THE NEED FOR AN ADEQUATE REMEDY FOR THE SLOWDOWN

Labor and management have resorted to a wide variety of methods by which to strengthen their respective bargaining positions.[1] Among these has been the slowdown.[2] Historically, labor's use of the slowdown as a bargaining weapon has been infrequent, consequently the legal status of this activity has too often been summarily discussed. Among the few writers who have commented on the slowdown, the consensus is unanimous that it is an unjustifiable practice.[3] Nevertheless, labor's use of this device may not be sporadic in the future. An appreciation on its part that public opinion condemns such a practice would seem to have only questionable value as a restraint on the exercise of this coercive bargaining force.[4] Recent cases indicate current usage of the slowdown by labor and evidence the fact that its status in the law is in the stage of formulation,[5] though the trend clearly reveals a condemnation of this activity.[6]

Since the slowdown is conceded to be an unjustifiable practice and because the primary objective of the Labor Management Relations Act is to foster collective bargaining,[7] the Act's failure to provide adequate

1. *E.g.,* Strikes, sit-down strikes, picketing, boycotts, walkouts, lockouts, shutdowns, strikebreaking.

2. The slowdown is not easily defined. Its most obvious manifestation appears when employees stay on the job but reduce their production rate. Collective bargaining agreements which contain no-slowdown clauses prohibiting labor unions from engaging in a slowdown often define the term slowdown with an explanatory expression such as "restriction of production," "interference with production," or "curtailment of work." See Collective Bargaining Agreements, General Motors Corp.—United Auto Workers, 5 CCH LAB. LAW REP. ¶ 53,101 (1953); Ford Motor Co.—United Auto Workers, *id.* at ¶ 53,160. One writer describes slowdowns as ". . . partial work stoppages by employees who prefer to strike on their employer's time rather than on their own." TELLER, A LABOR POLICY FOR AMERICA 96 (1945).

3. One author has recently written, ". . . there can be little doubt of the general public condemnation of occupying a job and taking pay while simultaneously refusing to perform the services required." Cox, *The Right to Engage in Concerted Activities,* 26 IND. L.J. 319, 338 (1951). "[Slowdowns] . . . are a dishonest form of activity, sometimes difficult to prove, and highly indefensible. They are not sanctioned by many labor leaders, and they should not be tolerated by responsible union leadership." TELLER, *op. cit. supra* note 2, at 96.

The term "unjustifiable" when used in this discussion indicates a general disapprovement. No legal connotation is suggested.

4. See Weisenfeld, *Public Opinion and Strikes,* 4 LABOR L.J. 451 (1953).

5. See Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952); Elk Lumber Co., 91 N.L.R.B. 333 (1950); *accord,* International Union, UAW, AFL v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949); Montgomery Ward & Co., 64 N.L.R.B. 432 (1945).

6. This "trend" will be discussed and developed throughout this analysis; however, it includes specific instances of NLRB decisions, court holdings, opinions of writers in the field, and apparent public condemnation.

7. 61 STAT. 136 (1947), 29 U.S.C. § 141 (Supp. 1951). Hereafter, the word "Act"

safeguards against the slowdown is significant. It becomes necessary to fit the slowdown into its peculiar niche within the framework of federal and state labor-management laws.[8]

The LMRA, as it originally passed the House of Representatives, contained a section which included the slowdown as one of certain enumerated "unlawful concerted activities."[9] The conference committee, however, deleted this provision and attempted to incorporate its categorized offenses in other portions of the Act.[10] Unfortunately, by deleting this proposed section, its specific prohibitions were lost, and the status of the slowdown was open to speculation.

Consideration of the slowdown followed by inaction might mean that Congress thought it an approved activity not to be subjected to interference; on the other hand, the omission could mean that federal regulation was considered inappropriate and that the states were free to legislate on the practice. Again, Congress may have expected the National Labor Relations Board and the courts to conclude that the

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as used in this Note will refer to all five Titles of the LMRA. When Title I, which is the amended National Labor Relations Act, is meant, the phrase Title I will be used.

The Act recognizes that a judicial edict is unenforceable against large numbers of employees and that the real solution to labor-management problems lies in fostering mutual cooperation. Cooperation is to replace coercion in this complex area of human relationships. § 1. See NLRB v. Norfolk Southern Bus Corp., 159 F.2d 516, 518 (4th Cir. 1946); S. S. Pennock Co. v. Ferretti, 201 Misc. 563, ——, 105 N.Y.S.2d 889, 894 (1951).

8. The application of the state law to labor problems in general, and to the slowdown in particular, is dependent upon the scope of the LMRA and whether or not it was an attempt to preempt the entire labor field or parts of it; or if this analysis is not adhered to, whether or not the LMRA invalidates state law because of a direct conflict. For a discussion of the applicability of state law to labor questions, see Cox, *supra* note 3, at 334-344; Cox and Seidman, *Federalism and Labor Relations,* 64 HARV. L. REV. 211 (1950); Handler, *The Impact of the Labor-Management Relations Act of 1947 Upon the Jurisdiction of State Courts Over Union Activities,* 26 TEMP. L.Q. 111 (1952); Petro, *Participation by the States in the Enforcement and Development of National Labor Policy,* 28 NOTRE DAME LAW. 1 (1952); Ratner, *Problems of Federal-State Jurisdiction in Labor Relations,* 3 LABOR L.J. 750 (1952); Smith, *The Taft-Hartley Act and State Jurisdiction over Labor Relations,* 46 MICH. L. REV. 593 (1948).

9. "Sec. 12(a). The following activities, when affecting commerce, shall be unlawful concerted activities:

"(3) Calling, authorizing, engaging in, or assisting—

(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises. . . ."

H.R. 3020, 80th Cong., 1st Sess. § 12 (1947). Resort to these unlawful activities would have subjected employees and labor organizations to civil damages; injunctive relief; cease and desist orders; and whatever other remedies attend a deprivation of rights under the Act. *Id.* at §§ 12(b), 12(c), 12(d). See also Iserman, *Unsolved Problems of Labor Law,* 21 TEMP. L.Q. 334, 349 (1948).

10. See H.R. REP. No. 510, 80th Cong., 1st Sess. 58-59 (1947).

slowdown constitutes a type of conduct unprotected by Section 7.[11] But, regardless of inarticulated Congressional intent, one fact is certain—the slowdown is nowhere specifically mentioned in Title I of the LMRA.[12] Congress' failure to enunciate clearly the law on slowdowns has imposed upon the Board and the courts the burden of bringing this activity within the Act's purview. In order to fulfill this implied obligation, they have attempted to utilize Section 7.[13]

11. This view seems to be the more valid interpretation of the legislative intent. "Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement." *Id.* at 59. See International Union, UAW, AFL v. Wisconsin Employment Relations Board, 336 U.S. 245, 260 (1949). However, no answer is suggestive in the LMRA or in the legislative history as to whether or not placing activity outside the protection of Section 7 is meant to be exclusive, or whether, in addition to being unprotected under Section 7, the activity may be further regulated by the states.

12. See note 7 *supra*. Title I contains a definition section but fails to define either the slowdown or the more widely utilized labor practice, the strike. § 2. The slowdown is, however, included within the Title V definition of strike.

"When used in this Act—

(2) The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." § 501.

Had this definition of strike been meant to apply to Title I, it should have been included within Title I's definitions. The independence of Title I from the rest of the Act is supported by the fact that Title V incorporates, as its own definitions, definitions from Title I, and, therefore, implies that the two titles stand alone. For example, the term "supervisor" was added to the definitions of Title I by the 1947 amendment; it was then adopted as a definition in Title V of the same amendment; whereas, "strike" (including the slowdown) is defined only in Title V. Furthermore, the word "strike" was used in the original NLRA in Section 13 and, yet, was not defined in that Act. The argument could be maintained that the amendment purposely did not define "strike" because its meaning had already been established by court opinions.

The Supreme Court, however, has employed the Title V definition of strike to define strike as used in Section 13 of Title I. International Union, UAW, AFL v. Wisconsin Employment Relations Board, 336 U.S. 245, 258-265 (1949). However, even if the definition contained in Title V does apply to Title I, the definition of the word "strike" does not in any way govern the *right* to strike. This right is protected by Section 7 and is phrased in terms of concerted activity and not in terms of strike. Thus, it is not the definition section but Section 7 that defines the right to engage in various activities. Therefore, the one place in Title I where the definition of the term slowdown might find specific application lends no assistance in determining its legal standing.

13. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." § 7. To assure the effectiveness of this Section, the Act provides:

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . . " § 8(a).

Once the behavior of the employees is included within Section 7, it becomes a

Usually, improper union conduct is controlled by the NLRB through the provisions of Section 8(b) which pertains to unlawful objectives.[14] However, because the slowdown is not an objective, but rather a means by which to achieve union goals, it is not subject to the provisions of Section 8(b). Regulation of means is provided for by Section 7.[15] The LMRA was not intended to overrule the precedents relating to undesirable means which were established in the interpretations of Section 7 of the original National Labor Relations Act but, indeed, was passed in deference to and in harmony with these Board and court decisions.[16] Prior to the amendment, unlawful conduct, irrespective of the objective sought, was controlled by permitting employers to discharge employees engaged in such activity.[17]

Originally, the Board interpreted Section 7 of the NLRA in a literal sense. If the activity was in fact concerted, it was protected. Gradually, exceptions arose and certain forms of behavior, though concerted in fact, were held to be unprotected. These exceptions have transformed the original factual description of concerted activity into a legal concept which divides unprotected activity into two general categories, "unlawful" and "indefensible."[18] The former is self-explanatory;[19] the

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protected concerted activity and any attempt by the employer or labor organization to interfere with this protected activity is an unfair labor practice subject to corrective action by the NLRB and the courts. § 10(c).

However, if the employees' activity is *not* protected under Section 7, then the above provisions granting relief are not applicable, and employers may engage in self-help action such as discharge and the lockout.

The Board has also utilized Section 8(d). Discussion of this facet of the problem is at pp. 288-291, *infra*.

14. The dichotomy of objectives-means was discussed by the Supreme Court in International Union, UAW, AFL v. Wisconsin Employment Relations Board, 336 U.S. 245, 263 (1949). Section 8(b) enumerates the prohibited unfair labor practices of labor organizations. The courts have refused to broaden the Section's coverage by judicial interpretation. See Rabouin v. NLRB, 195 F.2d 906, 912 (2d Cir. 1952); NLRB v. National Maritime Union, 175 F.2d 686, 490 (2d Cir. 1949).

15. See note 13 *supra*.

16. These principles were cited and discussed by the conference committee and were left out of the Act for fear *exclusio unius* might apply if mention were made of some but not every possible undesired means to an end. See H.R. REP. No. 510, 80th Cong., 1st Sess. 39 (1949).

17. The LMRA protects this remedy: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." § 10(c).

For a thorough discussion of Section 7 and concerted activity, see Cox, *supra* note 3, at 323.

18. A complete explanation of what constitutes "concerted activity" is not undertaken in this Note. For a discussion of the point, see Cox, *supra* note 3, at 323-325.

19. "Unlawful" is a general classification including both unlawful objectives and unlawful means to an objective. See NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939) (breach of contract); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (violence); Thompson Products, 72 N.L.R.B. 886 (1947) (strike to force employer

latter includes activity not unlawful but, nevertheless, disapproved to such an extent that it is considered unprotected.[20] In terms of this definition, the slowdown is not unlawful but is indefensible and, hence, unprotected by Section 7.[21]

Since the slowdown is not an unfair labor practice, employers have no access to the NLRB for redress under Section 8(b). However, because the slowdown is unprotected by Section 7 employers may use self-help against this practice by discharging, locking out, or otherwise disciplining workers.

The effect of the slowdown on collective bargaining has recently been before the NLRB in the *Phelps Dodge Copper Products Corp.* case.[22] The Corporation refused to continue bargaining with the union

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to engage in an unfair labor practice); American News Co., 55 N.L.R.B. 1302 (1944) (violating a federal statute). "It is too well established, however, to require extended discussion that not every form of concerted activity which falls within the literal language of Section 7 is given protection, so as to immunize those who participate in it against discharge or other discipline. Picketing accompanied by violence, sit-down strikes, strikes against Board certifications, or in breach of a no-strike clause in a contract, are examples of concerted activity, which, though designed to achieve 'collective bargaining' or for 'mutual aid or protection' of employees, are not accorded the protection of the Act by this Board or by the courts." The Hoover Co., 90 N.L.R.B. 1614, 1621 (1950).

20. "We do not interpret this [Section 7] to mean that it is unlawful for an employer to discharge an employee for *any* activity sanctioned by a union or otherwise in the nature of collective activity. The question . . . is . . . whether . . . particular activity was so *indefensible,* under the circumstances, as to warrant [the employer discharging the participants]." (Emphasis supplied.) Harnischfeger Corp., 9 N.L.R.B. 676, 686 (1938). See also Jefferson Standard Broadcasting Co., 94 N.L.R.B. 1507 (1951). A rigid test as to what is protected or unprotected is not desired, and authorities ". . . must certainly not create the impression that to be unprotected, conduct has to be in any sense illegel. . . ." Gregory, *Unprotected Activity and the NLRA,* 39 VA. L. REV. 421, 436 (1953).

21. Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952); Elk Lumber Co., 91 N.L.R.B. 333 (1950). In a recent case an attempt was made by the court to limit the criteria to be applied to Section 7 to include only "unlawful" activities; the court concluded that the "indefensible" theory was incorrect. International Brotherhood of Electrical Workers v. NLRB, 202 F.2d 186 (D.C. Cir. 1952). One writer accurately and effectively argued that this case was not in line with established precedents. Gregory, *supra* note 20. The Supreme Court, in NLRB v. International Brotherhood of Electrical Workers, 74 S. Ct. 172 (1953), reversed the circuit court. The Court did not consider the application of Section 7, for though the activity may have been concerted in fact it was not for the purpose of "mutual aid or protection"; it was nothing more than insubordination by a concerted group. Though the Court's approach seems questionable, the result is desirable. The Court did add as dictum: "Even if the attack were to be treated . . . as a concerted activity wholly or partly within the scope of those mentioned in § 7, the means used . . . have deprived the attackers of the protection of that section. . . ." *Id.* at 179.

22. 101 N.L.R.B. 360 (1952). Collective bargaining is defined in Section 8(d): "For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . but such

after the latter had instituted a slowdown during a period of contract negotiations. Ordinarily, in "unusual circumstances" an employer need not bargain—these circumstances being where the union's behavior indicates a lack of fair dealing and, hence, precludes any opportunity to determine whether or not the employer is wanting in good faith.[23] The Board, reversing its trial examiner, considered the slowdown to be one of these unusual circumstances and held that the employer need not bargain so long as this practice continued.[24]

In the *Phelps Dodge* case the NLRB so defined good faith that a party must bargain unless the other party is lacking in fair dealing.[25] Apparently, this interpretation means the Board will inquire into the good faith of the party refusing to bargain only after determining whether or not the complaining party has satisfied the requisite of fair dealing.[26]

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obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

23. Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360, 368 (1952). The employer and the union must "confer in good faith" though they need not reach an agreement. § 8(d).

24. This was apparently the first time the Board had to face this specific problem. 17 NLRB ANN. REP. 178 (1952). The duty to bargain as defined in Section 8(d) and the concept of "concerted activities" under Section 7 are not necessarily related. Thus, unfair labor practices, strikes in violation of no-strike clauses, and slowdowns are all unprotected under Section 7. NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939); Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952); Elk Lumber Co., 91 N.L.R.B. 333 (1950); Joseph Dyson & Sons, 72 N.L.R.B. 445 (1947). But since unfair labor practices do not relieve the employer of his duty to bargain, whereas strikes in violation of no-strike clauses do relieve the employer of this duty, it becomes evident that the activity's relationship to Section 7 is not the criteria used in determining whether or not the employer must continue to bargain. Jones Furniture Mfg. Co., 98 N.L.R.B. 1302 (1952); I.B.S. Mfg. Co., 96 N.L.R.B. 1263 (1951); Union Mfg. Co., 95 N.L.R.B. 792 (1951); Higgins, 90 N.L.R.B. 184 (1950); Charles E. Reed & Co., 76 N.L.R.B. 548 (1948).

The reason for excusing the employer from his duty to bargain when employees engage in a strike in violation of their contract is based upon the injustice caused by forcing the employer to bargain collectively for the purpose of reaching a mutual agreement and, yet, permitting the union to violate an already existing mutual agreement—such a strike violates the hard-earned results of the collective bargaining process. In regard to slowdowns, however, this reason is inapplicable, for a slowdown does not violate a contract (assuming the absence of a no-slowdown provision) and, hence, does not detract from the vitality of the collective bargaining agreement and policy. This was the trial examiner's analysis in the *Phelps Dodge* case, *supra*. But the Board in reversing its examiner felt that the slowdown carried sufficient other evils to warrant the employer's refusal to bargain.

25. Cox contends that Section 8(b)(3), which lists as an unfair labor practice a lack of good faith bargaining on the union's part, gives implied statutory support to this position by the Board. Cox, *Some Aspects of the Labor Management Relations Act 1947*, 61 HARV. L. REV. 274, 283 (1948). He adds: "In the long run, free collective bargaining can be preserved and strikes diminished only by building up among employers and employees the realization that both owe a duty to the public to adjust their differences without recourse to economic weapons. . . ." *Id.* at 281.

26. Such an approach seems to be an application of the maxim of equity which declares that ". . . he who comes into equity must come with clean hands. . . ." McCLINTOCK, PRINCIPLES OF EQUITY 52 (2d ed. 1948).

This criteria is, perhaps, as vague as good faith, but used together the two standards help create an atmosphere of equality in which collective bargaining may take place. Instead of good faith being an absolute concept blindly applied to the defendant in a controversy, it has taken on a partner, fair dealing. The behavior of all parties concerned in a labor controversy is now scrutinized before the Board decides whether or not bargaining must continue. The NLRB's position seems to be in accord with the legislative intent which envisioned that each party would be free to accept or reject all proposals made to it.[27]

At times labor and management engage in activities designed to apply pressure upon the other for the purpose of gaining an advantage in bargaining relations;[28] however, not all types of behavior still leave the other party free to bargain. If employees were not allowed to strike, they would be handicapped in bargaining negotiations, for the employer, satisfied with his position, would hardly be in a cooperative mood and would tend to prolong the dispute. To remedy this situation, employees are guaranteed the right to strike; and the employer must bargain with them if they do.[29] Both parties, receiving no benefits, are presumably in commensurate bargaining positions. The slowdown, on the other hand, results in an inequality similar to the one which would exist if the employees were forbidden to strike, except that here it is the employer whose freedom of bargaining is restricted, for the employees, receiving full wages under an existing contract, are not in a cooperative mood.

Since the basic purpose of the Act is to foster collective bargaining,[30]

27. "The committee bill is predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining. Government decisions should not be substituted for free agreement. . . ." SEN. REP. No. 105, 80th Cong., 1st Sess. 2 (1947).

28. In many instances labor and management realize that their respective interests do not conflict but are complementary to and often identical with each other. Such a realization results in bargaining negotiations founded in honest cooperation. This is to be contrasted with negotiations backed by the threat or actuality of economic pressures. The LMRA though expounding free collective bargaining, is, in reality, predicated on a balancing of economic forces, for the Act does protect certain coercive tactics. The anomaly is apparent and inadvertently tends to establish a negative attitude at the bargaining table. No suggestion for correcting this situation is offered here. It is important, however, to mention this shortcoming and to make known the fact that the textual discussion of collective bargaining is in terms of existing law—shortcomings and all.

29. The employer is not excused from the obligation of bargaining if the union engages in a strike. See NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 334 (1938). NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874, 885 (1st Cir. 1941). However, if the union had contracted away this right to strike and then proceeded to strike, the employer would be free of the duty to bargain. Higgins, 90 N.L.R.B. 184, 185 (1950); United Elastic Corp., 84 N.L.R.B. 768, 773 (1949). See discussion in note 24 *supra*.

30. See note 7 *supra*.

it seems sound that the Board eliminate a situation which establishes an unfair advantage in bargaining relations and creates an impediment to free bargaining. If circumstances were otherwise, labor would be permitted to use the Statute to gain an unfair bargaining advantage contrary to its primary purpose of providing for "equality of bargaining power between employers and employees."[31] The Board's position seems to be consonant with what Congress intended by "equality of bargaining."

While the Board and the courts have utilized Sections 7 and 8(d) in an attempt to alleviate the inequality caused by labor's use of the slowdown, the relief available under these Sections is limited in scope and effectiveness. Consequently, the remedies are not always adequate. A slowdown justifies the discharge of participating employees.[32] When it is realized that the entire personnel may engage in a slowdown, the inadequacy of discharge is self-evident.[33] The employer may selectively discharge, firing only the most flagrant participants, but his motive must be based upon the employees' unprotected activity and not on antiunion sentiments.[34] An employer may also lockout employees who slowdown,[35] but he may hesitate to exercise this prerogative because of its effect on

31. § 1. For a discussion of the inequality of bargaining relations under the Wagner Act and the changes the Taft-Hartley Act was to provide, see SEN. REP. No. 105, 80th Cong., 1st Sess. 1-3 (1947). The NLRB in the *Phelps Dodge* case said of the slowdown, "[It is a] . . . harassing tactic irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good faith bargaining must rest." Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360, 368 (1952).

32. C. G. Conn v. NLRB, 108 F.2d 390, 397 (7th Cir. 1939); Elk Lumber Co., 91 N.L.R.B. 333 (1950).

The term "discharge" is used generally and includes lesser employer disciplinary actions such as suspensions, forced vacations, and layoffs.

33. There may be times when an employer could discharge his entire personnel and, with little loss on his part, hire replacements, but this would occur only in rare instances where an abundance of employees was available—for example, during an acute depression. Even in such a situation, however, other practical factors would have to be weighed by the employer. Generally, the necessary economic situation, which would permit such a mass discharge, does not exist.

34. The employer commits an unfair labor practice if he discharges employees for union activity even though the employees could have been discharged for other nonunion reasons. NLRB v. Electric City Dyeing Co., 178 F.2d 980 (3d Cir. 1950); Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86 (3d Cir. 1943.) For elaboration of this point, see Jennings, *The Right to Strike: Concerted Activity Under the Taft-Hartley Act,* 40 CALIF. L. REV. 12, 19 (1952). The Board has held that an employer does not commit an unfair labor practice in disciplining employees whom he *mistakenly* thought were engaged in a slowdown. Underwood Machinery Co., 74 N.L.R.B. 641 (1947).

35. See Koretz, *Legality of the Lockout,* 4 SYRACUSE L. REV. 251, 254 (1953); the author also defines lockout. *Id.* at 251. See also Comment, 51 MICH. L. REV. 419 (1953); International Shoe Co., 93 N.L.R.B. 907, 909 (1951); Linkbelt Co., 26 N.L.R.B. 227, 261-265 (1940).

public opinion.[36] Furthermore, many practical considerations may restrain the employer from pursuing this remedy.[37]

The Board has determined that Section 8(d) excuses the employer from bargaining with his employees if they are engaged in a slowdown.[38] This solves nothing. While the employer is not legally required to bargain, the practical effect of the slowdown on production schedules, profits, and expenses may realistically compel the employer to grant labor's demands in order to protect his interests. In addition to being inadequate practically, this remedy perverts the Act's purpose of promoting collective bargaining between the parties and, thus, is an undesirable solution of the problem.

The employer may, however, find remedies outside Sections 7 and 8(d). Provision is made in the LMRA for damage suits by employers against unions for breach of collective bargaining agreements.[39] If it could be successfully contended that a slowdown is a breach of an implied contract, a damage suit could be maintained.[40] Because of the nebulous obligations imposed, it seems improbable that the courts will read implied duties into collective bargaining agreements.[41] And, too, since a large number of these agreements contain express no-slowdown clauses,[42] it seems even more unlikely that courts will consider a slowdown a breach

36. Since the slowdown can be extremely difficult to prove, the employer may find it an impossible task convincing the public that he has done nothing wrong in locking out his employees and that the party really at fault is a group of employees or the labor union.

37. Business commitments and economic and financial considerations may deter the employer from shouldering the burden of decreasing production or closing his plant.

38. Phelps Dodge Copper Products Corp., 101 N.L.R.B. —— (1952).

39. § 301(a). This provision gives jurisdiction to federal courts without regard to the amount in controversy or citizenship of the parties.

40. The LMRA does not classify a breach of contract as an unfair labor practice, so redress by the NLRB is not available to employers. For discussion of this facet, see Levinson, *Breach of Contract Under the Taft-Hartley Act,* 2 LABOR L.J. 279 (1951).

Prior to the Federal Act there was much difficulty in bringing damage suits in state forums. Blinn, *NLRB Policy on Strikers' Breach of Collective-Bargaining Agreements,* 32 ORE. L. REV. 277, 279 (1953). There is still a question as to whether or not a federal substantive right was created in addition to a federal forum. See SEN. REP. No. 105, 80th Cong., 1st Sess. 17 (1947); SEN. MINORITY REP. No. 105, 80th Cong., 1st Sess. 14 (1947); Wallace, *The Contract Cause of Action Under the Taft-Hartley Act,* 16 BROOKLYN L. REV. 1 (1950).

41. See Gregory, *The Collective Bargaining Agreement: Its Nature and Scope,* 1949 WASH. U.L.Q. 3, 14.

42. Perhaps as many as 85%-90% of collective agreements contain no-strike provisions. See 74 MONTHLY LAB. REV. 272 (1952). No-slowdown provisions are generally included with no-strike clauses.

It is of importance and interest to note the high percentage of no-strike clauses. Breaches of such a provision make unions liable for damages in federal courts. See note 40 *supra.* For a discussion of the no-strike clause and other available remedies see Daykin, *The No-Strike Clause,* 11 U. OF PITT. L. REV. 13 (1949).

of an implied obligation. Furthermore, serious reflection reveals that the union-management relationship may be substantially impaired by attempts to enforce the collective bargaining agreement like a "legal" contract.[43]

Ostensibly, a slowdown, being unprotected under Section 7, not only enables the employer to engage in self-help but also permits him to seek state assistance.[44] Consequently, the employer could perhaps obtain an injunction in a state court, not against the employees slowing down but against the union for authorizing a slowdown or for acquiescing in it.[45] This remedy is dependent upon certain factors: the possibility that a little Norris-LaGuardia act does not prohibit such restraining orders;[46]

43. There is real merit in the contention that collective agreements are not identical with "legal" contracts and, consequently, should not be enforced as such. Their historieal development is unique. To fit the relatively recent and novel concept of a collective agreement into well-established contract law seems to be evading the problem. The law of labor-management relations should be the law that developed with these relations and not a completely foreign criteria. Do labor and management consider these agreements binding contracts or just framework skeletons that serve as guides to a fluid, ever-changing relationship? Many questions could be raised that would point to the fallacy of calling collective agreements "legal" contracts. The problem is only posed.

44. See note 8 *supra.* The Supreme Court has stated the basic proposition thus: "Congress has not seen fit in either of these Acts [NLRA and LMRA] to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control." International Union, UAW, AFL v. Wisconsin Employment Relations Board, 336 U.S. 245, 252 (1949). The Court in discussing intermittent work stoppages by employees said: "There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the State or it is entirely ungoverned." *Id.* at 254. This rationale is applicable to the slowdown as well as the intermittent work stoppage. See Note, 20 TENN. L. REV. 784, 786 (1949). There is real merit in permitting state experimentation in the labor field so long as the result of state action does not frustrate national policy. Smith, *supra* note 8, at 615.

45. "Whether a state court may issue a labor injunction in the enforcement of state law will depend upon the extent to which the state's substantive labor law may co-exist with relevant federal law." Note, 48 COL. L. REV. 759, 768 (1948); see notes 8 and 44 *supra.* It appears that even states with anti-injunction laws ". . . have continued to enjoin concerted . . . activity carried on for unlawful purposes or in inappropriate circumstances." Teller, *The Taft-Hartley Act and Government by Injunction,* 1 LABOR L.J. 40, 50 (1949).

There is no provision in the LMRA for private injunctive relief from federal courts. Rice, *A Paradox of Our National Labor Law,* 34 MARQ. L. REV. 233, 235 (1949). For a thorough discussion of this problem, *see* Alcoa S.S. Co. v. McMahon, 81 F.Supp. 541 (S.D. N.Y. 1948), in which the court concluded that the Norris-LaGuadia Act prevented it from issuing an injunction. *But cf.* Mountain States Div. No. 17 v. Mountain States T. & T. Co., 81 F.Supp. 397 (D. Colo. 1948).

46. Indiana, for example, has a little Norris-LaGuardia Act which forbids injunctions in labor disputes in many instances. IND. ANN. STAT. § 40-504 (Burns Repl. 1952). However, it would seem that under certain circumstances—where neither an absolute prohibition nor a basic policy of the act prevented it—injunctive relief might be available. *Id.* at §§ 40-501—40-502. See *e.g.,* MASS. ANN. LAWS c. 214, § 9A (Supp. 1952); PA. STAT. ANN. tit. 43 § 206d (1952); WYO. COMP. STAT. ANN. §§ 54-502—54-503 (1945).

the existence of the prerequisites for injunctive relief;[47] and the contingency that the LMRA did not preempt the field and, hence, preclude the states from exercising jurisdiction over slowdowns.[48] Also, an employer might obtain a remedy from a state labor relations board, assuming it did have jurisdiction, in the form of a cease and desist order depending,[49] of course, on the provisions of the particular state labor law.

Injunctive relief in state courts might be available despite the existence of little Norris-LaGuardia acts;[50] redress through state labor boards would seem to be more easily obtained.[51] Although over six years have elapsed since enactment of the LMRA, today, even with comprehensive labor laws in twelve states, forty-seven states are without legislation governing slowdowns.[52] Thus, it is evident that the states are not providing adequate relief for employers harassed by slowdowns. There is no reason to anticipate a sudden flood of state legislation on the matter; on the contrary, the only pertinent state provision was enacted in 1939.

Approximately 85 percent of today's collective bargaining agreements contain no-slowdown clauses and establish arbitration procedures in case of their breach.[53] If the union refuses to follow the contracted-for procedure, perhaps the employer has adequate remedies in the courts for breach of contract.[54] However, the propriety of enforcing the collective

47. See *e.g.*, IND. ANN. STAT. § 40-507 (Burns Repl. 1952); MASS. ANN. LAWS c. 214, § 9A (Supp. 1952); N.J. REV. STAT. § 2A:15-53 (Supp. 1951); N.M. STAT. ANN. § 57-201 (1941).

48. See note 44 *supra*.

49. Such action was upheld in International Union, UAW, AFL v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949).

50. This would depend entirely on the particular wording and interpretation of the act in question and would, of course, differ from state to state. The Indiana Act leaves much open to interpretation. See note 46 *supra*.

In states not having anti-injunction acts, injunctive relief is possible in labor areas not covered by the LMRA. Williams, *Union Practices Prohibited by the Federal and State Labor Acts*, 30 DICTA 289, 290 (1953).

51. See note 49 *supra* and accompanying text.

52. Wisconsin makes the slowdown an unfair labor practice:

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

"(h) To . . . engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." WIS. STAT. § 111.06 (2) (h) (1951).

A breach of contract in Wisconsin is also an unfair labor practice. *Id.* at 2(c). One author has said: "Redress of breach of collective agreements . . . is indeed an increasing concern of the Wisconsin Employment Relations Board. Recently these cases have constituted more than half of its unfair labor practice decisions." Rice, *supra* note 45, at 239.

53. See note 42 *supra*.

54. See note 40 *supra*.

agreement like a contract is, at best, questionable. Notwithstanding that the parties may provide remedies, the Act's failure to adequately resolve the problems created by the slowdown is without justification. There have been indications that no-slowdown clauses may be decreasing in frequency.[55]

At present, the LMRA affords no effective relief from the slowdown. The Board and the courts can go no further to bring this unjustified tactic within the scope of the Act. Therefore, prohibition of the slowdown should be included within the provisions of Section 8(b) of the LMRA. Such regulation would accomplish, at least, two advantageous objectives: It would establish an express national policy on slowdowns; and it would permit the NLRB to issue appropriate remedial orders to unions engaged in this practice. If the slowdown were to be included within Section 8(b) as an unfair labor practice, the unions and the employees would lose no legal or moral rights,[56] for only the adequacy of remedies given an employer against this admittedly unfairly coercive device would be affected. By affirmative action Congress can dispel the existing confusion and provide a more certain and exact method of alleviating the injustices of the slowdown.

CORPORATE DONATIONS: COMMON LAW, STATUTORY, AND CONSTITUTIONAL IMPLICATIONS

An estimated three hundred million dollars are deducted from corporate tax returns each year as donations to charity,[1] although seventy years

55. Unions may shy away from the use of no-strike provisions because of damage liability for contract breaches. There is another indication that the no-slowdown clause may decrease in use because of the NLRB's holding that the clause is an *absolute* prohibition. For example, if the employer engages in an unfair labor practice, a union may attempt to retaliate by slowing down or striking in violation of its contract rather than go to the Board for relief. Suppose, then, the employer discharges the employees for striking in breach of the contract. The Board has upheld such discharges. The Board contends the union should have sought aid from it and not attempted self-help action. For a full discussion of the preceding material, see Blinn, *supra* note 40, at 281.

56. It is true unions would lose the opportunity to hold the slowdown before the employer as a possible contract clause and demand concessions for inclusion of a no-slowdown provision in the collective agreement. But as has been indicated, the slowdown is both legally and morally frowned upon; consequently, losing this opportunity can hardly be considered as losing any right.

1. ANDREWS, CORPORATION GIVING 15 (1952). This figure is based on corporate income tax returns. It is believed that many dollars are listed as necessary and ordinary business expenses although they resemble a "gift" more than a true expense. *Id.* at 41.