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The Taft-Hartley Act and Union Control of Hiring - A Critical Examination

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THE POETRY OF SHAKESPEARE and the hiring practices of labor unions might appear on first impression to have naught in common. The musings of King Henry upon the battlefield of Agincourt comport more readily with the formal decorum of the theater hall than with the hurly-burly of the hiring hall. But words of wisdom grow only more in stature with the passing years, and are bound by no rigid proscenium arch. And, therefore, the truths of Shakespeare's sixteenth century have their own special pertinence in this, our own twentieth century.

For just such a distillation process as Shakespeare poetically describes is to be found in the landmark opinion which the National Labor Relations Board issued last April in the Mountain Pacific case. In

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[The views expressed herein are those of the author, and are not intended as binding or authoritative determinations either by the Office of the General Counsel or the Board.]

The General Counsel is appointed by the President, by and with the advice and consent of the Senate, for a term of four years. It is his principal responsibility (a) to exercise final authority in respect of the investigation of charges and the issuance and prosecution of unfair labor practice complaints under Section 10 of the Act; (b) to exercise general supervision over the officers and employees of the twenty-three Regional Offices and seven Subregional Offices, located throughout the country and in the Territories, and over all attorneys employed by the Agency except Trial Examiners and Board legal assistants; and (c) to exercise such other duties as the Board may prescribe or as may be provided by law. (See 20 Fed. Reg. 2175 (1955))

1. The words "hiring hall" as used throughout this article encompass any system whereby union clearance or referral is a factor in obtaining employment. The traditional hiring hall is limited to the maritime and longshoremen unions' operation of an actual building, or hall, where employees come to seek employment, and to which employers come to recruit their work forces.

that opinion the Board, for the first time, squarely and directly addressed itself to the legality of union control of the hiring process. Said the Board:

"We believe that the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process would be negated, and we would find an agreement to be non-discriminatory on its face, only if the agreement explicitly provided that:

(1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

(2) The employer retains the right to reject any job applicant referred by the union.

(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement."

While these sentences may not prove as matchless as Shakespeare’s lines, they yet provide a new and lucid focal point for consideration of union control of employment opportunities. And in its attempt to balance important and conflicting considerations, the Board has forcefully sought to discard the evil of hiring halls and at the same time to salvage their beneficial features. It has, in effect, informed all interested parties that, by scrupulous compliance with the objective criteria set forth by the Board, the “soul of goodness” inherent in hiring hall practices may be distilled, and from the “weed” of unfair labor practices “honey” may be derived.

The Mountain Pacific doctrine is broad and sweeping in scope. The Board there attempts to bring to fruition the sum of its experience in this area, to clarify what had become a confused body of law, and to strike a careful and judicious balance. The history of hiring practices in the maritime and the building and construction industries provides an illuminating, practical insight into the problem of union control of employment. The course of pertinent legislation bearing on hiring practices and the evolution of Board and court decisions implementing such legislation must be viewed against this institutional background if the Mountain Pacific doctrine is to be judged in proper perspective.

3. Id. at 5-6.
I.

HISTORY OF HIRING HALLS.

A. The Maritime Industry.⁴

For many decades, the hiring practices in the maritime industry have foundered on the rock of casual labor.⁵ Since ships arrive and depart intermittently, the work of loading and unloading is unsteady and accordingly the system of employment is subject to rapid and irregular fluctuations. Moreover, skill and experience are not prime requisites for longshoremen’s work, so that the regular labor force finds itself in competition with newcomers who choose casual employment either to supplement their income or to tide themselves over until they are able to obtain more desirable jobs. The seaman too is exposed to a similar competition from casual workers who drift to the waterfront in time of stress.⁶ The result has been a chronic labor surplus. Moreover, notably along the New York waterfront, the unstable character of the industry has attracted known criminals and other questionable persons,⁷ so that the history of maritime employment has for a long time been tainted with graft, violence, corruption, favoritism, and turbulence.⁸

In this chaotic atmosphere, the use of normal hiring and job-seeking techniques was virtually impossible. During the years preceding the passage of the Wagner Act, numerous methods of hiring were tried in efforts to eliminate the problems that stemmed from the casual nature of maritime employment. From the moment of their organization, the various unions in the field constantly strove to eradicate the evils of erratic and insecure employment inherent in hiring on a casual basis,⁹ but their attempts were met with a marked lack of

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⁴ The material in this section is from a number of sources, principal among them being LARROWE, SHAPE-UP AND HIRING HALL (1955), and reports and hearings before various congressional committees.

⁵ SWANSTROM, THE WATERFRONT LABOR PROBLEM ch. II (1938); LARROWE, op. cit. supra note 4, at 49-52.

⁶ HOHMAN, SEAMEN ASHORE 233 (1952).


⁹ LARROWE, op. cit. supra note 4, at 7-15, 87-92.
success for many years. Employers first utilized employment procedures which, though now long out-dated, still by bitter memory exert some influence on waterfront affairs:

"The hiring practices of the sailing-ship era were characterised by a commercialised ring of exploitation which included the shipping-master, the boardinghouse keeper, the grog-shop proprietor, the runner, and the prostitute. At best the shipping-master 'hired' his crews by exacting advance notes and allotments for two or three months' pay in order to meet his fees and the charges of the other members of the ring; at worst he simply shanghaied men for outward-bound vessels in exchange for 'blood money' from the captain." 10

During the 1920's and early 1930's, when the unions were in a period of decline,11 seamen were either hired directly by the mate or captain on board the vessels, or else they gathered at the dock where arrival or departure of a vessel was scheduled, and took their chances of being selected to be signed on by the shipmaster.12 This procedure was also used in the stevedoring industry, where it is known as the "shape-up." 13 Under these early systems complete discretion by the person in charge of hiring was the keynote; and favoritism, graft, and discrimination abounded.

Another procedure utilized by employers during this period, and one which proved successful along the Pacific Coast, was employers' hiring halls or "employment bureaus." 14 Although these bureaus brought a degree of order to the hiring procedures, and served as a clearing house for employers and employees, they were generally believed to have continued the practice of discriminating against union members. Not until 1935, when the protection afforded by the then infant National Labor Relations Act (Wagner Act)15 facilitated organization of the employees by the various unions, did the union-operated and controlled hiring halls replace the former hiring procedures.

The development of union hiring halls made substantial contributions toward the extirpation of the worst features of casual em-

13. The "shape-up" is utilized in the stevedoring industry on the East Coast to this day, although it has been a union-controlled "shape-up" for some time. Larrowe, op. cit. supra note 4, at 49-82.
The hiring halls provided an adequate registered work force to meet peak labor demands. They assured employers a means of recruiting labor that was superior to methods previously employed. They operated so as to distribute work evenly among workers in the field in times of work shortages, and thus assisted in diminishing the graft, favoritism, and corruption which had been nurtured by the earlier hiring procedures.

On the other hand, hiring halls shifted control over initial employment from employers to unions, and, as could be expected, unions frequently operated the halls to enhance the union's power and control, and to increase their membership ranks. From a hiring system where union membership effectively barred a worker from obtaining employment, as was the case under solely employer-operated systems, the pendulum swung over to the other extreme, so that for practical purposes only members of the union could get jobs. While the union-operated hiring halls were not entirely free from corruption, graft, and even criminal infiltration, it is generally true that on the whole the new system removed the flagrant abuses and evils with which the shape-up and similar hiring arrangements were fraught, and that for the most part union hiring halls were and are run honestly. Some were, of course, run discriminatorily in that they favored members at the expense of non-members, but until the passage of the Taft-Hartley amendments, to do so was not unlawful, for under the Wagner Act the closed shop was permissible.

A lawful closed-shop contract required membership in a union as a condition of employment at the very outset. In other words, membership in a union was a prerequisite to obtaining employment. This had the effect of perpetuating the incumbent union possessed

16. Hearing on H.R. 5008 Before a Special Subcommittee of the House Committee on Education and Labor, 81st Cong., 1st Sess., at 20-25, 76-81 (1949); S. REP. No. 1827, supra note 8; LARBOR-4, op. cit. supra note 4, at chs. 4-6.
17. S. REP. No. 1827, supra note 8; Hearing on H.R. 5008, supra note 16; 24 NOTRE DAME LAW. 82 (1948).
18. See, in particular, the conclusions drawn by Senator McClellan, S. REP. No. 1417, supra note 7, at 4-7.
19. Hearing on S. 1044, supra note 8; S. REP. No. 1417, supra note 7, at 3: “Much that is shameful and unsavory has been uncovered about the behavior of certain elements in both labor and management. This sort of information has necessarily been spotlighted, but it is in no way intended to reflect on the overwhelming majority of the labor unions and businessmen of this Nation, of whose integrity the committee is firmly convinced.” See LARBOR-4, op. cit. supra note 4.
21. That is, a contract requiring union membership at the outset of employment as distinguished from one requiring membership some time after employment commences. The latter is called a union shop, and is valid under the Taft-Hartley Act if certain requirements are met. See the proviso to Section 8(a)(3) of the Taft-Hartley Act, which is set out at note 26 infra.
of a closed-shop contract as the representative of the employees, for a union could expel from membership for any reason and could lawfully cause the expelled person to be discharged or could effectively prevent him from being hired. Thus, the dissidents were effectively silenced; those employees who were interested in supplanting the incumbent labor organization with another found themselves expelled for "dual unionism," and consequently out of a job. These were among the reasons for congressional action in 1947 prohibiting the closed shop and strictly delimiting the permissible degree of "union security."

B. Building and Construction Industry.

Unlike the maritime industry, the building and construction industry had been highly organized for many years prior to the passage of the Wagner Act. The unions in this industry did not need the protection of the National Labor Relations Act to gain their foothold for a variety of reasons. The cohesiveness of the employee force, the financial resources of the unions, and the difficulty of replacing skilled workers all served to enhance the bargaining position of these unions. However, the circumstances which gave rise to the unionization of employees in this industry, in large part paralleled those of the stevedoring and maritime industries.

Generally speaking, the work of the building and construction industry is performed on separate project sites rather than at fixed locations. Contractors bid on or otherwise obtain a construction job, make arrangements to place the necessary equipment on the site, and hire the skilled artisans and laborers they need for the particular job. Upon completion of the job, they move on to a new job site and repeat the process. Of necessity, then, workers in the industry are

22. For a period of time before the amendments, the Board by decision ruled that during a reasonable period before a contract's termination date, when it is appropriate for employees to seek a redetermination of representatives, even a valid closed-shop contract does not permit a discharge for the purpose of eliminating employees seeking a change in bargaining representatives. Rutland Court Owners, Inc., 44 N.L.R.B. 587 (1942), 46 N.L.R.B. 1040 (1943). This became known as the Rutland Court doctrine. The Supreme Court found this doctrine of no validity in Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355 (1949), although by that time the question was virtually moot, the Taft-Hartley amendments already being in effect.

23. Bertram and Maisel, Industrial Relations in the Construction Industry (1955); Edelman, Channels of Employment (1952); Haber and Levinson, Labor Relations and Productivity in the Building Trades (1956).

Like the maritime industry, the building and construction industry has also had its share of graft and labor racketeering problems, due in part to "the disparity of power between the union and employer, the great diversification of managerial control, the severe competitive practices, and the resulting advantages to be gained by union 'stabilization.'" Haber and Levinson, op. cit. supra, at 47; see also Taft, op. cit. supra note 7, at 4-10.
rarely attached to a single employer. In the course of a given work year employees are employed by a number of different contractors on a number of different construction sites. Employment is thus temporary and intermittent in nature.

This kind of employment relationship creates special problems both for the contractor and for the worker. The contractor, before he bids on or undertakes a project, must be apprised of such vitally relevant factors as the availability of a specialized labor force in the area where the project is to be performed and the cost of such a labor force. If he is a general contractor and will require one or more subcontractors to complete the job—as often as not a completion date for the project is fixed, and failure to meet that date invokes penalties—he also needs to have information relevant to their needs and costs. When he actually undertakes the job, it is imperative that the workmen he procures actually possess the skills which he requires. Without laboring the point too much, it is obvious that the contractor, who is frequently a stranger to the area involved, cannot fulfill his needs on the basis of approaching individual workmen. The nature of his operation is such that he requires some central source both for his information and for his employment needs.

The individual workman in the construction industry is likewise handicapped. Unlike his counterpart, the industrial employee, he has no fixed locations at which he can apply for work. Construction projects are scattered, often located in remote areas, and advance information as to their location and employment needs is not widespread. Moreover, the practicability of a search for employment under these admittedly adverse conditions is aggravated by the fact that the employment, when and if obtained, is likely to be short term. By the same token, the construction worker, because of the very nature of the industry, lacks the assurance which his industrial counterpart has, namely, that proficiency in the performance of the job which he obtains is at least a minimum guarantee of continued employment.

Union hiring halls and referral systems are one answer to these reciprocal needs of the contractor and the worker. The building and construction industry is highly organized both as to contractors and workers. Most of the workers are attached to one of the numerous craft unions which jealously guard their jurisdictional lines and set craft standards which their adherents must meet. In addition, these unions bargain collectively for their members with contractors who themselves are usually organized on local or regional levels. The contractors are thereby assured of some uniformity in their employment
relationships, a *sine qua non* for successful business operations in their field, as in any other field; and the employees are compensated in some degree for the handicap of working for a number of employers in succession and forfeiting the stability which customarily flows from continued employment with the same employer. Finally, and perhaps most important of all, the union hiring hall or referral system furnishes a means whereby the contractor can meet his need for skilled labor and the skilled worker can obtain employment. As in the maritime and longshoring industry, the vast majority of building trades employees were covered by preferential hiring arrangements.\(^2\) Employees usually obtained jobs by union referral and those who were employed directly by a contractor were normally required to get clearance from their union in order to remain on the job. In short, the unions in the building and construction industry assumed the functions of an employment agency and, as we have noted in connection with the other industries, union controlled employment agencies inevitably connoted preference for union members.

Government attempts to regulate union control over hiring must be viewed in this labor relations context. The problem stated simply was to protect employees from job coercion and at the same time retain the socially useful features of union hiring halls. For years now, the Congress, Board, and courts have sought some accommodation, some balance of conflicting considerations, some process of distilling honey from the weed which would yield a result most beneficial to the public interest.

II.

**The Taft-Hartley Amendments and Subsequent Legislation and Proposals.**

Section 8(3) of the Wagner Act, which forbade discrimination in employment to encourage or discourage union membership, contained a proviso which permitted a closed-shop contract.\(^2\) To eliminate this system of hiring, Congress in the Taft-Hartley amendments


\(^2\) 49 Stat. 452 (1935), 29 U.S.C. § 158(3) (1946). The proviso is as follows: "That nothing in this Act... shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective bargaining unit covered by such agreement when made."
of 1947 left intact the introductory language of section 8(3) prohibiting discrimination by employers to encourage or discourage union membership, but it curtailed the scope of the proviso by outlawing the closed shop, permitting only a form of union shop, and limiting the enforcement of permissible union-shop agreements to compelling the payment of union dues and initiation fees. Furthermore, the amended act made it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of" section 8(a)(3). The result, as Senator Taft explained, was that:


The full text of section 8(a)(3) is set out below. Provisions added by the 1951 amendments are in italics; provisions eliminated in 1951 are in brackets.

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

"(3) by discrimination in regard to hire or tenure of employment or by any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

27. The union shop is permissible, that is, subject to the laws of the particular state or states in which the employer does business. See section 14(b) of the act, 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1952), which reads: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

28. Actually the requirement of membership permitted by the proviso to section 8(a)(3) of the act, when read in conjunction with the second proviso to section 8(a)(3) and section 8(b)(2), is reduced to a requirement of payment of dues and initiation fees. See Union Starch & Refining Co., 87 N.L.R.B. 779 (1949), enforced, 186 F.2d 1008 (7th Cir. 1951), cert. denied, 342 U.S. 815 (1951).

"[T]he bill does abolish the closed shop. Perhaps that is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them. That has produced a situation, certainly on the ships going to Alaska, . . . where there is no discipline. A man may be discharged one day and may be hired the next day, either for the same ship or for another ship. Such an arrangement gives the union tremendous power over the employees; furthermore, it abolishes a free labor market. A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field. Under such circumstances there is no freedom of exchange in the labor market, but all labor opportunities are frozen." 30

Again, the Senate Report accompanying Senator Taft's proposed bill stated:

"It is clear that the closed shop which requires pre-existing union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. Extension of this principle to licensed deck and engine officers has created the greatest problems in connection with the safety of American vessels at sea." 31

However, Senator Taft did not envisage section 8(a)(3) as an invalidation of all contractual hiring halls or similar arrangements. What were condemned were not hiring halls, but hiring hall practices that were tantamount to a closed shop. While an employer could not make a contract in advance that he would take only men recommended by the union, Senator Taft remarked, nevertheless, that if "the employer wants to use the union as an employment agency, he may do so; there is nothing to prohibit his doing so." 32

But opinion in the halls of Congress was not unanimous on the point either in the Eightieth Congress or thereafter. In June of 1949, Representative Lesinski of Michigan introduced a bill which would amend the Taft-Hartley Act by stating that: "Nothing in this Act shall be deemed to make an unfair labor practice the performance

32. 93 Cong. Rec. 3836 (1947).
of an obligation of a collective bargaining agreement between an employer and a labor organization . . . incorporating in whole or in part any hiring or employment practices prevailing in the maritime industry prior to June 15, 1947." An identical bill was introduced in the Senate by Senator Magnuson of Washington one month later. On June 12, 1950, the Senate bill was reported back in the following amended form:

"Nothing in this Act shall be deemed to make an unfair labor practice the demand for or performance of an obligation in a collective-bargaining agreement between an employer and a labor organization or organizations in the maritime industry . . . establishing a hiring or employment practice under which the employer undertakes to refer job opportunities to and seek employees from a hiring hall operated by the labor organization and giving preference to members of the labor organization or those holding evidence of temporary status equivalent to membership for the purpose of employment.

"For the purpose of this subsection, the term 'maritime industry' includes all industries employing personnel engaged as licensed or unlicensed members of the crews of ships or barges engaged in offshore, coastal, intercoastal, or inland transportation, or in longshore operations servicing such ships or barges."

The purport of the amended bill, according to its sponsor, was "to remedy an extremely serious situation directly caused by the Taft-Hartley Act. That law had made illegal the hiring practices which have been built up over years of democratic collective bargaining in the maritime industry."

While conceding that there had been "some doubt" in the matter, Senator Magnuson was firmly of the opinion that since the hiring hall was a species of closed shop it was outlawed by the act, and both he and the majority of the Committee on Labor and Public Welfare believed that the Board and the courts had so held in NLRB v. National Maritime Union of America. Senator Taft, dissenting, took issue with these conclusions:

"The majority report proceeds upon the erroneous assumption that unless the closed-shop prohibition of the Taft-Hartley Act is clear, it is to be considered valid."

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34. S. 2196, 81st Cong., 1st Sess. (1949); 95 Cong. Rec. 8888 (1949).
36. Ibid.
Act is removed for maritime unions, such unions cannot continue to have hiring halls in that industry, but must go back to a complete open shop, or even recruitment by 'crimps' and 'shape-up.' The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them. The Board and the court found that the manner in which the hiring halls operated created in effect a closed shop in violation of the law. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, as long as they are not so operated as to create a closed shop with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union."  

Senator Magnuson's proposal was passed over on the floor of the Senate, but in the following session he introduced a similar bill "to legalize maritime hiring halls." The differences of opinion as to the degree of liberty permitted by the amended proviso with respect to hiring halls was emphasized in the following colloquy during the committee hearing on the bill:

Senator MAGNUSON: "[Management and labor] are under a legal cloud, and I think management and labor want to get out from under that legal cloud."

Senator TAFT: "There is no legal cloud if they comply with the law."

Senator MAGNUSON: "They complied with the law before the law was passed as far as practice."

Senator TAFT: "It is perfectly legal to run a hiring hall under the law, if they run it right, if they don't discriminate."

Senator MAGNUSON: "That depends upon what you and I would interpret as running it right. My idea of the right running of a hiring hall may be different from your interpretation."

But any "legal cloud" that section 8(a)(3) might have cast upon hiring halls still persisted, since the Senate once more failed to take any action. In fact, no proposals to "legalize" hiring halls in the maritime or building and construction industries have as yet been enacted into law. Senator Taft, one of the chief architects of the Taft-Hartley Act,

40. 96 Cong. Rec. 8737, 14697 (1950).
42. Hearing on S. 1044, supra note 8, at 76.
43. On August 9, 1951, Senator Taft introduced S. 1973, 82d Cong., 1st Sess. (1951), 97 Cong. Rec. 9675 (1951), which would have permitted execution of collective bargaining agreements prior to the hiring of employees in the building trades
amendments, proved to be a powerful opponent to any efforts to legalize hiring systems which he maintained had never been declared illegal, and continued congressional silence on the subject has left the issue in doubt—legislatively speaking. The Board and the courts, however, confronted daily with the necessity for deciding cases, moved to resolve some of these doubts.

III.

CASE LAW—BOARD AND COURT.

By establishing a statutory scheme which outlawed the closed shop while permitting the hiring hall as such, Congress produced a unique problem and a paradox. The crux of the problem and the paradox was to protect employees from job coercion and at the same time to permit the operation of union hiring halls. Whereas the policy of the act was “to insulate employee’s jobs from their organizational rights,” still Congress was doubtlessly well aware of the history of union-employer hiring arrangements in casual-labor industries like the building and construction and maritime industries, and of the necessity for an efficient system of locating employment. Yet the legislative branch did not appear convinced that it should grant these industries either a wholesale exemption from the act or a respite from the union-security limitations imposed by the act.

It was in this legislative and institutional framework that the Board sought a resolution of the hiring-hall problem. The Board’s initial approach was to correct hiring-hall abuses as they arose in individual cases. This was illustrated by the earliest hiring-hall case following passage of the Taft-Hartley Act: National Maritime Union of America. In that case, the union insisted upon, and struck for, a hiring-hall provision which would require only that the employer hire such persons as were supplied by the union unless the union was unable to supply the needed replacements. Despite broader readings by industry and would have authorized labor agreements which require membership in the contracting union on or after the seventh day following employment. But Senator Taft underlined that the “bill does not, however, provide for a closed shop. It provides for the same union shop which is provided for in the various terms of the Taft-Hartley law.” Thus, it suffered from no such vice as had earlier proposals. This bill passed the Senate (98 Cong. Rec. 5028-29 (1952)) but died in the House Committee on Education and Labor. Similar proposed bills included S. 656, 83d Cong., 1st Sess. (1953); S. 2650, 83d Cong., 2d Sess. (1954); S. 888 and S. 1614, 85th Cong., 1st Sess. (1957).

some senators and several legal commentators, to the effect that union hiring halls had been outlawed, the Board did not pass on the question whether exclusive hiring halls were legal or illegal, since the provision on its face did not constitute a so-called closed shop contract, by virtue of which employers would be required to hire only such persons as were members of the contracting union. But the Board did hold that the respondent union violated the act by striking for an exclusive hiring hall on the basis of record evidence that in its actual operation the existing hiring hall discriminated in fact against non-members, and that the union and the employers contemplated that such discrimination would continue. Although no specific act of discrimination was shown, section 8(b)(2) also proscribed those acts by which a union attempted to cause such discrimination.

The union requested the Board to consider the peculiar characteristics of maritime employment and the economic facts which gave rise to the maritime hiring hall. But the Board, in reply, remarked that the wisdom of legislation which rendered the particular hiring hall unlawful raised considerations for the legislature and not the courts:

"The full facts concerning the reasons for and operation of maritime hiring halls were brought to the attention of the Congress prior to the enactment of the amended Act. The Congress determined that the public interest required that hiring halls involving discrimination against employees who are not union members be outlawed." 49

While continuing to treat the hiring-hall problem in terms of specific abuses by discrimination in actual practice, the Board, in the Pacific American Shipowners case, emphasized that a hiring-hall contract, which required that the employers secure, and the union furnish, all unlicensed personnel through the offices of the union, and that

46. See note 37 supra.
47. 47 Mich. L. Rev. 283 (1948); 24 Notre Dame Law. 82 (1948); Williams, Hiring Halls in the Maritime Industry under Federal Law, 8 N.Y.U. Int'l L. Rev. 178 (1953).
48. Likewise, a threat of a strike for a similar purpose is a violation of section 8(b)(2). American Radio Ass'n, 82 N.L.R.B. 1344 (1949); National Maritime Union, 82 N.L.R.B. 1365 (1949).
49. National Maritime Union (The Texas Company), 78 N.L.R.B. 971, 979 (1948). See also Daniel Hamm Drayage Co., 84 N.L.R.B. 458 (1949), enforced, 185 F.2d 1020 (5th Cir. 1951).
preference be accorded to persons presently employed and those hav-
ing seniority by reason of previous employment, would be lawful,
provided that the contract specifically stated that the union would
administer these hiring provisions without discrimination by reason of
membership or non-membership in the union, and that the ultimate
right to accept or reject any employee was retained by the employers.
Said the Board:

"In our view, the provision contained in the proposal that
personnel be secured through the offices of the Respondent does
not, on its face, require discrimination because of union affiliation.
In any event, the proposal is explicit in its further requirement
that the hiring provisions be administered without discrimination
and we find no justification for assuming that the Respondent
would violate its agreement by dispatching personnel on a dis-
criminatory basis."

In the very same opinion, the Board reaffirmed its earlier policies by
holding that another provision, by which "the Employers agree to
give preference of employment to members of the Union, and to se-
cure employees in their Stewards Department through the offices of
the Union . . .," violated section 8(b)(2) of the act. "Such provi-
ison, under which the hiring hall and member preference requirements
are inextricably combined, is clearly discriminatory and by its actual
enforcement, . . . members of the Respondent have been unlawfully
accorded preference in employment over non-members." (Emphasis
added.)

It is possible that the Board, at least after the Pacific American
Shipowners case, considered of some significance the express provision
insuring against discrimination in a hiring-hall agreement. How-

52. Id. at 1101. Member Reynolds dissented from this holding of the Board. He
believed that the delegation of "such complete and absolute control over hiring by
the Employers to the Respondent would without more be tantamount to discrimina-
tion against nonmembers of the Respondent." Id., at 1105. Further, in Member Rey-
nolds' view, the preferential hiring provision of the previous contract between the
Employers and the Respondent would in effect result in continued preference to
union members by virtue of the seniority clause in the new agreement, since only
union members could have obtained such seniority.

53. Id. at 1100. However, the Board relied on International Longshoremen's and
Warehousemen's Union (Waterfront Employers Ass'n of the Pacific Coast), 90
N.L.R.B. 1021 (1950), enforced, 211 F.2d 946 (9th Cir. 1954), wherein the Board
found the union in violation of section 8(b)(2) by "thus entering into contracts
discriminatorily granting preference in employment to their members, and by actively
participating in the enforcement of these provisions." This language could indicate
that the agreement was illegal on its face, rather than illegal in actual operation.

ever, one court which has dealt with the problem did not appear to require such an express provision as a necessary condition to the existence of a valid hiring hall.\footnote{55. N.L.R.B. v. Swinerton, 202 F.2d 511 (9th Cir. 1953), \textit{cert. denied}, 346 U.S. 814 (1953).}

The legality of hiring halls under the act was not comprehensively treated by the Board in its decisions prior to \textit{Mountain Pacific}. As noted above, in the majority of cases involving a hiring hall, decision has rested on the existence of discriminatory practices apart from the effect of the contract. Thus, in \textit{American Pipe and Steel Corporation},\footnote{56. 93 N.L.R.B. 54 (1951).} the Board agreed with the Trial Examiner that the agreement did not establish an illegal “closed shop hiring-hall arrangement,” but reversed the Trial Examiner by finding that the union had caused the employer to discriminate in practice against a union member who had no referral from the union.

“It is well established that an employer’s acceptance of the determination of a labor organization as to who shall be permitted to work for it is violative of Section 8(a)(3) of the Act, where, as here, no lawful contractual obligation for such action exists. \ldots [B]y the act of yielding to the Local’s demand that Watson be removed, the Employer perforce strengthened the position of the Local and forcibly demonstrated to the employees that membership in, as well as adherence to the rules of, that organization was extremely desirable. Such encouragement of union membership was particularly effective when, as in the present case, the Employer deferred to the demand of the Local that employees be cleared through its hall, and membership appears to have been a condition precedent to obtaining the necessary clearance.”\footnote{57. \textit{Id.} at 56.}

In \textit{Hunkin-Conkey Construction Company},\footnote{58. 95 N.L.R.B. 433 (1951).} the Board, although concluding that the employer had not in fact agreed with the union to hire employees only through the union’s offices, stated:

“Moreover, assuming \textit{arguendo} that the Respondent Company and the Respondent Unions had entered into such an agreement, we have not found a provision that personnel be secured through the offices of a union violative of the Act, absent evidence that the union unlawfully discriminated in supplying the company with personnel.”\footnote{59. \textit{Id.} at 435. See also, Missouri Boiler and Sheet Iron Works, 93 N.L.R.B. 319 (1951); Firestone Tire & Rubber Co., 93 N.L.R.B. 981 (1951).}
And in the *Philadelphia Iron Works Case,* the Board reiterated:

"However, we do not adopt the Trial Examiner's reasoning insofar as it states that the Respondents' agreement to condition employment upon the Union's approval is, without more, in itself illegal."

It should be observed, however, that certain language employed on occasion by the Board does not appear to reflect an entirely consistent position on the issue of whether a bare hiring hall, aside from other evidence, is unlawful. The Board has at times indicated that an exclusive hiring arrangement by itself was per se unlawful. In the *Lummus Company* case, the Board said:

"Furthermore, even if it is assumed that the Carpenters might have referred nonmembers of its union to the Respondent for employment, the Respondent's requirement that job applicants obtain approval from the Carpenters as a condition of employment is in itself a discriminatory hiring condition within the meaning of Section 8(a)(3) of the Act." 61

Similar language is contained in the *Spoon Tile Company* case, decided in 1955. In contrast to these remarks, the Board, in a decision issued not long after the *Lummus Company* case, found it "unnecessary to pass on the reasoning of the Trial Examiner that an employer's requirement that applicants be referred by a union is violative of the Act, absent evidence that the union unlawfully discriminated in supplying the employer with personnel." 68 This was particularly anomalous since the Trial Examiner's language was the precise reasoning of the Board itself in the *Lummus Company* case. 64 It may be significant that, in both the *Lummus Company* and the *Spoon Tile Company* cases, the Board referred to specific evidence of discriminatory practices in the operation of the particular hiring hall, thus tempering the broader implications of those opinions.

If any single pattern can be said to emerge from the Board decisions up to *Mountain Pacific,* it would appear to be that exclusive hiring halls or referral systems, while prima facie unlawful, may satisfy

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60. 103 N.L.R.B. 596, n. 5 (1953), enforced, 211 F.2d 937 (3d Cir. 1954).
the requirements of the act if non-discriminatory clauses and right of rejection provisions are included. This was the gravamen of the Pacific American Shipowners decision. The bulk of the cases have not dealt with the legality of the hiring-hall agreement but have, rather, taken the view that only where the evidence demonstrates actual discrimination in operation does an exclusive hiring hall violate the act; the language of the Hunkin-Conkey case, not that of the Lummus Company case, has preponderated.

The treatment of hiring-hall cases in the courts has shed little more light on the subject. The weight of authority, in quantitative terms at least, has been, like the Board, to approach the subject in terms of specific discrimination in actual operation of the hiring-hall agreements. The Eighth Circuit Court of Appeals, in denying enforcement of a Board order, never determined whether an employer could or could not be held to have committed an unfair labor practice by merely entering into a discriminatory hiring agreement, since it found that the evidence was insufficient to support discriminatory practices or an illegal hiring agreement. Said the court: "The factor in a hiring-hall arrangement which makes the device an unfair labor practice is the agreement to hire only union members referred to the employer. See, American Pipe and Steel Corporation, 93 N.L.R.B. 54."

But at least one court of appeals appears to lend support to the broad Board language that exclusive control of hiring by a union is per se unlawful. The court flatly stated that "... a union may not insist that an employer subordinate his own hiring preference to the union's referral arrangement." Of prime significance in the case law in the area of section 8(a)(3) and section 8(b)(2) violations is the Supreme Court decision in Radio

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65. NLRB v. International Longshoremen's and Warehousemen's Union, Local 10, 214 F.2d 778 (9th Cir. 1954); NLRB v. Philadelphia Iron Works, 211 F.2d 937 (3d Cir. 1954), enforcing, 103 N.L.R.B. 596 (1953); Eichleay Corp. v. NLRB, 206 F.2d 799 (3d Cir. 1953); NLRB v. Local 743, 202 F.2d 516 (9th Cir. 1953); NLRB v. F. H. McGraw & Co., 206 F.2d 635 (6th Cir. 1953); NLRB v. Swinerton, supra note 55; NLRB v. Whittenberg Constr. Co., 200 F.2d 157 (6th Cir. 1952); NLRB v. National Maritime Union, 175 F.2d 686 (2d Cir. 1949), enforcing, 78 N.L.R.B. 971 (1948).


67. NLRB v. Local 542, International Union of Operating Engineers, AFL, 255 F.2d 703 (3d Cir. 1958). See also NLRB v. International Bhd. of Boilermakers, 232 F.2d 393 (2d Cir. 1956); NLRB v. Alaska S.S. Co., 211 F.2d 357 (9th Cir. 1954); NLRB v. Waterfront Employers, 211 F.2d 946 (9th Cir. 1954), enforcing, 90 N.L.R.B. 1021 (1950).

68. NLRB v. Local 542, International Union of Operating Engineers, AFL, 255 F.2d 703, 705 (3d Cir. 1958). One of the alleged discriminatees in this case, James Russell, a member of respondent union, was refused referral by the union solely because he sought work in Bethlehem as an applicant from Philadelphia when Bethlehem men were unemployed.

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UNION CONTROL OF HIRING

Officers’ Union v. NLRB,69 rendered by the Court in 1954. Although the decision seems to give comfort to all sides of the question, analysis of the many propositions of law set forth in relation to the facts of the particular case tends to bolster the broadest Board view, namely, that union control over hiring is itself enough to warrant finding a violation of the act. In the case, the union’s contract, covering the employment of radio officers on ships of the contracting companies, provided that, when vacancies occurred, the company would select such qualified radio officers who were members in good standing of the union, when available. Furthermore,

“The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary 'clearance' for the position to which the Radio Officer has been assigned. If a member is not in good standing, the Union will so notify the Company in writing.”70

Had this given the union complete control over hiring, the contract “would have legalized the actions of the union in this case,” 71 since the agreement antedated the Taft-Hartley Act. 72 But the Court agreed with the circuit court73 that the contract which gave the employer the right of free selection did not constitute a hiring-hall arrangement. The company offered employment to Fowler, a union member, who thereupon “bumped” another union member, junior in service with the company, without seeking clearance from the union. The union notified the company that Fowler was not in good standing in the union because of his failure to secure advance clearance, refused subsequently to clear Fowler, and another man was dispatched to the job by the union. Upon these facts, the Court affirmed a finding that the

69. 347 U.S. 17 (1954). The Court also decided two other cases in the same opinion: NLRB v. Teamsters Union; Gaynor News Co. v. NLRB.
71. Id., at 29-30
72. Section 102 of the Taft-Hartley Act, 61 Stat. 152 (1947), 29 U.S.C. § 158 (1952): “No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act ... and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.”
73. NLRB v. Radio Officers’ Union, 196 F.2d 960, 963 (2d Cir. 1952).
union had violated sections 8(b)(1)(A) and 8(b)(2). While the Court might have restricted its decision to a finding that the union by its practices had caused the employer to discriminate specifically against Fowler, the language used by the Court is not thus limited. The clear implication is that absolute unfettered union control over hiring is not lawful under the Taft-Hartley Act. In holding that there had been encouragement of union membership, the Court declared:

"The circumstances in Radio Officers and Teamsters are nearly identical. In each case the employer discriminated upon the instigation of the union. The purposes of the unions in causing such discrimination clearly were to encourage members to perform obligations or supposed obligations of membership. Obviously, the unions would not have invoked such a sanction had they not considered it an effective method of coercing compliance with union obligations or practices. Both Boston and Fowler were denied jobs by employers solely because of the unions' actions. Since encouragement of union membership is obviously a natural foreseeable consequence of any employer discrimination at the request of a union, those employers must be presumed to have intended such encouragement. It follows that it was eminently reasonable for the Board to infer encouragement of union membership . . . ." 74

IV.

MOUNTAIN PACIFIC

THE LAW TODAY.

It was in this posture of the law that the Board handed down in its decision in the Mountain Pacific case. That decision does not lay down a new policy but represents rather another step of the Board's thinking in this field. From its many years of experience the Board concluded that it was no longer sufficient to treat the hiring-hall problem in terms of specific abuses, but that it was now necessary to deal with the legality of hiring halls generally. Behind lay a long history of traditional practices, of heated congressional debate and of variegated case law. What was needed was a definitive decision that would be meaningful for the present while not completely undoing the past. It was almost inevitable, therefore, in the light of what had gone before, that the Board would adopt the middle ground that it did, that it would find some types of hiring halls unlawful, and at the same time find that others were lawful.

A. The Board Decision.

Involved in the Mountain Pacific case itself was a hiring contract which provided that the recruitment of employees should be the responsibility of the union. The employers were to call upon the local union to furnish qualified workmen, and only if the union should be unable to furnish workmen within 48 hours would the employer be free to procure workmen from other sources. The Board deemed it significant that the contract was "silent as to methods or criteria to be followed by the Union in performing its function as hiring agent." The union was free to pick and choose on any basis it saw fit. Job applicants could reasonably expect, from that fact alone, that their employment opportunities would depend to a large extent upon their compliance with union desires.

"Faced with this hiring hall contract, applicants for employment may not ask themselves what skills, experiences or virtues are likely to win them jobs at the hands of AGC contracting companies. Instead their concern is, and must be: what, about themselves, will probably please the unions or their agents; how can they conduct themselves best to conform with such rules and policies as unions are likely to enforce; in short, how to ingratiate themselves with the union, regardless of what the employer's desires or needs might be." 76

In view of these circumstances, the Board held that the exclusive hiring contract in question was unlawful on its face. Unfettered control of the hiring process was vested in the union, and it was eminently reasonable for the Board to infer encouragement to union membership. 77 "The employers here have surrendered all hiring authority to the Union and have given advance notice via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so." 78 "[I]t is difficult," the Board reasoned, "to conceive of anything that would encourage . . . subservience to union activity, whatever its form, more than this kind of hiring-hall arrangement." 79

By its very nature, however, this analysis imported a caveat. Not every union hiring arrangement, even an exclusive hiring arrange-
ment, was an unfair labor practice. Unions and employers could still agree to, and operate under, exclusive hiring arrangements provided they set forth in their contract certain safeguards to neutralize the improper effects of a totally unrestrained union hiring hall. And, to accomplish this, the Board listed three safeguards as the minimum requirements for legalizing an exclusive hiring hall agreement.80

Finally, the Board cautioned that even such a lawful hiring arrangement would not immunize either the employer or the union if the hiring power delegated by the employer to the union was in fact exercised in an unlawful discriminatory manner. Earlier Board law had substantially established this proposition, but the Board wished to affirm positively that compliance with the Mountain Pacific criteria gave no carte blanche to any and all activity.

The Mountain Pacific decision, significant though it may be, cannot be said to be a wholly pioneering decision. It is rather a clarifying restatement of the main threads of the case law at that juncture. It finds its precursor in the Board's post-Taft-Hartley decision on the legality of an exclusive hiring-hall agreement, the Pacific American Shipowners case.81 Two of the three safeguards specifically required by Mountain Pacific were incorporated in the contract in the earlier case. Mountain Pacific is basically an evolution of that earlier opinion. The only additional requirement now imposed by the Board is that all provisions relating to the hiring procedure be posted by the parties, so that employees and applicants for employment are fully apprised of them.

This third safeguard should not, of course, be minimized, as it is perhaps the most important of the three. For it is by informing employees of the “provisions relating to the functioning of the hiring agreement” that they are put on notice of the non-discriminatory criteria or standards that will govern referrals to jobs, and are given substantive assurance of the guarantee against discrimination.

Hiring halls which may fairly be regarded by employees as offering them job referral opportunities based upon objective standards

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80. Restated here, the safeguards are as follows:
“(1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.
“(2) The employer retains the right to reject any job applicant referred by the union.
“(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.”
81. See note 51 supra.
or criteria and wholly without reference to whether they are union members or comply with union policies and practices cannot be said improperly to encourage union membership. Each of the three safeguards now required to legitimize an exclusive hiring-hall contract is designed to give substance to this principle. Satisfaction of the first of these requirements, when posted, serves to disabuse employees of the assumption that they must please the union to obtain employment. The second requirement, that the employer have a right to reject applicants, lessens the control of the union over the hiring function, and thereby the power to act arbitrarily toward job applicants. And by informing employees of the "provisions relating to the functioning of the hiring agreement," the objective criteria aimed at eliminating those aspects of the system which placed it afoul of the act are broadcast, and ignorance is transformed into knowledge.

B. Implications of the Mountain Pacific Doctrine.

Although the Mountain Pacific decision has been in effect for about a year, neither that case nor any subsequent Board decision involving the legality of hiring halls has been before a court of appeals. The Board's decision does not, by any means, represent the last word on, or the optimum solution to, the complex problem of hiring halls. Clearcut and incisive answers do not come easily in a situation where there are strong competing interests and conflicting rights. The Board is essentially an adjudicatory agency, and the law in this field has progressed largely on a case-by-case basis. The prudence inherent in the judicial process restrains the Board, as well as the courts, from deciding more than the precise case presented. It is reasonable to expect that the Board will add to the development of the law in this field as time goes on, and that the Board's view of this problem will be shaped, refined, and embellished in accordance with experience. The courts can also be expected to express their views in this regard. Indeed, in view of the significance of the problem, it is not unlikely that the Supreme Court will have its say in the not too distant future.

Within the confines of this Article, there is little space for a detailed analysis or speculation on all the ramifications of the Mountain

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82. A frequent employer-objection to hiring halls was that they forced the employer to take unqualified personnel. See Hearings on S. 1044 Before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong., 1st Sess. (1951).

83. Mountain Pacific is now pending before the Court of Appeals for the Ninth Circuit.
Pacific decision. However, a few of the readily apparent problems may be suggested. Thus, the third safeguard poses one of the more troublesome problems; some say the language used by the Board is susceptible to differing interpretations. It could be read so that a bare posting of the language set forth by the Board suffices to legalize a hiring-hall contract. Or it could be read to require that there be set forth, in the contract or in the notice, the methods or criteria that the parties have established through the bargaining process for operation of the hiring hall. The latter view appears more in keeping with the opinion as a whole, for as a practical matter, the only reason parties might object to including the objective criteria in the contract would be their desire to control employment on some non-objective or discriminatory basis.

It may not be enough that the union and employer merely disavow an intent to discriminate and to avoid actual discrimination. The need for the hiring-hall safeguards spring not only from the Taft-Hartley provisions which ban discrimination, but arise equally from the ban against restraint or coercion of employees contained in other provisions of the act, namely, section 8(a)(1) and section 8(b)(1)(A). Violations of both these latter sections were found by the Board in Mountain Pacific. The elimination of possible restraint or coercion of jobseekers is as much at the heart of the matter as the elimination of possible discrimination. The posting of notices that make clear that there will be no discrimination in hiring does

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84. Last June, the author issued a statement, in the form of a long series of questions and answers, about union hiring halls and referral systems, in response to many specific questions that had been raised regarding the applications of the Board's Mountain Pacific decision to particular hiring hall and referral systems. As noted therein, those comments were not in any sense advisory opinions or rulings, nor were they binding or authoritative determinations either by the Office of the General Counsel or the Board.


"Sec. 7. 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 8. (a) 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;"

""...

"(b) It shall be an unfair labor practice for a labor organization or its agents—"

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."
not necessarily take care of any possible restraint or coercion. Employees may also be restrained and coerced by a contract which vests unilateral control in the union over any hiring procedure, because it creates a fear that there will be discrimination notwithstanding general reassurances to the contrary.

Two Board decisions are illuminating on this point. One is *Pacific Intermountain Express*, 86 decided before *Mountain Pacific*, and the other is *Houston Maritime*, 87 decided since. In *Pacific Intermountain Express*, the Board found that the union actually determined the seniority standing of all employees, and the union seniority lists were utilized by the company in effecting reductions in force and in assigning work. Further, the record revealed that the union, in preparing its seniority lists, established the seniority dates of employees who were not members of the union when hired as of the date upon which they became members of the union rather than as of the date of their employment; with respect to those employees who were members of the union when hired, however, their seniority was established as of the date of their employment. In *Houston Maritime*, the contract between the employers and the unions obligated the employers to select gang foremen from lists furnished by the unions, and also vested in the gang foremen authority and responsibility with respect to hiring and placement of all men in the gang. The Board found that these two features in effect divested the employers of their hiring and placement functions and gave those functions to the union, creating an exclusive hiring arrangement. As the *Mountain Pacific* safeguards were not included in the contract, the Board concluded that the agreement was unlawful. 88

86. 107 N.L.R.B. 837 (1954), enforced, 225 F.2d 343 (8th Cir. 1955).
87. 121 N.L.R.B. No. 57 (1958). Other Board decisions in which violations of the act have been based on the *Mountain Pacific* doctrine include: Booth & Flinn Co., 120 N.L.R.B. No. 75 (1958); K. M & M. Construction Co., 120 N.L.R.B. No. 140 (1958); Local 715, United Bhd. of Carpenters and Millwrights, AFL-CIO, 121 N.L.R.B. No. 60 (1958); Los Angeles-Seattle Motor Express, Inc., 121 N.L.R.B. No. 205 (1958); News Syndicate Co., 122 N.L.R.B. No. 92 (1959).

The last two cases cited also applied the so-called "Brown-Olds Remedy," requiring both the employer and union charged, jointly and severally, to reimburse all dues and fees paid by employees where the provisions of an exclusive hiring agreement were unlawful as failing to contain the *Mountain Pacific* safeguards. The remedy derives from *United Ass'n of Journeymen & Apprentices of Plumbing and Pipefitting Industry, Local 231, AFL-CIO (J. S. Brown—E. F. Olds Plumbing & Heating Corp.),* 115 N.L.R.B. 594 (1956), and requires that unions and employers (Broderick Wood Products, 118 N.L.R.B. 38 (1957), enforced, 43 L.R.R.M. 2123 (10th Cir. 1958)) who, because of the existence of illegal hiring arrangements, have coerced employees into becoming members of the union, must refund the full amount of dues and assessments collected from the employees for as far back as six months prior to the filing of the charge.

88. The *Houston Maritime* decision signifies that the Board will carefully scrutinize all arrangements and procedures relating to the hiring process to see if an ex-
In both Pacific Intermountain Express and Houston Maritime, the evil found was delegation to the union of unilateral and unfettered control over the hiring process. No question of failure to post was raised in either case, but it seems clear that no type of posting could cure the evil. Moreover, the contracts in both cases specified that there should be no discrimination against non-members. Nonetheless, the Board found that the contract provisions per se violated all pertinent sections of the act. The only essential difference between P.I.E. and Houston was that in the former case the union was delegated exclusive control over seniority, and in the latter case the union was given exclusive control of the selection of the gang foremen who did the hiring.

These cases appear to be equally applicable to contract provisions which propose to turn over to the union the exclusive power to draft the rules for operation of the hiring hall. Drafting the rules must of necessity include the power to fix the standards for hiring and consequently the order of hire. Further, if the union has exclusive power to set the rules, it also presumably could change them at will. For example, the power to shift at will and without notice, from a geographic basis of hiring to straight seniority or to “longest unemployed” seems to come within the “unfettered control” of the hiring process which the Board condemned in Mountain Pacific and in Houston.

Thus, it may fairly be concluded that the standards for hiring must be fixed by the collective bargaining contract, i.e., by mutual agreement and must not be open to unilateral change by the union. Otherwise, the jobseeking employee must look solely to the union for his chance of obtaining a job which appears to be precisely the type of restraint or coercion which was struck down in the P.I.E. and Houston cases.

CONCLUSION.

The effectiveness of the Mountain Pacific approach to the exclusive hiring-hall problem will depend in large measure upon the degree of cooperation between leaders of industry and labor and repre-

clusive hiring hall or referral system is created. If it is, all the safeguards required by Mountain Pacific are essential to its validity. The test, in short, is not whether words of exclusiveness are actually used, but whether a reasonable construction leads to that conclusion. It would seem to follow that oral arrangements, or any arrangements whereby a union may affect the hiring process, if in fact operated so as to require clearance from the union, are subject to the Mountain Pacific criteria. Clearly, there can be no such thing as a valid oral exclusive hiring agreement, for the posting requirement in itself requires that at least those portions of such a contract relating to hiring be reduced to writing. Presumably, posting all the provisions of an oral arrangement that met the Mountain Pacific standards would suffice, as actually creating a written exclusive hiring contract.
sentatives of government. It has been aptly said that the man who does no wrong needs no law. Unfortunately, experience has shown that wrongs do occur, and it is then that the government is forced to step into the picture. Generally, without doubt there has been a very high degree of acceptance by both unions and employers of the specific provisions, and indeed, the basic purposes of the act. Since the Board issued *Mountain Pacific*, the earnest efforts of both employers and unions in the construction industry to adjust to that decision have already been clearly manifested. International unions have been preparing and distributing to their constituent locals explanations of the *Mountain Pacific* decision, and suggestions for adapting their hiring arrangements to it. Trade associations have done the same for their employer members. Contracts have been revised, and are being studied with an eye toward meeting the standards now required.

The *Mountain Pacific* decision reflects this evident spirit of cooperation. Its holding is that a hiring hall under which the employer secures employees solely through the union, with nothing more, is unlawful. But, recognizing the counterbalancing desirability of properly-run hiring halls, its dictum opens the way to retention of traditional institutions: exclusive hiring halls may be lawful, provided that they contain non-discriminatory safeguards, the employer has a right of rejection, and all provisions relating to the functioning of the hiring portions of the agreement are posted.

The decision represents a balancing of conflicting desiderata. It weighs the inherently discriminatory tendency of an exclusive hiring-hall system against its social and economic utility. As a culmination and clarification of the many cases in this area that have been decided since the Taft-Hartley amendments, *Mountain Pacific* is a notable example of the Board's function of maintaining a proper equilibrium between the respective rights of employers, employees, unions, and the public. It illustrates a comprehensive distillation process, still in progress, aimed at preserving those elements which are salutary and removing those elements which are deleterious in hiring-hall arrangements. The full realization of these twin objectives, as well as the final answers to the many questions that the *Mountain Pacific* decision evokes, lie in the future, as the Board and the courts come to grips with the varied situations.