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The 1986–1987 Labor Board: Has the Pendulum Slowed?†

Douglas E. Ray*

The 1986–87 period reviewed in the following *Survey* is notable for a number of important developments in the area of labor and employment law. One of the most important questions at the beginning of this time period, and the subject of this Introduction, is the state and direction of the law with regard to employee rights in the workplace, both in a union and non-union setting.

This question is particularly important when reviewing the recent decisions of the National Labor Relations Board.¹ The fiftieth anniversary of the National Labor Relations Act² in 1985 was marked by many attacks on the Board's ability and willingness to protect employees. Union leaders charged that labor laws had "been turned squarely against" workers and unions and that unions should not even bother seeking protection from the Board.³ United Mine Workers President Richard L. Trumka, for example, described Board decisions as "result-oriented" and stated that workers would be better off if the Board were abolished and the Taft-Hartley Act revoked.⁴ Similarly, AFL-CIO President Lane Kirkland described the labor laws as a "dead-letter" and suggested that workers might be "better off with the law of the jungle."⁵

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* Professor of Law, University of Toledo College of Law; B.A., University of Minnesota; J.D., Harvard University Law School. The author thanks Ms. Linda Whalen for her expert assistance.

¹ The National Labor Relations Board (NLRB or Board) is an adjudicative body heading the federal agency bearing the same name. Section 3(a) of the National Labor Relations Act, as amended, provides that the National Labor Relations Board shall consist of five members "appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a) (1982).

² National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 19 U.S.C. §§ 161–169 (1982)).

³ Remarks of James R. Herman, President of the International Longshoremen's and Warehousemen's Union, at the Pacific Coast Labor Law Conference (May 2–3, 1985), reported at 119 Lab. Rel. Rep. (BNA) 47, 48 (1985).

⁴ Remarks at University of Louisville Conference (April 24–25, 1986), reported at 122 Lab. Rel. Rep. (BNA) 25, 28 (1986).

⁵ Wall Street Journal, Aug. 16, 1984, at 8, col. 2. In a 1986 speech, Mr. Kirkland stated that the labor board "operates largely as an accounting tool to enable the worst elements in business to budget and limit their liability for breaking the law." Speech delivered to the AFL-CIO Convention in Anaheim, California (Oct. 28, 1985), reprinted at Kirkland, VITAL SPEECHES, 132–36 (Dec. 15, 1985).

These reactions and comments were motivated in part by a series of NLRB decisions issued between 1983 and 1985 which overruled prior precedent. Some of these decisions allowed employers to interrogate employees concerning their feelings about a union,⁶ to relocate part of a company's facilities without first bargaining with the union over the decision to relocate,⁷ to discipline or discharge strikers for picket line misconduct under a broader range of circumstances than had been allowed in the past,⁸ and to discipline at least some employees for refusing to cross stranger picket lines.⁹ NLRB decisions also narrowed the definition of "concerted activity" to allow employers to discipline or discharge employees under certain circumstances for complaining to state commissions about job safety.¹⁰

This Introduction will review and analyze a sample of 1986-87 NLRB decisions to determine how the current Board interprets these new standards in the area of employee and union rights and determine whether, in light of recent substantial changes in Board membership,¹¹ the pendulum of change at the NLRB has slowed.¹² Has filing charges with the NLRB become futile? Is it "open season" on employees affiliated with unions and strikers? Are unions in a bargaining relationship aided not at all by the law?

⁶ *Rossmore House*, 269 N.L.R.B. 1176, 116 L.R.R.M. 1025 (1984), *enforced sub nom.* *Hotel Employees & Restaurant Employees Union v. NLRB*, 760 F.2d 1006, 119 L.R.R.M. 2624 (9th Cir. 1985).

⁷ *Otis Elevator Co.*, 269 N.L.R.B. 891, 115 L.R.R.M. 1281 (1984) (no duty to bargain regarding company's relocation of research facilities; decision turned upon "significant change in the nature and direction" of company's business); *see also Milwaukee Spring Div. of Ill. Coil Spring Co.*, 268 N.L.R.B. 601, 115 L.R.R.M. 1065 (1984), *enforced*, 119 L.R.R.M. 2081 (D.C. Cir. 1985) (mid-term work relocation to reduce labor costs, after bargaining with union but not securing its consent, is not an unfair labor practice, because it does not violate express provision of labor contract).

⁸ *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 115 L.R.R.M. 1113 (1984) (striker's verbal threats, unaccompanied by physical acts or menacing gestures, no longer per se protected against discharge). The Board stated that Section 7's protection depends on whether the striker's misconduct, under all the circumstances, "may reasonably tend to coerce or intimidate" other employees. *Id.* at 1046, 115 L.R.R.M. at 1115. In determining the reinstatement rights of unfair labor practice strikers engaging in unprotected activities, the Board will no longer balance the severity of any employer unfair labor practice against the gravity of the striker's misconduct. *Id.* at 1047, 115 L.R.R.M. at 1116.

⁹ *Indianapolis Power & Light Co.*, 273 N.L.R.B. 1715, 118 L.R.R.M. 1201 (1985) (general contract clause barring strikes will be interpreted by the Board to include sympathy strikes; employees who refuse to cross stranger picket line may be disciplined).

¹⁰ *Meyers Indus., Inc.*, 269 N.L.R.B. 493, 115 L.R.R.M. 1025 (1984), *remanded sub nom.* *Prill v. NLRB*, 755 F.2d 941, 118 L.R.R.M. 2649 (D.C. Cir. 1985) (refusal by non-union employee to drive allegedly unsafe truck and his complaint to state public service commission are not "concerted" activity, because individual worker took such action on his own behalf and not "with or on the authority of other employees").

¹¹ Members Wilford Johansen, Marshall Babson, and James Stephens were appointed in 1985. Member Mary Cracraft was appointed in 1986.

¹² For a recent and thoughtful review of labor law decisions at the Supreme Court, see Gould, *The Burger Court and Labor Law: the Beat Goes On — Marcato*, 25 SAN DIEGO L. REV. 51 (1987). Professor Gould suggests that Burger Court decisions "represent a continued swing of the pendulum against the interests of organized labor." *Id.* at 76.

For a clear discussion of the 1986-87 Supreme Court decisions in the areas of labor and employment law, see the speech by Professor Charles B. Craver, subtitled "Expanding Focus upon Individual Rights and Pre-emption." 125 Lab. Rel. Rep. (BNA) 259 (1987) (text of Aug. 10, 1987 speech to ABA's Section of Labor and Employment Law).

The answers to these questions are particularly important in the late 1980's. These are critical times for labor organizations. The level of union representation has declined from about 35 percent of the private non-agricultural workforce in the 1950's to about 18 percent currently.¹³ This decline in the level of representation has been attributed to increasing employer resistance to organization and collective bargaining,¹⁴ the changing composition of the workforce and jobs,¹⁵ high unemployment levels, and the combined effects of foreign competition and deregulation.¹⁶ In an era of increasing resistance to union activity, changes in law that make it more difficult for unions to organize or maintain their representative status, even if not the sole cause of union decline, can accelerate the trend.

The cases reviewed in this Introduction address employee rights in a union organizing campaign,¹⁷ with particular emphasis on cases applying the Board's new rules for determining when an employer may lawfully question an employee concerning his or her feelings about a union,¹⁸ the collective bargaining process,¹⁹ the current Board's stance on the stability of bargaining relationships,²⁰ the rights of striking employees²¹ and, finally, employee rights in a non-union setting.²²

I. EMPLOYEE RIGHTS AND THE ORGANIZATION CAMPAIGN

Among the 1984 Board decisions criticized as destroying employee rights are those involving interrogation of employees and employer speech and action during a union organization campaign. The Board's 1984 decision in *Rossmore House*,²³ which held that interrogating individuals known to be union supporters will no longer be regarded as a *per se* unfair labor practice but, rather, will be judged under "all the circumstances," has been strongly criticized.²⁴ Other decisions which permit employers to grant additional

¹³ 124 Lab. Rel. Rep. (BNA) (discussing the January 1987 edition of *EMPLOYMENT AND EARNINGS*, published by the Bureau of Labor Statistics). Unions still represent approximately 17 million United States workers. *Id.* The remaining 80 million persons in the private workforce also have rights under the NLRA. These rights also have been affected by recent changes. See *infra* notes 118-36 and accompanying text.

¹⁴ For a discussion of increased employer resistance to union representation by unlawful means, see Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

¹⁵ Dickens & Leonard, *Accounting for the Decline in Union Membership, 1950-80*, 38 INDUS. & LAB. REL. REV. 323 (1985).

¹⁶ Gould, *Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform*, 38 STAN. L. REV. 937, 942 (1986).

¹⁷ See *infra* notes 23-61 and accompanying text.

¹⁸ See *infra* notes 26-43 and accompanying text.

¹⁹ See *infra* notes 62-72 and accompanying text.

²⁰ See *infra* notes 97-116 and accompanying text.

²¹ See *infra* notes 73-97 and accompanying text.

²² See *infra* notes 118-36 and accompanying text.

²³ See *supra* note 6.

²⁴ Professor Charles J. Morris has argued that the *Rossmore House* approach "represents an invitation for employers to delve into employee sentiment about unions and thereby improve the employer's election chances." C. Morris, Remarks at the Third Annual Multi-State Labor and Employment Law Seminar, Dallas, Texas (Mar. 19-30, 1985), reported at 119 Lab. Rel. Rep. (BNA) 281, 282 (1985).

employee benefits before an election and permit employer speeches linking unionization with plant closing have also met with strong criticism.²⁵

A. Interrogation

When the dispute has involved employers questioning employees concerning their union feelings, the Board has continued to apply the *Rossmore House* standard and reviewed cases of alleged interrogation on a case by case basis. In *Rossmore House*,²⁶ the Board adopted a "totality of circumstances" test in cases involving alleged interrogation of open and active union supporters. The *Rossmore House* Board stated it would "weigh the setting and nature of interrogations involving open and active union supporters," and listed four criteria for determining whether such questioning is unlawful under the test: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation.²⁷

The *Rossmore House* standards have led the Board to allow interrogation in certain circumstances but have not led to an "open season" for employer questioning. In *Tribune Co.*,²⁸ the Board panel held that interrogating employees did not violate the Act or constitute objectionable conduct where the employees publicly supported the union. Similarly, in *Creative Food Design*,²⁹ the Board found that a manager did not act unlawfully when he asked two employees the identities of persons who signed union authorization cards despite the fact that, in the same discussion, the manager also unlawfully threatened the employees with restaurant closure. The Board found that the inquiry would not reasonably create a fear of reprisal and was not coercive where the employees were fully aware that the employer already knew the card signers' identity.³⁰ *Creative Food Design* demonstrates that the *Rossmore House* standards do affect the pre-election environment.

In other cases, while the Board majority has found some interrogation lawful, new Board members have registered their disagreement. In *Super H Discount*,³¹ for example, the Board panel majority found lawful an assistant store manager's inquiry to two employees who were discussing a union authorization card over a store intercom. The majority found the inquiry legal as a "single, isolated, and innocuous exchange."³² Member Johanson dissented, stating that "[a] supervisor's questioning of an employee about her and other's union activities is not isolated and certainly not innocuous."³³ Member Babson took a similar view of the law in *Cartridge Actuated Devices*.³⁴ This decision involved a shop floor conversation where a low level supervisor asked an employee what he thought about the union. The employee responded that he was not sure but that something had to be done to improve working conditions. Because the encounters occurred on the shop floor, involved a low level supervisor and contained no threatening

²⁵ *Id.* at 282-83.

²⁶ 269 N.L.R.B. 1176, 116 L.R.R.M. 1025 (1984).

²⁷ *Id.* at 1178 n.20, 116 L.R.R.M. at 1027 n.20.

²⁸ 279 N.L.R.B. No. 138, 123 L.R.R.M. 1333 (1986).

²⁹ 282 N.L.R.B. No. 171, 124 L.R.R.M. 1273 (1987).

³⁰ *Id.* at 6, 124 L.R.R.M. at 1275.

³¹ 281 N.L.R.B. No. 109, 123 L.R.R.M. 1177 (1986).

³² *Id.* at 2, 123 L.R.R.M. 1178.

³³ *Id.* at 4, 123 L.R.R.M. 1042.

³⁴ 282 N.L.R.B. No. 66, 124 L.R.R.M. 1042 (1986).

language, the panel majority found no Section 8(a)(1) violation.³⁵ Member Babson would have found an unfair labor practice because the encounter occurred early in the campaign at a time when the employer did not know whether the questioned employee was an open and active labor supporter, was initiated by the supervisor, and occurred in the context of other unfair labor practices.³⁶

Finally, the Board has found questioning to constitute unlawful interrogation in a number of cases, sometimes over strong dissent by Chairman Dotson, one of the authors of the *Rossmore House* approach. In *Woodcliff Lake Hilton*,³⁷ for example, the panel found that an assistant manager unlawfully requested that an employee report back to him concerning any approaches for union support. In dissent, Chairman Dotson would have found the exchange an informal conversation, and not a threat.³⁸ In *Hospital Management Associates*,³⁹ the Board overruled the administrative law judge and found unlawful coercive interrogation where an employee's immediate supervisor called her into his office to speak privately and then asked her if she knew the union sympathies of specific people. *Atlantic Forest Products*⁴⁰ involved an open and active union supporter who wore a union button and told two supervisors about his union support. On the day before the election, his supervisor waited until he was alone in the breakroom and asked him to close the door. The supervisor then said, "Dave, I am not supposed to talk to you but just between me and you . . . well, how are you going to vote?" The employee told him he was going to vote "yes."⁴¹ The Board found the questioning coercive and unlawful.⁴²

In some cases, interrogation has been viewed as serious enough, when accompanied by other unlawful acts, to support issuing a bargaining order. In *Well-Bred Loaf*,⁴³ for example, the shift supervisor asked employees, who had not openly declared their union support, detailed questions concerning which employees engaged in union activity, which had signed union cards, and whether the employees questioned had signed union authorization cards. The questioning was accompanied by a warning not to sign a union card and a threat that the owner would discharge all employees involved in union activity. With the discharges of six employees in a unit of twenty-three, the interrogation was held to support a bargaining order.⁴⁴

In summary, the standards for what constitutes an unlawful interrogation under *Rossmore House* continue to evolve. It is not "open season" on employees. A test that measures coercive impact under all the circumstances, however, invites employers to come close to the boundary of unlawfulness and, because of the uncertainty about where that line will be drawn, to sometimes go beyond it. It further encourages employers to litigate cases of questionable legality.

³⁵ *Id.* at 4, 124 L.R.R.M. at 1044. The legislative provision refers to 29 U.S.C. § 158(a)(1) (1982).

³⁶ 282 N.L.R.B. at 5 n.5, 124 L.R.R.M. at 1044 n.5.

³⁷ 279 N.L.R.B. No. 146, 123 L.R.R.M. 1061 (1986).

³⁸ *Id.* at 4-5, 123 L.R.R.M. at 1062-63.

³⁹ 284 N.L.R.B. No. 5, 125 L.R.R.M. 1118 (1987).

⁴⁰ 282 N.L.R.B. No. 105, 124 L.R.R.M. 1127 (1987).

⁴¹ *Id.* at 5, 124 L.R.R.M. at 1130.

⁴² *Id.* at 6, 124 L.R.R.M. at 1130.

⁴³ 280 N.L.R.B. No. 36, 124 L.R.R.M. 1012 (1986); see also Koons Ford, 282 N.L.R.B. No. 88, 124 L.R.R.M. 1167 (1986) (bargaining order based in part on unlawful interrogations); Bridgeway Oldsmobile, 281 N.L.R.B. No. 165, 123 L.R.R.M. 1267 (1986) (bargaining order based on interrogation, threats to close, surveillance and discharge of union organizer).

⁴⁴ 280 N.L.R.B. No. 36 at 5, 124 L.R.R.M. at 1014.

B. Speech and Other Interference

With regard to other forms of election interference, the current Board may not be moving as far in a pro-employer direction as some critics fear. The Board continues to find employer conduct unlawful based on somewhat traditional analysis. In *Playboy Hotel*,⁴⁵ the Board found that the employer violated the Act and interfered with the union election when it granted improved health insurance benefits before an election. And, in *Atlantic Forest Products*,⁴⁶ the Board directed a second election in part because the employer withheld a regular pay raise and then attributed the event to the union's election petition.

The Board still monitors the election atmosphere for implicit and explicit threats. In *Link Manufacturing Co.*,⁴⁷ the Board found that the employer unlawfully created an atmosphere of surveillance by asking an employee how a union meeting had gone and advising an employee that he knew thirty-six employees had signed union cards. In *Standard Products Co.*,⁴⁸ an election was overturned when the Board found that an employer threatened employees with a loss of benefits and plant closure. Board members disagree, however, about what constitutes an unlawful threat in the organizational context. In *Black & Decker Corp.*,⁴⁹ the panel majority found employer literature objectionable when it implied that product lines and jobs would be lost in the event of unionization. In dissent, Chairman Dotson argued for the employer's right to inform employees of the "reasonably probable adverse consequences of unionization."⁵⁰ In *Atlantic Forest Products*,⁵¹ by contrast, the Board overruled the administrative law judge's ruling that an employer's speech was illegal when the employer stated that "in bargaining, so far as we are concerned, everything starts from scratch and even the benefits and wages you now have are bargainable."⁵² The employer went on to say:

We do not intend to let any union or anyone else force us to put your jobs in danger and if the union calls you out on strike to try and force us to do something which we think would hurt our business and affect your jobs, then we'll simply face up to a strike and get people in here who want to do the work or close the plant down if it can't be run efficiently. I repeat this will only be done if it can't be run efficiently.⁵³

The Board found the employer's speeches nothing more than "a partisan account," "mere partisan opinion," and "legitimate argument."⁵⁴

With regard to employer speech, it is difficult to tell when the Board will find a speech coercive and unlawful and when it will find the speech "mere partisan opinion." The newly evolving standard may also invite anti-union employers to engage in the kind of brinkmanship which the Supreme Court warned against in its landmark case dealing

⁴⁵ 281 N.L.R.B. No. 159, 123 L.R.R.M. 1182 (1986).

⁴⁶ 282 N.L.R.B. No. 105, 124 L.R.R.M. 1127 (1987).

⁴⁷ 281 N.L.R.B. No. 28, 123 L.R.R.M. 1084 (1986).

⁴⁸ 281 N.L.R.B. No. 18, 124 L.R.R.M. 1319 (1986).

⁴⁹ 282 N.L.R.B. No. 156, 124 L.R.R.M. 1210 (1987).

⁵⁰ *Id.* at 10, 124 L.R.R.M. at 1212.

⁵¹ 282 N.L.R.B. No. 105, 124 L.R.R.M. 1127 (1987).

⁵² *Id.* at 21-22, 124 L.R.R.M. at 1135.

⁵³ *Id.* at 22, 124 L.R.R.M. at 1135 (emphasis in original).

⁵⁴ *Id.* at 22-24, 124 L.R.R.M. at 1135-36.

with the difference between lawful prediction and unlawful threat, *NLRB v. Gissel Packing Co.*⁵⁵

C. Access to the Election Mechanism

The Board does seem to guard employee rights more jealously in the area of access to the NLRB election process. The Board has, for example, guarded employee rights to complete freely the union authorization cards necessary to obtain an election. In *Adco Metals*,⁵⁶ the Board confirmed its practice of holding authorization cards in confidence and found that the employer acted illegally when it advised employees that anyone signing a union authorization card could expect to be subpoenaed as a witness. In *Logo 7, Inc.*,⁵⁷ the Board held that the employer violated the Act by sending employees a letter stating that, in some instances, the union discloses signed authorization cards to the employer. The Board relied upon *Adco* to find this an unlawful threat, stating that it "recognized the vital role played by the solicitation of authorization cards in an organizational campaign and the chilling effect on the right of employees to signify their union support if they know that their employer can readily ascertain their identity."⁵⁸ Thus, while there are questions as to the degree employees are protected in the pre-election period, their right to an election has not been compromised.

D. Conduct of Elections

Finally, it appears that the current Board will strictly construe procedures for conducting elections. In *Lemco Construction, Inc.*,⁵⁹ the Board certified the results of an election where only one of eight eligible voters participated. A group of employees wished to vote together but relied on an incorrect timepiece and arrived after the polls were closed. The Board announced that the number of eligible employees who voted in a representation election will no longer determine the election's validity so long as there is adequate notice and opportunity to vote and employees are not prevented from voting by the conduct of a party or unfairness in scheduling.⁶⁰ Because the employees' reason for not voting was within their control, the Board found that the facts did not constitute "unusual circumstances."⁶¹

⁵⁵ 395 U.S. 575, 71 L.R.R.M. 2481 (1969). The Court noted that an employer "can easily make his [or her] views known without engaging in 'brinkmanship' when it becomes all too easy to 'overstep and tumble [over] the brink.'" *Id.* at 620, 71 L.R.R.M. at 2498 (quoting *Wausau Steel Corp. v. NLRB*, 377 F.2d 369, 372, 65 L.R.R.M. 2001, 2003 (7th Cir. 1967)).

⁵⁶ 291 N.L.R.B. No. 172, 123 L.R.R.M. 1245 (1986).

⁵⁷ 284 N.L.R.B. No. 19, 125 L.R.R.M. 1131 (1987).

⁵⁸ *Id.* at 2, 125 L.R.R.M. at 1131. Thus, the Board guards access to the authorization card process with some of the same intensity with which it guards access to the NLRB charge filing mechanism. See *Norris Concrete*, 282 N.L.R.B. No. 45, 123 L.R.R.M. 1329 (1986) (employer violated Act by threatening employees if they testify in NLRB proceedings or file charges, disciplining and discharging employees for filing charges, and laying off an employee because his son had filed charges).

⁵⁹ 283 N.L.R.B. No. 68, 124 L.R.R.M. 1328 (1987), *overruling* *Gold & Baker*, 54 N.L.R.B. 869, 13 L.R.R.M. 235 (1944) and *Kit Mfg. Co.*, 187 N.L.R.B. 1, 81 L.R.R.M. 1136 (1971).

⁶⁰ *Id.* at 5-6, 124 L.R.R.M. at 1330.

⁶¹ *Id.* at 6, 124 L.R.R.M. at 1330.

II. COLLECTIVE BARGAINING

Much of the criticism directed at the Board in recent years has been sparked by its decisions in the collective bargaining area. In *Otis Elevator Co.*,⁶² the 1984 Board found that the employer had no duty to bargain over its decision to relocate its research facilities because the decision turned on a "significant change in the nature and direction" of the business. In *Garwood-Detroit Truck Equipment, Inc.*,⁶³ the 1985 Board held that the company's decision to subcontract the installation and servicing of its truck equipment was not a mandatory bargaining subject. Even though the employer was trying to eliminate significant labor costs through subcontracting, the Board determined that the decision involved a "significant change in the nature and direction" of the business.⁶⁴ These decisions posed a significant threat to a union's ability to negotiate over a partial closing and attempt to preserve jobs.

A. *The Duty to Bargain*

With regard to the employer's duty to bargain over important business decisions, the Board recently has issued decisions that may limit *Garwood* and *Otis Elevator*. In *Strawsine Manufacturing Co.*,⁶⁵ the Board found that the employer violated the Act by failing to bargain with the union over its decision to close the plant and relocate the work. The Board stated that an employer is not exempt from bargaining under *Otis* when its decision is motivated by anti-union reasons. In *Litton Systems*,⁶⁶ a more important case, the Board found that the employer violated the Act by failing to bargain with the incumbent union over its decision to relocate countertop oven production from Minnesota to South Dakota. Because the decision rested primarily on labor costs, the Board viewed it as falling within the realm of mandatory bargaining. The majority, over a strong dissent by Chairman Dotson,⁶⁷ found that the union did not waive its right to bargain either through a broad management rights clause in the contract, because the clause did not specifically reserve to the employer the right unilaterally to transfer work, or through its failure to challenge earlier layoffs.

Similarly, in *Arrow Automotive*,⁶⁸ the Board found that the employer violated the Act by failing to bargain to impasse before unilaterally closing one of four plants and relocating the work to one of the remaining three. Again, the Board determined that the decision was based on labor costs and was, therefore, a mandatory bargaining subject. *Litton* and *Arrow Automotive* demonstrate that the current Board does impose some limits on *Olin's* reach. The test of whether the management decision turns on labor costs will not always be easy to apply, however, and no doubt will lead to lengthy litigation in many cases. The employer in *Arrow Automotive*, for example, was ordered to pay over five years' back pay to employees terminated due to the plant closing.

⁶² 269 N.L.R.B. 891, 115 L.R.R.M. 1281 (1984).

⁶³ 274 N.L.R.B. 113, 118 L.R.R.M. 1417 (1985). The facts of *Garwood* somewhat resembled those of *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 57 L.R.R.M. 2607 (1964), where the Supreme Court held that subcontracting did constitute a mandatory bargaining subject.

⁶⁴ 274 N.L.R.B. at 115, 118 L.R.R.M. at 1420.

⁶⁵ 280 N.L.R.B. No. 63, 123 L.R.R.M. 1270 (1986).

⁶⁶ 283 N.L.R.B. No. 144, 125 L.R.R.M. 1081 (1987).

⁶⁷ *Id.* at 15, 125 L.R.R.M. at 1085.

⁶⁸ 284 N.L.R.B. No. 57, 125 L.R.R.M. 1188 (1987).

B. *The Right to Information*

The current Board has not been uniformly hostile to unions attempting to perform their functions at the bargaining table. In a number of recent cases, for example, the Board has protected the union's right to the information necessary to perform its role as bargaining representative. In *New York Post Corp.*,⁶⁹ for example, the Board required the employer to provide information and statistics on a variety of matters, including equal employment opportunity, unit, non-unit and managerial personnel, work done by subcontractors, in-house computer subcontractor personnel, and employee absenteeism and sick leave use. In *Nielson Lithographing Co.*,⁷⁰ the Board required the employer to provide the union with financial information on the company. The employer's statement that jobs would be lost and that the company would go out of business unless economic concessions were made created the obligation to provide the information because the statement implied an inability to pay. New unions, too, have received Board protection. In *Angelica Healthcare Services*,⁷¹ the employer was required to furnish a newly certified union with employee names, addresses, seniority dates, wages, hours, insurance and pensions benefits, and disciplinary records.

The employer's duty to provide information has even extended to overcoming the employer's right to exclude persons from its premises. In *Hercules, Inc.*,⁷² for example, a union hygienist was granted access to the plant to investigate accidents, conduct health and safety inspections, and test for toxic or hazardous fumes.

III. STRIKES AND LOCKOUTS

The 1984-85 Board issued decisions that significantly affected the conduct and regulation of strikes. Standards for determining when an employer may fire a striker for picket line misconduct were changed in *Clear Pine Mouldings, Inc.*⁷³ *Indianapolis Power & Light Co.*⁷⁴ held that a broad no-strike clause in a contract bars sympathy strikers. In the strikes and lockouts area, the 1986-87 Board has not modified its earlier positions. Recent cases strictly apply the *Clear Pine Mouldings* test, expand an employer's power in a lockout situation, and change the analysis used to determine whether an employer may withdraw recognition from a union in a strike situation.

A. *Striker Misconduct*

In picket line violence cases, the Board continues to protect the rights of persons seeking to cross picket lines by a fairly strict construction of *Clear Pine Mouldings*.⁷⁵ This case held that an employer is justified in not reinstating a striker whose "misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimi-

⁶⁹ 283 N.L.R.B. No. 60, 124 L.R.R.M. 1377 (1987).

⁷⁰ 279 N.L.R.B. No. 118, 123 L.R.R.M. 1217 (1986). The Board distinguished *Atlanta Hilton & Tower*, 271 N.L.R.B. 1600, 117 L.R.R.M. 1224 (1984), where the Board found that employer references to the economy and industries in financial trouble did not convey an inability to pay sufficient to trigger the duty to provide financial information.

⁷¹ 280 N.L.R.B. No. 100, 123 L.R.R.M. 1252 (1986).

⁷² 281 N.L.R.B. No. 130, 124 L.R.R.M. 1252 (1986).

⁷³ 268 N.L.R.B. 1044, 115 L.R.R.M. 1113 (1984).

⁷⁴ 273 N.L.R.B. 1715, 118 L.R.R.M. 1201 (1985).

⁷⁵ See *supra* note 73 and accompanying text.

date employees in the exercise of rights protected under the Act."⁷⁶ If the employer can prove its allegations,⁷⁷ it seemingly may discharge employees under the *Clear Pine Mouldings* test for actions that cause no physical harm. In *GSM, Inc.*,⁷⁸ for example, the employer discharged a group of employees who had either slapped, kicked or thrown beer cans at vehicles crossing the picket line. In overruling the administrative law judge, the Board found that the employees' behavior disqualified them from reinstatement because:

Conduct such as kicking, slapping, and throwing beer cans at moving vehicles is intimidating enough in and of itself without being accompanied by additional threats of a "threatening or violent demeanor." Further, while such conduct might be "relatively innocuous" when measured against more violent behavior, it nevertheless is violent conduct which may reasonably tend to coerce or intimidate employees in the exercise of the rights protected under the Act.⁷⁹

Another employee who was discharged had strategically parked his van so picketers could hide behind it and throw rocks. In addition, when he was following a company truck in his van, another employee, his passenger, jumped out of the van to throw a cinder block at the truck. The Board found this employee was in "active cooperation"⁸⁰ with picketers engaged in coercive and intimidating conduct and could be discharged. Similarly, in *Cartridge Actuated Devices*,⁸¹ the Board stated that "[w]e do not agree . . . with the judge's observation that . . . kicking a vehicle is 'the type of impulsive behavior that can be expected on a picket line during the course of a lengthy and tense strike.'"⁸²

An employee may not safely claim provocation or retaliation as a defense for his or her picket line activity. In *Richmond Recording Corp.*,⁸³ the Board upheld the discharge of a striker for tossing nails on the employer's main driveway, even though the striker claimed he acted in retaliation for nails thrown under picketers' cars by guards and replacement workers. The Board stated that "two wrongs do not make a right."⁸⁴ In the same case, the Board upheld the discharge of a striker who hit a car with a stick after the car hit the striker while crossing the picket line. The Board found that the incident was precipitated by picketers who approached the car with sticks and intimidated the driver.

⁷⁶ 268 N.L.R.B. at 1046, 115 L.R.R.M. at 1115 (quoting *N.L.R.B. v. W.C. McQuaid, Inc.*, 552 F.2d 519, 528, 94 L.R.R.M. 2950, 2955 (3d Cir. 1977)).

⁷⁷ See *Louisiana-Pacific*, 282 N.L.R.B. No. 183, 125 L.R.R.M. 1175 (1987) (employer violated Act by discharging striker despite honest but mistaken belief that striker had thrown rocks at company van).

⁷⁸ 284 N.L.R.B. No. 22, 125 L.R.R.M. 1133 (1987).

⁷⁹ *Id.* at 3-4, 125 L.R.R.M. at 1134.

⁸⁰ *Id.* at 4, 125 L.R.R.M. at 1134. Member Babson found that the driver's participation in the cinder block incident was, standing alone, sufficient to warrant discharge. *Id.* at 4 n.10, 125 L.R.R.M. at 1134 n.10.

⁸¹ 282 N.L.R.B. No. 66, 124 L.R.R.M. 1042 (1986).

⁸² *Id.* at 1 n.1, 124 L.R.R.M. at 1043 n.1 (citing *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 115 L.R.R.M. 1113 (1984)).

⁸³ 280 N.L.R.B. No. 77, 124 L.R.R.M. 1081 (1986).

⁸⁴ *Id.* at 4, 124 L.R.R.M. at 1082.

B. Access to Property

While continuing to monitor the bounds of striker behavior, the current Board has recognized that picketing strikers do have the right under the Act to convey effectively their message to the public and other employees, at least when they do so peaceably. This right can outweigh the employer's property interests. In *Schwab Foods*,⁸⁵ the Board found that a struck grocery store violated the Act by prohibiting picketing in the walkway/ vestibule area in front of the grocery store and an adjoining drugstore. The only access to the area was from a parking lot maintained jointly by the two stores. The Board majority held, after balancing the Section 7 rights against those of the property owner,⁸⁶ that the employee's Section 7 rights prevailed and the employer could neither refuse striking employees access nor limit their picketing to outside the parking lot entrance. The panel majority noted that the Section 7 rights of the employee-strikers in *Schwab Foods* were stronger than those of the non-employee picketers denied access to the employer's property in the recent *Fairmont Hotel* decision.⁸⁷

C. Post-Strike Reactions

Sometimes the Board's commitment to protecting a person's freedom to honor or not to honor picket lines leads to decisions favoring strikers. In *Summa Corp.*,⁸⁸ the Board found that an employer violated the Act when it threw a \$4000 party for the 168 persons who had abandoned a strike which ended two and one-half months earlier. The Board found discriminatory the employer's failure to invite those who did not abandon the strike and rejected the employer's alleged justification that the party was necessary to reduce post-strike tensions. Chairman Dotson, in dissent, would have found the alleged business justification sufficient.⁸⁹

D. Lockout Issues

In a major decision that may affect employer and union strategies at bargaining impasse, the Board held in *Harter Equipment*⁹⁰ that absent specific proof of anti-union motivation, an employer lawfully may use temporary replacement workers during a lawful lockout. The Board found this action reasonably adapted to achieving a legitimate employer interest which has only a comparatively slight adverse effect on protected employees rights.⁹¹ In *Birkenwald, Inc.*,⁹² where temporary replacements were hired for

⁸⁵ 284 N.L.R.B. No. 120, 125 L.R.R.M. 1225 (1987).

⁸⁶ Application of a balancing test, of course, depends on the person who is doing the balancing. Chairman Dotson dissented. *Id.* at 12, 125 L.R.R.M. at 1233.

⁸⁷ 282 N.L.R.B. No. 27, 123 L.R.R.M. 1257 (1986).

⁸⁸ 282 N.L.R.B. No. 94, 124 L.R.R.M. 1089 (1987).

⁸⁹ *Id.* at 10-14, 124 L.R.R.M. at 1091-92 (Dotson, Chairman, dissenting).

⁹⁰ 280 N.L.R.B. No. 71, 122 L.R.R.M. 1219 (1986). The Board stated:

[A]s a general rule . . . an employer does not violate Section 8(a)(3) and (1), absent specific proof of antiunion motivation, by using temporary employees in order to engage in business operations during an otherwise lawful lockout, including a lockout initiated for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position.

Id. at 11-12, 122 L.R.R.M. at 1223.

⁹¹ *Id.* at 10, 122 L.R.R.M. at 1222.

⁹² 282 N.L.R.B. No. 130, 124 L.R.R.M. 1239 (1987).

locked out drivers and warehouse employees, Member Stephens indicated that he would prefer a balancing test such as that advocated by former Chairman Miller in 1972⁹⁵ rather than the *Harter Equipment* formula.⁹⁴ The implications of the *Harter Equipment* holding remain to be seen. Management infrequently uses lockouts, but this holding may increase their usage.

E. Status of Strike Replacements

Finally, in *Buckley Broadcasting Corp.*,⁹⁵ the Board held that it will no longer presume that replacement workers hired during a strike support the union in the same ratio as employees engaged in the walkout.⁹⁶ The Board held that the employer unlawfully refused to continue bargaining with an incumbent union because it lacked sufficient objective proof to establish a good faith doubt that the union had lost its majority support. This case may make it easier for an employer to withdraw recognition in a strike situation.

IV. CONTINUITY OF THE BARGAINING RELATIONSHIP

It is in the area of protecting the continuity of bargaining relationships that the current Board demonstrates that it is not an agency committed to destroying unions. In cases dealing with successorship issues and attempted withdrawal of recognition from incumbent unions, it has, with the exception of the *Buckley Broadcasting*⁹⁷ case, maintained prior Board standards and issued decisions protecting the incumbent union. Thus, it is not fair to say that the Board has proclaimed "open season" on incumbent unions.

A. Successorship

With regard to successorship issues, the Board has decided a number of cases in which an employer purchased a company with union-represented employees and attempted to avoid hiring a majority of the predecessor's workforce in order to avoid incurring a duty to bargain with the union. In *State Distributing Co.*,⁹⁸ the Board found that an employer that acquired a wine distributorship qualified as a successor employer even though it did not hire a majority of its employees from the predecessor's workforce. The Board found the successor's failure to hire its predecessor's employees illegally motivated by a desire to avoid having a majority of its workforce represented by a union. The Board determined that some of the predecessor's employees failed to submit employment applications because of the "climate of futility" engendered by the employer's remarks.⁹⁹ Similar results were reached in *American Press, Inc.*¹⁰⁰ and *Dasal Caring Centers, Inc.*¹⁰¹

⁹⁵ See *Inter Collegiate Press*, 199 N.L.R.B. 177, 177-79, 81 L.R.R.M. 1508, 1510-12 (1972) (Miller, Chairman, concurring), *enforced*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 416 U.S. 938, 84 L.R.R.M. 2924 (1974).

⁹⁴ 282 N.L.R.B. No. 130 at 5, 124 L.R.R.M. at 1240.

⁹⁵ 284 N.L.R.B. No. 113, 125 L.R.R.M. 1281 (1987).

⁹⁶ *Id.* at 17, 125 L.R.R.M. at 1286.

⁹⁷ See *supra* notes 95-96 and accompanying text.

⁹⁸ 282 N.L.R.B. No. 151, 124 L.R.R.M. 1241 (1987).

⁹⁹ *Id.* at 2, 124 L.R.R.M. at 1241.

¹⁰⁰ 280 N.L.R.B. No. 109, 123 L.R.R.M. 1064 (1986).

¹⁰¹ 280 N.L.R.B. No. 7, 124 L.R.R.M. 1071 (1986).

State Distributing is also noteworthy because of the Board's response to an argument concerning the appropriate remedy for the employer's unilateral and illegal reduction of wages and benefits. The employer argued that under the United States Court of Appeals for the Second Circuit's ruling in *Love's Barbeque Restaurant*,¹⁰² a "make whole" remedy for the entire five year period since the successor took over was not appropriate. The employer urged that the higher wage and benefit rate (the former contractual rate) should be paid for only a "reasonable time of bargaining" because bargaining in 1982 would likely have led to an impasse after which the employer could have lawfully reduced wages. Rejecting this argument, the Board stated:

With respect, we continue to adhere to our view that, in circumstances like those here and in *Love's Barbeque*, it is appropriate to calculate backpay on the basis of the contractual rates paid by the predecessor (in other words, the existing terms and conditions of employment) because the successor's unlawful failure to recognize and bargain with the union has left us without an adequate or reasonable alternative basis for calculating what rates would have been arrived at through lawful bargaining. As noted above in connection with the uncertainties regarding hiring, it is proper to resolve uncertainties against the one whose unlawful acts have created those uncertainties.¹⁰³

The Board noted that there was no certain way to determine whether the parties might have agreed, had there been bargaining, to a wage rate lower than the contract rate but higher than the rate unilaterally imposed and, if they had agreed, what the rate might have been and when it might have been implemented.

B. *Withdrawal of Recognition*

The Board has also had the opportunity to consider a number of cases in which an employer has attempted to withdraw recognition from a union by alleging that the union no longer has majority support. The general rule has been that an employer may not lawfully withdraw recognition from an incumbent union because of its asserted doubt of the union's continued majority status, unless the assertion is based on objective considerations sufficient to provide the employer reasonable grounds for believing that its employees no longer desire union representation.¹⁰⁴ Such asserted doubt may not be raised in the context of employer unfair labor practices aimed at causing employees to abandon the union.¹⁰⁵ In recent cases, the Board has rejected employer arguments of reasonable doubt both because of insufficient evidence and employer wrongdoing. As noted above,¹⁰⁶ however, the Board has changed the rule for determining the replacement workers' union feelings which, in turn, may change the result of some future cases.

¹⁰² 245 N.L.R.B. 78, 102 L.R.R.M. 1546 (1979), *enforced in pertinent part sub nom.* Kallmann v. N.L.R.B., 640 F.2d 1094, 1102-03, 107 L.R.R.M. 2011, 2017-18 (9th Cir. 1981).

¹⁰³ 282 N.L.R.B. No. 151 at 4, 124 L.R.R.M. at 1242.

¹⁰⁴ Celanese Corp., 95 N.L.R.B. 664, 28 L.R.R.M. 1362 (1951); Terrell Machine Co., 173 N.L.R.B. 1480, 70 L.R.R.M. 1049 (1969). See generally Ray, *Withdrawal of Recognition from an Incumbent Union Under the National Labor Relations Act: An Appraisal*, 28 VILL. L. REV. 869 (1983).

¹⁰⁵ Pittsburgh & New England Trucking Co., 249 N.L.R.B. 833, 836, 104 L.R.R.M. 1287, 1288 (1980); Chicago Magnesium Castings Co., 256 N.L.R.B. 668, 674, 107 L.R.R.M. 1344, 1345 (1981).

¹⁰⁶ See *supra* notes 95-96 and accompanying text.

In a number of cases, the Board found the employer's evidence insufficient to support its asserted doubt. In *Cowles Publishing Co.*,¹⁰⁷ for example, the Board majority found an employer's withdrawal of recognition illegal because it was not based on objective considerations sufficient to support the employer's alleged belief that the union no longer represented a majority of employees. Chairman Dotson would have found the withdrawal legal because it was based in part on seven months of union inactivity during negotiations and the high turnover of employees.¹⁰⁸ Similarly, in *Aquaslide 'N' Dive Corp.*,¹⁰⁹ withdrawal of recognition was inappropriate because only 97 of 248 unit employees were shown to no longer wish representation.

In other cases, employer unfair labor practices invalidated the employer's reliance on statements from a majority of employees. In *Hearst Corp.*,¹¹⁰ for example, three decertification petitions signed by a majority of employees were held insufficient to support a withdrawal because, both before and during circulation of the petitions, the employer solicited employees to repudiate the union, interrogated employees, promised better benefits, instructed employees how to resign from the union, and urged employees to sign the petitions. Similar results were reached in *Architectural Woodwork Corp.*,¹¹¹ where the employer had solicited employees to file a decertification petition, and in *Hohn Industries*,¹¹² where an employee petition rejecting the union resulted from the employer's unlawful poll of employee union sentiments.

The *Buckley Broadcasting*¹¹³ ruling that replacement workers hired during a strike will be presumed neither to support or oppose the incumbent union is not without

¹⁰⁷ 280 N.L.R.B. No. 105, 123 L.R.R.M. 1013 (1986).

¹⁰⁸ *Id.* at 7, 123 L.R.R.M. at 1015.

¹⁰⁹ 281 N.L.R.B. No. 34, 123 L.R.R.M. 1129 (1986).

¹¹⁰ 281 N.L.R.B. No. 113, 123 L.R.R.M. 1241 (1986). With regard to the employer's argument that employees were unaware of its unlawful acts and therefore such acts did not taint the petitions, the majority stated:

Nor is a different result warranted merely because the Respondent was able to produce 19 employee witnesses who testified that they were unaware of the Respondent's unlawful conduct. Where, as here, an employer engages in unlawful activity aimed specifically at causing employee disaffection with their union, its misconduct, we find, will bar any reliance on an expression of disaffection by its employees, notwithstanding that some employees may profess ignorance of their employer's misconduct. An employer that has engaged in unlawful conduct, of the type engaged in by the Respondent, cannot expect to take advantage of the chance occurrence that some of its employees may be unaware of its actions. For as the Board has previously stated, an employer who engages in efforts to have its employees repudiate their union must be held responsible for the foreseeable consequence of its conduct.

Id. at _____, 123 L.R.R.M. at 1242. Chairman Dotson noted that he does not agree that employer unfair labor practices should "ipso facto" prevent an employer from establishing that a decertification petition signed by a majority of employees was untainted by unlawful conduct. *Id.* at _____ n.11, 123 L.R.R.M. at 1243 n.11.

¹¹¹ 280 N.L.R.B. No. 108, 123 L.R.R.M. 1319 (1986).

¹¹² 283 N.L.R.B. No. 13, 124 L.R.R.M. 1352 (1987); see also *Louisiana-Pacific Corp.*, 283 N.L.R.B. No. 161, 125 L.R.R.M. 1122 (1987) (statements of disaffection with union from less than 20 percent of employees held not to constitute sufficient basis for withdrawal of recognition). A poll of employees taken three months after the withdrawal was found illegal because it was undermined by the unlawful withdrawal and thus lacked an objective basis. *Id.* at 6, 125 L.R.R.M. at 1123. Chairman Dotson dissented.

¹¹³ See *supra* notes 95-96 and accompanying text.

common sense. The idea that persons who cross a union picket line should be presumed to support the very union that is trying to get them dismissed is very hard to accept.¹¹⁴ A "no presumption" rule has much to recommend it and has been suggested in the past.¹¹⁵ The *Buckley Broadcasting* ruling does, however, expose the weakness of the entire concept of recognition withdrawal. Should an employer be able to refuse to bargain with an incumbent union based on a "good faith doubt" when neither the employer nor the employees have chosen to pursue a decertification election on their own? Unfair labor practice proceedings to test the validity of the employer's doubt can take years, while an election could be conducted in days.¹¹⁶ If the *Buckley Broadcasting* rule unacceptably alters the balance of economic weapons between employer and union, the answer may lie in reexamining the entire test for withdrawal rather than creating presumptions of doubtful validity.

¹¹⁴ See generally Note, *The Strikers' Replacements Presumption and an Employer's Duty to Bargain with the Incumbent Union*, 21 B.C.L. REV. 455 (1980). See also Ray, *supra* note 104. The question of how to treat replacement workers hired to take the place of economic strikers has a checkered history. In *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 49 L.R.R.M. 1466 (1962), the Board held that when permanent replacements constitute a majority of the unit, reasonable grounds exist to question the union's continued majority support. Similarly, in *Arkay Packaging Corp.*, 227 N.L.R.B. 397, 94 L.R.R.M. 1197 (1976), the Board majority distinguished a normal turnover situation from the strike replacement situation and stated that in the circumstances of that case "it would be wholly unwarranted and unrealistic to presume as a matter of law that, when hired, the replacements for the union employees who had gone out on strike favored representation by the Unions to the same extent as the strikers." *Id.* at 397-98, 94 L.R.R.M. at 1198. See also *Beacon Upholstery Co.*, 226 N.L.R.B. 1360, 94 L.R.R.M. 1334 (1976). Only six months after its decision in *Arkay*, however, the Board decided *Windham Community Memorial Hosp.*, 230 N.L.R.B. 1070, 95 L.R.R.M. 1565 (1977), a case involving a strike by nurses and other hospital personnel. There, a unanimous Board announced that the presumption of union support would apply in the strike situation, stating, "[t]he general rule . . . is that new employees, including striker replacements, are presumed to support the union in the same ratio as those whom they have replaced." *Id.* at 1070, 95 L.R.R.M. at 1566. The Board has continued to apply this rule in subsequent decisions. See, e.g., *Pennco, Inc.*, 250 N.L.R.B. 716, 104 L.R.R.M. 1473 (1980), *enforced*, 684 F.2d 340, 111 L.R.R.M. 2821 (6th Cir.), *cert. denied*, 459 U.S. 994, 111 L.R.R.M. 2823 (1982). In November, 1982 the Court denied certiorari to *Pennco*, a withdrawal of recognition case in which the Sixth Circuit rejected the employer's argument that striker replacements should be held not to support the union. Justice White, with whom Justices Blackmun and Rehnquist joined, dissented from the denial of certiorari. In their view:

The questions of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements should be presumed to oppose the certified union or favor the certified union, have produced conflict among the Courts of Appeals and between the Courts of Appeals and the agency charged with enforcing the National Labor Relations Act. The questions are of obvious significance to national labor policy. The need for a uniform approach to these questions is equally obvious.

459 U.S. at 996, 111 L.R.R.M. at 2824 (White, J., dissenting).

¹¹⁵ See Ray, *supra* note 104, at 903.

¹¹⁶ For a suggestion that the legislative history of the Act does not support continuation of the withdrawal of recognition concept after 1947, see Ray, *Industrial Stability and Decertification Elections: Need for Reform*, 1984 ARIZ. ST. L.J. 257.

V. INDIVIDUALS IN A NON-UNION SETTING

The rights of non-union employees under the Act¹¹⁷ have been much debated in recent years. In its 1984 decision in *Meyers Industries*,¹¹⁸ the Board overruled prior precedent¹¹⁹ which found implied concerted action, and therefore legal protection, when an employee takes individual action that also affects fellow workers. It dismissed the complaint of a non-union truckdriver who was fired after first refusing to follow his employer's order to drive a defective truck-trailer to Michigan from Tennessee and then filing a safety complaint with a state commission. The Board held that the driver's actions were not protected concerted activity because they were not "with or on the authority of other employees."¹²⁰ The Board reaffirmed its position in 1986 after the case was remanded from the Court of Appeals for the District of Columbia Circuit.¹²¹

While *Meyers II* makes it unlikely that the *Meyers* standard will soon be overruled, more recent decisions of the Board, in which new members of the Board have participated,¹²² indicate that *Meyers* may not be read as narrowly as first feared. Two recent decisions, over strong dissents by Chairman Dotson, seem to withdraw from an expansive reading of *Meyers*. In *Every Woman's Place*,¹²³ a Board majority distinguished *Meyers* and found that the employer violated the Act by discharging an employee for calling the Wage and Hour Division of U.S. Department of Labor to inquire about employees' rights regarding working on holidays. The call constituted concerted activity, in the majority's view, because the employee and co-workers previously had discussed overtime compensation with an employer official and the call was a "logical outgrowth of the original protest."¹²⁴ The majority found the call "sufficiently linked to group activity"¹²⁵ to constitute concerted activity and found it immaterial that the employee followed express instructions from other employees. Chairman Dotson dissented, in part, on the grounds that there was no evidence the employee acted on the authority of any employees when she made the call, nor any evidence that the employees intended to take the matter any further or to select the employee as their spokesperson. Chairman Dotson accused his

¹¹⁷ Section 7 of the Act protects non-union employees by providing:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1982).

¹¹⁸ 268 N.L.R.B. 493, 115 L.R.R.M. 1025 (1984) [hereinafter *Meyers I*], remanded sub nom. *Prill v. NLRB*, 755 F.2d 941, 118 L.R.R.M. 2649 (D.C. Cir.), cert. denied, 106 S. Ct. 313, 120 L.R.R.M. 3392 (1985), reaffirmed, 281 N.L.R.B. No. 118, 123 L.R.R.M. 1137 (1986) [hereinafter *Meyers II*].

¹¹⁹ See, e.g., *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 91 L.R.R.M. 1131 (1975).

¹²⁰ *Meyers I*, 268 N.L.R.B. at 497, 115 L.R.R.M. at 1029.

¹²¹ *Meyers II*, 281 N.L.R.B. No. 118, 123 L.R.R.M. 1137 (1986).

¹²² Only Chairman Dotson and Members Babson and Stephens participated in the *Meyers II* decision. Member Johansen did not participate. *Id.* at 1 n.1, 123 L.R.R.M. at 1137 n.1. Member Cracraft had not yet taken office.

¹²³ 282 N.L.R.B. No. 48, 124 L.R.R.M. 1001 (1986).

¹²⁴ *Id.* at 2, 124 L.R.R.M. at 1001.

¹²⁵ *Id.* at 1-2, 124 L.R.R.M. at 1001.

colleagues of ignoring the dictates of *Meyers* and reviving prior and overruled precedent. He termed the "legal outgrowth" argument a legal fiction.¹²⁶

Similarly, in *Salisbury Hotel*,¹²⁷ a Board panel majority found that an employee engaged in protected activity when she complained to her employer and co-workers about the employer's lunch hour policy and called the Department of Labor. Even though the employees did not specifically direct her to make the call, the Board panel majority found the call protected because it "logically grew out of the employees' concerted efforts" and was "therefore a 'continuation' of that concerted activity."¹²⁸ In a concurring opinion, Chairman Dotson stated that he would not find the Labor Department call a concerted activity.¹²⁹

Every Woman's Place and *Salisbury Hotel* indicate that *Meyers* will not always be read to require that employees explicitly deputize an employee to act on their behalf. The developing "logical outgrowth" standard is yet of uncertain dimensions, however, and it is not clear when it will protect employees. Other recent cases, too, indicate a willingness to protect individual rights in a variety of settings. In *Joseph D. Rario, DMD*,¹³⁰ a Board panel found that the employer violated the Act by discharging a dental hygienist who was authorized by co-workers to discuss with management employee complaints about overtime and uniform allowances. The Board panel held that the employer's asserted reasons for discharge were pretextual. In *New Horizons for the Retarded, Inc.*,¹³¹ the Board panel held that the employer violated the Act by discharging the leader of a planned sick-out. Because the sick-out was a one-time incident rather than a pattern of intermittent strikes, the Board found it protected.

In *Buck Brown Contracting*,¹³² the Board held that an individual represented by a union has protected individual rights outside the union relationship. The Board panel majority found that an employee was engaged in protected activity and illegally discharged when he tried to assist an unlawfully discharged co-employee to gain reemployment with the company. In response to the argument that such activity could undermine the exclusive representative, the Board panel majority stated that the employee "was not engaged in collective bargaining; rather, he was involved in classic concerted activity — joining with another to seek employment."¹³³

Finally, the current Board has given employees a certain latitude within which to exercise their rights. In *Consumers Power Co.*,¹³⁴ a Board panel held unlawful the discharge of a meter reader who complained about a supervisor's failure to provide police protection to another employee who had been kicked by a customer. The majority found it not dispositive that the meter reader became upset, cursed, and reflexively raised his fists to the supervisor when the supervisor moved his hands in front of the meter reader. The majority stated:

¹²⁶ *Id.* at 8, 124 L.R.R.M. at 1003.

¹²⁷ 283 N.L.R.B. No. 101, 125 L.R.R.M. 1020 (1987).

¹²⁸ *Id.* at 7, 125 L.R.R.M. at 1022.

¹²⁹ *Id.* at 10, 125 L.R.R.M. at 1022 (Dotson, Chairman, concurring).

¹³⁰ 283 N.L.R.B. No. 86, 125 L.R.R.M. 1024 (1987).

¹³¹ 282 N.L.R.B. No. 110, 124 L.R.R.M. 1181 (1987).

¹³² 283 N.L.R.B. No. 75, 124 L.R.R.M. 1379 (1987).

¹³³ *Id.* at 5 n.6, 124 L.R.R.M. at 1381 n.3.

¹³⁴ 282 N.L.R.B. No. 24, 123 L.R.R.M. 1305 (1986).

The Board has long held, however, that there are certain parameters within which employees may act when engaged in concerted activities. The protections Section 7 affords would be meaningless were we not to take in account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses. Thus, when an employee is discharged for conduct that is part of the *res gestae* of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service. We do not believe [the employee] crossed that line.¹³⁵

Chairman Dotson dissented on the grounds that the employee's actions were not concerted and that, in any event, he had exceeded the scope of protection by assaulting his supervisor.¹³⁶

Conclusion

The above cases demonstrate that resort to the National Labor Relations Board does not have to be a futile exercise for employees and unions. Recent decisions demonstrate that employees are protected in their right to select a union by decisions limiting employer interrogation¹³⁷ and coercive speech,¹³⁸ and protecting their right to obtain elections by use of authorization cards.¹³⁹ Recent decisions recognize the union's right to do its job at the bargaining table by limiting the employer's right to relocate without bargaining¹⁴⁰ and requiring the employer to provide relevant information to the union.¹⁴¹ Other decisions recognize the employer's duty to bargain with its employees' representative and do not easily allow the employer to evade its bargaining responsibilities in successor situations¹⁴² or by attempted withdrawal of recognition.¹⁴³ Finally, despite the decisions in *Meyers I*¹⁴⁴ and *Meyers II*¹⁴⁵ the Section 7 rights of non-union employees are recognized in many situations.¹⁴⁶

A close review of many of these opinions reveals what appears to be careful and studied decision-making. The Board applies precedent or distinguishes prior rulings with care and many opinions contain dozens of footnotes attempting to explain why a

¹³⁵ *Id.* at 8, 123 L.R.R.M. at 1307. In *Marico Enterprises*, 283 N.L.R.B. No. 112, 125 L.R.R.M. 1044 (1987), however, an employee was found to have crossed the line. Engaged in the protected activity of speaking with the employer's president on the plant floor in the presence of co-workers, the employee insulted and directed obscenities at the president and refused to leave unless he was fired. The discharge was found lawful.

¹³⁶ 282 N.L.R.B. No. 24 at 11-13, 123 L.R.R.M. at 1307-08.

¹³⁷ See *supra* notes 26-43 and accompanying text.

¹³⁸ See *supra* notes 45-55 and accompanying text.

¹³⁹ See *supra* notes 56-58 and accompanying text.

¹⁴⁰ See *supra* notes 62-68 and accompanying text.

¹⁴¹ See *supra* notes 69-72 and accompanying text.

¹⁴² See *supra* notes 97-103 and accompanying text.

¹⁴³ See *supra* notes 104-16 and accompanying text.

¹⁴⁴ See *supra* notes 118, 120 and accompanying text.

¹⁴⁵ See *supra* notes 118, 121 and accompanying text.

¹⁴⁶ See *supra* notes 122-36 and accompanying text.

particular decision is or is not inconsistent with past precedent.¹⁴⁷ This is not to say, however, that labor's 1985 criticisms of the law are no longer of concern. While current cases carefully apply and distinguish precedent in a principled fashion, the precedent applied includes the 1983-85 cases about which labor complained. While the Board distinguished *Rossmore House*¹⁴⁸ and found some interrogation unlawful,¹⁴⁹ the case was not overruled. While *Otis Elevator Co.*¹⁵⁰ was carefully distinguished to find that some relocations and plant closings require prior collective bargaining,¹⁵¹ it likewise was not overruled. While *Meyers*¹⁵² was limited and distinguished in cases protecting individual rights,¹⁵³ it was reaffirmed, not overruled. Finally, *Clear Pine Mouldings*,¹⁵⁴ as applied, created a new code of conduct for picket line activity.¹⁵⁵

Other long standing problems have not disappeared. Professor Charles Morris, for example, has argued that Board enforcement of core employee protections has been "woefully inadequate" and that substantial restructuring and procedural reform is necessary to enable the NLRB to perform its statutory objectives in these areas.¹⁵⁶ His review of NLRB annual reports indicates that between 1962 and 1981, a time when union organizational activity was declining, discriminatory discharges and refusal to bargain charges increased dramatically.¹⁵⁷ We must ask whether any Board, whatever its political background, can effectively control an employer that chooses to violate the law.

Another problem that remains is that of delay. A number of the 1986 and 1987 cases discussed above involve incidents which occurred in 1981 and 1982.¹⁵⁸ With regard to interference with elections, collective bargaining, successorship, and withdrawal of recognition, delay is fatal to employees' right to representation. After a four to six year hiatus, a bargaining order cannot restore to employees their prior effective representation. The demonstrated futility of the union throughout such delay undercuts the support of even the most ardent union supporter. Normal turnover over such a period will further erode majority support and thus the effectiveness of the representation.

In summary, the union rhetoric of 1985 no longer fully applies. If one of the purposes of such rhetoric was to slow the rate of change and moderate the influence of employers, it has been partially successful. Resort to the Board is not futile and boycotting the Board in every case could forfeit some of the protections to which employees are legally entitled. The guiding precedents of 1984-85 do survive, however, and the law which is now applied in Washington includes those decisions which so discouraged labor.

¹⁴⁷ See, e.g., *Every Woman's Place*, 282 N.L.R.B. No. 48, 124 L.R.R.M. 1001 (1986).

¹⁴⁸ See *supra* notes 6, 23-26 and accompanying text.

¹⁴⁹ See *supra* notes 37-41 and accompanying text.

¹⁵⁰ See *supra* note 62 and accompanying text.

¹⁵¹ See *supra* notes 65-68 and accompanying text.

¹⁵² See *supra* notes 118-21 and accompanying text.

¹⁵³ See *supra* notes 122-36 and accompanying text.

¹⁵⁴ See *supra* note 73 and accompanying text.

¹⁵⁵ See *supra* notes 76-84 and accompanying text.

¹⁵⁶ Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 17 (1987).

¹⁵⁷ *Id.* at 20.

¹⁵⁸ See, e.g., *Creative Food Design*, 282 N.L.R.B. No. 171, 124 L.R.R.M. 1273 (1987) (five years); *Atlantic Forest Prods.*, 282 N.L.R.B. No. 105, 124 L.R.R.M. 1127 (1987) (six years); *Consumers Power Co.*, 282 N.L.R.B. No. 24, 123 L.R.R.M. 1305 (1986) (five years); *Cowles Publishing Co.*, 280 N.L.R.B. No. 105, 123 L.R.R.M. 1013 (1986) (five years).

Furthermore, uncertainty exists as to where lines will be drawn regarding election campaign propaganda, interrogation, bargaining duties, and individual rights. Such uncertainty may cause some employers to stray too close to the line in areas where there are few effective remedies for illegal activity. As with many areas of the law, there are few clear cut answers. We must look to future decisions to determine whether the tempering influence noted here will continue.