THE KOHLER STRIKE

Union Violence and Administrative Law

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HENRY REGNERY COMPANY
Chicago 1961

Library of Congress Card No. 61-16005

First printing January 1961
Second printing March 1961

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PREFACE

I have followed the Kohler Company's struggle with the United Automobile Workers Union for years, as stage after stage of the dispute has demonstrated the things that have gone wrong in the labor policy of the United States. But its full value as a textbook illustration of the defects of our labor policy was not complete until August 26, 1960, when the National Labor Relations Board handed down its decision on the charges brought by the UAW against the company. With that decision, the dispute acquires an historic significance, for now it points up in a dramatic way all the principal shortcomings of our present labor policy.

These are four: the toleration shown to union violence by government; the governmental favoritism which has encouraged union officials to fall into greater and greater antisocial excesses; the unfair and sometimes impossibly heavy burdens which have been placed on employers, all coming to rest eventually on the shoulders of the consuming public; and finally the reposing in administrative agencies of judicial functions which those agencies have abused, to the infinite harm of society.

During its dispute with the Kohler Company, the United Automobile Workers Union engaged in sustained violence which covered almost the whole range of illegality, stopping just short of murder. It violated the laws of all levels of government, from local trespass laws to the federal government's National Labor Relations Act. The Kohler Company, on the other hand, despite the burdens placed upon employers by

our labor relations laws and the provocations of the union, pursued throughout the dispute a course of legality. Yet the decision of the National Labor Relations Board rewards the union and punishes both the company and many of the employees who came to work for it during the strike, at a time when it took considerable courage to do so.

I submit this document as evidence that our labor policy stands in compelling need of reform. While the Kohler dispute illustrates all the major evils of present labor policy which I have mentioned, it focuses attention on one perhaps more forcefully than on the others: the administrative law approach in labor relations. Experience with the National Labor Relations Board in this case alone is a strong argument for restoring to the constitutional courts of this country the full authority of decision in labor cases. When it is realized that the defects of the Board revealed by this case are duplicated in countless others, the argument becomes overwhelming.

I hope that this book will serve also to correct the historical record concerning the Kohler Company and Kohler Village. Using all the methods of propaganda, the officials of the Auto Workers Union have accused the Kohler Company of being a "feudal, reactionary, dictatorial employer." They have led people to understand that Kohler Village is a regimented "company town" whose residents are little more than exploited serfs.

Frankly suspicious of such charges, I made an independent investigation of both the Village and the Company's history and policies, with the results summarized in Chapter 1. A whole book might easily be

written about the company or the village; both are models of the best in American practice and tributes to the practicality of this country's highest ideals. But since the prime purposes of *this* book are to set forth the facts of the Kohler strike and to reveal the inherent defects in administrative law, I have confined myself to the barest possible account of the character of the Kohler Company's policies and of life in Kohler Village.

I am indebted to the officers of the Kohler Company for the unreserved cooperation they have extended in my efforts to ascertain the facts. They have been, I believe, entirely candid on every subject which I chose to explore. As to all facts and issues involved in the dispute with the Auto Workers, my sources have been official documents and the transcript of the record in the Kohler-case hearings before the National Labor Relations Board and its trial examiner.

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PART I

KOHLER AND THE AUTO WORKERS UNION

1. KOHLER OF KOHLER

FIFTY MILES north of Milwaukee and just west of Sheboygan lies one of the prettiest towns in the United States. There is a winding river with smooth meadowland on either bank, here a copse, there a village green, and everywhere clusters of comfortable homes set in wide lawns. The streets are broad and spotless, and the city dweller, struck by what seems to him an uncanny quiet, is relieved when he sees children along the margins, making kids' noises, playing the same games that kids play all over the country. As he moves on, if it is summer, he hears reverberating yells such as come only from an indoor-outdoor swimming pool in full swing. Then he is at the village recreational-cultural-educational center. Adjoining the Olympic-size swimming pool in its enclosure of gigantic sliding glass doors, he finds a theatre whose design and acoustics have been praised by all visiting artists, from Marian Anderson to Cesare Siepi. Next to that stands a big gymnasium, and beyond that a cluster of school buildings which would grace any college campus—schools which enhance the town's appeal and play their part in the brisk bidding for the village homes when they go up, as they all too rarely do, for sale.

Kohler Village, pop. 1715, did not just happen. It is a community with a purpose, built deliberately around a plan, intended to realize a dream. The dream was that of an Austrian immigrant, John Michael Kohler, who saw that his thriving business could not expand properly in Sheboygan and who felt that living and working could be combined with pleasing results in the right environment. It has taken a long time, a persevering dedication, and downright business acumen—for the whole plan would dissolve if the business failed—to make it all come true. But the necessary ingredients were there. The plan has not failed. John Michael Kohler would more than likely be pleased if he could see what his sons, their associates, and the villagers have wrought with the business he founded in 1873.

Merging with the village, neither dominating it nor lost in it, is the means of production which provides income for most of the village people, as well as for a large number of residents of nearby communities. With a payroll of over four thousand, Kohler of Kohler is the largest employer in Sheboygan County. Its plants and buildings do not mar the countryside, although they cover more than two hundred acres. They give off no dirt. What noise they make is inaudible outside the fence which surrounds them. There is a new engine plant, big enough to contain eight football fields. But like the older plant buildings, the offices, and the foundries, it has a pleasing line, charmingly old fashioned in comparison with some kinds of modern construction, yet thoroughly functional and in harmony with the other plant buildings. Futuristic notes are supplied by a maze of power lines, and by a row of prodigious tanks for the

storage of butane (Kohler was once the largest industrial user of butane in the country, and perhaps still is). The contents of these silvery tanks could blow up the whole county if carelessly handled or sabotaged. But the Kohler people do what they can and must to preclude either.

With all its charm and peace and quiet, Kohler Village is pretty isolated. Transients, business callers, visiting artists, single persons working at the plant, school teachers and others need a place to stay in the Village for longer or shorter periods. The homes, practically all owned in fee-simple absolute by the people who live in them, are not available for such purposes. Even the few owned by the Kohler Company are occupied by lessees. Hence the American Club, a rambling building with hotel facilities, has been provided by the company. The Club faces the main offices across a broad mall and a wide road called High Street, and is within walking distance of all the places which either transients or longer term residents need to reach. It is quiet and comfortable, an architectural gem, with spacious rooms and accommodations easily the equal of the best commercial hotels. The bar is first rate and the food is even better. The plumbing is by Kohler.

Kohler Village was—and is today—what few other industrial communities anywhere in the world have been: a combination of beauty and utility, of tranquility and industriousness, of peace and productivity. Houses in the village command thousands of dollars more than similar houses elsewhere in the area. The taxes are low. The schools are famous. One hears that "it's a great place to bring up kids." One hears almost equally often that Kohler has very

rarely, even during the depths of the depression, laid off an employee. Kohler workers stay with the company a long time; well over one thousand belong to its Twenty-Five Year Club. The firm has had group life, health, and accident insurance since 1917; an informal pension fund since time immemorial, which was fully funded in 1949; and a company-paid workmen's compensation program before state law started to compel such plans in Wisconsin, in 1911. Himself an immigrant, John Michael Kohler was deeply opposed to the exploitation of immigrant labor which was prevalent in many areas when he founded his company. In every respect, he stood for labor relations far in advance of his time, and his sons built soundly on his attitude. As a result, a deep loyalty to the company developed over the years, both among its employees and in the community. Kohler came to be known as "a good place to work" and "a place where you got a square deal."

2. THE SEQUENCE OF EVENTS BEFORE THE STRIKE

KOHLER VILLAGE was not quiet on April 5, 1954. Marching in solid ranks before the main entrance to the plant early that morning were some two thousand persons. They were there to prevent anyone from going to work, and they succeeded. As one eye witness put it, "employees attempting to enter the plant were slugged, kneed in the groin, kicked, pushed, and threatened," almost always by the group of militants who had come from out of town to "help." For fifty-four days, despite restraining orders, agreements by union officials to obey those orders,

and efforts of the Kohler management and nonstriking employees, the plant was shut, in the words of one union officer, "as tight as a drum." It was many more months before persons might go to their jobs in peace without fear of reprisals to themselves, their homes, and their families. The life of surrounding communities was torn and disrupted. All is not entirely calm, even today. And the recent decision of the National Labor Relations Board has reawakened animosities which had been lying dormant in the slumber which precedes oblivion.

Before the NLRB's decision can be properly understood it is necessary to consider the sequence of events which led to the violation of the peace of Kohler Village, and to pursue the tortuous occurrences which followed. When we have done that we shall undertake a careful examination of the decision.

On April 17, 1952, the leaders of the Kohler Workers Association (KWA) a small union of Kohler employees, voted to affiliate with the United Automobile Workers of America (UAW). This decision, unlike others made by the leaders, was kept secret, "because," as one of the KWA leaders testified under oath before the McClellan Committee, "we wanted to be sure the affiliation went through a lot of people who were still sympathetic with the KWA and the company . . . so we expunged this from the record so it wouldn't go in the paper." Ten days later, however, the proposition of affiliation with the UAW was put up to the membership. With time for little reflection on the issue, the membership approved the affiliation. Not quite two months later, in an NLRB-conducted election held on June 10-11, 1952, Local

833 of the UAW was selected as bargaining representative by a slight majority of the Kohler employees participating in the election, receiving 52.6 per cent of the votes cast. The NLRB thereupon certified Local 833 as the exclusive representative of Kohler employees.

Upon request of Local 833, the Kohler management entered into negotiations which continued from August of 1952 to February of 1953 before the parties could come to a mutually acceptable agreement. That agreement, scheduled to terminate on March 1, 1954, was hailed by the union's leaders as "a real victory." They estimated its wage gains, including fringe benefits, at eighteen cents per hour. Moreover, the contract contained a quarterly wage-reopening provision which the union soon utilized.

At the earliest possible date, May 23, 1953, the union demanded an additional increase of fourteen cents an hour. It finally settled for three cents. Later, in October of 1953, the company began compiling data on the incentive earnings of its employees pursuant to a request by the union. The union took the position that there were substantial inequities in the system of payment of incentive earnings. Although disagreeing that there were such inequities, and feeling rather convinced that the union was merely looking for the bitterest possible source of contention, the Kohler management nevertheless believed that it should go along with the union representatives' request for information in order to demonstrate its good faith. Later, when reviewing the facts to this point, the NLRB found that the Kohler Company "fully met its obligation to bargain in good faith."

With the termination date of the contract coming on March 1, the company began as early as December 12, to invite meetings with the union negotiators in order to form a new contract. Again, on January 15, the management urged an early exchange of contract proposals so that negotiations might not be impaired by the pressure of an imminent expiration date.

Curiously enough, the union leaders seemed to be dragging their feet at this stage. However, contract proposals were exchanged on January 25, and on February 2, negotiations began, with a nine to five schedule on normal workdays. Between February 2 and April 3, the parties had twenty meetings, consuming a total of at least a hundred hours. Agreement was reached on several points, the number of issues was substantially reduced, and, while disagreement persisted on the major points, even there the issues were narrowed.

There was some shadow boxing at this stage of the negotiations, but apparently the union negotiators were mainly responsible. Both the NLRB and its trial examiner found that the company's bargaining representative, Mr. Lyman C. Conger, repeatedly urged that the parties "get down to the meat of this contract." It was only after considerable such prodding, said the NLRB, that the union "reluctantly agreed to turn its attention to the major proposals."

The major issues which divided the parties in the course of the February negotiations, and which continued to divide the parties throughout the dispute, according to the union's principal negotiator, Mr. Robert Burkart, were these: arbitration, union security, seniority, pensions, insurance, general wages, and

a paid lunch period for employees in the company's enamel shop. These were to become known as the "seven major issues." On all the company made one or another concession. This is true even of the union-security issue, upon which the company held deep convictions. It felt, and still feels, that union leaders do not have a right to make union membership a condition of employment, any more than company executives have a right to insist upon non-union membership. Yet the company was willing to go along with checking-off union dues, if voluntarily authorized to do so by the individual employees involved. On the other issues, company concessions were more substantial, but still not substantial enough for the union negotiators. The NLRB trial examiner said: "[The Kohler Co.] maintained its position on the various issues by supporting arguments which were legitimate, and, in the main, reasonable, though they failed in persuasion."

With negotiations pretty well deadlocked, the union proposed on February 25, just a few days before the March 1 termination date, that the 1953 contract be extended for one month. The company counteroffered to extend the contract for a full year, with its quarterly wage reopener. The union having rejected this offer, the company on the next day offered a general increase of three cents an hour, together with such proposals as it had made during the February negotiations on the other issues. These were to include all the agreements thus far reached. The union negotiators declined this offer, too.

On March 2, the company announced to both the union and the employees involved that termination of a government contract on June 30, 1954,

would necessitate ending the employment of the temporary workers in the company's shell department. These employees had been hired originally under the understanding that (1) their employment was contingent upon the government contract and (2) if other jobs were available for them upon termination of the contract they would be transferred to such jobs with seniority dating back to their original time of hiring. The reader should bear this in mind, as well as the fact that the announcement was made before the company could have known that there would be a strike in progress as of the date of the termination of the shell contract.

Between March 3 and March 8, the parties met with government mediators. The result of these meetings was again a stalemate. The union negotiators listed the same seven issues which had stalled negotiations previously, declaring they had reached their "basic" position on them. They were apparently serious about this, for Mr. Burkart even refused the request of the mediators that the parties go over the issues again. In view of the deadlock, the union negotiators said, a strike vote would be taken on March 14. The view of the Kohler negotiators was similar. On March 10, in response to a request from the mediators, they summarized the issues and the company's views, and said that the company had reached its final position. Thus, as of March 10, both parties agreed that they were at loggerheads.

The strike-vote was held on March 14. Of 3344 Kohler employees eligible to vote, only 1253 actually voted. Of these, 1105 voted in favor of striking and 148 against. It should perhaps be noted that a frequent reaction of employees who do not want to

strike, but do not quite dare oppose the union organizers or union leaders openly, is to be absent at at the time a strike vote is taken.

Negotiations were resumed on March 17-19 but were again fruitless. The union representatives declared that further meetings would be a waste of time, and the company negotiators agreed. The meeting of March 19 closed with a blunt suggestion by Mr. Jess Ferrazza of the UAW that the company prepare for a strike.

The parties did not meet again till April 2. On that and the next day discussions were conducted under the pall of an announcement that a strike would be called on April 5. During the meeting of April 2, Mr. Harvey Kitzman, another UAW representative, suggested that the union and the company discuss the matter of company operations during the strike. Mr. Kitzman thought that arrangements could be made for those few who, the union thought, should be allowed to enter during the strike. He offered the kind of "pass" arrangement which the UAW leadership generally tries to obtain in advance when there is to be a strike. This device admits only supervisors, maintenance men, and office workers. Mr. Conger declined the suggestion, saying that the company intended to make its own decision on whether or not to keep the plant open for those of its employees who wanted to work.

Thus ended the pre-strike negotiations.

3. THE STRIKE BEGINS: VIOLENCE AND BARGAINING IN THE SUMMER OF 1954

AT FIVE O'CLOCK on the morning of April 5, when the two thousand tightly ranked pickets blocked the three regular entrances to the Kohler plant, the strike began; and it was clear that the Kohler contract proposals had definitely been rejected. One of the first steps taken by the company that day was an official announcement to all supervisory personnel that the three-cent increase rejected by the union was to go into effect immediately. Work was almost at a standstill; attempts by large numbers of non-striking personnel to enter were rebuffed by the massed pickets—not only that day but every day thereafter for fifty-four days. Hence for almost two months there were only a few employees to enjoy the three-cent increase. But there is no doubt that those at work received the increase instantly, and that it was effective for the rest as of April 5, 1954. Kohler's Bulletin for Supervision under date of April 5, 1954, announced that:

> Effective today (April 5) all employees in the bargaining unit who report for work will receive the three cents per hour wage increase.
>
> Since negotiations with the union have reached an impasse, we are putting this increase into effect.

Repeatedly from April 5 to the end of May, groups of Kohler employees tried to get back to their jobs, but despite all their efforts to breach the massed pickets, they could not force their way in to the plant. Allan Graskamp, president of Local 833, as well as

higher officials of the UAW, such as Emil Mazey, admitted before the McClellan Committee that the mass picketing was designed to prevent nonstrikers from going back to work. Although it is a basic right of every American to work during a strike, Mr. Mazey took the position that "no one has a right to scab despite the law." His view, shared by most of the other union officials, was that workers who do not join in strikes are like traitors to their country—and that they should be treated as such. The Sheriff of Sheboygan County repeatedly refused to exercise his authority, or to do his duty, in aid of the workers who wished to continue at their jobs. The Mayor of Sheboygan failed to protect their homes and family life from vandalism and degrading assaults.*

Both sides were apparently aware that, but for the mass obstructive picketing, large numbers of Kohler employees would report for work. Mr. Conger indeed often expressed the opinion that the UAW's precarious grip upon the loyalty of the Kohler workers was the most important single fact in the case, that the union's insistence upon a compulsory unionism agreement was what really prevented an early agreement, and that there would have been no need for mass picketing if the workers had really wanted to strike. The NLRB's trial examiner recognized these things when he said:

Obviously picketing on the scale and in the manner as here conducted was reasonably calculated to bar, and had the necessary effect of barring, ingress and egress to and from the plant. The Union recognized that this was so; its boastful banner headline in its newspaper on April 8,

*Later, both the mayor and the sheriff were to concede that they had received financial support from the union in their election campaigns.

correctly described the situation: 'SHUT DOWN LIKE A DRUM.' That the Union hoped and intended to keep it so was plain from all the evidence down to the time that the enforcement proceedings, brought by WERB, forced the Union to open its picket lines on May 28.

The trial examiner also concluded from all the evidence that the union's strike strategy committee "turned on and off the type of picketing at will."

The Kohler people moved early for an injunction against the union's obstructive tactics, citing the obvious violation of both state and federal law which those tactics involved. On April 15 the company asked the Wisconsin Employment Relations Board (WERB) to take the steps necessary to restrain the mass picketing. The union did not challenge the charge that its conduct violated state law. Instead, on May 4, the union moved to adjourn the WERB hearing on the ground that it needed time to prepare a suit in federal court to challenge the state agency's jurisdiction. (Incidentally this challenge went all the way to the Supreme Court of the United States, with the Court finally holding that the WERB had jurisdiction to control picket line force and violence.)

During the WERB hearings Mr. Conger announced to the UAW representatives that the company did not intend to tolerate the flagrant invasions of human rights of which the union was guilty. It would not bargain with a gun at its head, and it intended to discharge or deny reinstatement to all strikers who participated in illegal conduct. Mr. Graskamp answered this by saying that "you are going to take everybody back—every striker back." The union was thus put on notice very shortly after the strike began that the company would take a stern view—within its

legal and moral rights—of the union's unlawful violence. The company learned too at this early date that the union intended to insist, as a condition to settling the strike, upon the reinstatement of even strikers guilty of unlawful conduct.

In spite of his indignation, Mr. Conger agreed to an adjournment of the WERB hearing when, pursuant to a request by the WERB, the union promised to keep its picketing within legal bounds. Mr. Conger also agreed to negotiate with the union, and the parties actually met on Friday, May 7, 1954. That meeting produced no results. The union then proposed meetings over the week end. When Mr. Conger declared that he saw no reason to meet before the following Monday, the union negotiators broke off, and resumed the mass picketing the next day. Even the NLRB's trial examiner had considerable difficulty understanding this sequence of events. He said: "What is mystifying about this part of the case is why under all the circumstances the union chose to end the WERB truce by resuming mass picketing."

With the violence growing daily, with community bitterness constantly increasing, and the Kohler employees who wanted to get to their jobs unable to enter the factory, the WERB on May 21 finally issued a comprehensive order against the union's obstructive mass picketing and violence. The following day, May 22, is notable in this chronicle in two ways. First, President Walter Reuther of the UAW visited the Sheboygan strike headquarters. Second, the union leaders officially announced that the WERB order of May 21 was not enforceable and that, in any event, they intended to disregard it. Again, therefore, attempts by large numbers of Kohler employees to

return to work were frustrated.

By May 28, the WERB had had enough. It took its order against illegal violence to court for enforcement. With this final and much delayed resort to the real courts of the land, one phase of the unlawful conduct ended. Under threat of a comprehensive court order, the union leaders promised again to obey the original decree of the WERB. At the same time, persuaded by the judge's suggestion that it credit the promise at least until it was broken, the Kohler management agreed once more to meet with the union leaders and to discuss with them the contract issues which they had already covered so many times.

On and off throughout the month of June, 1954, Mr. Conger and the company's negotiating team met with the union representatives, going over and over all the previous proposals and even considering new issues raised by the union—and this in spite of the fact that acts of violence were being committed by union members and imported international union agents throughout this period. Thus the company continued to compile information on incentive earnings which the union negotiators had been asking for. While the pressure of other problems created by the union made it impossible for the company to deliver the data relevant to the alleged inequities precisely when the union leaders wanted it, there was never any question of ultimate compliance, and Mr. Burkart had agreed that "inequities were a side issue." Moreover, the company came to an agreement with the union during the June negotiations on procedures for dealing after the strike was ended with the striking temporary shell department employees whose jobs were to terminate, as the union knew, on June 30.

On June 24, Mr. Conger again protested the union's violent tactics. As soon as mass picketing was prevented by the injunction, a campaign of vandalism and violence started. A non-striker's telephone might ring at intervals all night. If he picked it up he would hear threats and obscenities. In the morning his car's paint might be ruined by acid, or sugar in his gasoline tank might put the engine out of commission. A "paint bomb" might be hurled through a window of his house and shatter against the wall, ruining rugs and furniture. His livestock might sicken, and investigation would reveal that they had been poisoned. A count placed the number of such incidents at more than four hundred, but the count was limited to those who came forward with affidavits, and it is therefore probably low.

The Kohler employee who dared now to withhold himself from the strike which had originally been voted by a minority of the total labor force was ringed by a terror which engulfed him in sadistic threats and cruelty. Sometimes the terrorism would become blatant, as when the strikers and the "men from Detroit"—the international's organizers sent down by the central UAW—would make a tavern their own special haunt. One non-striker was trapped in such a place and so terribly beaten that he suffered three broken ribs and later contracted pneumonia. But probably more devilish than beatings or the destruction of cherished possessions was the most open of the visible pressures—a device the union called "visiting at home." A man would return from work to find that the way to his house—his own front lawn—had been packed by strikers, strike sympathizers, and the omnipresent "men from Detroit."

Among them would have been gathered as many of his own personal friends and neighbors as possible. Through jeers and catcalls and obscenities, and surrounded by a crowd of the merely curious, he would have to make his way to his front door.

The union leaders thus applied pressures which made the entire community a veritable hell. And all this took place curiously and numbingly outside the law. A man could not retaliate, sue, or even effectively call the police, for those law officers who were not impotent because of political sympathies were restrained by the fear of provoking further violence and causing greater suffering to the community.

Fair play became a mockery in Sheboygan. While the negotiations were going on, violence never slackened. The man who was beaten and suffered three broken ribs in the "union" tavern to which he had unwarily gone was Willard Van Ouerkerk. His age was about fifty, his height was five feet six, and his weight was one hundred and twenty-five pounds. His attacker was one of the "outsiders," a "Detroit man" sent in to "help." His age was twenty-seven, his height was six feet three and a half, and his weight was two hundred and thirty pounds.

Mr. Conger finally announced that because of the violence against Kohler employees and because the negotiations were developing no signs of any disposition on the part of the union to accept the company's proposals, the negotiations would have to be broken off if the violence continued. Jess Ferrazza said: "The trouble hasn't even started yet. We haven't gone into high gear yet but we are just about to do so." Mr. Kitzman said, "I hope you will never go the route of soliciting employees because then the trouble will

start." It was at this time that Mr. Mazey said "No one has a right to scab despite the law." Meetings on June 25 proved futile. Violence and vandalism continuing unabated, on June 29, Mr. Conger broke off negotiations.

The June negotiations play an important part in the NLRB's decision, and for this reason it will be of service to note carefully what the trial examiner had to say of those negotiations:

> Negotiations were carried on almost daily from June 1 to 25. On the surface, at least, substantial progress was made toward reaching an agreement. Burkart testified that during those meetings [the Kohler Co.] made 'the most important concessions' which it had made, and his summary of negotiations of June 20 showed numerous concessions and changes proposed or agreed to on the major issues of seniority, pensions, and insurance, as well as on the other matters. Speaking on the Union's radio program during this period, Burkart similarly acknowledged that improvement had been made in the contract, and Graskamp referred to the Company's apparent bargaining in good faith on major issues. The daily strike bulletins also carried similar comments on the Company's apparent sincere willingness to explore avenues of agreement.

While the Company was thus bargaining in good faith, making many concessions, the union's campaign of terrorism was reaching a new height. At about this time Mr. John Gunaca, together with other thugs imported by the union from Michigan, savagely mauled William Bersch, a sixty-five year old Kohler employee, and his son William Jr. The elder Mr. Bersch was beaten so badly that he had to stay in a hospital for eighteen days. Moreover, he had to return to the hospital seven times after that and in fact never fully recovered his health to the day of

his death. Mr. Gunaca fled to Michigan, where for over four years he was protected by the governor of that state against attempts by Wisconsin authorities to secure his extradition. When he finally returned to Wisconsin to face trial, in 1959, Mr. Gunaca was found guilty of the assault on the Berschs and sentenced to three years. Earlier, Mr. William Vinson of the UAW had been convicted of the assault on Mr. Van Ouerkerk and sentenced to a one to two year term, of which he served thirteen months. These are but two of the hundreds and hundreds of acts of violence, vandalism, obstruction, and harassment which occurred during the summer of 1954 and for the next two years. The interested reader will find a fuller account in parts 21 to 26 of the McClellan Committee's Hearings and in my book, *Power Unlimited: The Corruption of Union Leadership.**

After negotiations were cut off on June 29, the company issued a routine announcement—entirely in accordance with its earlier announcement of March 2 and with the understanding of the union as a result of the June negotiations on the subject—that the employment tenure of the striking temporary shell-department employees was terminated. Shell-department employees who had chosen not to strike were transferred to permanent status in other departments of the plant. The shell contract was exhausted, and there was no more work in the shell department, but there was plenty of work elsewhere in the plant. Therefore, following its past practice and in compliance with an understanding embodied in the 1953 collective agreement, the company made these transfers.

* (N. Y.: Ronald Press, 1959.)

Had the *striking* shell-department employees applied for other work in the plant, the company would undoubtedly have done the same thing for them. This inference cannot be gainsaid, for the company restored hundreds to their jobs during the summer of 1954. In fact, it never did deny reinstatement to any striker who applied, except for ninety or so persons who had been guilty of serious misconduct, and as to them the NLRB upheld the company's position entirely. One more thing: setting aside a single dubious incident which we shall consider later, it is clear from the record that the company took not a single step to induce any one to come to work during the strike. While granting jobs without discrimination to striking applicants, the Kohler Co. never once advertised for or solicited employees during the strike. It did not need to do so. Despite the union's reign of terror, applications for employment were abundant whenever workers could make their way to the employment office. At least a half of these applicants were strikers or former Kohler employees.

As employment at Kohler grew during June and July—and quite possibly because of that fact—the union's campaign of violence and intimidation increased. So much so that the company refused to meet with the union throughout July. Mr. Conger firmly repeated the company's avowal that violence and lawlessness would not be rewarded or encouraged in any way. However, when federal mediators suggested further meetings in August, the Kohler management agreed to meet with the union, and from August 4 to 13 several meetings were held. The seven major issues (arbitration, union security, seniority, pensions, insurance, general wages, and a paid lunch

period in the enamel shop) which had dominated all past negotiations continued to dominate the August meetings. On August 10, the union submitted what it described as significant modifications of its demands on these issues.* Mr. Conger declared that the union's demands were in substance the same as they had previously been. As an example he cited the union's "change" from a standard compulsory union membership clause to a demand for maintenance of membership, together with automatically renewed check-off of union dues from year to year. He was substantially correct on this. The union shop permitted by the Taft-Hartley Act does not differ greatly from the kind of check-off of union dues which the union was asking for on August 10.

On August 13,* in a formal reply to the union's proposal of August 10, the company once more offered what it had offered in previous negotiations, plus of course the concessions it had made from time to time, as for example in the June negotiations. It repeated its position on the seven major issues and went over them carefully with the union on August 13. The problem concerning re-employment of strikers guilty of misconduct was also discussed. On this the union's position was still the same: "everybody was going back to work with full benefit rights and without discipline of any kind." Mr. Kitzman said that the strike could not be settled on the basis of the company's offer, and Mr. Conger said that it could not be settled on the basis of the union's demands. Mr. Graskamp asked whether the company had made its final offer and whether there was any

*The union's letter of Aug. 10 and the company's reply of Aug. 13 are reproduced in Appendices A and B, respectively.

possibility of further concessions. When Mr. Conger repeated that the offer was final, Mr. Graskamp said: "If this is the company's final offer, the hinges on the door are in good working order and you can use them." The Kohler people then left the room.

Although the federal mediators attempted to induce further meetings, the union announced on August 16 that the membership had voted to reject the company's offer of August 13. This fact made further meetings seem useless, but another series of occurrences forced a wider breach between the parties. Starting about August 4—again just as the company renewed negotiations—nonstriking Kohler employees in Sheboygan were subjected to a frightening series of "home demonstrations." Mobs sometimes numbering in the hundreds would congregate at the homes of nonstrikers, heckling them, calling them dirty names, and frightening their wives and children. For the trial examiner they were "disgraceful spectacles of mob proportions, with as many as four hundred, five hundred and even seven hundred persons assembled." Following its firm resolution to refuse to bargain with "a gun at its head," the Kohler management on August 18 declared that it would not meet further with the union representatives until the vicious and unlawful pressures upon the people and the workers of the community ceased. The parties did not meet again in August 1954.

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Thus ended the second stage of the dispute. Despite the union's succession of unlawful strike tactics, its resistance to legal process, and its dishonoring of its repeated promises to desist from its illegal violence,

the company did not completely break off relations. At the barest suggestion of any sincere intent by the union to abandon unlawful violence, Mr. Conger was quick to resume negotiations. He met with the union on May 7, in the midst of the mass picketing, on the basis of a promise (which was not kept) that the coercive picketing would be ended. He met again with the union for almost the whole month of June and engaged in serious negotiations concerning which the union leaders expressed satisfaction, despite the fact that union agents engaged in a succession of brutal assaults in the face of a promise to obey the Wisconsin court's order of May 28 against coercion. On the suggestion of federal mediators, in August, the Kohler management met with the union again. It offered the same contract proposals that it had been making all along, together with such modifications as had been agreed upon in the interim. When the union people stood fast on their earlier demands, and when the home demonstrations reached an intolerable height, the meetings were broken off once more.

4. THE SEPTEMBER NEGOTIATIONS

By September of 1954 it was apparent that the UAW had made a serious and (from the point of view of its members) a very costly error in striking against the Kohler Company. The union learned by then that without large scale violence and mass obstruction it could not shut down the plant, could not keep Kohler employees and other residents of Sheboygan County from applying for work at the factory. And, slowly but surely, the Kohler management's efforts to secure legal protection of its rights and of the rights of em-

ployees who wished to work were bearing fruit; the union's violent interferences were being confronted by the law. Matching the UAW's persistent use of intimidation against those who chose to work, the company with equal persistence pursued its legal remedies.

It was a slow process. The company's losses during the early months of the strike while the union had the plant virtually barricaded were enormous. The personal harm done to those who wished to work during the strike and to their families was shameful. But by the end of August, when specific court orders prohibited the mass picketing and the home demonstrations, things were picking up at Kohler. Employment and production, though not yet up to prestrike levels, were climbing rapidly. Careful observers on both the union and the management side could, and some did, conclude that Kohler was winning the strike.

The union's reaction was typical. When on August 30 the home demonstrations were held by Judge Arold F. Murphy to be a violation of the standing injunction, the UAW changed its tactics again. It began to picket the Kohler employment office in an obstructive and coercive manner. It also took the first steps toward the nationwide boycott of Kohler products by means of which, it publicly threatened, the company could be destroyed.

Under the circumstances, the Kohler management might lawfully and justifiably have continued to refuse to meet further with the union, or it might at least have taken a firmer stand in negotiations; for it would have been economically feasible as well as understandable and lawful for the company to stiffen

its bargaining position. The Kohler management chose, however, neither to decline further meetings with the union nor to withdraw any of the contract offers it had previously made.

After holding that the union's home demonstrations violated the injunction, Judge Murphy gratuitously offered his services as a mediator between the union and the company, saying that he had had successful experience in that role and that, although neither party had to accept his services since he had no legal standing, still he might be able to do "some good." With the background provided by six months of bargaining with the UAW on the stalemated issues, Mr. Conger expressed the opinion that further meetings would be futile. In spite of that feeling, however, Mr. Conger agreed to meet with Judge Murphy, the federal conciliators, and the union negotiators.

Several meetings were held in September. At times all of the parties just mentioned met together; at times Judge Murphy met with one or more members of the union's bargaining team; at times with Kohler negotiators alone. Early in September, after having met with the union negotiators, Judge Murphy suggested to the Kohler negotiators that the strike *might* be settled if they would offer the union "seven cents or even five cents" (including the three cents already granted). All the other issues, he insisted, could be forgotten except the arbitration issue; and even on the latter, he said, the union was prepared to accept a clause limiting arbitration to discharges.

As we shall see, both the NLRB and its trial examiner took the position that these suggestions by Judge Murphy constituted a binding offer by the

union to concede on *all* the other issues if the company would only raise its wage offer to "seven cents or even five cents."

This conclusion is in conflict with the facts. In the first place, Judge Murphy himself stated that the union would continue to insist upon the arbitration of discharges—a proposal which the parties had discussed previously and upon which they had reached an impasse.

In the second place, the record establishes that Judge Murphy had not transmitted accurately to the Kohler negotiators even the wage increase that the union negotiators had hinted that they might accept. Mr. Harvey Kitzman, one of the union negotiators, testified that the union had told Judge Murphy "that we would take seven cents and [an additional] three cents for the skilled trade workers"—not "seven cents or even five cents."

In the third place, Judge Murphy was simply in no position to bind the union in any way, for he was not, and he knew he was not, an authorized union agent. He knew that he was not authoritatively conveying an offer to the company from the union. He knew that what he was doing was the precise contrary: he was seeking to persuade the company to make a higher wage offer than it had made during the whole preceding six months of negotiations with the union, in the hope that such an offer would move the dispute off dead center. These facts emerge from Judge Murphy's testimony before the McClellan Committee. The Committee's Chief Counsel at one point asked the judge whether he had gone to the company "with the understanding . . . that you could speak for the union and perhaps settle the strike." Judge Murphy's

reply indicates his complete understanding that he was only seeking a further concession from the company which, he hoped, might lead ultimately to an agreement. This is his reply to the Chief Counsel's question:

> I had the feeling that there was some chance of my getting an offer from the Kohler Company officials of some increase in wages which I thought would break the log jam or be the important opening wedge to final negotiations.

This testimony was rejected by both the NLRB and the trial examiner. In reaching their conclusion that Judge Murphy was making a binding offer on behalf of the union, the Board and its trial examiner also ignored even more illuminating testimony. Conclusively refuting the finding that he was acting on a specific authorization from the union, Judge Murphy testified that:

> The mere mention of the words 'five cents' was purely my own device, but I said I was sure I was authorized to make the statement because I had confidence that I would be able to sell the idea of five cents to the union. Of course, I could not give anybody any assurance of that.

In the circumstances it is not surprising that the Kohler management was skeptical. Mr. L. L. Smith, Kohler Executive vice president, a man who had participated in some of the previous negotiations with the union, said that he very much doubted whether the judge's opinion was well-founded. The Kohler negotiators were strongly convinced, in particular, that the union would insist that all the strikers be reinstated, even those whom Kohler intended to discharge because of their participation in illegal violence. Contrary to the NLRB's finding, this problem

was not raised for the first time in the September negotiations. It had been raised several times previously, and each time the union negotiators had insisted that every striker would have to be reinstated, even those who had been responsible for the most seriously unlawful conduct. The Kohler people found it difficult to believe, finally, that the union was ready to abandon the firm stand it had taken on the seven major issues which had deadlocked the parties ever since February of 1954.

Later in the month, when the company met, not with Judge Murphy alone, but with him and the union's full negotiating team, including both Mr. Kitzman and Mr. Mazey (the highest official of the UAW who participated in the negotiations), the company's skepticism was confirmed. Judge Murphy opened this meeting by reviewing what he felt were the basic issues separating the parties at that time. His view as expressed then was that "the question of wages, a general wage increase, the question of arbitration, and return of strikers to their jobs were the three basic issues that were keeping the union and the company from reaching a settlement."

But Mr. Mazey took sharp exception to Judge Murphy's opinion. Testifying in the NLRB hearing, Mr. Mazey said:

> I disagreed very sharply with Judge Murphy. I said that the balance of the issues were still in the picture, and that the question of the return of strikers to the job was not an issue, that the Union would insist on every striker being returned to his job without discrimination if a settlement were to be reached with the Company.

When asked what he meant by "the balance of the

issues," Mr. Mazey said he was referring to the "familiar seven issues."

Mr. Smith's skepticism thus proved to be sounder than Judge Murphy's optimism. Although the judge had not been discouraged by the company's remarks concerning the futility of further meetings with the union, and had insisted on further meetings after Mr. Smith questioned the idea that the union would settle for "seven cents or even five cents," he finally understood the difficulty after listening to Mr. Mazey. Mr. Kitzman, who had obviously used the judge as a catspaw to lure a higher offer from the company without committing the union to anything, was present at the last September meeting. He did not demur at Mr. Mazey's final word on the union's position. Judge Murphy asked for no further meetings.

While declining to make the higher wage offer which Judge Murphy solicited, the Kohler negotiators continued to offer to the union in the September negotiations the proposals which had been hammered out during the preceding six months of negotiations. Mr. Conger's uncontroverted testimony suggested that the company was not inflexible even on the wage issue. Although the NLRB and its trial examiner took the position that Mr. Conger had insisted on the three cent increase *or* the old contract, this seems an unreasonable inference when the facts are considered. Mr. Conger testified to the effect that it would have been practically impossible for the company to withdraw the three cent increase, once it had been made, as of course it had been. Thus, in his view, the union should have been and actually was in no doubt that the three cent increase would have remained in effect if the union had accepted the old contract, as the com-

pany repeatedly offered.

The outstanding fact in regard to the September negotiations is, however, that they occurred. In spite of its sincere and hard earned conviction that further meetings were futile, the company did meet and treat with the union at Judge Murphy's request, even though the judge had no official standing and no authority to compel such meetings. Of almost equal significance is the fact that the company at all times during the September negotiations was prepared to enter with the union into the agreement which it had earlier proposed, together with the concessions made in the course of the marathon negotiations in which it had been engaged for the previous six months. It was no more and no less willing to compromise than it had been, despite the fact that in September it was in a much stronger economic position than it had enjoyed at any prior time during the strike.

It may be well to mention at this time that there is nothing in the law which compels either party to make any concessions during collective bargaining, whether directly or at the suggestion of a mediator such as Judge Murphy. Indeed no principle is more clearly established in the law of collective bargaining. The Kohler negotiators' refusal to make the offer suggested by Judge Murphy could therefore in no sense be regarded as unlawful or as a refusal to bargain in good faith. But of this more later.

The final point to note concerning the September negotiations is that if the company's stand was firm, the union's was no less so. It seems probable that the union was expecting its new weapon, the nationwide boycott of Kohler products, to force the company to yield. But this was not to be.

5. THE BOYCOTT, THE CLAYBOAT RIOT, AND CONCLUDING EVENTS

"OBVIOUSLY KOHLER CO. has lost some orders because of the boycott," said Mr. Lucius P. Chase, Kohler's General Counsel, in testifying before the McClellan Committee. He went on to say, however, that the company had not been seriously hurt as of the spring of 1958, although the UAW's nationwide secondary boycott had then been carried on for almost four years. "We believe," he said, "that the losses have been more than offset by other business which we are receiving directly as a result of the stand we have taken. . . . Our company is at least holding its own competitively. National magazines have quoted our competitors to this effect. Our production is the best we have ever had, both in output per man hour and the quality of our product. This comes from the finest work force in our history, mostly veteran employees." The most important thing the company had proved, Mr. Chase thought, was that the American people would support a business which acted on principle:

> We believe we have demonstrated that a company need not succumb to union violence and coercion, but can successfully take a stand for principles in which it believes.

If the boycott failed, it was not for lack of trying. The UAW clearly thought it was going to break Kohler economically. Mr. Donald Rand, UAW international representative in charge of the elaborate boycott machinery, told the *Wall Street Journal* in August of 1956 that he was heading the "most comprehensive boycott ever organized by labor." He thought it no exaggeration to say that the UAW was

"wrecking the company."

The boycott was indeed comprehensively organized. The UAW assigned to it fifteen of its regularly employed international agents; several strikers worked full time on it; and many strikers took part in specific operations. Boycott headquarters operated on an almost military basis, with battle maps and all. Any Kohler customer might be visited in person, reached by phone, or directed or requested through the mail to quit using Kohler products.

Groups of strikers would follow trucks carrying Kohler products to their destinations. There they would picket the trucks, often in a threatening fashion. Frequently the drivers said they were menaced with bodily harm. At times the consignees of Kohler products would also be picketed.

Architects, builders, general contractors, and plumbing contractors in many areas were warned to quit specifying or using Kohler products. For example, Mr. John Fairbairn of Chicago said that his engineering firm was told by a UAW man on March 28, 1957, that it might encounter trouble on its construction jobs if it kept using Kohler products.

Plumbing supply houses in many areas throughout the country were a prime target of the boycott. Sometimes indirectly, sometimes explicitly, their proprietors were warned of serious reprisals unless they quit dealing in Kohler products.

The UAW attempted to induce the Journeyman Plumbers and Steamfitters International Union to adopt a policy of having its members refuse to install Kohler plumbing fixtures. The International refused to do so, but plumbers' local unions in a number of areas complied, their members refusing to work with

Kohler products.

Perhaps the most ominous feature of the boycott lay in the UAW's efforts to induce local, state, and federal governments to refuse to award contracts to Kohler or to use its products in government projects. The UAW bombarded the U.S. Department of Defense with pleas and demands that no military contracts be awarded to Kohler. Through the political pressure long a UAW specialty, union agents induced city councils in many parts of the country to adopt resolutions abjuring the use of Kohler products. Corporation counsel in many of these cities advised that such resolutions were illegal or unconstitutional, so that in most instances they were repealed. But they remained in effect in some.

The UAW has always contended that it was using only permissible and justifiable solicitation and persuasion in seeking to induce people to refuse to use Kohler products. Its publicity always refers to the boycott as a "lawful, primary boycott," not (an unlawful) secondary boycott. But the UAW has been very careful to avoid a court test of the accuracy of such protestations. In the three instances in which victims took the UAW to court on charges of unlawful secondary boycotting, the union avoided a trial by entering into consent decrees (which do not confess guilt but which escape further action at law by involving promises to discontinue the conduct involved).

While Mr. Chase felt that Kohler had gained as much business as it had lost as a result of the boycott, he made no attempt to gloss over the fact that the boycott had done real harm to some of the company's small distributors. He said:

While the boycott in total may have a very slight effect

on the Kohler Co., because we sell in forty-eight states, and what happens in a single market may not be of overwhelming importance to us, that local market may be the entire source of business for one of our distributors, and it is very serious for many, and because it is serious for many, of course, it is for us, too, even though it doesn't affect our overall sales materially.

He also brought the McClellan Committee's attention to the one-sided character of our labor laws, as they have been construed. Had the Kohler Company attempted to induce other firms to refuse to deal with the UAW or to hire Kohler strikers, it would have been held guilty of an unfair labor practice, with extremely serious consequences flowing from such a holding. Yet the UAW was privileged to spread economic harm all over the country, not only to Kohler, but to its entirely innocent distributors and other neutral third parties. The UAW's agent in Washington tried to lead the McClellan Committee to believe that the Kohler Company had actually prevented the employment of some strikers. However, when Chairman McClellan asked whether he was charging that the Kohler Company "has actually been active in trying to prevent strikers from getting jobs?" the UAW's agent replied that "I don't have enough evidence to make such a charge."

The nationwide boycott was started in September of 1954. The following month the UAW began a much more localized, and much more violent, course of interference with Kohler operations. Beginning about October 1, the union undertook to prevent applicants from entering the Kohler employment office. As one witness put it, "persons approaching the employment office had their progress blocked by a

solid mass of pickets, were bumped, shoved, kicked, tripped, threatened, vilified, and spat upon." An obvious violation of the Wisconsin injunction against coercive picketing, the employment office picketing was the target of a contempt action brought by the Wisconsin Employment Relations Board, the agency which the union had promised as far back as May that it would refrain from coercive acts. In May of 1955, the union was adjudged in contempt. The judge found Local 833 of the UAW and sixteen individuals guilty of contempt, assessed fines against them and sent one to jail.

In spite of the nationwide boycott and the unlawful employment office picketing, the Kohler management met with the union in November. Mr. Mazey suggested at that time that Kohler submit to arbitration of the strike issues. The meeting broke up when the company rejected the suggestion.

In December of 1954 and January of 1955, the company was faced with a decision involving certain strikers who were tenants of the American Club and two others who were leasing farm homes from the Kohler Company. No thought had been given to evicting the American Club tenants merely because they were on strike. In fact they occupied rooms there without interference for many months after the strike. However, when the Club management informed the company late in 1954 that there was a shortage of rooms, the strikers were asked to leave. All but two left without objection. The two who insisted upon remaining were firmly but gently evicted. No violence was used, and the two were given due notice of the company's need for the rooms they were occupying.

They left when the Club management told them that the rooms they had been occupying would be double locked against them.

The two strikers who had been occupying company owned homes under leases were allowed several extensions, at their request. One of these lessees was still occupying the home at the time of the NLRB hearing. The other left after termination of his extension, which had been granted on the understanding that he would surrender the premises in six months.

On January 4, 1955, Kohler met with the union negotiators in Chicago, with the parties, in the words of the NLRB's trial examiner, "covering the seven major issues without result save to agree that they were the points in dispute." These were of course the same seven issues upon which the parties had been deadlocked since February of 1954. At this point in his report the trial examiner seemed to understand what was really keeping the parties from a strike settlement. As we shall see, at other points the trial examiner, like the NLRB after him, took another view of the facts.

On February 8, 1955, the NLRB hearings began. They were to continue on and off for more than two years, compiling a record of over twenty thousand pages. Mr. Herbert V. Kohler, president of the company, was the main witness in the first sessions, which lasted for two days. One of the features of his appearance was an announcement that the company intended to deny reinstatement to all strikers guilty of unlawful conduct. On February 25, the UAW asked for a list of the strikers who were to be denied reinstatement and asserted a right to negotiate with the company on the issue. Responding to this request on

March 1, the company submitted to the union a list of strikers to whom re-employment was being denied. On the same day the company directly discharged the same strikers. As an example of the trial examiner's peculiar way of putting the facts of the case, here is how he writes up the two events just mentioned:

> On March 1, without notice to the Union, [the company] discharged ninety-one strikers 'because of misconduct in connection with the strike.' On the same date, [the company] wrote the Union, acknowledging the letter of February 25, and informed the Union that ninety-one strikers whose names were listed would not be re-employed.

Even though his own adjacent sentences show that the company gave the union notice, he sees fit to say that it did not.

The parties' next meeting also was in Chicago, on April 21. With both sides stating that they had not changed their positions at all, there was little discussion of the issues. Mr. Mazey made the remark that with the discharge of ninety strikers there were now ninety-seven issues rather than the seven which had deadlocked the parties since the beginning.

The now almost legendary clayboat riot occurred on July 5, 1955. A ship with clay imported by Kohler from Cornwall, England, docked at Sheboygan scheduled to unload on July 5. The UAW has, as usual, disclaimed any responsibility for the riot which occurred that day and prevented unloading the boat. But the facts indicate clearly that the union was responsible for the large crowd which gathered, for the picketing which physically obstructed the unloading operations, and for the damage done to the unloading equipment of the Buteyn Brothers, the small firm which undertook to perform the unloading operation for the Kohler Company.

Thus Mr. Robert Treuer, an international representative of the UAW, admitted that it was his intention in a radio broadcast "to invite Kohler strikers and others down to the dock when this clayboat came in." Other witnesses testified that the union had engaged in a telephone campaign as a means of amassing the great crowd that gathered. A number of disinterested witnesses swore that Mr. Donald Rand (the same person who, as chief of the nationwide boycott, expressed the opinion that it would "wreck the company") was in charge for the union at the Sheboygan docks. Mr. Rand denied that he was anything more than an interested spectator. But even the McClellan Committee's Chief Counsel, Mr. Robert F. Kennedy, no enemy of the UAW, found this hard to believe. At the hearings he said to Mr. Rand:

> You were there at seven o'clock in the morning at the arrival of the equipment, at eleven o'clock in the morning at the arrival of the crane and where all the damage was done, and six o'clock at night when they came to try to pick up their equipment. . . . You were there three times and three incidents occurred.

Mr. Rand continued to deny that he bore any responsibility for the unlawful violence which occurred that day. The equipment of the Buteyns, small contractors merely trying in good faith to carry out their obligations to an old customer, sustained six to seven thousand dollars worth of damage, including injury to five engines because of insertion of "some foreign material." Insurance covered only part of the cost. Tom Shields, the Kohler Company's construction manager, was severely beaten. Other people were molested. The police chief testified before the McClellan Committee that the "entire area was out of

control—beyond reach of normal law and order."

Although put on notice by the Kohler management that the City of Sheboygan would be liable in damages if it did not provide the protection necessary to get the clay boat unloaded, the Mayor of Sheboygan, Mr. Rudolph J. Ploetz, continued to be more interested in supporting the strikers' obstruction than in carrying out his duties as Mayor and restoring order. The City of Sheboygan was later found guilty of a dereliction of its duty and ordered to pay damages; but the Kohler Company suffered an immediate defeat. The clay boat left the Sheboygan docks for Milwaukee. There too, however, the city authorities found it less dangerous to surrender to union pressure than to carry out their municipal duties. Like the citizens of Sheboygan, the taxpayers of Milwaukee later had to pay thousands of dollars for this dereliction on the part of its administration. And Kohler still did not have its clay. It could find no port nearer than Montreal which would resist union pressure. From Montreal the clay was shipped by rail to Kohler.

Despite the long catalogue of disastrous experiences, the Kohler management continued to meet with the union, whenever requested. There were unproductive meetings on July 27-29 and again on August 1-2, 1955. On the latter date, Kohler offered the union an increase of five cents per hour for all incentive workers and ten cents per hour for all non-incentive workers, together with various other proposals. The union asked for increases of ten cents and fifteen cents, respectively, as well as reinstatement of all strikers, even those guilty of misconduct. The next day, August 3, the union held a mass meet-

ing during which, it reported to Kohler, the membership rejected the company's strike settlement proposals. Thereupon the company put into effect the increase which it had offered to the union and which the membership had rejected, notifying the union of this action on the same day.

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The events of August 1955 are the last ones of substantial significance in the dispute betweeen the Kohler Company and the UAW. The nationwide boycott continued for years after that, with some traces evident even up to 1960. Moreover, hundreds of acts of vandalism against nonstrikers and their homes and other property occurred after August 1955. But no conduct of the company after that date was considered of substantial legal significance by either the NLRB or its trial examiner, and that fact provides the basis for drawing this portion of the chronicle to a close with the events of August.

The report of the NLRB's trial examiner and the decision of the NLRB itself are the items to which we now turn. If the facts and the conclusions drawn from those facts seemed to present a different aspect to the NLRB and its trial examiner from the aspect they have in this account, the reader will have to decide for himself, on the basis of the recorded evidence, where the truth lies. Fortunately, the legal issues raise no great problem, even for the nonlegal reader. The applicable law is fairly simple, and with few exceptions there is no dispute about what the applicable law is. The big issues in this case involve the facts, and what the facts mean. As to those, the intelligent reader is competent to judge.

PART II

THE NLRB DECISION

6. HIGHLIGHTS OF THE DECISION

ON AUGUST 26, 1960, more than six years after the UAW had first charged Kohler with unfair practices and after two years of hearings before its trial examiner, the NLRB handed down its decision. While condemning the union's violence and refusing to uphold some of its charges against the company, the Board's decision in its main thrust amounts to a serious blow to the Kohler Company and a deadly one to a large number of the persons who applied for and accepted jobs which the strikers had vacated.

The Board ruled that the company had bargained lawfully in good faith up to the date of the strike. Therefore the strike could not be held to have been *caused* by an unfair practice. Instead, the Board held, the strike was in the beginning simply the result of a lawful economic dispute—an "economic" rather than an "unfair labor practice" strike, in the more technical language of labor law. But after the strike began, according to the Board, the company did not continue to bargain in good faith, and thus the strike was converted to an "unfair labor practice" strike and prolonged as such. This alleged conversion and prolongation of the strike brought into play a set of rules carrying serious consequences for the company and the striker-replacements.

The law specifically declares that employers and unions must bargain in good faith. It declares equally specifically, however, that neither party is under any obligation to make a concession or come to an agreement with the other. In short, good-faith bargaining may result in an impasse, with the parties failing to come to an agreement. At such a point, the union is free to call a strike, and the employer is free to attempt to carry on his business by offering employment to anyone who wishes to work, whether previously employed or a new applicant. If, after the employer has hired new workers on a permanent basis, the strikers apply for reinstatement, the employer is under no obligation to restore the strikers to their jobs. Under the law as it has developed, the NLRB is explicitly denied the authority to compel any employer to take back "economic" strikers whose jobs have been filled. The striker-replacements are entitled to keep those jobs.

Exactly the converse is true when a strike has been caused or prolonged by employer unfair labor practices. Then the position of the striker-replacements is precarious, and the position of the strikers is secure. In an unfair-practice strike, the strikers are entitled to have their jobs back upon application for reinstatement. If it is necessary for the employer to discharge the replacements in order to provide jobs for the strikers, he must do so.

Thus, when the NLRB held that the Kohler Company failed to bargain in good faith after the strike began—and that this failure prolonged the strike—the consequence was that the strikers were entitled to get their jobs back, upon application. The further consequence was that Kohler had to discharge as

many replacements as would be necessary in order to supply jobs to strikers who actually applied for reinstatement. No one could tell, when the decision was finally handed down some six years after the strike began, how many strikers would apply for reinstatement. A large number of the prestrike Kohler employees abandoned the strike shortly after it started—if indeed they could ever be said to have taken a voluntary part in the strike at all. These were people who very promptly went back to work. Hundreds of others would not be applying for reinstatement for a number of reasons—death, retirement, removal from the area, jobs elsewhere, and so on. Still, while making full allowance for all such contingencies, it was a certainty at the time of the decision that there would be hundreds of applications for re-employment from strikers who would want to return to Kohler—possibly more than a thousand. Hundreds of the persons who had braved the picket lines and suffered the continued intimidation of the UAW might have to be let go in order to provide jobs for the strikers who had left.

As we shall see in the next chapter, there is much to question and much to doubt in the NLRB's decision that the Kohler Company failed to bargain in good faith after the strike began. It is even more doubtful that the Kohler Company was in any rational sense responsible for prolonging the strike. Therefore, there is reason to believe that the NLRB's decision will be reversed in the appeal which has been filed in federal court. But the present rules are such that the employer cannot in a case of this kind put off reinstating the strikers while waiting for a decision from the appellate court. For if the

decision of that court affirms the NLRB, the employer will have to give back pay to the strikers for the whole period between their application for reinstatement and the actual date when they are given jobs. At $18 per day for 1500 strikers, the cost to the Kohler Company would come to $135,000 per week or over $8,000,000 per year. Few employers can afford such a risk, especially since it often takes as much as two years for a court to reach a decision on the validity of an NLRB order.

Hence, even though the NLRB decision may ultimately be reversed, in a case of this kind the union and the Board win, although they are legally in the wrong, while the employer and the striker-replacements lose, although *they* are legally in the right. Herein lies one of the most serious injustices of current labor policy and law. Those who wonder why it is that employers do not more stoutly resist arrogant union demands will find part of the reason in these circumstances. The ultimate situation has been predetermined so that it is often a case of heads the union wins and tails the employer loses.

While the decision on responsibility for having prolonged the strike was the most serious of the NLRB rulings against the Kohler Company, there were others. The Board held that the company had violated the National Labor Relations Act also in "discharging" the temporary shell department employees who had gone out on strike; in "discharging" one Alex Dottei; in making inquiries concerning strikers and their leaders during the strike; in attempting, through a supervisor, to induce one of the strikers to return to work; in attempting, again through a supervisor, to induce a union agent to

forego prosecuting certain grievances; and, finally, in "evicting" certain of the strikers from the American Club and from company-owned farm homes. We shall consider these rulings in detail in a subsequent chapter.

As mentioned earlier, the decision did not go entirely against the company. While the UAW insisted that the Kohler Company broke the law when it discharged ninety-one strikers involved in violent and obstructive acts, the NLRB held that the company actually could have fired every single striker who participated in the mass picketing, the employment office picketing, and the home demonstrations. Certainly, the Board held, the Kohler Company was well within its rights in selecting some for discharge. Besides holding, contrary to the union's charge, that the company had bargained in good faith prior to the strike, the Board also held that the company had a legal excuse for refusing to meet with the union from April 5 to May 28, from June 29 to August 5, and from August 18 to September 1 (1954)—during the periods in which union violence went to extreme lengths. Finally, the Board dismissed charges that in nineteen individual cases the company had engaged in unlawful interrogation of strikers who returned to work.

Although we shall not be dealing further with these dismissed charges, at least not in any direct or systematic way, the Board's view of the company's right to discharge the strikers who had participated in misconduct calls for one observation. The upshot of the whole NLRB decision is that because the Kohler Company did not choose to discharge *all* the strikers—even though it might lawfully have done

so—it is compelled to restore them to employment, even if it should be at the expense of the striker-replacements who braved the picket line.

Summed up, the decision must be characterized, not merely as a defeat for the company, but as an injustice to hundreds of human beings. Individuals will bear the penalty. In not a single instance was the company ordered to give a striker any back pay. There was no money penalty attached to any of the rulings against the Kohler Company. On the other hand, hundreds of men who went to work at Kohler will lose their jobs. Furthermore, those still working there will find themselves under the jurisdiction of a union which has been found guilty of unlawful obstruction and grievous violence in innumerable instances, but which has nevertheless been restored to its position as bargaining representative. In a word, the NLRB has rewarded the guilty and punished the innocent.

The accuracy, justice, and legal validity of the NLRB's decision are the subject of the following chapters.

7. THE NLRB ON WHAT PROLONGED THE STRIKE

THE LEGAL DOCTRINE on strike prolongation is easily stated. An economic strike is converted to an unfair-practice strike and prolonged as such if two facts exist:

1. The employer commits unfair labor practices, *and*
2. The evidence discloses to a fair and rational mind that but for those unfair practices the strike would be settled.

It is not enough, in other words, that the employer commits unfair practices after the strike begins. Those unfair practices must *cause* the prolongation of the strike. If the strike would continue anyway, naturally the unfair practices cannot be held responsible for prolonging it. Moreover, prolongation does not exist where a union shows by its actions that it is waiving intervening unfair practices and continuing to negotiate on the issues which brought about the strike in the first place. In short, there must be both unfair practices and a causal relation between them and the continuation of the strike.

Ostensibly applying these rules, the NLRB held that the following items were unfair practices, and that they prolonged the strike:

1. The three-cent increase granted on April 5, the day the strike began.
2. The company's delay or failure to supply certain wage information requested by the union.
3. The "discharge" of the striking temporary shell-department employees.
4. The company's attitude in the September negotiations with Judge Murphy and the union.
5. The increase granted on August 5, 1955.
6. The company's offer to cancel the discharge of Alex Dottei.

1. The Three-Cent Increase

The NLRB's ruling that the granting of the three-cent increase on April 5, 1954,* constituted an unfair labor practice is based upon the *assumption* that the company at the same time kept in effect the provi-

*There is a question concerning the actual date of the increase, but it is irrelevant to the present discussion. See Chapter 10.

sions of the old (1953) contract with the UAW. Giving the nonstriking employees both the three-cent increase and the old contract, the Board said, was more than the company had offered the union. Negotiations reached an impasse, the Board said, because the company's final offer to the union before the strike had been a three-cent increase with the *new* 1954 proposals—*or* the old (1953) contract unchanged for another year *without* any wage increase. Had the company offered the union what it gave the nonstrikers, the Board concluded, the union would have accepted it and the strike would then have ended forthwith.

The law on the subject is that an employer may give to employees directly any increase which has been offered to and rejected by the union. Further, an employer may even give employees directly a wage increase which has not previously been offered the union—if in the process the employer has not disparaged the union, or undermined it in the eyes of the employees, or otherwise made a mockery of the collective-bargaining principle.

None of these rules justified the three-cent increase, in the Board's opinion. Although the parties continued bargaining for more than a year after the increase was granted, said the Board, Kohler had disparaged the union and flouted the collective bargaining process by both the increase and its subsequent conduct. The Board's position is perhaps most comprehensively put in this statement:

> In the instant case . . . the [company] did not first offer to or discuss with the Union that wage proposal it ultimately placed in effect, namely, the 1953 contract plus the three-cent wage increase. Nor did it suggest to the

employees that it had discussed this matter with the Union or that the Union had rejected it. Instead, it placed the increase in effect without notice and without discussion or negotiation with the Union, thereafter denied it the opportunity of accepting the 1953 contract plus a three-cent wage increase, and at the same time frequently proclaimed that it would not reward the Union for having struck. Moreover, the [company] did not treat this wage increase as an allowance of the Union demands, but rather, steadfastly refused to offer the Union that same wage proposal already placed in effect, and in September bluntly stated that if the Union wanted to renew the old arbitration clause, it could do so only on the condition that it take the entire old contract, without the three-cent raise.

There are a great many errors in that reading of the facts and of the evidence in the case, but we need concern ourselves only with the basic flaws. The most fundamental of these is the Board's assumption that the company gave the nonstrikers both the three-cent increase and the 1953 contract. This is an error that no person conversant with labor relations should make. The simple fact is that *the company could not have given the nonstrikers the 1953 contract.*

In the nature of things a collective-bargaining agreement can only exist when there are the two parties—management and union—to sign it and to administer it. This is especially true of collective agreements which provide for arbitration—as did the 1953 contract. Both parties in such agreements must participate in the process leading up to arbitration, and in the selection of an arbitrator. Once this is understood, it becomes evident that the company did *not* give to employees directly that which it denied to the union; it did not, because it physically could not give the employees the 1953 contract. And that being true, the

Board's holding that the Kohler Company committed an unfair practice in giving the three-cent increase cannot be valid.

Statements made and quoted in the Board's own opinion, although apparently considered by the Board to support its conclusion, establish that Kohler did not continue the old contract in effect. Thus the Board quotes the company publication, *People,* as having announced to the employees on March 10 (after the 1953 contract had expired), "that the check-off authorizations expired with the contract and were no longer recognized." The company did assure the employees, on March 10, that the pension and insurance plans would continue unchanged. But for a company which had had pension and insurance plans for fifty years before the union came upon the scene, there is nothing in that announcement to surprise anyone. The company said to the union negotiators *before the strike* that it intended after March 1—and until a new contract was formed—to "continue the past practice and operate along the lines of the expiring contract." But here again there is a vast difference between continuing "along the lines" of a contract and operating under a contract.

A phase in the handling of this issue which has a most singular air of duplicity is the way in which the Board introduced a further quotation from the March 10 issue of *People.* The quotation soon to follow was prefaced by the Board with these words: "With respect to the *other contract provisions,* [the company] said . . ." This would suggest that the quotation was intended to assure the employees that the 1953 contract would remain in effect, when, as even a cursory reading would suggest, such was not its purport at all.

On the contrary, this quotation calls attention to the fact that many employee rights and privileges existed long before the union came to Kohler and explicitly reminds the employees that *the contract has terminated*:

> Some employees seem to be of the opinion, either through confusion or misrepresentation, that the Company now may take away rights and privileges that they have enjoyed over the past years (many of which were in effect long before there ever was a contract with this union). Such is not the case. *While there is no contract in effect at this time,* many times in the past the company has operated without a contract. It plans no radical changes in its policies which have been carefully worked out over the years *even though no contract exists.* [Italics supplied]

For the Board to cite the foregoing items as *support* of its holding that Kohler continued the old contract in effect during the strike is obviously impermissible. The company could not—by itself—without a union to participate in the agreement—keep the old contract in effect; and all the evidence just cited is firm proof that the company understood that fact. Thus the Board erred in holding that the company gave *both* the old contract and the three-cent increase to the employees, and that error of fact led to the legal error of holding the company guilty of an unfair practice in granting the three-cent increase which the union had rejected.

Besides the error of holding that the company gave the nonstrikers both the three-cent increase and the old contract, the Board and its trial examiner gave the evidence a highly questionable interpretation when they concluded that the Kohler Company in the September negotiations insisted on withdrawing

the three-cent increase as a condition of a renewal of the 1953 contract. In the first place, as a simple matter of fact, the Kohler negotiators never withdrew their offer to renew the old contract; it was the union which had found the greatest fault with that contract, insisting upon changes in forty-eight of its seventy provisions. The old contract was available at all times to the union after April 5, 1954.

Moreover, the Kohler negotiators, Mr. Conger and Mr. Hammer, testified that they had taken the position in the September negotiations that the union could have had both the old contract and the three-cent increase which had already been granted. When the union negotiators asked whether the three-cent increase would remain in effect if the union accepted the old contract, Mr. Conger replied, according to his own testimony, that as the increase had already been put in effect there was no way of revoking it.

Such testimony must be credited because its credibility is inherent: as a practical matter it would have been impossible for the company to revoke such an increase, once granted. Yet instead of Mr. Conger's statement the trial examiner and the NLRB chose to credit the inherently implausible union testimony to the effect that the company would have revoked the three-cent increase if the union accepted the old contract.

The Board's characterization of the three-cent increase as an unfair practice depends on two assumptions: (1) that the old contract accompanied the increase; and (2) that the company never offered the union both the old contract and the increase. Both assumptions have failed: the first as being contrary to fact, and the second as being unsupported by convinc-

ing evidence in the record. As to the second, indeed, the convincing evidence is to the contrary.

There is a further weakness in the Board's position. According to the Board, the three-cent increase *caused* the strike to continue. But here too all the evidence is to the contrary. Throughout the summer of 1954 the negotiations continued. When they broke off, as they did several times, it was never because of the three-cent increase; indeed, that matter was never even mentioned. Two other reasons were always cited: (1) the Kohler position that it would not bargain with a gun at its head, i.e., while the union was engaging in extremely violent tactics; and (2) that an impasse was reached on the same seven major issues which produced the deadlock as early as February 1954.

While the record is full of evidence to this effect, perhaps the most convincing such item is the union's own letter of August 10, 1954, setting forth, in the form of demands, the basis on which the union would settle the strike.* Listed in that letter are the seven major issues. The letter does not even mention the three-cent increase, let alone provide a basis for the Board's conclusion that the strike was continuing because that increase had been granted.

Thus, even assuming that the three-cent increase had never been offered the union before it was given directly to the employees, no reasonable mind could fairly conclude that it prolonged the strike. The union continued the strike because the company refused to yield on the seven major issues, not because of the three-cent increase.

*For the full text of the union's letter of August 10, see Appendix A.

This is established finally by the fact that the union's first charges against the company, filed on July 12, 1954, made no mention of the three-cent increase as an unfair practice. The union knew about the increase as early as April 8, 1954. Its failure to charge the increase as an unfair practice on July 12 should convince even the most reluctant mind that the increase played no role in prolonging the strike. If the union did not know of the increase till July 15, as it once weakly protested, the Board's view that the increase prolonged the strike from June 1 onward becomes even more vulnerable. For it is impossible that a fact unknown to the union could have induced it to continue a strike which it would otherwise have ended.

2. The Failure To Supply Wage Information

The Board also held that the Kohler Company committed an unfair practice which prolonged the strike by failing to supply the union with information relating to the wages of the company's incentive workers. As early as January 20, 1954, the union requested in writing that the earnings of each division be forwarded to it as they were gathered. The information was needed, said the union, in order to promote informed bargaining on alleged inequities in the company's incentive-pay methods.

While the Board's explanation of its reasoning on this issue is extremely complicated and confusing, it seems to proceed along these lines: The law requires employers to furnish wage information with reasonable promptness when such information is required for intelligent bargaining; with respect to a part of the wage information, Kohler did not provide it promptly enough; with respect to the re-

mainder, the company did not provide it at all—and this complete failure was traceable to the company's position that the information was not available or necessary for bargaining. Furthermore, the Board concluded, these unfair practices "contributed to the prolongation of the strike."

The Board's only attempt to support this conclusion is in the following quotation of one of the trial examiner's findings:

> The trial examiner found that the average incentive earning information requested was both appropriate and necessary to the performance of the Union function, and that the inequities question, although not among the seven major issues on which the contract negotiations foundered, was still a live issue, and one which, if resolved, could well have formed the foundation for reaching further agreements. . . . The Board agrees . . .

This statement recognizes that the negotiations foundered on the seven major issues. It also recognizes that the wage-information had nothing to do with those issues. The natural conclusion to be drawn from those admitted facts would be that neither a delay in supplying nor even an outright refusal to supply the wage-information could have prolonged the strike. But apparently the Board's determination to hold that Kohler committed unfair practices and that those unfair practices prolonged the strike blinded it to the obvious conclusion. And it therefore proceeded to pile speculation upon speculation in order to make out some kind of a case for the holding that a *minor delay* in supplying *a part* of the wage information prolonged the strike.

The facts in the record relevant to this matter are clear. They are: *first,* there was only a minor delay,

and that a completely justifiable one; *second,* Kohler never did refuse to supply any part of the information; *third,* the union agreed that the alleged inequities were only a "side issue"; *fourth,* so unimportant did the union negotiators consider the issue that they did not get around to examining the wage-information which the company actually supplied; *fifth,* the union negotiators agreed that settlement of the issue would best be postponed till the strike was ended and the men were back at work.

The bulk of the wage information sought by the union pertained to the company's enamelware division. As a matter of fact, the trial examiner himself found—and the Board agreed with him—that the company's "delay, prior to June 11, in delivering the enamelware earnings may well be excused on the grounds that there was no apparent urgency about supplying the enamelware information." Throughout June the company's negotiators were inundated with work. There were not only the daily negotiations with the union in June, but also the labor, vexation, and harassment which the union's unceasing campaign of violence created.

Thus, although the wage information was on Mr. Conger's desk on June 14, he simply could not get to it. And, as he testified, he felt that he should check it before transmitting it to the union. The Board rejected this explanation, saying that Mr. Conger should have transmitted the information first and checked it later. But it is not yet the Board's function, nor does it have the authority, to make such a business decision. From June 28 to August 5, by the Board's own holding, the company's duty to bargain with the union was suspended, owing to

the union's violent and unlawful conduct. On August 5, when the parties next met, Mr. Conger presented the enamelware division wage-information. To call this an unreasonable delay is unreasonable in the circumstances confronting the Kohler management.

As to the wage-information pertaining to the company's other divisions—amounting to thirty-five per cent of the total—although the company never did supply it, this failure was the result, not of any refusal, but of an agreement between the company and the union that the inequities issue could best be settled when the strike ended. In support of its contention that the company refused to supply the remaining thirty-five per cent, the Board quoted President Herbert V. Kohler's letter of August 13, 1954. That letter said, among other things, that:

> In the contract last year the company agreed to a procedure intended to reduce the number of existing wage classifications and eliminate any inequities. This procedure did not function due to the union's insistence on another general wage increase thinly disguised as an inequity adjustment and on the union's insistence that the company compile data not available and not necessary for bargaining.*

Both the trial examiner and the Board read the concluding statement as a refusal by the Kohler president to supply the wage information which the union was currently seeking in the summer of 1954. How they could so construe it is extremely difficult to understand. For one thing, the whole paragraph obviously refers to experience in the preceding year, under the 1953 contract—not to the 1954 negotiations. For another, only a few days before this letter was written the company had actually supplied the union with

*For the full text of this letter, see Appendix B.

the bulk of the wage information involved in the 1954 negotiations. It would have been senseless for the company to refuse to supply the very information, the bulk of which it had in fact just supplied.

Finally, the "data" to which reference is made in the letter did not relate to wage information at all. As the unrebutted testimony of Kohler witnesses shows, that "data"—sought by the unions in 1953—involved written *job descriptions,* not wage information. The company had *agreed* to supply wage information early in 1954 when the union requested it. It failed to supply job descriptions, because there were no such things.

The final proof that the Board and its trial examiner misconstrued the August 10 letter as a refusal to supply the remaining wage information comes from Mr. Robert Burkart, the union's chief negotiator. Questioned directly by Mr. Conger at the NLRB hearing, Mr. Burkart said: "No, I have got to admit that, Mr. Conger, you never said that you wouldn't give them [the wage information] to us."

The remaining thirty-five per cent of the wage information sought by the union was not furnished, according to the uncontroverted testimony of Mr. Conger, because the company and the union agreed in August to handle the matter of wage inequities after the strike was ended. Indeed this testimony was corroborated by Mr. Burkart. Answering the observation that "you did not list the adjustment of inequities in the seven points you mentioned," Mr. Burkart said:

> No, we were not aware of the fact that there was any disagreement on this point. We felt it was impossible to adjust inequities, when the plant was not operating,

and we are not there on the scene, and we figured that would be adjusted by continuing to negotiate on inequities after we returned into the plant again, as we had attempted to do before the strike occurred. It is not a point in dispute so far as the settlement of the strike is concerned at the present time.

Needless to say, the NLRB did not quote this testimony. To have done so would have been to expose the error of the Board's finding that the wage-information matter had prolonged the strike.

The Board did, however, make much of a vague statement by Mr. Burkart to the effect that the union had asked for the wage information after the August meetings. According to the Board, that subsequent request established the union's continued interest in the wage information. But this builds a large conclusion on a very small basis. Mr. Burkart had been asked when the last time was that the union "made any reference" to the wage information. His reply was —"I would say in the month of September." This falls far short of convincing testimony: among other things it lacks definite dates, and it is obviously inconsistent with his testimony that inequities were "not a point in dispute."

Perhaps the most persuasive indication that the wage-information matter could have had nothing to do with prolonging the strike is to be found in the union negotiators' neglect of the information with which the company did in fact provide them. The bulk of the information sought by the union—that pertaining to the enamelware division—was provided by the company early in August, 1954. As of June 10, 1955, Mr. Burkart had not even looked at it. He testified that day at the NLRB hearing as follows:

We were certainly very busy with other matters, and it was not necessary for me at that time to start getting into this particular problem. I was aware that such a document was in the possession of the local union, but I was busy on other affairs and did not get into that particular question. There was no bargaining on the matter of inequities in the offing at that time. We were busy with the company on the seven major points in the contract, so this then was more or less of a side issue.

Needless to say, this too was testimony to which the NLRB made no reference in its decision. But it is now before the reader, and he may make an informed judgment on the question whether the wage-information affair—admittedly a side issue according to the union spokesman himself—prolonged the strike.

3. The Striking Shell Department Employees

The NLRB gave scant attention to the question of the legality of the termination of the employment of the striking shell department employees. In fact, rather than explain how the termination was an unfair labor practice, the Board simply adopted the trial examiner's conclusion that it was; and it similarly avoided the problem of demonstrating a casual relationship between the termination and the prolongation of the strike. This is what the Board said:

> . . . the Board finds, in agreement with the trial examiner, that on or about July 1, in violation of . . . the Act, [the company] discriminatorily discharged the striking shell department employees, . . . for the sole reason that they were on strike, and that the [company] thereafter discriminatorily failed to offer them reinstatement on the same basis as those nonstrikers similarly situated. The Board also finds, in agreement with the trial examiner, that in June [the company] violated . . . the Act by discharging the striking temporary employees and by

transferring the nonstrikers to other departments without notification to and without negotiation or consultation with the Union as their exclusive bargaining representative. The Board also agrees with the trial examiner's finding that these unfair labor practices contributed to the prolonging of the strike. . . . While the Board agrees with the trial examiner that the [company's] discharge of the striking temporary shell department employees and the transfer of nonstriking shell department employees to other departments without prior notification to and without prior negotiation or consultation with the Union in June may not have directly prevented the reaching of a contract agreement in June, such unlawful conduct does further demonstrate the [company's] lack of good faith during the June negotiations.

The facts, already stated generally in Chapter 3, are these. Employment in the shell department was temporary and known by everyone concerned to be tied to the government shell contract. Moreover, by the terms of the 1953 collective agreement between the union and the company, the company reserved the right to transfer or release all temporary employees "whenever there is no work available for them in such temporary department." As early as March 2, not only before the strike but even before anyone knew that there would be a strike, the Kohler Company announced to both the union and the temporary employees that both the shell department contract and their employment would terminate on June 30. Thus it would be correct to say that the employment of the temporary shell department employees was actually terminated on March 2, to be effective as of June 30—indicating as clearly as possible that the shell department employees were not discharged *because* they had gone on strike.

During the June negotiations the parties discussed the shell department employees, with union and company both acting on the assumption that their employment would be formally terminated on June 30, in accordance with the company's March announcement. Thus the union proposed that the shell department employees be given vacation pay even though their jobs were to end before July 1 (the normal eligibility date for vacations); the company agreed to and carried out this proposal (the *striking* shell-department employees had not been working since April 5, of course).

The parties also agreed during the June negotiations that if the company chose to give shell-department employees other jobs within ninety days after they had been laid off, their seniority should date back to their original hiring in the shell department. Although the trial examiner insisted that the company actually did not give such seniority to striking shell-department employees who came back to work later during the strike, that finding is contrary to the direct testimony of the person who was in the best position to know: namely, Kohler Vice President Lyman C. Conger.

On July 1 the company wrote to each of the striking shell-department employees, referring to the understanding that his employment was terminated in accordance with the terms of hire, the collective agreement, and the March notice. The company transferred the *nonstriking* shell-department employees to other jobs in the plant. This transfer was within the company's rights, even as defined in the expired 1953 collective agreement. For that agreement expressly provided that the company might

transfer temporary employees to permanent jobs if it chose to do so, and if it accorded them seniority as of the date of their original hire, which the company did.

Nine of the fifty-three striking shell-department employees abandoned the strike and came back to work. As already mentioned, the trial examiner found that some of these were not given seniority dating back to their original hire. But, again as already mentioned, this finding is contradicted by the direct testimony of the person who knew best what kind of seniority had been given, and hence is unacceptable as a matter of both common sense and law.

Fundamentally the Board and the trial examiner found two unfair practices in regard to the striking shell-department employees. First, they held that those employees were discharged *because* they chose to strike; second, they held that the company was guilty of an unlawful refusal to bargain when it announced the termination of the employment of the striking employees without consulting with the union, either as to the dischargees or as to the non-striking employees whom the company transferred to other jobs.

Enough has already been said to establish that it was simply an error of fact to find that the strikers were discharged *because* they had gone on strike. They were not, properly speaking, discharged at all on July 1. Rather, on that date, their employment terminated in accordance with the full understanding of all the parties involved. That they happened to be on strike at the time made no difference. No one can rationally contend that a person may prolong his employment indefinitely by going on strike.

As to the fact that the company transferred nonstriking shell-department employees to other jobs, this cannot properly be viewed as discrimination against the strikers. Had the strikers shown the same inclination to continue working, they also would have been given other jobs. This inference is established by the fact that the company did actually give jobs to all striking shell-department employees who applied for work later during the strike, as nine did. Finally, the company was empowered by both past practice and the 1953 collective agreement to transfer temporary employees to permanent jobs. So much for the facts.

As to the law, a company has the right to continue operations during a strike, even to the extent of hiring new employees. This being so, it can scarcely be doubted that an employer may give existing and nonstriking employees different jobs during a strike.

The Board and its trial examiner have tried to turn the facts and the law upside down. They have attempted to transform a voluntary cessation of employment by the strikers into a discharge. And they have tried to deprive the Kohler Company of the established right to carry on its business during the strike.

Largely the same is true of the holding that the Kohler Company unlawfully refused to bargain in good faith in failing to notify the union of the pending July 1 termination and in not clearing the "discharge" and the transfer with the union first. The company did in fact notify the union of the pending termination long before the June negotiations. The record is clear on this, and it is therefore impossible to understand how the Board and its trial examiner

could take the position that the Kohler Company "discharged" the striking shell-department employees without giving notice to the union. Not only did the union have notice, but as a matter of fact the union and the company actually bargained and came to important agreements on the subject of the termination during the June negotiations.

Apart from the notice issue, the trial examiner (with the Board's subsequent approval) found that the company did not bargain in good faith with the union during the June negotiations. Because it is very difficult to understand and convey what the trial examiner had in mind here, it is best to present his own words:

> In the discussions concerning the shell department employees no differentiation was made as between strikers and nonstrikers, and [the company] at no time prior to July 1 notified the Union of its intention or plan to differentiate between them with respect to their tenure, status, seniority, or transfer rights. Neither did [the company] notify the Union of the discharges on July 1, of the basis of its selection, of the identities of the dischargees, or of the fact that it was according transfer and seniority privileges to the nonstriking temporaries whom it retained. . . . Nor did [the company] notify the Union of its disparate treatment of striking and nonstriking permanent employees in the shell department. . . . Whether negotiations on the subject would have been successful or unsuccessful, they were a necessary step in performance of [the company's] obligation to bargain with the Union and to avoid unilateral action which would derogate from the Union's status as the bargaining representative of all the employees. Nor was failure necessarily to be expected, since agreement had been reached to the extent that the subject of the temporary employees had been brought into the June negotiations.

All this seems to imply that the company "put one

over" on the union; that the company misled the union into believing that on June 30 the employment of the *nonstrikers* would be terminated, as well as that of the striking shell-department employees. This is a strange position for the trial examiner to take—if indeed we are correct in attributing this position to him. There is nothing in the record, or in common sense, to support the finding that the company deceived the union in this respect. Moreover, to repeat, the company did not "differentiate" in its treatment of strikers and nonstrikers. The nonstrikers chose to continue working; the strikers chose to leave their work. It is as simple as that, and the union had a clear understanding of these realities. Only the trial examiner's strenuous effort to create an unfair practice where none existed could so twist the facts.

So drastically have the Board and its trial examiner confused the issue that a firm restatement of the basic facts is necessary. The union called the strike. Some of the shell-department employees chose to join in the strike; others chose to remain at work. The company acted well within its rights in transferring nonstriking employees to other jobs. The strikers operated well within their rights in staying away from their jobs. The termination date of the jobs held by the striking shell-department employees intervened. Being on strike at the time when their jobs ended could not make those jobs continue. If the strikers wanted to reapply for other jobs, nothing prevented them from doing so. In fact a great number did apply, including some of the shell department workers, and when they did the company put them all back to work.

For the trial examiner to insist that the company should have discussed with the union the employment

termination of the strikers and the job transfer of the nonstrikers was simply absurd. The union could not have let the strikers go back to work without giving up the strike. The only subjects which a discussion of this matter could have covered, therefore, would have been the basic strike issues. But these are the very subjects which engrossed *all* the attention of the parties during the June negotiations.

On the major strike issues the trial examiner himself observed that the June negotiations were fruitful. Moreover, as we have seen in Chapter Three the union expressed genuine satisfaction over the great progress made "toward reaching an agreement" in the June negotiations. No one who bears all these facts and considerations in mind can accept the NLRB holding that the Kohler Company was guilty of a refusal to bargain which prolonged the strike simply because it did not discuss the transfer of the nonstriking employees and the termination of employment of the striking shell department employees in the June negotiations. Failure to come to an agreement on the seven major issues is what prolonged the strike, in June and thereafter. The shell department matter had not the remotest effect on the stalemate, one way or the other.

4. The September Negotiations

The NLRB held that the Kohler Company went into the September negotiations with a conviction that it had won the strike and with a purpose not to reach an agreement with the union. This purpose was manifested, the Board found, by Mr. Conger's preliminary remark that further negotiations would

be futile; by the company's refusal to "accept" Judge Murphy's "offer of settlement" on the basis of an increase of "seven cents or even five cents"; and by the introduction "for the first time" in the September negotiations of the company's intention not to reinstate strikers guilty of violent and unlawful conduct. Taking all these into consideration, the NLRB concluded that the Kohler Company was guilty of an unlawful refusal to bargain in good faith during the September negotiations—and that this unfair practice prolonged the strike.

Since the September negotiations have been described in Chapter Four, there is no need to review the facts here. Attention may be concentrated, rather, on the Board's process of decision. Each step in that process involves an egregious abuse of fact, or law, or proper judgment of fact and law.

Consider the weight given by the Board to its inference that the Kohler Company went into the September negotiations with a conviction that it had won the strike. The first thing to recognize is that this was an *inference.* The Kohler witnesses did not testify that they went into the negotiations with a conviction that the company had won the strike. The Board inferred it from newspaper articles written by journalists. If there is ever a sound basis for inferring what goes on in the minds of others, this is certainly not it.

But even if the inference were sound it would have been legally irrelevant. There is nothing illegal when one party concludes that it has been victorious in a strike. Furthermore, there is nothing illegal when conduct is adjusted in accordance with such a conviction. If a union raises its demands because it feels

that it can win or has won a strike, the law does not hold that the union has committed an unfair practice or a refusal to bargain. The law is the same for both union and employer; both have a duty to bargain in good faith. Therefore, it is perfectly lawful for an employer to stiffen in his position when he feels that the economic facts are with him. Thus it would have been lawful for the Kohler Company to withdraw some of the concessions previously made, always provided that it continued to meet and negotiate with the union in good faith. This being true, it goes without saying that the company could hold fast to the offers previously made.

And that is, of course, all that the Kohler Company did during the September negotiations. It did not make any new concessions, it is true. But if one thing is perfectly clear in the law of collective bargaining, it is that neither party is under an obligation to make any concessions. On the other hand, the Kohler Company held forth in the September negotiations the various proposals that it had made in the prestrike negotiations; and it is significant that the Board held the prestrike negotiations to have satisfied the requirements of good faith bargaining. Moreover, the Kohler Company continued to offer in the September negotiations the further concessions it had made in the bargaining sessions held after the strike.

Despite the company's admittedly good-faith bargaining before the strike and despite the concessions after the strike began, the negotiations repeatedly foundered on the "seven major issues." This is a fact which is noted repeatedly, curiously enough, in both the Board's opinion and the trial examiner's report. And it is this fact, of course, which accounts for Mr.

Conger's feeling, when approached by Judge Murphy, that further negotiations would be "futile." No matter what else the labor laws may provide, they do not make it an unfair practice for a negotiator to be pessimistic about the possibilities of a settlement, especially after nine months of marathon negotiations have failed to produce an agreement.

Had Mr. Conger refused to participate in further meetings, one might have argued that he was guilty of a refusal to bargain. But it is by no means certain that even that argument would be legally valid. For it is a well recognized principle that the duty to bargain does not require meeting in perpetuity. All courts recognize that a person who has been bargaining in good faith for a reasonable time may call it quits. However, the significant fact here is that Mr. Conger did not refuse to meet with the union.

Equally significantly, he held forth the same contract offer that the company had made before. To rule that this amounts to an unlawful refusal to bargain is to rewrite the labor law. The law expressly provides that the duty to bargain does *not* require either party to make a concession. The only inference that can be drawn from the NLRB's position is that—contrary to law—it would compel the Kohler Company to make a concession.

The soundness of this inference is established by the way in which the Board dealt with Judge Murphy's proposal concerning the "seven cents or even five cents." As shown in Chapter Four, Judge Murphy was a catspaw. He was not authorized by the union to settle the strike on the basis of "seven cents or even five cents." He was being used only to extract a further offer from the Kohler Company upon which

the union might then build the basis for a settlement of the kind which it wanted. In holding the company guilty of bad-faith bargaining for its failure to fall into this trap, the NLRB and its trial examiner demonstrated one or the other, or both, of these qualities: (a) an invincible ignorance concerning the realities of collective bargaining; (b) an absolute determination to find the Kohler Company guilty of unfair practices regardless of the facts or the law.

The final basis of the NLRB's holding on this issue rests upon a simple error of fact. The Board took the position that the September negotiations fell through because the company introduced then, *for the first time*, the issue of reinstatement for strikers guilty of misconduct. That is just not so. Mr. Conger testified that he had repeatedly raised this issue and that, each time he had done so, the union negotiators had insisted upon reinstatement of all strikers, including those with the greatest responsibility for the union's unlawful conduct. Therefore the Kohler people had every reason to believe that this issue, too, would bar a settlement of the kind which Judge Murphy optimistically predicted.

As we have seen, their opinion was vindicated in the meeting of late September, when Mr. Emil Mazey insisted that all strikers would have to be reinstated and that the union's position on the seven major issues would have to be conceded before the strike could be settled. The Board dismissed this salient fact by suggesting that Mr. Mazey did not take part in the earlier September negotiations and, more subtly, that his vews did not determine union policy. These suggestions cannot be credited. Mr. Mazey *had* participated in previous negotiations. He was the

highest of the parent union's officials to do so. The parent UAW was a party to the 1953 contract and would have had to be a party to any subsequent contract. In the union's critical letter of August 10, outlining the union's position on the seven major issues, Mr. Mazey's signature comes first.* In view of all this, it was unjustified to suggest, as the Board did, that a strike settlement could have been reached without Mr. Mazey's approval.

In sum, the Board's holding concerning the September negotiations rests fundamentally on the assumption that the Kohler Company was obliged to make whatever concessions might have been necessary in order to reach a settlement of the strike. When all the errors of fact, of inference, and of judgment are cleared up, that is the only possible conclusion.

There is no longer any need to emphasize the error of the Board's view. Even if a union loses face as a consequence, the Board has no legal power to force an employer to make a concession. The Kohler Company had better offers to the union on the bargaining table throughout September than it had at any time prior to the strike, when the Board itself held that Kohler bargained lawfully and in good faith. In view of that holding it is impossible to follow the Board's reasoning that the same or better offers at a later point became unfair labor practices.

5. The "Unilateral" Increase of August 5, 1955

The questions posed by the Board's rulings on other issues become more puzzling when one considers its ruling on the increase which Kohler granted

*See Appendix A.

on August 5, following negotiations with the union on July 7-20 and August 1-2, 1955. During those negotiations, even though its position was then stronger than ever, the Kohler Company actually offered the union new concessions on wages and on other matters.

As to wages it offered an increase of five cents per hour for all incentive workers and ten cents per hour for those not on incentive-pay. This, incidentally, was at least the equivalent of the increase which Judge Murphy was sure he could "sell" to the union—and which the Board held in effect that the company was obliged to offer the preceding September, if it wished to avoid being held guilty of unfair practices. In addition, as the trial examiner himself noted, the company "offered to enter into a one year contract incorporating provisions it had previously agreed to; to change its pension and insurance plans as previously proposed; . . . and to offer reemployment within three months to a minimum of 550 employees then on strike (employees discharged for misconduct to be excluded)."

The union, on the other hand, refused to move from its former position on any of the significant contract issues. With some minor exceptions, as the trial examiner said, the union "otherwise closely adhered to its earlier position on other contract issues. Its wage demand was [i.e., continued to be] for a general wage increase of ten cents plus five cents additional to nonincentive workers. The Union also agreed to withdraw all pending charges, but proposed that all strikers be reinstated without discrimination [including of course the ninety discharged for seriously unlawful conduct]."

On August 3, 1955, the union held a mass meeting, during which all the company's proposals, including the wage increase, were rejected. Learning of this rejection, the Kohler Company on August 5 announced and put into effect retroactively to August 1 the wage increase which the union refused to accept.

Granting this increase, the Board held, was an unfair labor practice, a violation of the company's duty to bargain. "The Board finds," it said, "as did the trial examiner, that [the Kohler Company] separately and independently violated . . . the Act by the unilateral granting of a wage increase on August 5, 1955, in the absence of an impasse on wages or other contract issues. The Board also agrees with the trial examiner that this unfair labor practice contributed to the prolongation of the strike."

Board Member Philip R. Rodgers dissented from this finding. He viewed the evidence "as showing that an impasse was reached by the parties when the union membership rejected [the Kohler Company's] settlement proposals, including the wage increase later placed in effect." "In view of this impasse," he concluded "he would find that [the company] lawfully placed in effect the August 5 wage increase."

The trial examiner had held that in the negotiations of August 2, "discussions centered almost entirely" on the issue of reinstatement for the strikers guilty of serious misconduct. "There was practically no discussion of contract issues," he found. And he considered it important that the Kohler Company did not inform the union that "it intended to put the wage increase into effect if settlement was not reached."

For these reasons, according to the trial examiner, it could not be said that an impasse had been reached. And therefore, he ruled, the Kohler management showed a lack of good faith in bargaining and an intention to disparage the union when it put the increase into effect.

As already noted, there is no question but that under the law an employer may "unilaterally" adopt proposals which the union has definitely rejected. The question, therefore, is whether or not the Kohler Company's wage and other contract offers had been definitely rejected. On this the record is clear. It shows that the union negotiators rejected these offers in the meeting of August 2, and it shows a further rejection in the mass meeting of August 3. Perhaps more important, the record shows a continuous impasse on the company's wage and other proposals for more than a year prior to August of 1955. When the Board majority accepted the trial examiner's conclusion in the face of such a record, it exhibited a contempt for fact and law so gross as to defy belief.

Here again, as in the previous rulings, the Board's decision is defective in all essential respects. It finds an unfair practice where the record demonstrates that there was none. And it holds that the (nonexistent) unfair practice prolonged the strike without even pretending to establish the necessary causal relationship.

6. *Alex Dottei*

With the holding that the Kohler Company committed an unfair practice which prolonged the strike when it voluntarily offered to withdraw its discharge of Alex Dottei, we encounter one of the most extraor-

dinary features of the NLRB's remarkable decision. Mr. Dottei was on the company's original list of ninety-one strikers whom it intended to discharge for participation in illegal violence. The activities which induced the Kohler Company in the first place to discharge Mr. Dottei were of the same kind as that in which the other ninety dischargees had engaged: mass picketing, violent employment office picketing, home demonstrations, assaults, and so on. A majority of the NLRB members held that the Kohler Company was justified in discharging the other ninety employees. Therefore, beyond the shadow of a doubt the company would also have been upheld in discharging Mr. Dottei, too—but for the fact that at one point in the hearing before the trial examiner, the company offered to withdraw the discharge of Dottei (merely as one among possibly others of the ninety-one) if it could come to an agreement with the NLRB's General Counsel with respect to other unfair practice charges.

As it happens, the NLRB General Counsel refused to agree to the company's proposal. He insisted on continuing to prosecute the charge that the company had committed an unfair practice in regard to some thirty-five of the discharges. Ultimately—and this is so vital that it bears repetition—the Board rejected the General Counsel's contention and upheld the company. But the crucial point at present is that the General Counsel did not agree to the condition upon which, *exclusively*, the company had held forth its offer to withdraw Mr. Dottei and possibly others from the list of dischargees. This being so, the offer was of course not binding upon the company.

So prejudiced was the trial examiner, however, that

he held the company's offer to withdraw Mr. Dottei's discharge was an admission that it had erred in including him on the list of dischargees! Biased as he may have been, however, the trial examiner acted more judiciously on this issue than a majority of the Board later did. The trial examiner at least did not hold the Kohler Company guilty of an unfair practice *merely* because it had conditionally offered to withdraw its discharge of Dottei. He held, instead, that the discharge was unlawful because Mr. Dottei's admittedly unlawful conduct was not "sufficiently grave" to justify a discharge.

Two members of the NLRB, Chairman Leedom and Member Rodgers, took the position that since Dottei had participated in the same unlawful conduct, his discharge was as justified as that of the other ninety. Two members, Messrs. Bean and Fanning, took the position that Mr. Dottei's conduct was not unlawful enough to justify his discharge. The remaining Board Member, Mr. Jenkins, held that by offering to withdraw Dottei's discharge the company "in effect confessed error in his discharge and is now estopped from litigating this matter."

Thus a bare majority of the Board held the Dottei discharge an unfair labor practice, and the same majority went on to hold that this unfair practice was instrumental in prolonging the strike. The latter holding requires elucidation. Kohler refused to negotiate with the union as to the ninety-one strikers it intended to discharge for misconduct. The question whether this refusal amounted to an unlawful refusal to bargain turned upon the legality of the discharges. If the discharges were legal and justifiable, then the refusal to negotiate them would be simi-

larly lawful; if not, the refusal would be unlawful.

The true inwardness of the holding that Mr. Dottei's discharge was an unfair practice is now apparent. Holding it an unfair practice, the Board Majority laid the basis for the further holding that the Kohler Company's refusal to negotiate the discharges as a whole was an unlawful refusal to bargain. And from there it was, for the Board majority, an easy step to the conclusion that such a refusal to bargain was an unfair practice which prolonged the strike. Still and all, it is difficult to believe that the three Board members could expect anyone to take seriously their assertion that the Dottei affair prolonged the strike.

Of certain ancient warriors it was said that "when their legs are smitten off they fight upon their stumps." The NLRB has far outdone those ancient warriors. With no foundation in fact and none in law or logic, it has held the Kohler Company guilty of a number of unfair practices. Not satisfied with that remarkable accomplishment it has gone on to essay an even greater one. While itself acknowledging that the company's marathon negotiations with the union repeatedly foundered on the rock of the "same seven major issues," it has nevertheless held that the company's alleged unfair practices prolonged the strike. The company argued vigorously before the Board that the union's charges should have been dismissed if for no other reason than that by its willful, sustained, and flagrantly lawless conduct it had forfeited any right to resort to the law. It said: "To ignore

the union's patent and flagrant denials of the employees' rights under the Act while searching the record for miniscule, technical and speculative violations on the part of the company is to swallow the camel while straining at the gnat." To this obvious description of its attitude the Board refused to concede the slightest merit. Instead it chose to reward the union, even though that required the kind of manipulation of fact and law which we have been observing. And there is more to come.

8. THE "SPYING" AND OTHER ALLEGED UNFAIR PRACTICES

THE NLRB FOUND the Kohler Company guilty of other unfair practices: "spying" on the strikers and investigating their leaders; attempting to solicit the return to work of one striker; "coercing" another in the performance of union functions; and "evicting" others from company-owned lodgings and homes. Of these, the "spying" ruling is the most significant; first, because the NLRB considered it to be further evidence of the company's failure to bargain in good faith after the strike; second, because it displays the Board's distortions of the evidence and unfairness to the company in a particularly emphatic way.

1. The "Spying"

The Board roundly castigated the company for engaging in three types of investigative activity. The first involved, according to the Board, "matters plainly outside the scope of lawful inquiry." These were (a) striker sentiment concerning the status of

the strike in the spring and early summer of 1955; (b) the private lives of certain officials of the parent UAW who were in charge of the strike; and (c) the "coming and going" of union officials from union headquarters and other places where strikers might gather. The Board held that investigating each of the foregoing activities constituted unlawful surveillance in violation of the National Labor Relations Act.

The Kohler Company did in fact keep watch upon the strikers and their leaders. Company personnel observed events on the picket line, and detectives were hired to dig up information. But a true understanding of these activities can be gained only by placing them in context, something which the Board neglected to do. Innumerable acts of violence were committed by the pickets. Union agents were guilty of several brutal assaults. Hundreds of acts of vandalism in Sheboygan were sworn to, against the property of nonstrikers, with not a single suspect apprehended by the police.

The plain fact of the matter is that the company, fighting for survival against the men who avowedly intended to "wreck" it, had to take on the job which the duly constituted police authorities were flagrantly neglecting because of political pressures and political union influence. On the one hand, the company was attempting to find out who was responsible for the vandalism and the assaults on its people. On the other hand, it was gathering evidence which it needed in order to defend its discharge of the strikers guilty of the most serious violence. Had it not engaged in the surveillance which the Board condemned, it would have been found guilty of an unfair labor

practice in making those discharges, too.

But, said the Board, the surveillance of the strikers extended to accepting detective-agency reports in the spring of 1955 concerning striker attitudes on whether the strike had been lost by then. Here again the Board distorted the facts. The detectives submitted forty reports covering three years and three months and totalling 299 pages. Of these, only three minor excerpts, torn out of context, and totalling only a fraction of a page, could be found to support the conclusion that the company was checking strikers' beliefs concerning the status of the strike. The vast bulk dealt with legitimate subjects of inquiry.

In such circumstances the question which naturally arises is whether the company attempted to undermine the strike by underhanded attempts to find out what the strikers were thinking about it. Mr. Conger testified that the detectives were ordered not to check "legitimate union activities of anyone" but to confine themselves to "only illegitimate activities." More than ninety-nine per cent of the reports were so confined. No fair-minded person could conclude under these circumstances that Kohler had set detectives to spy on legitimate activities.

The obvious inference is that the three questionable items crept in accidentally. Moreover, they recounted striker-sentiment in May and June of 1955. Both the trial examiner and the Board accused the company of being sure it had won the strike in September, 1954. In August of 1955 the company made the highest wage offer it ever made to the union. This was after the May and June detective reports indicated belief on the part of the strikers that the strike was lost. All these facts considered together rather

plainly suggest that the Board was as wrong as it could be in its total analysis of the situation.

The Kohler Company was also said to have made inquiry into the "private lives" of some of the union leaders, but here again the specific facts and circumstances, which the Board did not mention, are important. These union leaders were required under the law to file non-Communist affidavits before they could avail themselves of the protection of the National Labor Relations Act. The Kohler inquiries were directed in part to that subject, admittedly legitimate. The same leaders were persistently inciting others to unlawful conduct, and the Kohler inquiries were in part directed to that fact, again legitimate. Finally, these leaders were important witnesses in the NLRB case, where much would depend on the credibility of their testimony. It is a basic right of every person engaged in litigation to seek evidence bearing on the credibility of antagonistic witnesses. In sum, therefore, the Board had no fair basis in the facts for its holding that these investigations were "plainly outside the scope of lawful inquiry."

The same is true of the company's check on the "coming and going" of union leaders to and from strike headquarters, which, too, the Board held was beyond the scope of legitimate inquiry. These checks were animated by the same purpose that accounted for the foregoing. Kohler was acting in self-defense, attempting to discover who was responsible for the violence and vandalism which the police were doing nothing about.

While holding the company guilty of an unfair practice for such "spying," the Board had nothing to

say about the kind of "intelligence activities" which the union was carrying on at the same time. The union proudly boasted that it had "agents" in the plant who gave it daily reports on the company's activities, the way orders were coming in, how production was going, even the cost of postage. Moreover, the union continually printed scurrilous and even libelous accounts of the private lives of the Kohler management.

Perhaps, however, the NLRB had nothing to say about these things because the trial examiner refused to allow the Kohler Company to get anything into the record about them. While admitting all the union's evidence about the company's inquiries, and then pontifically berating the company for its "astounding spying," the trial examiner ruled that the evidence proferred by the company was inadmissible. These were only "facetious and amusing" incidents, said the trial examiner, designed to maintain "the morale and spirits of the strikers."

Thus the company was held guilty of an unfair labor practice for engaging in a legitimate act of self-defense. At the same time, evidence of illegitimate spying and scurrilously untrue publications by the union was not even admitted to the record. The union investigated legal activities, while the company investigated illegal activities; yet, the company suffered the lash of the NLRB's contempt and the force of its "law," while the union was rewarded.

The NLRB commented upon two other categories of investigative activity by the company, without holding them to be unfair practices. It criticized the company for having *received suggestions* for strike-breaking activities and for "bugging" a hotel in which

some union officers were allegedly quartered. There was not the slightest wisp of evidence in the record that the company acted upon these suggestions, and the Board therefore felt that it could not hold the mere receipt of them an unfair practice. But it made use of them anyway, holding that the *suggestions* "buttress our earlier findings that at all times after June 1, 1954, . . . the [company] failed to bargain in good faith."

The final item which aroused the Board's wrath involved the company's investigation of one of the NLRB's own lawyers. The Board said:

> The possible ramifications of such conduct is [sic] beyond comprehension . . . the Board can envision no justifiable excuse for the employment of detectives to spy upon and investigate its attorneys or other personnel while they are engaged in the performance of their duties pursuant to the Act.

The Kohler Company, together with all other persons who are held to a strict standard of legality, must accept invasions of files, subpenas, extended investigations into intimate affairs, and the multitude of other ways in which government agents pry into private lives today. But NLRB personnel are off-limits. In the specially privileged class in which the NLRB has placed union leaders there is apparently room for one other category—NLRB personnel.

2. *The "Solicitation" of Alois Forstner*

The Kohler Company committed an unfair practice, the Board held, when one of its foremen offered special favors to striker Alois Forstner if he would return to work during the strike. It did not matter,

said the Board, that the company had a strict rule against the solicitation of any striker; nor that owing to this rule, the foreman urged Forstner not to say a word about the request because that would get the foreman's "rear end in a sling"; nor that the complaint failed to allege a single other act of solicitation by the company; nor even that Forstner actually did not return to work. The only thing that mattered to the Board was that Forstner had special skills. That being true, the Board went on,

> it is reasonable to infer that [the company's] production *may* have been seriously handicapped without Forstner's services. Thus, even assuming [the company] had a general policy against solicitation, the solicitation of Forstner *may have been* an exception. . . . [Italics supplied.]

It is impermissible as a matter of law for the NLRB to pile one speculative inference upon another as the basis for a finding of unfair practices. A better example of that impermissible practice than the one just quoted would be difficult to find.

3. The "Coercion" of Gordon Majerus

In instituting the proceeding against the Kohler Company, the union made a broad and general charge that the company was guilty of "coercion" of employees in violation of the Act. When the trial began it was necessary to present some evidence in support of that charge. This proved to be extraordinarily difficult. Although Kohler employed two hundred and seventy-five supervisors and more than three thousand employees, not a single instance of true coercion could be cited. At a loss for anything more service-

able, therefore, the union was compelled to advance some innocuous remarks made by two Kohler supervisors as attempts to restrain and coerce Mr. Gordon Majerus in the performance of his duties as a union steward.

The first of these was reported by Majerus as a statement by his supervisor, Willard Kolhagen, to the effect that "there was no sense in fighting for this kind of guy." The reference was to a grievance which Majerus was processing. The employee involved had admittedly produced and was performing inferior work. According to Majerus, Kolhagen also told him later that his activities would put him in a bad light with the company. When asked to explain further, Majerus said: "Well, he argued with me. He said that this employee had done some work that wasn't just exactly what it should have been; he used arguments like that for his reasoning why he said that." Although there was no evidence that Majerus had actually been frightened by Kolhagen's alleged remarks, or that his activity as a steward was affected in the slightest degree, the trial examiner held that Kolhagen's remarks were unlawfully coercive, and the Board upheld this finding.

It also upheld the trial examiner's conclusion that Majerus was coerced by certain remarks of another foreman, Smith. According to Majerus, Smith told him he was making a mistake battling for the union, that if a strike was called he would be "out in the cold," and that he ought to take a job on another floor in the old engine plant. These remarks, according to the trial examiner, "were directed at discouraging Majerus' activities as a steward, though here the statements were implemented by suggestions of other

employment, that is by promises rather than by threats." The Board agreed.

To hold the company guilty of unlawful coercion on the basis of these two petty and isolated incidents violates both the law and common sense. The courts have repeatedly held that coercion may not be attributed to a company when there is such skimpy evidence as this, especially when the company's steady policy has been to warn its supervisors against any coercive activities, as the Kohler Company's policy so manifestly was, since these were the only incidents which could be dredged up in an employment unit involving two hundred and seventy-five supervisors and over three thousand employees. Beyond that, common sense rebels at the conclusion that the incidents revealed either a coercive intent or a coercive result.

4. The "Evictions"

The "evictions" from the American Club and two company-owned farm homes, described in Chapter Five, were also held to be unfair practices. The Board regarded them as having been motivated purely by the fact that the tenants were strikers. But since both the roomers at the American Club and the tenants of the homes were allowed to continue their occupancy for long periods after the strike (ranging from nine months after the strike began to some years thereafter), the Board's view of the facts is difficult to credit. Reason would tend to suggest that the act of striking had nothing to do with the company's decision to "evict" (actually it would be more accurate to say that the company refused to renew the leases on the homes and the rooming arrangement at the

American Club). For the company took the action in question only when a pressing demand for the accommodations asserted itself, not when the strike began. Moreover, it went along generously with the tenants, giving them liberal extensions after their leases had expired.

There is another way, too, of looking at the matter. In holding the company guilty of an unfair practice here, the Board has in effect said that striking gives an employee a special privilege to occupy company property. This comes entirely too close to holding that an employer must pay workers when they go on strike. It is true that an employer may not penalize his employees for striking. But it is also true that the act of striking carries with it no special privileges.

The better view would seem to be that the roomers and the tenants could no more extend their right to the Kohler accommodations by striking than the temporary shell-department employees could prolong their jobs by striking. Holding otherwise magnifies the right to strike out of all proportion to the at least equally important right of private property. No one would argue that the strikers had a right to compel the Kohler Company to continue to pay into their pension and insurance programs while the strike was going on. No one, presumably, would even argue that the strikers could for the first time during the strike expect the company to rent rooms at the American Club or lease farm homes to them. It would seem to follow that the company was similarly within its rights in refusing to extend the leases beyond their termination date and the rooming arrangements beyond a reasonable period of notice to vacate.

Finally, it simply goes against the grain to hold that

strikers who are doing their utmost to hurt a company economically should be entitled to occupy its premises. Twenty years ago the National Labor Relations Board took the position that a firm did not have a right to discharge even sitdown strikers who denied the owners access to their property. The Supreme Court reversed the Board in that case, admonishing it against the view that the only social rights of significance are those possessed by strikers.

The same admonition is germane here. The company's right of private property is entitled to as much respect as the worker's right to strike. Upholding the company's property right would not in the slightest degree have infringed upon the right to strike. But holding the strikers entitled to possession of the company's homes and rooms constituted a drastic impairment of its right of private property. True judging always seeks to balance rights, not destroy them. But the Board will apparently never learn to decide cases in a truly judicial manner.

PART III

THE DEEPER ISSUES

9. ON WINNING STRIKES AND BREAKING UNIONS

THE BOARD'S DECISION is so weak that one suspects an unrevealed motivation. Naturally it is difficult to pin down such a motivation with certainty. But the decision is shot through with remarks which suggest that the Board was influenced by a philosophy of labor relations which has long since worn thin. This theory holds that an employer is guilty of trying to break a union each time that he firmly resists the union's demands. It rests on the feeling that a union should never lose a strike.

Many people still hold to these views, even though they lack any foundation in fact today and lead to gravely harmful results. But precisely because they are widely shared, and because they are unsound and unwholesome, they must be examined carefully and if possible dissipated. For unless they are, they must inevitably lead to even more disastrous results than they have already caused.

Both its trial examiner and the Board itself repeatedly made reference to the Kohler Company's attitude toward the union and the strike. They apparently considered it worth repeating several times that company spokesmen talked about "teaching the union a lesson"; that the company's bargaining team thought

in September of 1954 that "further negotiations would be futile"; and that as of September 1954 the company thought it was "winning the strike."

None of these charges or insinuations had any proper legal significance; even if they were all true they could not be considered unfair practices in themselves or evidence of any other unfair practices. It is perfectly permissible for a company to teach a union a lesson, or to try to do so. For that matter, the UAW leaders in the Kohler strike took on the teaching function far more often and more explicitly than the company people did; the union agents repeatedly expressed the intention to teach the nonstrikers (the "scabs," as the union called them) and the company "a lesson." The only difference lay in the pedagogical methods which the respective parties adopted.

Mr. Conger testified without contradiction that the lesson he intended to teach was that the Kohler Company would not be intimidated by the union's violent and unlawful conduct; that it would not be coerced into concessions which it felt unwise; and that the union would not be rewarded for its bullying tactics. In short, this lesson would be taught by lawful methods for a lawful purpose. The same was not true of the union's intentions. Bent upon teaching the company and the nonstrikers that it was unwise to resist, the union's teaching technique was composed of mass obstruction, violence, vandalism, and the nationwide secondary boycott. The union's boast that it would "break the company" shows that the union lesson was to be taught by unlawful methods for an unlawful purpose.

More needs to be said on this. It is perfectly proper and in the public interest for employers and employees

to bargain collectively and to reach agreements on mutually satisfactory terms. There is nothing wrong, either, in an employer's making additional wage offers or other concessions in the course of peaceful, legitimate negotiations. But it is not in the public interest for an employer to make concessions as a result of violent pressures of the kind which the UAW brought to bear.

The public interest is harmed when an employer gives in under such pressure, in the same way that it is harmed whenever persons give in to bullies. Wage concessions forced by violent action are the same as the "protection money" exacted by racketeers. Decent social standards are destroyed in the process. The jungle begins to take over. With labor costs higher than they need to be, prices go up. Consumers have to pay more. When they refuse to do so, men are thrown out of work. This is the reason there is so much unemployment in such heavily unionized industries as coal-mining, steel, and autos.

The total social cost of violently imposed wage increases is thus an extreme one. It is not just a matter of economics or of material welfare. Far more precious considerations are involved. The good society is one in which personal freedom is at a maximum, where people can follow their own choices without fear of brutal dictation. The employer who stands fast against thugs deserves praise and support—not the kind of perversion of law and justice of which the NLRB was guilty in the Kohler decision.

Then there is the suggestion that the Kohler Company was somehow guilty of something evil in believing that it had won the strike. As a general rule, the public is the true and ultimate victor when a company

wins a strike. Winning a strike means that production is resumed on the basis of the company's offer rather than the union's demands. Whether the strikers themselves come back to work or their jobs are filled by replacements does not matter here. What matters is that costs are lower and production more efficient under terms offered by employers than under those demanded by unions. Unions are out to get more and more for less and less—more and more money for less and less work. The public has to pay that bill, nobody else. For a government agency to take the position that it is wrong for a company to win a strike is tantamount to scorning and rejecting the public interest, to serve the special interests of a pressure group instead.

This perversion has had extremely serious consequences, going far beyond the Kohler case. Not the least of these is the arrogant impudence of so many union officials today, who act more like spoiled children than men in whom workers and the country have reposed serious responsibilities. The favoritism shown at all levels of government has inculcated in union leaders the idea that they can get away with anything. They act accordingly.

No one suggests that a union should never call a strike. Everyone agrees that workers have a right to leave their jobs when they are dissatisfied with their pay or with other conditions. But too often strikes today represent the decision, not of the workers, but of the union leaders, and thus become a personal issue. For example, Mr. James Carey, president of the Electrical Workers Union, has been quoted recently as having said that "I owe G. E. a strike." Well over 70,000 men and their families were hurt

by the abortive 1960 strike against the General Electric Company—a grave result to be traced to personal pique. Union leaders would not act that way had such government agencies as the NLRB not led them to believe that they belong to a specially privileged class.

Union leaders who make a personal issue of strikes get themselves and others into a great deal of trouble. The average businessman knows his own business well, and he has a good idea of his employees' thinking. He will not let a dispute reach the strike stage if he can help it. But if he feels that the men and the market will not support the union's demands, he may take a strike. Once he takes a strike, he is likely to hold out stubbornly.

Then, after having foolishly brought trouble upon himself, the union leader of the spoiled-brat type gets frantic. He runs for help. He will beseech local politicians, the clergy, the governor of the state, perhaps the President of the United States to take his part against the "vicious," "reactionary," "backward" employer. The UAW did all this during the Kohler dispute. Mr. Carey did it before and during the 1960 strike against General Electric.

If the outsiders refuse to side with him, the union leader acts more than ever the spoiled child. He directs the vituperation formerly concentrated upon the employer toward the unwilling outsiders. Mr. Mazey hurled insults at the Wisconsin clergy who failed to agree with him that the Kohler Company was a mediaeval sweatshop. He said that a judge who sentenced one of the UAW bullies should have been dismissed from the bench.

The next step is violence. The union leader has

called a strike when he should not have done so. His own members show a disposition to return to work. Others show an interest in taking the jobs which the strikers have left. Having anticipated these results, the employer's resistance to the union's excessive demands stiffens. Political and other prominent figures have declined to bail out the leader. Somehow the plant has to be kept from operating. There is only one way left—bar access to the plant, boycott the company, with vicious telephone calls in the night frighten those who wish to return to work, hurl paint bombs through living-room windows, spray acid on cars.

All these things happened during the Kohler strike, and they have happened in hundreds of other recent strikes. A gory pattern has developed. But important as it is to understand the pattern, it is even more important to understand its causes. Those causes may accurately be summed up in two words: *governmental favoritism.* On the one hand, the laws of the land vest in unions special privileges available to no other person or group in society. On the other hand, government personnel at all levels have winked at union violence and other forms of unlawful conduct. No agency has been more culpable in this process than the NLRB. No case has so clearly illustrated the process from beginning to end as the Kohler dispute.

Each time an employer takes a firm stand in negotiations with a union he is accused of being reactionary and anti-union. If he attempts to exercise his fundamental right as a free man to continue operations during a strike, he is charged with "union-busting." The NLRB apparently credits such accu-

sations.

But it is wrong in every way to equate firm resistance with "union-busting." When you go to a store and insist that the price be lowered for you, you do not accuse the storekeeper of attempting to destroy you if he refuses. You do not even think of yourself as having been destroyed if the next person who comes along offers to pay the price which you have found too high. In the same way, it is improper for a union to accuse an employer of a destructive motive when he firmly refuses to raise his offer.

In the nature of things, it is open to a union to ask for any amount it wishes; requests cost nothing. But there are narrow limitations to what an employer can pay. A mere five-cents-per-hour wage increase, for example, cost the Kohler Company hundreds of thousands of dollars per year. That may not seem significant to an outsider, but it is, of course, a substantial amount for the person who has to pay it. Tactically and propaganda-wise, the employer is at a disadvantage; he seems always to be resisting. But the intelligent person will realize that the unions' talk is cheap, and should be discounted as such.

It would be more accurate to say that the UAW was out to break the Kohler Company. The union, not the company, was the aggressor. The company did not make demands of the union; it offered concessions. The Kohler Company did not assault union men; it tried to defend itself against assaults. The nationwide secondary boycott was the union's device, not the company's.

When all is said and done, no business can break a union by resistance to its demands even if it should

wish to do so, without doing greater harm to itself in the process. Unions have all the natural advantages in an industrial dispute. When they are broken, they break themselves.

The decision to strike, in the first place, is for the union to make. A calculated risk is involved. If large numbers of the workers seem content with the employer's offer, or if there are other people in the vicinity willing to work at the wages offered by the company, the union is simply arrogant and unintelligent in calling a strike. The employer cannot be blamed. He is doing what anyone would do, and what the public interest requires, when he refuses to concede an increase which he considers excessive. He knows that if he asks the public to pay more than it is willing to pay for what he has to sell, he cannot complain if people stop buying. He does not think that the public is trying to break him. Instead, when goods do not move at the price he is asking, he lowers the price. Assaulting the public, or barring access to his competitors' goods, does not occur to him.

The same moves are available to a union, and continue to be available even after a strike has proved to be a mistake. If it appears that the employer is going to be able to carry on business despite the strike, the union leader's duty as a responsible member of the community is to terminate the work stoppage. When he is intransigent, he himself breaks the union, or seriously weakens it.

We should be perfectly clear on this point. Union leadership forfeits its right to represent workers when it is stupid or arrogant or both. And it is both stupid and arrogant in prolonging a strike that should never

have been called in the first place. The people who are hurt worst in these cases are the workingmen, particularly those who uncritically repose their faith in the union leaders. They are the ones who lose their jobs, whose families suffer deprivation, whose whole future may be seriously impaired. Union leaders ought not to be rewarded when they have betrayed such a trust.

On the contrary, mechanisms which penalize arrogance and stupidity on the part of persons in positions of authority have a moral and material value to society which cannot be exaggerated. A society which rewards arrogant blunderers invites a great deal of trouble for its members. One which removes stupid and arrogant persons from positions of authority is serving its members in the best possible way. Viewed in this light, the employer who resists excessive union demands is a public servant of the highest order. Firmness and courage have always ranked high in the category of social virtues. They are especially valuable in industrial disputes, when union leaders have all the propaganda advantages; when talk, which is cheap, goes very far; and when resistance, which must be silent, counts for something only among the most sensitive and intelligent members of society.

These considerations expose the deeper significance of the Kohler stand in its dispute with the UAW. They also illuminate the profundity of the philosophic errors which animated the NLRB's decision. The Board did precisely that which a social agency should not do. In the grip of antisocial misconceptions, the Board rewarded social vice and penalized social virtue.

10. TOWARD THE RULE OF LAW

FROM ITS FIRST entry into the Kohler dispute to its final decision in August of 1960, the NLRB conducted itself more in the manner of a kangaroo court than of a fair-minded legal tribunal. It would be a serious mistake, however, to conclude that this has been a special case. On the contrary, although the Kohler case is in some respects unique, the NLRB has conducted itself in a similar fashion throughout its history. It has inherent faults, the roots go deep into the law which created it, and a change in personnel would not affect those roots in the slightest degree. Correcting the situation requires basic change. A genuine rule of law in labor relations can come only when three measures are taken: *first,* revision of those features of the basic labor relations law which can never be administered in a fair judicial manner; *second,* abolition of the NLRB; and *third,* restoration of full power to the true constitutional courts of the country.

1. Kangaroo Court?

Webster's New International Dictionary defines a kangaroo court as a "tribunal in which, although conducted under some authorization, the principles of law and justice are disregarded or perverted." The NLRB is an administrative tribunal conducted under the authorization of the National Labor Relations Act. Anyone who has read this short book up to the present can bear witness to the fact that the Board has "disregarded or perverted" a number of "principles of law and justice." Reference to it as a "kangaroo court" is therefore proper, even on the

basis of the ground already covered.

But there is more. The Board and its trial examiner did not play fast and loose with the facts and the law only in the ways already described. In a number of ways they denied the Kohler Company its basic right to due process of law. While there is no need to burden this account with the details of all the denials of due process, two instances should be recounted.

The UAW charged the company with having given its employees the celebrated three-cent increase on April 5, 1954. The complaint issued by the NLRB accepted this date and accused the company of having committed an unfair practice by giving the increase on April 5, 1954. In its answer to the complaint, the company admitted giving an increase on *April 5, 1954*. Throughout the hearing, reference was constantly made to "the three-cent increase of April 5."

In a true court of law, all facts alleged in the complaint and admitted in the answer are regarded as established, with no need of further evidence, and the April 5 date should therefore have been regarded as established by the pleadings. In spite of this principle, the trial examiner ruled that the increase was made on *June 1 or thereafter,* admitting it was a matter of "drawing a date out of a hat."

The Kohler Company could have established that the increase was made on April 5, 1954. It had documentary proof in the supervisory bulletin which has already been quoted here. Moreover, there were at least two hundred people in the plant on April 5, 1954, who had received the increase as of that date; and they could have testified to that effect. After the trial examiner pulled the June 1 date "out of

a hat," the company offered the evidence which would establish the April 5 date. But the trial examiner denied the right to submit such proof. The NLRB upheld this denial. Furthermore, after upholding this denial, the NLRB went on to uphold the trial examiner's ruling that the increase was granted on June 1, 1954!

This rank denial of due process was not erased by the Board's insistence that it would have found the increase an unfair practice even if the date were April 5, rather than June 1. For by the Board's own ruling, the Kohler Company was relieved of the duty to meet and treat with the union between April 5 and May 28, when the mass picketing was going on. That being the case, it could be argued with great strength that the increase ought not to be considered an unfair practice, coming as it did at a time when the union was engaging in admittedly unlawful conduct and the Kohler duty to bargain was suspended.

The trial examiner was guilty of another even more egregious denial of due process. Since an employer is not obliged to negotiate while the union is engaging in violent misconduct, the trial examiner should have admitted into evidence all testimony offered by the Kohler Company concerning violent and unlawful conduct. Instead, the trial examiner denied admission into the record of a vast amount of such evidence, evidence showing violence throughout the summer and fall of 1954 and even continuing beyond that. This evidence was denied admission because the trial examiner considered it "merely cumulative."

But now note the upshot of this denial. Both the trial examiner and the NLRB held that Kohler was

excused from meeting with the union between April 5 and June 1, 1954; between June 29 and August 5, 1954; and between August 18 and September 1, 1954. Proved union violence excused the company's refusal to negotiate in those periods, they held. Yet after denying admission of evidence which proved that the union violence continued *throughout the summer,* the trial examiner held that the Kohler Company unlawfully refused to bargain between June 1 and 28, between August 5 and 18, and after September 1!

This denial of due process, extreme as it is, pales somewhat in significance before the remarkable fact which emerges from the rigging process which we have been observing: *the Kohler Company was held guilty of unlawfully refusing to bargain only during the periods in which it engaged in sustained negotiations. During all periods in which it absolutely refused to meet with the union the company was held to have committed no violation of the duty to bargain.*

In the collection of strange and remarkable features of the NLRB's decision which we have already witnessed, this one must certainly occupy a prominent position. The guilty must be rewarded and the innocent punished; *and the innocent must be punished most severely when they are most innocent.* As Webster says, a kangaroo court is a tribunal in which "the principles of law and justice are perverted."

2. *Politics and Prejudice*

Chapter Nine of this book deals with prejudice, exploring two biased and erroneous views which may have accounted for the NLRB's indefensible rulings.

At this point we may as well face squarely the additional possibility that the decision was politically motivated. That suggestion is not being made here for the first time. It has become common gossip among specialists in labor relations. President George Meany of the AFL-CIO was only expressing a generally held opinion when he said of the NLRB's Kohler ruling that "the timing of that decision bears all the marks of political expediency." This was said, incidentally, in the course of a speech which Mr. Meany made before the September 1960, convention of the International Association of Machinists.

There is no way of proving absolutely that a decision has been politically motivated; naturally, the NLRB members would firmly deny that this or any other decision was so influenced. However, the inference seems fair in this case, as similar inferences have seemed fair in respect of large numbers of other decisions handed down by the NLRB over the years. The NLRB took an inordinately long time to hand down this decision. Why should it choose to hand down an anti-employer decision in so celebrated a case during a presidential election campaign? The extraordinary vulnerability of the decision on both facts and law confirms the inference that the decision was politically motivated. Putting the case as mildly as possible, it would have been easier on the facts to decide in favor of the Kohler Company than against it.

But whether or not the decision was in fact politically influenced is far from being the most important point here. The fundamentally important point is that administrative tribunals are particularly susceptible to political considerations, in a way in

which duly constituted courts are not. Members of administrative tribunals are short term political appointees; they are an essential part of the political equipment of the administration which gives them their office.

Federal judges, on the other hand, have life appointments in office. Although political considerations figure in the selection, their tenure for life has been deliberately designed to release them from future political pressures. By and large the system works. With few exceptions, the federal courts are real courts of law; their judges are above politics, in the best sense of that expression. Even the relatively few biased judges are such, not because of the pressure of their position, but because of moral and intellectual shortcomings about which very little can be done.

NLRB members are in no such sheltered position. If they displease the administration in power, they can have little hope of reappointment. Therefore even those with the necessary moral and intellectual equipment can never be in a position to act as real judges. For a real judge must be ready to offend the current political powers whenever consideration of law, fact, or equity call for such offense. For a true judge, there is no dictum more compelling than the old saying, "let justice be done even if the heavens fall!"

3. Fundamental Defects of Administrative Law

The binding political orientation is only one of the fundamental defects of the NLRB. There are other equally basic reasons why the NLRB can never be a truly judicial body. These lie imbedded in

the law which created the Board (the National Labor Relations Act), and in the limitations put upon administrative agencies by the Constitution of the United States.

Neither the NLRB nor, for that matter, a true court can make the NLRA's collective bargaining rules work. Those rules are inherently defective. On the one hand, the law compels an employer to bargain in good faith; on the other hand, it declares that an employer need make no concession or reach any agreement. But attempting to force good-faith bargaining without compelling agreement or concession has proved to be a hopeless job. It has led the NLRB further and further into the bargaining process, till now the NLRB can be seen dictating the terms of agreement. That is in substance what happened when the NLRB held the Kohler Company guilty of an unfair practice because it declined to make the offer that Judge Murphy suggested.

The same thing has happened in many other cases. For example, the NLRB has recently held that an employer may not condition his agreement on the union's agreeing to have a vote among the employees before any strike is called. Such decisions involve economic, not juridical, judgments. They put the NLRB at the bargaining table, not on the bench.

The NLRA's majority rule principle similarly obviates any possibility of the NLRB's operating in a genuinely judicial manner. This principle means that a union selected by a majority of the employees voting in an appropriate bargaining unit is the exclusive representative of *all* employees in that unit including the employees who do not vote at all, as

well as those who vote against the union.

Even the problems of defining appropriate bargaining units and of deciding which employees are eligible to vote cannot be made to yield to the kinds of rules which lead to solid judgments. The structure of industry is too complex and employment is too fluid. Hence arbitrariness is a salient feature of unit and eligibility decisions.

But if such problems could be made to yield to judicial process, a hopeless problem would still remain, the elections themselves. Conducting an election is an administrative act, purely and simply. A court of law cannot remain one while conducting elections.

Administrative law was sold to the people of the United States on the basis of false claims. We were told that the true courts were old-fashioned and outmoded. They were too slow, too technical, too reactionary. They did not fit in the modern world. But administrative agencies, we were told, would remedy all these deficiencies. They would be manned by experts in particular fields. They would be more flexible. They would not be bound by the restrictive rules of evidence and procedure. They would, in short, give us what everyone wants from the legal system: speedy justice.

Not a single one of these claims has been borne out by experience. Bitter experience has taught us that the personnel of administrative agencies are more often than not rigid, doctrinaire bureaucrats who place ideological and political objectives above law and justice. Their decisions follow hidebound patterns of thought which will not admit of change when the facts and the law insist upon change.

They have exhibited no expertise even in the field of their specialization; for example, the NLRB has never really understood what collective bargaining is all about. When it comes to expertise in understanding or administering *law,* their performance is simply pitiable.

Releasing administrative agencies from the rules of evidence and procedure has proved a sad error. Those rules are the product of centuries of effort devoted to the tasks of clarifying issues and establishing truth. Abandoning the rules has given administrative agencies the opportunity to muddy issues and to play fast and loose with the truth. They have seized this opportunity and exploited it to the full.

The most abysmal failure has come where most was promised. Instead of the speed we were promised, we have experienced delays in law enforcement exceeding anything in previous experience. Here the Kohler case provides an excellent example. NLRB proceedings were instituted in October of 1954. Not until late August of 1960 did the Board hand down its decision. This six year lapse is bad enough by itself. But when one considers that the NLRB decision does not by any means dispose of the case, the travesty on "speedy justice" heightens.

As has been noted, the NLRB decision puts the Kohler Company at a serious disadvantage. Despite its questionable character, the Kohler Company is virtually forced to obey the NLRB's order. The decision is weak and may very well be reversed. But a risk of several million dollars is involved. So the Kohler Company must restore strikers to their jobs even at the cost of discharging replacements hired during the strike.

Two years or so from now, a federal court may very well reverse the NLRB's decision. If it does, a great many lives will have been needlessly confused. Many serious and intricate personal difficulties will have been irresponsibly created. Men will have been forced to change jobs, to move their families, to find new living quarters, to undergo the pain and heartache of transplanting children—all because doctrinaire ideologues foolishly felt that "administrative law" was a better juridical system than the one set up by the Constitution of the United States.

With this observation we have reached the basic flaw in the system of "administrative law." All the defects trace finally to one fact: *administrative agencies conflict with the Constitution.*

Our charter of government insists that the true judicial power of the United States can be vested only in true courts, manned by judges who have life tenure in office. This federal judiciary, under the Constitution, has mandatory jurisdiction over *all* cases involving federal law. For this reason, the Congress has never given administrative agencies full judicial power. The violation of the Constitution would have been too open, too flagrant.

This is not to say that administrative agencies as we know them are consistent with the Constitution. Far from it. Congress has given them some of the legal and fact-finding powers which the Constitution reserves exclusively to the federal courts. But this grant is somewhat hidden, and it is complex and devious; it is not the obvious violation of the Constitution which a grant of full judicial power would be. It is, in short, disingenuously enough hidden to fore-

stall constitutional attack, or at least to make such an attack difficult and complicated.

But this very deviousness is what accounts for the delays. First, the legal and fact-finding powers are distributed between the NLRB and the true courts in a way that has been raising trouble consistently for a full generation, with no one knowing even today precisely which powers belong to the Board and which to the courts. This confusion will continue as long as administrative agencies exist. There is no way in which the power to find facts can be fractionalized and parceled out. Either you have the power or you don't have it.

Second, the coercive power which must stand behind every truly judicial order has been formally denied to the NLRB. To have given it this power would have been once again to reveal the truth: the violation of the Constitution would have been open and flagrant. Hence, formally speaking, an NLRB order has no binding force till it has been upheld by the decree of a true constitutional court. As we have seen, the Kohler Company is virtually compelled to obey the NLRB's order despite the possibility that a court will refuse to enforce it; and in this way the Board's orders have an unconstitutionally coercive quality. But the fact remains that as a formal matter, enforcement powers are reserved for the courts. And so every NLRB decision of any importance is taken to the courts for either enforcement or denial of enforcement.

Speedy justice is unattainable under such a stupid and complicated arrangement. The Constitution envisioned state and federal courts all over the country,

all with full power over facts and law, and all with the true judicial power to issue binding orders. There is a limit to the speed which is attainable consistently with justice. But within that limit, the structure envisioned by the Constitution is the best one which can be devised.

In its place we have one administrative agency, located with deviously limited powers in Washington, D. C., acting mainly as a roadblock to speed and a hazard to justice. Its fact finding is colored by its ideological prejudices. Its legal analysis is weak because of its doctrinaire attitudes and lack of legal expertise. It has no power to issue the swift and binding orders which alone can serve the ends of justice in many cases. Promising "speedy justice," it delivers neither speed nor justice. It is a bottleneck. It gives us delay, muddied issues, distorted findings of fact, and perverted conclusions of law. Webster's definition of "kangaroo court" was obviously not written with the NLRB in mind, but it might have been.

4. A Return to Law

There is no mystery about what needs to be done if we wish to return to the law and to achieve an effective administration of justice. We need as a nation to insist that the forces of law and order prevail against violence. The more flagrant and illiberal features of the National Labor Relations Act must be repealed. The National Labor Relations Board must be abolished. Finally, full jurisdiction and power must be restored to the state and federal courts.

The prevalence of violence in labor disputes can

not be tolerated in any country which pretends to be civilized. Whatever superficial indications of civilization may suggest, a country is a jungle to the extent that persons can not go about their legitimate business free of the fear that they will be assaulted or blocked by thugs and bullies. We have the means. The governments of this country have burdened the productive citizenry with confiscatory taxation. There are plenty of police. If hundreds are used to keep order when it is a question of protecting Communist bullies visiting the United Nations in New York City, it is not asking too much to have adequate police protection against union bullies.

The special privileges of compulsion granted unions by the NLRA must be repealed, and personal freedom must be restored to workingmen. The present right of workers to join or not to join unions free of coercion by employers or unions should be strengthened. This can be done best by repealing the majority-rule principle, leaving unions to represent only those employees who want such representation, not those who vote against it. The duty to bargain must be repealed, for it cannot be enforced without reaching a result which nobody wants: namely, agreements compelled by government.

With the repeal of the majority rule principle and the duty to bargain, there will no longer be a need of conducting representation elections. When that point is reached no need for an administrative agency in labor relations will exist at all, and the NLRB may be abolished with no loss to anyone concerned. In fact, there will be a gain all round. Collective bargaining will proceed more wholesomely and more naturally without the bumbling interventions of the

NLRB. The gain in progress toward the rule of law and the effective administration of justice will be substantial.

With the abolition of the NLRB, full jurisdiction in labor disputes will revert to the state and federal courts scattered around the country. These genuine courts have no ideological axe to grind. They feel that their function is to find the facts truly and well, and to develop the law on the basis of standards evolved over the centuries. To the degree that speedy justice is attainable, they will give it to us. They have the fundamental power to do so. The absurd roadblock of a single administrative agency located in Washington, D. C., will have been cleared. If we want a rule of law in the United States, this is the only way to get it.

The era of childish rebellion against our fundamental institutions has produced only strife, chaos, and tragedy. Let us then look again to the Constitution and its noble intent to establish justice and to insure domestic tranquility.

APPENDIX A

August 10, 1954

Mr. Herbert V. Kohler, President
Kohler Company
Kohler, Wisconsin

Dear Sir:

This is to advise you that the International Union, UAW-CIO Local 833, hereby modifies its monetary and contractual demands on the company in an effort to arrive at a speedy and honorable settlement of the matters in dispute between the union and the company.

1—General Wage Increases:

a. General wage increase of 10¢ an hour for all hourly rated workers retroactive to March 1st, 1954.

b. An additional 5¢ per hour wage adjustment for all skilled workers in the maintenance and tool and die departments retroactive to March 1st, 1954.

c. Establishment of procedures to resolve any existing wage inequities inside the plant and to reduce the number of existing wage classifications. The company is to furnish the union with necessary wage and other data required to make an intelligent study of wage inequity problems.

2—Non-contributory Pension Plan guaranteeing minimum standards equal to UAW-CIO pension benefits.

3—Improvements in Hospital-Medical Insurance to provide:

a. Increases in daily benefit for room and board from $6.00 to $8.00 per day.

b. Increase the maximum days of hospitalization from 31 to 120 days.

c. A change of definition of dependents to include children from birth instead of 14 days after birth.

d. Provide maternity benefits of $8.00 per day for 10 days and surgical benefits of $60.00 or a total reimbursement of $140.00. The increased cost of these benefits which amount to approximately 9/10th of 1¢ per hour to be paid for by the company.

4—The continuation of present Arbitration provisions in the contract with a clarification that the discharge or discipline of workers shall be subject to arbitration.

The union is agreeable to provide an additional grievance step prior to Arbitration which will be attended by the Regional Director of the UAW-CIO or his designated representative.

5—An amendment to the seniority provisions to provide for lay-offs according to seniority only.

6—Maintenance of Membership contract provisions with self-renewing check-off of union dues.

7—A 4% lunch time allowance for Enamel Shop and Pottery Dry Finishers engaged in continuous three shift operations.

The union is willing to negotiate on these matters still in dispute until satisfactory agreements are reached.

Sincerely yours,
EMIL MAZEY
Secretary-Treasurer, UAW-CIO.
HARVEY KITZMAN
Director, Region 10, UAW-CIO.
ALLAN GRASKAMP
President, UAW-CIO Local 833.

APPENDIX B

August 13, 1954

UAW-CIO, Local #833
527-A North Eighth Street,
Sheboygan, Wisconsin

Attention: Mr. Allan J. Graskamp, President

Gentlemen:

This is in reply to your letter of August 10, 1954, containing what you term a modification of your demands.

These are virtually the same demands which you made orally before negotiations were discontinued on June 29th and vary in terminology rather than in substance from your demands prior to the strike.

They offer no basis for an assumption that agreement can be reached.

The company's position on these demands is as follows:

1. The company has offered a 3¢ per hour wage increase. This makes a total of 18¢ per hour granted in the last two years.

   In addition, the company has granted fringe benefits estimated by the union at 6¢ per hour.

   In view of the fact that earnings of Kohler Co. employees have always exceeded the average for the industry, the state and the locality, the company's wage offer is not only fair but generous. The company's wage offer remains at 3¢ per hour, effective April 5, 1954.
2. The wages of employees in maintenance work and tool and die work are generally in line with wages paid in other departments and we are not in accord with any additional blanket increase for these employees.
3. In the contract last year the company agreed to a procedure intended to reduce the number of existing wage classifications and eliminate any

inequities. This procedure did not function due to the union's insistence on another general wage increase thinly disguised as an inequity adjustment and on the union's insistence that the company compile data not available and not necessary for bargaining.

Early in the negotiations, prior to the strike, the company expressed its willingness to establish procedures for bargaining to reduce the number of wage classifications and eliminate any intra-plant inequities that may exist. Company representatives have advised you that this is still the company's position.

4. Your objection to the present pension plan seems to stem mainly from the fact that it was in existence before your union became the bargaining agent and that the union therefore can not claim credit for forcing it upon the company.

   The company has offered to supplement the present pension plan to yield retirement benefits at age 65 equivalent to the maximum benefit under the union's plan for the total years of credited service in any case where the present plan would yield less. It does not agree that the plan be made non-contributory.

5. The company has offered to increase the daily benefits under the hospitalization insurance plan from $6.00 to $8.00 per day; to increase the maximum days from 31 to 120 days; to change the definition of dependent to include children from birth instead of 14 days after birth; and to increase maternity benefits from the present flat payment of $100 to a maximum benefit of $140.

   The company has also offered to continue to pay the full cost of hospitalization and surgical insurance for employees, including the increased benefits mentioned above.

The company will continue to contribute 14¢ per month toward the cost of hospitalization insurance for the employee's dependents.

6. The company has agreed to arbitration of the interpretation and application of the contract which is all the power a judge would have if the contract were before a court of law.

The company does not agree that vital management decisions shall be subject to the review of an arbitrator.

Many employees of the company presently working have been threatened with retaliation when the strikers return to work.

If any such attempts are made, the company will take prompt and adequate disciplinary action. It does not agree that its freedom in this respect shall be restricted by arbitration of discharges.

7. The company does not agree that seniority shall be made the sole factor to be considered in the event of a lay-off or for any other purpose.

In order to be fair to all employees and to maintain an efficient operation, merit and efficiency of performance must continue to be given consideration as well as seniority.

8. As you have been advised repeatedly, the company does not agree to any form of compulsory union membership.

It will not require employees to join a union as a condition of employment nor will it require them to continue membership in a union which they do not believe is properly representing them.

The company does not agree to maintenance of membership.

It has offered the same check-off provision to which it agreed in the last contract, the only change being to prevent deliberate misinterpretation by the union.

9. Sufficient time is now available for lunching in the Enamel Shop, as shown by the fact that the men do eat their lunch. The demand for a 4% lunch time allowance is a thinly disguised demand for a 4% increase in Enamel Shop rates in addition to the increase other employees receive.

An additional wage increase in the Enamel Shop is not warranted.

As you were advised prior to the strike, we intend to eliminate the third shift in the Pottery Dry Finishing Department.

The demands made in your letter offer little prospect for a settlement of the strike by agreement.

Company representatives will attend the meeting now scheduled by the Federal Conciliators for Friday, August 13, 1954.

If the situation appears to be still deadlocked and an impasse reached, further negotiations will be useless until such time as you are willing to take a more realistic view of the situation.

Very truly yours,
KOHLER CO.,
HERBERT V. KOHLER — *President*