think it important that the volume of commerce involved was relatively small as compared with cases which it had considered previously. The Court wrote:

The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small . . . The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication. The language of the . . . Act seems to make it plain that Congress set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved . . . The Act on its face

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thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts - unfair labor practices - which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce. Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis.\textsuperscript{8}

The Court went on to point out that there are many industries which are extensively engaged in interstate commerce even though conducted by relatively small units, and that some, like the clothing industry, are extensively unionized and have had a "long and tragic history of industrial strife."\textsuperscript{9}

The Fainblatt decision is important since it so firmly rejected the argument that a substantial or particular amount of commerce must be involved before the Board would have jurisdiction. As more fully developed below, the Court's decision is consistent with the intention of Congress as evidenced by its rejection of a proposal to exclude employees of small employers from the coverage of the original Act. And yet the Board, which had fought to have its jurisdiction upheld in the Fainblatt case, subsequently took action which diminished the full impact of the decision.

\textsuperscript{8}Ibid., pp. 606-607.

\textsuperscript{9}Ibid., p. 607.
CHAPTER III

THE EXERCISE OF JURISDICTION JR. A

CASE-TO-CASE METHOD

In the immediate years after Painblatt the Board continued to assert jurisdiction over more and more companies in various industries and was upheld, in most instances, by the federal courts. In N.L.R.B. v. Bradford Dyeing Assn., 310 U.S. 318, the Supreme Court upheld the applicability of the Act to an employer whose operations constituted a relatively small percentage of his industry's capacity, and held that the Board's jurisdiction was not defeated by the possibility that the employer's customers might be able to secure the same service from other local processors if a labor dispute should stop the interstate flow of materials to and from the employer's plant. In Polish National Alliance v. N.L.R.B., 322 U.S. 643, involving a fraternal benefit society which engaged in a commercial life insurance business throughout the United States, the Supreme Court stated that in determining whether or not prescribed practices would adversely affect commerce the Board was not limited to the quantitative effect of the activities immediately before it.

Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.1

1322 U.S. at 646.
The cumulative effect of these and other cases concerning the legal limits of the Board's jurisdiction forces the conclusion that "untold small enterprises are subject to the power of the Board."²

Once this broad legal jurisdiction was firmly established, one would imagine that the Board would exercise its jurisdiction to the fullest in order to bring the benefits of the Act to as many employees as possible. However, the Board soon took the position that it would better effectuate the purposes of the Act

not to exercise its jurisdiction to the fullest extent possible . . . but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce.³

Claiming that limitation of funds and personnel made it impossible to handle all cases affecting commerce, the Board began to decline to assert its legal jurisdiction in cases which came before it on the ground that to assert jurisdiction would not effectuate the policies of the Act. Prior to 1950 this declination of jurisdiction occurred on a case-by-case basis; i.e., in each case which came before it the Board would decide whether its legal jurisdiction should be asserted. Not only was much time and effort obviously spent in ascertaining the jurisdictional facts in each case, but much confusion arose because it could not be predicted in advance how the Board would rule; different rules-of-thumb applied for various industries, and even within the same industry.

²Separate opinion of Mr. Justice Frankfurter in Bethlehem Steel Co. v. N. Y. State Labor Board, 330 U. S. 767, 782-783.

³Hollow Tree Lumber Co., 91 N.L.R.B. 635.
The Board's policy under this case-to-case approach as to firms engaged in manufacturing appears to have been to take jurisdiction over all such firms, except those which were very small. However, the decisions indicate a reluctance to take jurisdiction of firms engaged in making food products, e.g., bread or dair products, and household articles. The mining industry appears to have been treated as manufacturing, with jurisdiction not being asserted over very small mining firms. Prior to the Taft-Hartley Act in 1947 the Board generally declined to assert jurisdiction over construction firms on the ground that their operations were essentially local. Subsequent to Taft-Hartley, and prior to 1950, the Board took jurisdiction over such firms. In the public utility field, the Board generally took jurisdiction over local bus lines which serviced employees of companies engaged in interstate commerce or connected with interstate carriers. But, in at least one instance, the Board declined jurisdiction over a large, important bus line in the City of Chicago. As to gas and electric utilities, while the Board generally took

4 See, for example, Acme Corrugated Box Co., 88 N.L.R.B. 96; Puritee Thermometer Co., 87 N.L.R.B. 47; National Tool Company, 78 N.L.R.B. 625.


6 Detroit Canvas Manufacturers Ass'n., 80 N.L.R.B. 287.

7 See, for example, Superior Stone Products, Inc., 88 N.L.R.B. 736; Southwest Metals, 72 N.L.R.B. 54; Mason & Son Coal Co., 72 N.L.R.B. 196.


9 See, for example, Watson's Specialty Shop, 80 N.L.R.B. 533; Samuel Langer, 82 N.L.R.B. 1028; Wadsworth, 81 N.L.R.B. 804.


jurisdiction,\textsuperscript{12} it twice declined to assert jurisdiction over small rural electric cooperatives.\textsuperscript{13}

In the service industries, the Board declined to assert jurisdiction over hotels, regardless of size.\textsuperscript{14} It generally refused to take jurisdiction over laundry and dry cleaning establishments,\textsuperscript{15} unless they serviced firms engaged in interstate commerce,\textsuperscript{16} and had a similar test for other service firms, such as those rendering plant protection, building maintenance, and reporting and transcribing proceedings before government agencies and congressional committees.\textsuperscript{17}

In the retail trade industry, the Board apparently found its most difficult jurisdictional problems under this case-to-case approach. It made or developed many distinctions to justify different treatment for different kinds of retail outlets; e.g., between franchised and non-franchised dealers or between department stores and specialty shops. Any analysis of some of the decisions in this industry as well as the other industries considered above

\textsuperscript{12}See, for example, Pacific Gas and Electric Co., 87 N.L.R.B. 257; East Central Oklahoma Cooperative, Inc., 87 N.L.R.B. 604.

\textsuperscript{13}Irwin County Electric Membership Corp., 88 N.L.R.B. 718; Platte-Clay Electric Cooperative, Inc., 83 N.L.R.B. 363.

\textsuperscript{14}The White Sulphur Springs Hotel, 85 N.L.R.B. 1487.

\textsuperscript{15}See, for example, J. Arthur Anderson, 83 N.L.R.B. 1120; Progressive Cleaners & Dyers, Inc., 81 N.L.R.B. 1299.

\textsuperscript{16}Indianapolis Cleaners and Launderers Club, 87 N.L.R.B. 472; New York Steam Laundry, Inc. 80 N.L.R.B. 1597.

\textsuperscript{17}Standard Service Bureau, 87 N.L.R.B. 1405; Rheinstein Construction Co., Inc., 88 N.L.R.B. 46; Columbia Reporting Co., 88 N.L.R.B. 188.
reveals why the Board in 1950 established standards to govern the exercise of its jurisdiction.
CHAPTER IV

THE 1950 AND THE 1954 STANDARDS FOR ASSERTING JURISDICTION

In October, 1950 the Board unanimously issued a series of decisions which set forth various standards to govern the future exercise of jurisdiction in the forty-eight States.\(^1\) It declared that it would generally take jurisdiction over cases involving enterprises in the following categories:

1. Instrumentalities and channels of commerce, interstate or foreign;\(^2\)
2. Public utilities and transit systems;\(^3\)
3. Establishments operating as an integral part of a multistate enterprise;\(^4\)
4. Enterprises producing or handling goods destined for out-of-state shipment, or performing services outside the State in which the

\(^1\) In Roy C. Kelley, 96 N.L.R.B. 6, the Board held that its general policies on jurisdiction did not apply to enterprises within the District of Columbia or any territory since Section 2(6) of the Act gave it plenary jurisdiction over such enterprises. It is submitted that such a distinction has no real foundation and indicates the loose thinking which has occurred in this area. The writer believes that the existence of plenary jurisdiction is important only in determining whether legal jurisdiction exists, and can see no reason why it better effectuates the policy of the Act to exercise jurisdiction over one firm and not over another one of equal size solely because the first firm is located in the District of Columbia.

\(^2\) W.B.S.R., Inc., 91 N.L.R.B. 630.

\(^3\) Local Transit Lines, 91 N.L.R.B. 623.

\(^4\) The Borden Co., 91 N.L.R.B. 628.
the firm is located, valued at Twenty-five Thousand Dollars a year;\(^5\)

5. Enterprises furnishing goods or services of Fifty Thousand Dollars a year or more to concerns in categories (1), (2), or (4);\(^6\)

6. Enterprises with a direct inflow of goods or materials from out-of-State valued at Five Hundred Thousand Dollars a year;\(^7\)

7. Enterprises with an indirect inflow of goods or materials valued at One Million Dollars a year;\(^8\)

8. Enterprises having such a combination of inflow or outflow of goods or services, coming within categories (4), (5), (6), or (7), that the percentages of each of these categories taken together add up to one hundred;\(^9\)

9. Establishments substantially affecting the national defense.\(^10\)

The Board, in these cases, did not intend to substantially revise its former policies on exercising jurisdiction but to "clarify and define where the difficult line can best be drawn."\(^11\)

While the establishment of standards brought some certitude into this area, other problems arose to cause the Board, and the parties before it, concern; e.g., how were the standards to be applied where complete data were not available because, for example, the company had not yet engaged in operations;

\(^5\)Stanidaus Implement and Hardware Co., 91 N.L.R.B. 618.

\(^6\)Hollow Tree Lumber Co., 91 N.L.R.B. 635.

\(^7\)Federal Dairy, Inc., 91 N.L.R.B. 638.

\(^8\)Dorn's House of Miracles, Inc., 91 N.L.R.B. 632.


\(^10\)Westport Moving & Storage Co., 91 N.L.R.B. 902.

\(^11\)Hollow Tree Lumber Co., supra, at p. 636.
what should be done where the employer is engaged in more than one operation or where there was an association of employers; should the standards be applied retroactively.

This latter problem also shows the apparent inconsistencies which can arise because of a policy of not asserting jurisdiction. In Almeida Bus Service and Almeida Bus Lines, Inc., 99 N.L.R.B. 498, decided June 4, 1952, the Trial Examiner had found that the employer had unlawfully interrogated an employee on August 28, 1950, had refused to bargain with a Union in September 28th because of the refusal to bargain. The Board reversed the Trial Examiner and dismissed the complaint because it felt that the employer had been justified in believing that the Board would not assert jurisdiction over his operations at the time he committed the alleged unfair labor practices, pointing out that its decision in Local Transit Lines did not issue until October 5, 1950. The Board stated: "(W)e are satisfied that equity and fair play require dismissal . . ." (page 501). The "equity and fair play" of allowing someone to interfere with the legal rights of employees solely because of a change in the policy of an administrative agency is difficult to understand. A violation of the law does not cease to be a violation because the violator believes he will not be punished.

Another problem which confronted the Board was whether or not the stand-

12See also Screw Machine Products, 94 N.L.R.B. 1609.

13It is gratifying to note that in 1958 the Board recognized the injustice and stated that the 1958 standards would be applied to such cases since a respondent's belief that the Board would not assert its jurisdiction did not give it "any legal, moral or equitable right to violate the provisions of the Act." Siemons Mailing Service, 122 N.L.R.B. No. 13.
ards should be applied to certain industries, such as building and construction and hotels. Subsequent to Taft-Hartley the Board had asserted its jurisdiction in the building industry, and in one secondary boycott case had stated that it felt called upon to exercise the Board's bull power in such cases.14 After the adoption of the standards, the Board made it clear that they would be applied to the building and construction industry just as to other industries.15 As to the hotel industry, a majority of the Board held that its former policy of declining jurisdiction over hotels in forty-eight States should continue, regardless of the standards.16

The 1950 standards continued in effect, with minor variations, until 1954, when a majority of the Board announced a revision of the standards which substantially limited the area in which the Board would exercise jurisdiction.17

The majority of the Board stated that in future cases jurisdiction would be asserted only if the enterprise involved could meet one of the following standards:

1. General Standards for Other-Then-Retail Establishments:

(a) Receipt of goods or materials annually from out of State valued at Five Hundred Thousand Dollars or more.

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16Hotel Association of St. Louis, 92 N.L.R.B. 1388.

(b) Producing or handling goods and shipping such goods out of State, or performing services outside the State, valued at Fifty Thousand Dollars or more.

(c) Receipt of goods or materials from other enterprises in the same State which those other enterprises received from out of State valued at One Million Dollars or more.

(d) Furnishing goods or services to enterprises coming within subparagraph (b), above, or to public utilities or transit systems, or instrumentalities or channels of commerce and their essential links which meet the jurisdictional standards established for such enterprises; and

(i) Such goods or services are directly utilized in the products, services, or processes of such enterprises and are valued at One Hundred Thousand Dollars or more; or

(ii) Such goods or services, regardless of their use, are valued at Two Hundred Thousand Dollars or more.

(e) An establishment which is operated as an integral part of a multistate enterprise; and

(i) They particular establishment involved meets any of the foregoing standards; or

(ii) The direct outflow of the entire enterprise amounts to Two Hundred Thousand Dollars or more; or

(iii) The indirect outflow of the entire enterprise amounts to One Million Dollars or more.

2. Standard for Intrastate Links of Interstate Commerce:

Transportation operations or other local activities such as intrastate transit companies which constitute a link in the chain of interstate commerce or in the interstate transportation of passengers where the annual income received from services which constitute a part of interstate commerce totals no less than One Hundred Thousand Dollars.

3. Standards for Concerns Doing National Defense Business:

Enterprises engaged in providing goods or services directly related to national defense pursuant to Government contracts in the amount of One Hundred Thousand Dollars or more a year.

4. Standards for Retail Concerns:
An enterprise operating a single retail store or service establishment if it had (1) annual purchases directly from out of State in excess of One Million Dollars (direct inflow), or (2) annual purchases indirectly from out of State in excess of Two Million Dollars (indirect inflow), or (3) sales directly out of State in excess of One Hundred Thousand Dollars (direct outflow).

As to intrastate chains of retail stores or service establishments, the direct inflow, indirect inflow, or direct outflow of all stores in the chain were totaled. If the totals satisfied any one of these standards, jurisdiction was asserted over the entire chain or over any store or group of stores in it.

5. Standard for Multistate Retail Chains:

Enterprises comprising a multistate chain of retail stores or service establishments if the annual gross sales of all stores or establishments in the chain exceeded Ten Million Dollars; otherwise, only over those individual stores or establishments which comprised integral parts of the chain and which independently satisfied a standard set forth in paragraph (4) above.

6. Standard for Franchised Dealer:

Local retail establishments which have a franchise agreement with a multistate enterprise only if the establishment meets one of the jurisdictional requirements applied to local retail establishments.

7. Standard for Office Buildings:

Office buildings operations when the employer which owns or leases and which operates the office building is itself otherwise engaged in interstate commerce and also utilizes the building primarily to house its own offices.

8. Utilities and Transit Systems:

Local public utility and transit systems affecting commerce whose gross volume of business exceeded Three Million Dollars per annum.

9. Newspapers:

Newspaper companies which hold membership in or subscribed to interstate new services, or published syndicated features, or advertised nationally sold products, if the gross value of business of the particular enterprise involved amounted to Five Hundred Thousand Dollars or more per annum.
10. Association of Employers:

All association members who participated in multiemployer bargaining was considered as a single employer and the totality of the operation of the association members was considered.

11. Communications Concerns:

Radio and television stations, and telephone and telegraph systems if the annual gross income of the enterprise involved amounted to at least Two Hundred Thousand Dollars.

12. Restaurants:

The same standards established for retail stores.

13. Taxicabs:

No standard; refused to assert jurisdiction.

The leading case setting forth the views of the majority - Chairman Farmer and Members Rodgers and Beeson - and the separate dissenting views of Members Murdock and Peterson is Breeding Transfer Co., 110 N.L.R.B. 493. It is to be noted that all three members of the majority were appointed by President Eisenhower, whereas Members Murdock and Peterson were holdovers from the previous administration.

The majority of the Board predicted that the revised standards would reduce its caseload by no more than 10 per cent and that no more than one percent of the total number of employees subject to the Board's legal jurisdiction would be affected. They advanced four major reasons for the changes: (1) the problem of bringing the caseload of the Board down to manageable size, (2) the desirability of reducing an extraordinary large caseload so that adequate attention could be given more important cases, (3) the relative import-

18Chairmen Farmer took office July 13, 1953; Member Rodgers on August 28, 1953; and Member Beeson on March 2, 1954.
ance to the national economy of essentially local enterprises as against those having a truly substantial impact on our economy, and (4) over-all budgetary policies and limitations. They expressly denied that a desire to establish broader State jurisdiction was a factor in their decision. They did state:

If one of the inevitable consequences of our action is to leave a somewhat larger area for local regulation of disputes, we do not share our colleagues' apparent view that this is a sinister development. 19

Member Murdock dissented vigorously arguing that the new standards "accomplished a drastic curtailment in the area of protection" afforded by the Act, and were "premised upon the view that there should be a re-allocation of authority between the Federal Government and the States in the regulation of labor relations." 20 He quoted, in his dissenting opinion, excerpts from public speeches made within the preceding year by Chairman Farmer and Member Rodgers which he felt substantiated his statement:

The slash in jurisdiction now consummated has been frequently premised and predicted in public speeches of members of the majority during the past year in keeping with an announced belief in the philosophy of returning a greater share of Federal authority to State and local governments. 21

Member Murdock predicted that the new standards would eliminate at least twenty-five per cent and perhaps 33-1/3 per cent of the Board's jurisdiction, and protested the statistical approach taken by the majority in its prediction that only ten per cent of the caseload and one per cent of the employees would be affected. He also contended that the Board had had a manageable case-

19 N.L.R.B. at p. 497.
20 Ibid., pp. 500-501.
21 Ibid., p. 502.
load since 1950 and that, shortly before the adoption of the new standards, only sixteen complaint cases and eighteen representation cases were available for assignment to legal assistants needing new assignments. As to the majority's citation of "overall budgetary policies and limitations," he stated the facts showed "no pressing budget difficulties and in fact a voluntary reduction in the staff of the agency in the past year." Murdock also argued against excluding enterprises from the area in which the Board would exercise its jurisdiction inasmuch as such enterprises might fall in a "no man's land" of labor disputes, in which the Board will not, and other agencies cannot, act.

In a separate dissenting opinion, Member Peterson stated that, while he believed that the Board had the legal authority to establish a jurisdictional plan, he objected to the new plan because of "what strikes me as its arbitrary and categorical character." Arguing that one could only speculate as to the factors giving rise to the new plan, he agreed that, because of this

It is not only plausible but natural to infer, as Member Murdock suggests, that the new standards had their genesis in a decision to confine the Board to a much narrower jurisdiction so that a considerable amount of Federal authority . . . would be administratively reallocated to the State governments.

This disagreement between the members of the Board as to the reasons for the extensive changes in its jurisdictional standards was unfortunate, in the writer's opinion. It is a generally accepted fact that union leaders and union lawyers have argued for more federal intervention in the field of

22 Ibid., p. 517.
23 Ibid., p. 527.
24 Ibid., p. 528.
industrial relations whereas most management representatives have sought less federal, and more state, intervention in this field. This fact, coupled with the fact that the three members of the majority were appointed by President Eisenhower and that two of them had made public statements indicating a personal desire to return more power to the states gave rise to the belief among many students of this area that the new standards were an attempt by the Board to usurp Congress' prerogatives by resolving the policy question of how much federal law is necessary and desirable:

In view of the public statements . . ., it would be naive to assume that a desire to release some of the federal government's labor power to the states was not also a strong force behind the decision . . . . Even more broadly, considerations of how much law is actually necessary or desirably today in the labor field may have played a significant part in molding the new standards. These, however, are basic policy questions which should be resolved by the legislature and not the administrative fiat. Yet, by denying the presence of such considerations and relying solely upon the issue of a burdensome caseload the new Board appears to have taken from Congress the task of remodeling the act . . . .

In addition, the contention of the majority that only ten per cent of its caseload and one per cent of covered employees would be affected appears to have been statistically unsound. A study of the actual effects of the new standards is beyond the scope of this work. However, a few years ago the writer helped prepare certain exhibits for a labor organization, which was contesting the Board's Three Million Dollars annual volume of business standards for the local transit industry. These exhibits, based on the data

available as to this industry, showed that approximately 37-1/2 per cent of the employees of local transit companies subject to the Act and over ninety-five per cent of such companies would be excluded from the Board's jurisdiction by the 1954 standards, and that, as an example of the magnitude of the changed standards, not one intra-state, privately owned local transit company in the State of Illinois met the Board's new jurisdictional standard.26 In its decision in this case, Charleston Transit Company, the Board majority did not see the need to challenge the reliability of the Union's exhibits since it held that it was interested in total caseload of the Board and not in the effect on one particular industry:

The primary consideration was the reduction of the Board's caseload, and . . . staff studies had indicated that the total effect of the adoption of the 1954 standards . . . would be to reduce the Board's normal caseload by ten per cent. The Union does not challenge the correctness of this estimate.27

The writer cannot but agree with Member Murdock's comment that

(t)o deny the merit in the Union's successful attack on the impact of the transit standard . . . on the ground that the Union has not successfully challenged the Board's estimate as to the effect of all the standards on its caseload, is an exercise in logic which I do not follow.28

This is especially so inasmuch as the staff studies of the Board as to the impact of the new standards were never made available for study.

In its decision in Breeding Transfer Company, the majority stated,

The purpose of our jurisdictional changes being to eliminate

26 See dissenting opinion of Member Murdock in Charleston Transit Company, 118 N.L.R.B. 1164 at p. 1173.

27 118 N.L.R.B. at p. 1168.

28 118 N.L.R.B. at p. 1174.
purely local activities, the true impact of our change is more intelligently understood in terms of the number of employees affected rather than by the number of companies excluded.29

The writer believes that the Board was in error in its reliance on this factor. Two or three firms in a particular industry may employ seventy or eighty percent of the total employees in that industry while twenty or thirty firms may employ the remainder. A jurisdictional standard which eliminated all by the employees of the two or three firms would only exclude twenty or thirty percent of the employees. But if the two or three firms were unionized, especially for any extensive period of time, it would be unlikely that the employees of those firms would have need to invoke the protection of the Act through the Board. Thus, the actual result of a standard might well be to exclude only the employees who need and desire the services of the Board. It is the writer's opinion that statistics are not a true guide to the effect of any jurisdictional standard. Rather, the writer believes that the only important consideration is the effectuation of the policies of the Act; figures and statistics cannot measure the hardships suffered by an employee who has been discriminated against by an employer or a labor organization and discovers that the federal government cannot help him because of a "jurisdictional standard" artificially established by an administrative agency.

29110 N.L.R.B. 493 at p. 499.
CHAPTER V

1964 TO 1959 - DEVELOPMENT OF A

"NO-MAN'S LAND"

Subsequent to the establishment of the 1954 jurisdictional standards, some State courts and labor agencies began to take cases in situations where the national Board would decline jurisdiction in accordance with the standards. In other states the authorities believed that the federal pre-emption rule required that they refrain from exercising jurisdiction over such firms, thus creating a "no-man's land" wherein neither federal or State Laws were effective.

The federal pre-emption rule or federal "supremacy" doctrine is deeply rooted in our legal history. Clause 2 of Article VI of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In 1819 the Supreme Court, in *McCulloch v. Maryland*, 4 Wheat. 316, applied this clause to hold invalid a State tax upon notes issued by a branch of the Bank of the United States, stating "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the power
vested in the general government." 4 Wheat. at 436. A few years later, in the case of *Gibbons v. Ogden*, 9 Wheat. 1 (1824), the Court held that certain statutes of the State of New York concerning the use of State waters by steam vessels were null and void insofar as they applied to certain vessels licensed by the United States. Thus, the Court held that even though the State statutes were legitimately enacted pursuant to State authority, they could not interfere with, or be contrary to, the laws of Congress made in pursuance of the Constitution.

In 1915, Mr. Justice Holmes in *Charleston & W. Carolina R. R. v. Varnville Co.*, 237 U. S 597 at p. 604, stated the rule to be: "When Congress has taken the particular subject matter in hand co-incidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." However, as indicated above, it was not clear whether this doctrine would apply in an area in which Congress has pre-empted by legislation but which is left uncovered by the policies of the agency administering the federal law.

This question remained unanswered until the Supreme Court handed down three decisions in March, 1957. In *Guss v. Utah Labor Relations Board*, 353 U. S. 1, the Court, with two Justices dissenting, held that, where the National Labor Relations Board had legal jurisdiction, a State agency had no jurisdiction to act even though the Board had declined, or obviously would have declined, to exercise its jurisdiction because Congress had completely displaced state power to act except where the Board had ceded jurisdiction pursuant to Section 10 (a) of the National Labor Relations Act. 1 The Court acknowledged

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1Section 10 (a) empowers the Board to cede jurisdiction to State agencies
that its decision would result in a "no-man's land" but said that the remedy was to be found elsewhere:

Congress is free to change the situation at will . . . . The National Labor Relations Board can greatly reduce the area of the no-man's land by re-asserting its jurisdiction and . . . by ceding jurisdiction . . . The testimony given by the Chairman of the Board before the Appropriations Committees shortly before the 1954 revisions of the jurisdictional standards indicates that its reasons for making that change were not basically budgetary. They had more to do with the Board's concept of the class of cases to which it should devote its attention. . . . 2

In Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20, the majority of the Court held that a state court did not have jurisdiction of an interstate employer's action to enjoin certain picketing by a union since such picketing is governed by the Taft-Hartley Act, even if the National Labor Relations Board would decline jurisdiction on the basis of its jurisdictional standard. A similar holding of the Court is found in San Diego Building Trades Council v. Garmon, 353 U. S. 26, which involved a situation wherein the National Board had already dismissed a petition filed by the employer on jurisdictional grounds.

Two Justices dissented from the holdings in the above three cases on the grounds that the Board had discretion to refrain from exercising its jurisdiction and that Section 10 (a) was not intended to eliminate the power of the States to act when the Board declined to take jurisdiction.

over any cases in any industry (with certain exceptions) "unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

2355 U. S. at pp. 11-12.
The Guss decision placed the responsibility for the "no-man's land" squarely on the shoulders of Congress and/or the Board. Both of these bodies recognized that a situation whereby thousands, and perhaps millions, of employees and their employers were left to the law of the jungle was intolerable and took steps to remedy it. Various bills introduced during the 85th Congress were designed to diminish or eliminate the "no-man's land:"

H. R. 9578, introduced by Congressman Laird (R., Wisconsin), provided that the National Labor Relations Act be amended so as to allow the states to handle cases declined by the Board; S. 3098 which had a similar provision was introduced by Senator Smith (R., New Jersey); Senator Watkins (R., Utah) introduced S. 3692 wherein he proposed that the Board be authorized to decline jurisdiction as an exercise of its discretion and that nothing in the Taft-Hartley Act should be construed to prevent any state agency or court from assuming jurisdiction over labor disputes where the Board so declined; and the much publicized Kennedy-Ives (S. 3974) would have made it mandatory upon the Board to exercise the full statutory jurisdiction over all cases, except those ceded to state labor boards by an agreement under Section 10, (a).

While all of the above bills failed to pass in the 85th Congress, some help was given by voting increased appropriations for the Board, of which $1,500,000 was for the express purpose of enabling the Board to lower its jurisdiction standards, thereby reducing the area of the "no-man's land.

Chairman Leedom had testified before a House sub-committee that if this additional amount were appropriated the Board could lower the standards and take

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twenty per cent of the cases rejected under the 1964 standards. The Board's appropriation for the fiscal year ending June 30, 1959, was $13,100,000, almost $4,000,000 more than the $9,384,800 appropriated for fiscal year 1958.

On October 2, 1958, the Board publicly announced the adoption of new jurisdictional standards to be applied as of that date to all pending and future cases. The new standards are:

1. Non-retail enterprises: $50,000 outflow or inflow, direct or indirect. (Direct outflow refers to goods shipped or services furnished by the employer outside the State. Indirect outflow includes sales within the State to users meeting any standard except solely an indirect inflow or indirect outflow standard. Direct inflow refers to goods or services furnished directly to the employer from outside the State. Indirect inflow refers to the purchase of goods or services which originated outside the employer's State but which he purchased from a seller within the State.)

2. Office Buildings: Gross revenue of $100,000, of which $25,000 or more is derived from enterprises which meet the new standards.

3. Retail concerns: $500,000 gross volume of business.

4. Instrumentalities, links, and channels of interstate commerce: $50,000 from interstate (or linkage) part of enterprise, or from services performed for employers in commerce.

5. Public Utilities: $250,000 gross volume, or meet the non-retail standard.

6. Transit systems: $250,000 gross volume.

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5 As reported in 42 L.R.R. No. 25 at p. 368 (July 28, 1958).


7 Ibid.
(7) Newspapers and communication systems: Radio, television, telegraph, and telephone: $100,000 gross volume; newspapers: $200,000 gross volume.

(8) National defense: Substantial impact on national defense.

(9) Business in the Territories and District of Columbia:

D. C. -- Plenary Territories-- Standards apply.

(10) Associations: Regarded as single employer.

The Board set forth the general consideration which led it to revise the standards in Seimons Mailing Service, 122 N.L.R.B. No. 13, 43 L.R.R.M. 1066. It acknowledged that the new standards did not cover all enterprises over which it had legal jurisdiction and that a "no-man's land" would still exist. But it defended this result on the grounds that the new standards would bring its caseload to the maximum workload which could be handled by the Board and its staff within existing budgetary policies and limitations." In this case the Board also defended the use of jurisdictional standards in determining whether or not to assert jurisdiction rather than an ad hoc or case-by-case approach, stating that its experience under the 1950 and 1954 standards demonstrated that standards "significantly reduce the amount of time, energy and funds expended by the Board and its staff in the investigation and resolution of jurisdictional issues, thus enabling the Board to devote a greater portion of the resources to the processing of substantive problems in a greater number of cases."

Subsequent to the establishment of the above standards, the Board set a

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$500,000 gross annual business jurisdictional standard for hotels and motels, other than residential hotels. This establishment of a standard for the hotel industry was a first in Board history for until the decision of the Supreme Court in Hotel Employees Local No. 255 v. Leedom, 358 U. S. 99, the Board had refused to assert jurisdiction over hotels in the States, both before and after the adoption of jurisdictional standards. In the Hotel Employees case the Court simply stated that the Board's long standing policy not to exercise jurisdiction over the hotel industry as a class was contrary to the principles expressed in Office Employees v. Labor Board, 353 U. S. 313. In the latter case the Supreme Court was presented with the question whether the Board may, by application of general standards of classification, refuse to assert any jurisdiction over labor unions as a class when they act as employers. (Section 2 (2) of the Act specifically exempts labor organizations from the definition of "employer" except when they are acting as an employer.) The Court pointed out that Congress in amending the Wagner Act did not exclude unions when acting as employers and held that an arbitrary blanket exclusion of union employers as a class was beyond the power of the Board.

The 1958 jurisdictional standards certainly should materially reduce the area of the "no-man's land." But nothing short of complete elimination is acceptable to anyone interested in peaceful labor-management relations. A "no-man's land" presents an intolerable situation.

944 Labor Relations Reporter No. 5 at p. 45 (May 18, 1959).

The popularly known Kennedy-Ervin bill as introduced to the current Congress (S. 506, 86th Congress 1st Session) would have eliminated the "no-man's land" by requiring the Board to assert jurisdiction over all labor disputes falling within its legal jurisdiction except where a cessation agreement was effective. The administration's "Labor-Management Practices Act of 1959" (S. 748) would have authorized the Board to decline to assert jurisdiction over cases where, in its opinion, the effect on commerce was not sufficiently substantial. State agencies and courts would be permitted to act with respect to such cases.\(^{11}\) The Kennedy bill was revised in committee and reintroduced as S. 1555. As so revised, the Board was required to exercise its full jurisdiction but permitted it to enter into agreements with State agencies to have the latter exercise jurisdiction in the "no-man's land," applying federal law in accordance with decisions of the Board and the federal courts.

The Senate itself rewrote the committee-approved bill's provision as to jurisdiction by accepting an amendment which does not require the Board to assert its jurisdiction over all cases but permits State or Territorial agencies other than a court to exercise jurisdiction "over all cases over which the Board has jurisdiction, but by rule or otherwise, has declined to assert jurisdiction." The amendment retained the provision that the agency apply federal law in accordance with Board and federal court rules of decisions. As so amended the Kennedy bill passed the Senate April 25, 1959.\(^{12}\)

\(^{11}\) A comparison of the two bills prepared by the Office of the Solicitor of the U. S. Department of Labor is reported at 43 L.R.R. No. 27 at pp. 326-339.

\(^{12}\) The full text of the bill (S. 1555 as approved is reported at 43 L.R.R. No. 51, pp. 664-686.
Whether the Kennedy Bill will pass the House of Representatives without amendment is considered unlikely by many authorities.\(^{13}\) In addition, President Eisenhower is reported to have been critical of the bill's provisions on the "no-man's land" saying that there should be a "definite law here to confer or to recognize that authority of the states to meet those particular problems."\(^{14}\)

The major difficulty of the "no-man's land" provision of the Kennedy bill is that few states have labor agencies which could take jurisdiction and relieve the national Board or eliminate the "no-man's land." The Bureau of National Affairs reports that as of March, 1959, only ten states and Hawaii and Puerto Rico have such agencies, and that only five of these are similar in structure to the Board.\(^{15}\) Very likely, these states could adopt any necessary revisions to satisfy the requirements of the Kennedy bill without difficulty. The remaining states, however, would need legislation to establish labor agencies and would have the further difficulty of securing competent personnel to staff them. It appears doubtful that even a majority of these thirty-nine states will incur the financial obligations connected with such agencies in order to exercise jurisdiction in the present "no-man's" area, unless they believe that their intra-state firms need an agency and/or believe that the federal Board will again raise its standards once such agencies are established.

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\(^{13}\) See 44 L.R.R. No. 1, pp. 1-2.

\(^{14}\) Ibid., p. 1.

\(^{15}\) 43 L.R.R. No. 43 at p. 577.
CHAPTER VI

ANALYSIS AND CONCLUSIONS

It is evident from the above historical development of the Board's jurisdiction and its exercise of that jurisdiction that this matter has troubled the Board and the interested parties that use its processes from the establishment of the Board in 1935 up to the present. It is also apparent that difficulties will continue to be present in the future unless affirmative steps are taken.

The above history also reveals that the Board has been clearly wrong in the past, e.g., in its position as to unions as employers and the hotel industry. It is this writer's opinion that the Board may have been also in error in refusing to exercise jurisdiction where it had legal jurisdiction and, particularly, when it established standards for the exercise of its jurisdiction. While this opinion is definitely in the minority of those legal writers who have treated the question of the Board's jurisdiction, it has substantial support from a legal viewpoint. Only when practical considerations are given weight does a need for discretion in exercising jurisdiction arise. And, it is doubtful, in the writer's opinion, that the Board's action has been the most practical.

During consideration of the original Wagner Act (National Labor Relations Act) Senator Wagner, himself, proposed to define "employer" in a way which
would have excluded businesses with less than ten employees from the jurisdiction of the Board. This was rejected because Congress sought the full limit of the commerce power and did not want to deprive any employees of their rights under the law merely because they worked a small plant. In this connection the Senate Labor Committee stated:

After deliberation, the Committee decided not to exclude employees working for very small employer units. The rights of employees should not be denied because of the size of the plant in which they work. Section 7 (e) imposes no such limitation. And in cases where the organization of workers is along craft or industrial lines, very large associations of workers fraught with great public significance may exist, although all members work in very small establishments. Furthermore, it is clear that the limitations of this bill to events affecting interstate commerce is sufficient to prevent intervention by the Federal government in controversies of purely local significance.¹

It is thus clear that the Congress which provided for the entrance of the federal government into the area of industrial relations did not favor restrictions on the rights of employees of small employers.

The Supreme Court, as noted above, supported this Congressional intent in the early cases upholding the jurisdiction of the Board. While it is true that these cases did not concern the question of whether or not the Board had discretion to decline to exercise its jurisdiction the language of the Court is particularly significant:

Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control . . . ²

¹Senate Report No. 573, 74th Congress, 1st Session (1935).
... Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis.

There are not a few industries in the United States which, though conducted by relatively small units, contribute in the aggregate a vast volume of interstate commerce ... It is not to be supposed that Congress ... intended to exclude such industries from the sweep of the Act ... 3

Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce. 4

These cases show that the Supreme Court, as well as the Board at that time, understood that a particular situation may not be viewed in isolation and that the nature of the industry, the extent of unionization, etc., must be considered. These factors must be remembered when thought is given to the right of the Board to set general standards for the exercise of jurisdiction, which standards practically ignore the individual aspects of a particular case.

The legislative history of the Taft-Hartley Act in 1947 reveals no substantial congressional approval of the Board's jurisdictional policies. Actually, we find affirmation of the idea that the size of the employer should not be determinative. Two union practices which Congress intended particularly to regulate in 1947 were the secondary boycott and the closed shop, both of which are often found in industries comprised of small employers, e.g., the construction industry. In this connection, we find Senator Taft stating, "(L)arger employers can well look after themselves, but ... there are

hundreds of smaller employers ... who ... have come gradually to be at
the mercy of the labor union leaders."5

The Taft-Hartley Act amended the Wagner Act in another respect Having a
bearing on the question of the Board's discretion as to jurisdiction. The
Act in Section 3 (d) creates the office of General Counsel separate from and
independent of, the five-member Board, and gives the General Counsel "Final
authority, on behalf of the Board, in respect of the investigation of charges
and issuance of complaints under Section 10, and in respect of the prosecution
of such complaints before the Board." The first General Counsel after the
passage of Taft-Hartley, Robert Denham, took the position that if he issued a
complaint in an unfair labor case the Board had no discretion to decline hear­
ing the case. ..6 Mr. Denham was also of the opinion that jurisdiction should
be exerted to the limit authorized by law. "After unsuccessfully opposing
the Board in several cases ... Mr. Denham aired the controversy publicly
... charging the Board with application of 'their old Wagner Act formulae'
when 'the principle of the theory has been repudiated by the passage of the
Taft-Hartley Act'. . . ."7

The issue was squarely presented to a federal Court of Appeals in

593 Saily Cong. Rec. 3950 (April 23, 1947); Legislative History of the

6For a similar position as to the elimination of any discretion in the
Board see Sylvester Petro, How the N.L.R.B. Repealed Taft-Hartley, (Washington,
1958), Chapter 8.

7B. J. George, Jr., "Taft-Hartley Act--Right of Board to Dismiss Unfair
quoting Address before New York Building Trades Employers' Association,
Haleston Drug Stores, Inc. v. N.L.R.B. (C.A. 9) 187 F. 2d 418, a case which present Board Member Fanning believes "fairly reflects the general view" that the Board has discretionary power to decline to assert jurisdiction. After the General Counsel, through a Regional Director, had issued a complaint and prosecuted the case before a Trial Examiner, the latter dismissed the complaint because the Board had, in an election proceeding, concluded that assertion of jurisdiction would not effectuate the policies of the Act since the employer's operations were essentially local in character. The Board affirmed the dismissal and the General Counsel, inter alia, sought review. The Court upheld the position of the Board:

By the express language of Section 10 (a) the Board was and still is empowered (not directed) to prevent persons from engaging in unfair labor practices affecting commerce. Its discretionary authority in respect of its assertion of jurisdiction was never, so far as we are informed, questioned under the Act as it existed prior to 1947. In N.L.R.B. v. Indiana & M. Electric Co., 318 U. S. 9, 18, 19 . . . the Court noted that 'the Board has wide discretion in the issue of complaints . . . . It is not required by the statute to move on every charge; it is merely enabled to do so.' . . . The Board, itself, without judicial challenge, acted on the assumption that it could, for reasons of policy or for budgetary or other reasons, decline to issue an unfair labor practice complaint, or to dismiss a complaint . . . if in its reasoned judgment the policies of the act would be best served by that course. Of this assumption and practice one can not doubt that Congress was fully cognizant. (Emphasis in original)

The Court then analyzed the Taft-Hartley changes and concluded that no change was intended to take the Board's discretion away. It concluded that both the Board and the General Counsel had power to withhold jurisdiction.

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9 187 F. 2d at p. 421.
This decision does not satisfy the writer as one to be the basis of the "general view." In the first instance, the writer questions the Court's reliance on the word "empowered" in Section 10 (a) for it appears that Congress did not give such significance to it. In the 80th Congress which passed Taft-Hartley, the House initially passed H. R. 3020 which provided for an Administrator rather than a General Counsel. Under Section 10 (b) of that bill the Administrator, upon the filing of a charge, was to investigate such charge, "and if he has reasonable cause to believe such charge is true, he shall issue . . . a complaint" (emphasis supplied). As House Report No. 245 on this bill stated, "It is only when the facts the complaint alleges do not constitute an unfair labor practice, or when the complainant clearly cannot prove his claim, that the Administrator has any discretion not to issue a complaint."10 (Emphasis supplied.) The House bill did not pass the Senate but the House Conference Report No. 510 states that the House-Senate conference agreement contemplated that the duties of the Administrator would be performed "under the exclusive and independent direction of the General Counsel of the Board" with no mention being made of any more discretion in this officer.11 Section 10 (b) as passed provides that upon the filing of a charge "the Board ... shall have power to issue ... a complaint." Thus, when we consider House Report No. 245 as to the Administrator's discretion, the conference report's statement that the General Counsel is to do the work of the Administrator, and then look at "Board" and "shall have power" in the Act, it is difficult to believe that


11Ibid., p. 557.
"empowered" has the significance given it by the Court in Haleston, even though "empowered" is in Section 10 (a) whereas the above reports refer to Section 10 (b). It would be inconceivable to this writer that Congress would wish to give the General Counsel no discretion as to issuing a complaint for jurisdictional reasons while the Board, at the same time, had such discretion and was declining to assert jurisdiction.

The writer's second objection to the Court's reasoning in Haleston relates to its conclusion that both the Board and the General Counsel have power to withhold jurisdiction. In the case before it, the General Counsel wanted the Board to take jurisdiction. But imagine the reverse situation, i.e., the General Counsel setting a more restrictive jurisdictional standard than the Board would have. Or imagine a persistent General Counsel who continued to apply his own discretion as to jurisdiction even though he knew that the Board would ultimately dismiss the case in the exercise of its discretion. (Such a situation, while not likely, is certainly a possibility. For the General Counsel is appointed for a four year term and may carry over into the administration of a President of the opposite party with a majority of the Board soon reflecting his views on jurisdiction rather than those of the General Counsel. And, absent flagrant abuses of discretion, court review of Board policies is only possible if complaint has issued.) Any such situations would soon become intolerable.

The third objection arises from the Court's citation of N.L.R.B. v. Indiana & M. Electric Co. in support of the Board having discretion. For that case, decided in 1943, involved the question of whether the Board should reopen a case and take additional evidence of violence allegedly committed by persons
who had been witnesses at the original hearing. The Court stated:

While we hold that misconduct of the union would not deprive the Board of jurisdiction, this does not mean that the Board may not properly consider such misconduct as material to its own decision to entertain and proceed upon the charge. The Board has wide discretion in the issue of complaints . . . . It is not required by the statute to more on every charge; it is merely enabled to do so . . . . It may decline to be imposed upon or to submit its process to abuse. The Board might properly withhold or dismiss its own complaint if it should appear that the charge is so related to a course of violence and destruction, carried on for the purpose of coercing an employer to help herd its employees into the complaining union, as to constitute an abuse of the Board's process.\(^{12}\)

The writer has difficulty seeing support in such a case, involving possible abuse of the Board process, and decided before the Board substantially began declining to exercise jurisdiction for policy reasons, for the Board's action in Haleson.

Some commentators on the Haleson decision are critical of the Court's holding on the ground that the Taft-Hartley Congress, in separating the jurisdictional functions and the prosecutorial functions by establishing the office of an independent General Counsel, intended to remove any discretion in the Board.\(^{13}\) This was the position of Mr. Denham. The writer is not convinced this contention has merit, particularly when Mr. Petro buttresses his arguments with implications that the Board has deliberately taken its stand on discretion so as to allow unions to violate the law without punishment, especially in the construction industry. While it is true that Congress was interested in abuses in the construction industry, the writer believes there is no basis for

\(^{12}\) 318 U. S. at pp. 18-19.

concluding that it intended "special legislation" for that industry.

Another problem in this area arises from the **Haleston** decision, although not connected with it. As discussed above, the Court relied on "empowered" in Section 10 (a) for its holding. Now Section 10 (a) deals with the Board's power to prevent unfair labor practices. Another, and equally important, function of the Board is to conduct elections to ascertain the bargaining representative desired by the majority of employees in a bargaining unit. Section 9 (c) of the National Labor Relations Act provides that "(1) Whenever a petition shall have been filed . . . the Board **shall** investigate . . . and if it has reasonable cause to believe that a question of representation affecting commerce exists **shall** provide for an appropriate hearing upon due notice . . . . If the Board finds upon the record of such hearing that such a question of representation exists, it **shall** direct an election by secret ballot and **shall** certify the results thereof." (Emphasis supplied.) This use of the mandatory "shall" could be particularly significant inasmuch as the original Wagner Act provided in Section 9 (c) that the Board **may** investigate whenever a question affecting commerce arises concerning the representation of employees. Thus, the reasoning of the **Haleston** decision could not be used to justify the existence in the Board of discretion not to assert jurisdiction in representation cases. The Board, however, has never made any distinction between complaint and representation cases in applying its jurisdictional standards, and the court decisions relating to discretion in the Board have been limited to complaint cases. This is because "Section 9 . . . makes no provision as it now stands for review of any order issued thereunder, and there is consequently no opportunity for judicial review of the application of the
'yardstick' in this context, except under the remote possibility that a court would issue mandamus to compel the Board to discharge the statutory duty.\textsuperscript{14}

In \textit{N.L.R.B. v. Denver Building and Construction Trades Council, et al.}, 341 U. S. 675, decided in 1951, the Supreme Court was faced with the question of whether picketing of a local construction project "affected commerce" within the meaning of the Act. In its opinion holding that the Board had jurisdiction, the Court stated that even "when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case."\textsuperscript{15} While this case has been cited in support of the Board having discretion in refusing to assert jurisdiction because of the volume of business involved, the statement quoted is \textit{diota} and would not be binding in future cases.

Another important decision in this area is \textit{Joliet Contractors Assn. v. N.L.R.B.} (C.A. 7) 193 F. 2d 833. The Court set aside the Board's dismissal of a complaint on jurisdictional grounds, holding that the unfair labor practices shown had a substantial effect upon commerce and that the Board's conclusion to the contrary was clearly erroneous. "Such being the case, we think the Board was without discretionary authority to dismiss the complaint. In any event, its action was an abuse of any discretion which it had."\textsuperscript{16}

\textsuperscript{14}Goodman and Griggs, supra, p. 906.

\textsuperscript{15}341 U. S. at p. 684.

\textsuperscript{16}193 F. 2d at p. 844.
The case involved an alleged secondary boycott in the construction industry and the Court gave great weight to the intent of Congress to stop secondary boycotts. It rejected the Board reliance on the Supreme Court's statement in Denver Building Trades Council and stressed the reasoning of Polish National Alliance that a case need not be viewed in isolation but may be considered as representative of others throughout the country.

The decision in Joliet Contractors is subject to criticism on the ground that the Court did not fully understand and meet the position of the Board.\(^{17}\) However, this writer believes it to be as well reasoned as Haleston and, thus, it "throws doubt upon the N.L.R.B.'s authority to decline jurisdiction in any part of the building trades at least . . . ."\(^{18}\) And, if valid as to the construction industry, it should apply to all industries since, in the writer's opinion, the Taft-Hartley Congress did not intend separate treatment of any industry. However, it would seem that the Court did not intend this result since it distinguished, but did not over-rule, its prior decision in Local Union No. 12, Progressive Mine Workers of America v. N.L.R.B.\(^{19}\) wherein it had agreed with the Board that the impact on commerce was not substantial and upheld its dismissal of the complaint for jurisdictional reasons.

While other courts have upheld the existence of discretion in the Board to refuse to hear cases for jurisdictional reasons,\(^{20}\) the Supreme Court has never

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\(^{18}\)Ibid., p. 119.

\(^{19}\)189 F. 2d 1.

directly upheld such discretion. In Guss v. Utah Labor Relations Board the Court stated that it has never passed "and we do not pass today" upon the validity "of any particular declination of jurisdiction by the Board or any set of jurisdictional standards . . ." (referring in a footnote to Denver Building Trades Council). And in Office Employees Union v. N.L.R.B., 353 U.S. 313, the Supreme Court stated, "(w)hile it is true that 'the Board sometimes properly declines to [assert jurisdiction] stating that the policies of the Act would not be effectuated by its assertion in that case' (emphasis supplied) Labor Board v. Denver Building Council . . . . " The Court also mentions that jurisdictional standards "exclude small employers whose business does not sufficiently affect commerce . . . . But its exercise of discretion in the local field does not give the Board the power to decline jurisdiction over all employers in other fields. To do so would but grant to the Board the congressional power of repeal. See also Guss v. Utah Labor Relations Board . . . where the Court refused to pass 'upon the validity of any particular declination of jurisdiction by the Board or any set of jurisdictional standards'." In a footnote, referred to in the above quotation the Court mentions hotel cases where the Board declined jurisdiction because of the local character of the business as well as various cab companies cases and states, "In these cases the declination of jurisdiction was based on the local character of the operation. We indicate neither approval nor disapproval of these jurisdictional declinations."
In its decision in *Siemons Mailing Service*, 122 N.L.R.B. No. 13, wherein it sets forth the reasoning behind the 1968 standards, the Board cites this case as affirming the existence of the Board's discretionary authority to decline to assert jurisdiction when the policies of the Act would not be effectuated by its assertion. The decision does lend some support to such a view but, in the writer's opinion, it is by no means clear that the Court was actually affirming the existence of such discretion in view of the cautious language used. Furthermore, since this issue was not directly before the Court, whatever it meant is *dictum*. More significant for the Board's position is that three Justices joined in Justice Brennan's concurring and dissenting opinion, wherein he wrote, "I am of the view that the Board has discretionary authority to decline to do so when the Board determines, for proper reasons, that the policies of the Act would not be effectuated by its assertion of jurisdiction."

On numerous occasions between the passage of Taft-Hartley and the present session of Congress bills were introduced which, if passed, would have affected the Board's jurisdiction. Senator Smith (R. New Jersey) offered a bill (S. 1785, 83rd Cong., 1st Sess.) which would have allowed the states to act in situations involving public utilities. Senator Goldwater (R. Arizona) introduced one (S. 1161, 83rd Cong., 1st Sess.) which would have returned to the states jurisdiction to regulate strikes, secondary boycotts and picketing even over industries affecting interstate commerce. Senator Ives (R. New York) proposed a bill (S. 1264, 83rd Cong., 1st Sess.) to give the states freedom to act in all cases which did not come within the National Labor Relations Board's jurisdictional

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23 Ibid., at p. 321.
standards. These, and others, failed of passage. The significance of the failure is difficult to ascertain. The Goldwater Bill, particularly, was more a question of "state's rights" and no real significance attaches to its inability to pass. The Ives bill, on the other hand, gave Congress a clear opportunity to forestall the Guss decision and the "no-man's land." Its failure to act on this opportunity may have been due to a desire to have the National Board keep and exercise its jurisdiction, due to a belief that the Supreme Court would not reach the result it did in Guss and, therefore, such legislation was unnecessary, or due to a thousand other considerations. In any event, the Kennedy bill of the present session, detailed above, appears to be the first legislation which clearly indicates specific congressional approval of the Board establishing jurisdictional standards, by providing for state action when the National Board does not.

It seems evident from the above analysis of legal decisions and congressional action prior to the present session that the right of the Board to decline to exercise its jurisdiction is not as clear as commonly believed. However, most writers, even those who question the Board's right, agree that as a practical matter the Board must decline to act in some situations or it would be overburdened with cases:

... Notwithstanding the legislative history of the Act, few would question the theory that, if retrenchment of jurisdiction is required, those businesses with the least impact on interstate commerce must, of necessity, be eliminated first. Furthermore, fixed jurisdictional standards, even though they are mechanical in operation, appear to present the most practical way to measure impact upon commerce and, at the same time, retain the advantage of uniformity and predictability. ... 24

24 50 Northwestern L. Rev. 190 at 196.
As a purely practical matter, one may readily agree that so little limitation remains upon the scope of the Board's jurisdiction . . . that the Board should have available some other means for restricting itself to those cases whose considerations will really effectuate the policy of the act. No other means are provided for in the act, however, and it is difficult to conceive how the Board . . . can create one without statutory authority, either by analogy to the procedure of courts or by exercise of its administrative discretion.25

The real problem facing the Board is its inability to hear all labor disputes which fall within the legal limits of its authority. . . . The only check would be through the policy of the General Counsel in issuing complaints. Should such restraint in initiating action also be treated as an abuse of discretion, the Board could not handle important matters promptly without recourse to some sort of priority system. It would then have to allow other matters to languish on the docket, denying effective relief.26

Other writers recognize the practical difficulties involved and suggest amendments to the Act:

One cannot with sincerity forcefully argue that exclusive jurisdiction resides in the Board if the Board cannot expeditiously hear and fairly determine the rights of the parties. Perhaps a part of the solution would be to increase the number of members on the Board to the number recommended when the Taft-Hartley Act was enacted. . . . 27

It is not the Board's function to change the law to conform with its own idea of proper policy and procedure . . . . One cannot but wonder if the field of labor law has not advanced to the point where a regular tribunal presided over by judges of certain tenure is in order . . . . The Board's decisions, which seem to be subject to every change in membership, and to every change in political climate, are a strong argument for tribunal (sic) which would work out a rational scope of coverage and adhere to it.28

Another commentator suggests that the answer to the "no-man's land" and

25Goodman and Griggs, supra, at 901-902.
2652 Yale L. J. 116 at 122-124.
27Pollard, supra, at 468.
28B. J. George, Jr., supra, p. 1158.
the Board's caseload is for the Board to obtain more money from Congress. Written before the recent increase in the Board's appropriation, the author advocates the establishment of regional member boards to carry out the functions now performed by the one Board. "The caseload could thus be distributed among at least five boards rather than have the entire burden resting upon the five men now charged by Congress . . . . Precedent for such an expansion of the national Board has already been established in the history of the federal courts." The actual need for the Board to decline asserting jurisdiction through the use of standards has been questioned by at least one writer. "If essential statistical data were made available to the Board by way of reporting by the General Counsel, the author ventures to predict that the jurisdictional standards would not only be revised downward, as accomplished in the latter part of 1958, but might possibly be abandoned completely." The author further contends that, regardless of the statistical results, the Board should abandon the use of jurisdictional standards, since they deprive parties of the public rights created by Congress and, in addition, indirectly make the Board a party contributing to the open violation of federal law by those below the standards who know they can violate the law with impunity. "Can the reader visualize the results of an announcement by the Internal Revenue Service that 'due to work load and budgetary limitations on personnel acquisition, all returns with

29Henderson, supra.

30Ibid., p. 898.

annual gross income of $15,000 and under will not be reviewed' . . . . It is admitted that the Board could not hear every case, but would not greater compliance with the act be accomplished if all violators knew that they ran the risk, in varying degrees, of possible Board adjudication?"32

In view of these differences of opinion, all of which have some validity, the writer believes that Congress should study the operation of the Board, as presently constituted, to ascertain whether it is desirable and/or necessary for the Board to decline jurisdiction, either on a case-to-case basis or through the use of jurisdictional standards. If this study reveals an actual need then Congress should consider whether increased appropriations would solve the problem and/or whether there should be changes in the structure of the Board. Certainly, money should not be the sole basis for jurisdictional standards, especially when the Board has never made a determined bid for increased funds and when we consider that the annual budget of the agency is only a minute part of the federal budget. Congress should bear in mind that a "no-man's land" is intolerable and that the answer of the present Kennedy bill is doubtfully practical, and, even if practical, certainly more expensive in the long run to the state governments.

A solution to the problems in this area must be found. The Board, itself, has done more to create the problems than to find solutions to them. Congress, then, is the body to provide a solution; protection of employee's rights and stability in labor relations require it.

32 Ibid., pp. 262-263.
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MISCELLANEOUS

Annual Reports of the National Labor Relations Board, First through Twenty-third


STATUTES


United States Constitution.
APPROVAL SHEET

The thesis submitted by Martin J. Burns has been read and approved by three members of the faculty of the Institute of Social and Industrial Relations.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Social and Industrial Relations.

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Signature of Advisor