

Judicial Interpretation and Determination of Section 7A of the N.I.R.A.

Irving L. Kalish

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The Supreme Court finds that motive rather than mode of enforcement is to guide the President under such section. He is given unfettered discretion to act in accordance with his belief concerning the best course. There is no express standard, no specific and particular criterion governing his determinations; there is no requirement of findings by the executive as a condition precedent to action; the guiding policy under which he is to act is vague and altogether too general in scope. The requisite that executive action within the pattern of a declared Congressional policy must be susceptible of judicial review is not met; no tangible or intangible framework of policy on which a court may operate is distinguishable.

"New Dealers," exercised over the curtailment of Presidential authority, might urge that the rule of expediency supersedes the rule of basic principle. The Supreme Court has held otherwise, Justice Cardozo dissenting. The problem of enforcement of the Recovery Act²⁰ resolves itself into Constitutional questions rather than into programs of expediency. The difficulty of enforcement has loomed as an obvious problem for solution; it will continue so to loom. There have been numerous obstacles in the path of such enforcement; some have been on a constitutional basis. The *Panama* case has raised and solved the important issue of executive powers delegated by the Congress. If, by subtle stages, governmental sovereignty may be converted into governmental tyranny and executive pronouncement into dictatorial and arbitrary manifesto, a return to fundamental concepts of American government is essential. The *Panama* case, therefore, cuts deeper into the core of American political theory than would appear at first blush.

EMIL F. KOCH.

JUDICIAL INTERPRETATION AND DETERMINATION OF SECTION 7A OF THE N. I. R. A.

Section 7 (a) of the N. I. R. A.¹ and code provisions relating to hours and wages, constitute the primary contributions of the Recovery Act to labor law. Prior to its enactment the labor unions were slowly but surely sinking into stagnation.² Its enactment was hailed by labor as its resurrection.³ It guaranteed labor free reign

²⁰ "President Roosevelt has said: 'All employers in each trade now band themselves faithfully in these modern guilds.' It will be interesting and instructive to note the construction which the courts will put (or be forced to put) on the words 'all' and 'faithfully' when applying them to powerful industrial units." (1934) 8 ST. JOHN'S L. REV. 406.

¹ 48 STAT. 198, 15 U. S. C. A. §707 A (1933).

² NEW REPUBLIC, Jan. 3, 1934, at 210, 211.

³ TODAY, Feb. 10, 1934, at 3.

in organization; it abolished and prohibited the fretful "yellow dog" contract—it granted and guaranteed to labor substantive rights and privileges together with remedial and procedural methods for the enforcement of those rights.⁴

Until the enactment of the Recovery Act there was no doubt that all employers might discriminate against union men or against members of any particular union.⁵ In *Adair v. United States*,⁶ which is representative of the attitude of the courts prior to the enactment of 7 (a), the court said, "It is not within the functions of the Government to compel any person in the course of his business and against his will to accept or retain the personal services of another or to compel any person against his will to perform services for another. The right of a person to sell his labor upon such terms as he deems proper is in its essence the same as the right of the purchaser to prescribe the conditions upon which he will accept such labor from the person offering to sell it. * * * It was the legal right of the defendant—no matter however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization. * * * In all such particulars the employer and the employee have equality of right and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."⁷ That the attitude of the Government, in these times of stress, has changed considerably with regard to labor legislation requires no explanation.

Section 7 (a) in substance provides: That employees are granted the right to collective bargaining; compulsion to join or refrain from joining a union is prohibited and the employer is required to comply with code hours, minimum wage, and other provisions.⁸ At

⁴ (1934) 44 YALE L. J. 105.

⁵ *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277 (1907); *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240 (1914); *People v. Marcus*, 185 N. Y. 257, 77 N. E. 1073 (1906); *Interborough Rapid Transit v. Lavin*, 247 N. Y. 65, 159 N. E. 863 (1928); *Opinion of the Justices*, 275 Mass. 580, 176 N. E. 649 (1931).

⁶ *Supra* note 5.

⁷ *Contra*, Justice Holmes, dissenting opinion.

⁸ "Every code of fair competition, and license approved, prescribed or issued under this title shall contain the following conditions:

- "1. That employees shall have the right to organize and bargain collectively through representatives of their own choosing and shall be free from the interference, restraint and coercion of employers of labor or their agents in the designation of such representatives in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.
- "2. That no employee and no one seeking employment shall be required as a condition of employment to refrain from joining, organizing or assisting a labor organization of his own choosing and
- "3. That employers shall comply with the maximum hours of labor, minimum rates of pay and other conditions approved or prescribed by the President."

a first reading of the statute⁹ its terms appear plain and simple, devoid of any ambiguity; but in fact it has created so much controversy and dissension in the ranks of labor with regard to its interpretation and explanation that it threatens to wreck the administration's entire recovery program.¹⁰ The National Labor Board was improvised to adjust industrial disputes arising out of the interpretation and operation of the Code. Its distinct powers were to settle differences between employers and employees by mediation and arbitration; to authorize and maintain regional boards; promulgate rules concerning its procedure and to review its findings. To remedy the discontent and dissension arising under the divers interpretations of 7 (a), Senator Wagner of New York has introduced a bill in Congress to tighten the collective bargaining provisions of the law and to make permanent the National Labor Board, but to date Congress has not acted upon it. For the enforcement of the substantive rights guaranteed by Section 7 (a), it has been provided that a violation or interference with the right of collective organizing and bargaining is punishable as a statutory crime.¹¹

Section 7 (a) has so strengthened the right to bargain collectively that by implication the employer must treat with the representative so selected.¹² This implication is a radical development in the labor law.¹³ Although there is some danger that the majority group might not adequately protect the interests of the minority such an interpretation would strengthen the bargaining power of the employees and prevent the employer from interfering with self-organization by favoring a friendly minority union.¹⁴ The minority however should have the right to bargain separately where the interest of the two groups are so fundamentally opposed that it would be unreasonable to permit one to represent the other.¹⁵

An exclusive bargaining agent, a majority non-company union, would be able to eliminate rival organizations if the prior legality of closed shop agreements is unaffected by the Recovery Act.¹⁶ Did Congress intend to prohibit all such agreements? There is much difference of opinion with regard to the question. It has been said

⁹ *Ibid.*

¹⁰ (1934) 8 ST. JOHN'S L. REV. 417.

¹¹ Subject to a fine of \$500 per day and an injunction procurable by the District Attorney.

¹² *Bayonne Textile Corp. v. American Federation of Silk Workers*, 116 N. J. Eq. 146, 172 Atl. 551 (1934); *In re Hande Engineering Corp.*, N. L. R. B. No. 12, Aug. 30, 1934; (1933) 47 HARV. L. REV. 85; *cf. Fryns v. Fair Lawn Fur Dressing Co.*, 114 N. J. Eq. 462, 168 Atl. 862 (1933).

¹³ (1934) 44 YALE L. J. 106.

¹⁴ (1934) 34 COL. L. REV. 1531, 1532.

¹⁵ *Ibid.*

¹⁶ *Jacobs v. Cohen*, 183 N. Y. 207, 76 N. E. 5 (1905); *Shinsky v. O'Neil*, 232 Mass. 99, 121 N. E. 790 (1919); *Underwood v. Texas and P. Ry. Co.*, 178 S. W. 38 (Tex. Civ. App. 1915). Closed shop agreements entered into for the benefit of contracting parties have been upheld even though employees were discharged because of them.

that the legislative history of 7 (a) negatives such a construction¹⁷ while on the other hand to require dissenters to belong exclusively to a majority union might be a denial of their rights to organize under Section 7 (a) (1).¹⁸ It has been held however that joining the majority organization may constitute a waiver of this right.¹⁹

Another uncertainty regarding the interpretation of 7 (a) is the legal significance that is to be given to the company union. It has attained a new significance as a means of appearing a potentially dangerous labor force aroused by the promises of 7 (a).²⁰ The only condition in 7 (a) relating to the company union prohibits making membership therein a condition of employment.²¹ But it is obvious that it may be illegally promoted and nevertheless qualify as a bargaining agency.²² It has been intimated that the mere act of drawing up a company union plan may itself be a violation of 7 (a),²³ since the lending of financial support and solicitation of membership exercise an undue influence in inducing employees to join the company union. The National Labor Relations Board has ordered employers to cease such sponsorship.²⁴ They have assumed the position however that a company union will not be deprived of its place on the ballot so long as its form of organization permits it, though not without difficulty, to represent employees in collective bargaining.²⁵ The most recent case interpreting this phase of Section 7 (a) is the case of *Sherman v. Abeles*.²⁶ The action was brought by a union of motion picture operators in New York City against the Independent Theatre Owners Association and The Allied Motion Picture Producers Union for injunctive relief in that the two defendants had violated Section 7 (a) (2) in requiring as a condition of employment

¹⁷ The bill in its original form [S. 1712, H. R. 5664, 73d Cong., 1st Sess. (1933)] prohibited an employer from requiring employees as a condition of employment to join any labor organization but was changed at the request of organized labor. Senator Wagner has stated that 7 (a) (2) was directed only at employer-dominated organizations and that a closed shop agreement with a legitimate union would still be permissible; see *Hearings Before the Committee on Ways and Means* on H. R. 5664, 73d Cong., 1st Sess. (1933) 115, 116.

¹⁸ (1934) 34 Col. L. Rev. 1362, 1363; cf. *Fryns v. Fair Lawn Fur Dressing Co.*, *supra* note 12; *Farulla v. Ralph A. Freundlich, Inc.*, 152 Misc. 761, 274 N. Y. Supp. 70, 73 (1934).

¹⁹ *In re Bennett Shoe Co.*, N. L. R. B. No. 159, Dec. 10, 1934. Members of a minority union joined the majority association in accordance with the terms of a closed shop agreement, at the same time retaining their membership in their own organization; subsequently they were discharged; *held*, proper on the ground that by joining they had ratified the agreement.

²⁰ (1934) 34 Col. L. Rev. 1537.

²¹ 7 (a) (2), *supra* note 8.

²² *Sherman v. Abeles*, 165 N. Y. 383, 193 N. E. 241 (1934).

²³ *In re Firestone Tire & Rubber Co.*, N. L. R. B. No. 156, Nov. 20, 1934; *In re Ely and Walker Dry Goods Co.*, N. L. R. B. No. 32, Sept. 25, 1934.

²⁴ *In re Johnson Bronze Co.*, N. L. R. B. No. 108, Oct. 3, 1934; *In re Danbury and Bethel Furn. Co.*, N. L. R. B. No. 116, Nov. 22, 1934.

²⁵ *In re B. Q. Goodrich Co.*, N. L. R. B. No. 155, Nov. 20, 1934; *In re Firestone Tire & Rubber Co.*, N. L. R. B., *supra* note 23.

²⁶ *Supra* note 22.

that motion picture operators join the Allied union (the evidence discloses that it is a company dominated union). The Allied had entered into a ten-year contract with the theatre owners' group for the employment of its members as operators to the exclusion of members of Local 306. An injunction *pendente lite* was granted in the Supreme Court and upheld in the Appellate Division, but was reversed in the Court of Appeals. Several questions were certified to the higher Court one of which was the constitutionality of Section 7 (a). The Court avoided its dilemma by holding that there had been no violation of Section 7 (a) (2), "since the proof was insufficient to show that anyone seeking employment from the defendant exhibitors had been required as a condition of employment to join Allied, or refrain from joining, organizing or assisting a labor organization of its own choosing."²⁷ The holding of the Court is based on the view that there was no evidence of specific overt acts or expression on the part of the defendants which were sufficient to show that operators were required, as a condition precedent to employment, to become members of the Allied union. But was not the conduct of the defendants illegal by implication? The Allied organization was of recent origin; there was sufficient evidence to constitute it a company union, the contract of employment provided for a ten-year period of employment to members of Allied to the exclusion of members of another union; operators of Local 306 were discharged and replaced by members of Allied. By implication the only effective means of reinstatement would require membership in Allied.²⁸

Labor's most effective weapon is the strike. The right to strike is not specifically mentioned in the N. I. R. A.; both legal periodicals²⁹ and courts have been quick to point out this fact.³⁰ To out-law strikes would have the effect of making arbitration compulsory. This is opposed on grounds of public policy by some writers.³¹ Because of the majority rule, strikes by minority groups to compel separate treatment will be properly restrained by injunction; however, protest against the agreement reached by the majority stands on a different footing.³² The employees would seem to be without rem-

²⁷ Instant case at 385.

²⁸ Instant case, 241 App. Div. 676, 269 N. Y. Supp. 849 (1st Dept. 1934).

²⁹ (1934) 19 IOWA L. REV. 346.

³⁰ *Bayonne Textile Corp. v. American Federation of Silk Workers*, *supra* note 12.

³¹ (1934) 34 CALIF. L. REV. 175, 177.

³² *A. R. Barns and Co. v. Beery*, 156 Fed. 72 (S. D. Ohio 1917); *Meltzer v. Kaminer*, 133 Misc. 813, 227 N. Y. Supp. 459 (1927); *International Brotherhood of Electrical Workers*, 48 S. W. (2d) 1033 (Tex. Civ. App. 1932). These cases proceed on the theory that calling of the strike will amount to a repudiation of the contract. Breach by the employer will, however, justify an otherwise illegal strike in protest. *Greenfield v. Central Labor Council*, 104 Ore. 236, 192 Pac. 783 (1920). But see *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279 (1st Dept. 1916) (breach does not justify a solely punitive strike).

edy when they struck against conduct which they erroneously supposed to be illegal.³³ But where the employer proceeds to rehire them he will apparently not be permitted to discriminate against particular strikers on the basis of their union activities.³⁴

It has been generally felt that Section 7 (a), without much difficulty and with adequate precedent, could be readily held constitutional. As a result of the recent decision handed down by Federal District Judge John P. Nields holding Section 7 (a) unconstitutional as applied to the *Weirton Steel Co.* case,³⁵ this view becomes doubtful. It is conceded that if Section 7 (a) will be upheld as constitutional, the power of Congress to enact such legislation is to be derived only from the "Interstate Commerce" clause³⁶ of the Constitution. Judge Nields in his decision stated, "Manufacturing operations conducted by the defendant in its various plants or mills do not constitute interstate commerce. The relation between defendant and its employees do not affect interstate commerce. Manufacturing is a cooperative enterprise. Production in quantities and quality with consequent wages, salaries and dividends depends upon a sympathetic cooperation of management and workmen."³⁷ Thus the legal arguments as to constitutionality turn upon whether a manufacturer or one who buys materials and sells products in another state comes under the constitutional power of Congress to regulate interstate commerce. The Supreme Court has previously held that the power of Congress to regulate commerce does extend to local matters which, though not themselves a part of interstate commerce, are inextricably intermingled with it or so closely related thereto as to make their regulation essential to the effective regulation of interstate commerce.³⁸ It is within the province of the Supreme Court to decide that industry or manufacturing, however remote from a clear unequivocal undisputed conception and interpretation as to what constitutes in-

³³ *In re Century Electric Co.*, N. L. R. B. No. 83, Sept. 17, 1934; *In re Globman Bros., Inc.*, N. L. R. B. No. 84, Nov. 8, 1934; *In re Gordon Baking Co.*, N. L. R. B. No. 248, June 19, 1934.

³⁴ *In re Ira Wilson & Sons Dairy Co.*, N. L. R. B. No. 62, Aug. 9, 1934.

³⁵ *New York Sun*, Feb. 27, 1935, at 1 and 16.

³⁶ U. S. Const. Art I, §8.

³⁷ *Supra* note 35, at 1.

³⁸ *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900 (1895); *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96 (1899); *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436 (1904); *Swift and Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276 (1906); *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301 (1908); *Second Employers Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169 (1912); *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729 (1913); *Houston, East and West Texas Ry. Co. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833 (1914); *Lawlor v. Loewe*, 235 U. S. 522, 35 Sup. Ct. 170 (1915); *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298 (1917); *Duplex Printing Co. v. Deering*, 254 U. S. 443, 41 Sup. Ct. 172 (1921); *Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Ry. Co.*, 257 U. S. 563, 42 Sup. Ct. 232 (1922); *Stafford v. Wallace*, 258 U. S. 495, 42 Sup. Ct. 397 (1922); *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 43 Sup. Ct. 470 (1923).

terstate commerce, is within the purview of the "Interstate Commerce" clause. It is submitted that 7 (a) will be upheld by the Supreme Court in conformity with the liberal trend and loose construction of the Federal Constitution as displayed in upholding other New Deal legislation.³⁹ The Nields opinion⁴⁰ doubtless will encourage unfriendly companies to continue their defiance of the law; the national welfare requires that the Supreme Court act promptly in deciding the constitutionality of 7 (a).

IRVING L. KALISH.

WARRANTIES—CONSULTATIONS—EVIDENCE—IN INSURANCE.¹

The term warranty as used in insurance law seems to be the brain child of the market place, foisted upon the courts by "stammering for a word" lawyers, applied loosely by judges until it secured such a firm grasp upon the terminology of insurance law that it is universally employed and as widely undefined.² A warranty is a term of the insurance contract, similar to a condition precedent, providing that a fact exists or will exist, which partly forms the inducement and consideration of the insurer's promise to assume the risk.³

In the early days of insurance, marine being the first kind known to the law, the assured was bound to comply strictly with the terms of his warranties.⁴ The theory was as follows: the underwriter was

³⁹ *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505 (1934); *Perry v. United States*, — U. S. —, 55 Sup. Ct. 432 (1935); *Norman v. Baltimore & O. R. R. Co.*, — U. S. —, 55 Sup. Ct. 407 (1935); *Nortz v. United States*, — U. S. —, 55 Sup. Ct. 428 (1935).

⁴⁰ *Supra* note 35.

¹ See (1931) 6 ST. JOHN'S L. REV. 91.

² Patterson, *Warranties in Insurance* (1934) 34 Col. L. Rev. 602, "A warranty in insurance law is (1) a term of an insurance contract (2) which prescribes, as a condition of the insurer's promise, (3) a fact, the presence of which, regarded as of the time of contracting, will or may render less probable than its absence the occurrence of the insured event." RICHARDS ON INSURANCE (4th ed. 1932) §86; DONAHUE, *OUTLINE OF INSURANCE* (1st ed. 1927) 20 (defines by showing effect of); MAY, *INSURANCE* §151 and BLISS, *LIFE INSURANCE* §34 (a warranty is a condition precedent); *Kasprzyk v. Metropolitan Life Ins. Co.*, 79 Misc. 263, 140 N. Y. Supp. 211 (1913).

³ The first reported insurance case is Dowdale's case, 6 Coke R. 476 (1589). In 1601 a special tribunal for the trial of marine insurance cases was established in England. In 1756 Lord Mansfield was appointed Chief Justice of the Court of King's Bench. He is accepted as the father of insurance law. RICHARDS ON INSURANCE §9.

⁴ This, generally, is still the law in New York. *Chase v. Hamilton*, 20 N. Y. 52 (1859); *Alexander v. Germania Fire Ins. Co.*, 66 N. Y. 464 (1876); *American Surety Co. v. Patriotic Assurance Co.*, 242 N. Y. 54, 150 N. E. 599