

1971-1972 ANNUAL SURVEY OF LABOR RELATIONS LAW*

TABLE OF CONTENTS

INTRODUCTION	1348
I. EMPLOYMENT DISCRIMINATION	1348
A. <i>Title VII of the Civil Rights Act of 1964</i>	1348
1. <i>Federal Court Jurisdiction Under the Civil Rights Act of 1866</i>	1350
2. <i>Grievance and Arbitration—Effect on Title VII Actions</i>	1353
3. <i>Filing Requirement of Title VII</i>	1361
4. <i>Seniority Systems and the "Business Necessity" Test</i>	1362
5. <i>1972 Amendments to Title VII</i>	1366
B. <i>The Philadelphia Plan—Affirmative Action Requirement</i>	1368
II. NLRB DEFERRAL TO ARBITRATION: <i>Collyer Insulated Wire</i>	1376
III. PREEMPTION; BOARD AND COURT JURISDICTION	1381
A. <i>Motor Coach Employees v. Lockridge</i>	1381
B. <i>Exception to the Anti-Injunction Statute: Nash-Finch</i>	1385
IV. BOARD PRACTICE AND PROCEDURE	1388
A. <i>Section 10(l): Terminal Handling Co. v. Solien</i>	1388
B. <i>The Blocking Charge Rule: Templeton v. Dixie Color</i>	1392
V. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY	1394
A. <i>Recognition without Election—Card-based Bargaining Orders</i>	1394
1. <i>Judicial Development of Gissel</i>	1394
2. <i>NLRB Development of Gissel: Restaurant Associates Industries, Inc.</i>	1400
B. <i>Pre-election Statements</i>	1401
1. <i>Applicability of § 8(c) to Representation Cases: Bausch & Lomb, Inc. v. NLRB</i>	1401
2. <i>Promise of Benefits; Threat of Reprisals</i>	1403
VI. UNFAIR LABOR PRACTICES	1405
A. <i>The Duty to Bargain</i>	1405
1. <i>Benefits for Retired Employees: Pittsburgh Plate Glass</i>	1405
2. <i>Decision to Close: General Motors; Summit Tooling</i>	1408
3. <i>Successor Employer: Burns and Ranchway</i>	1413
4. <i>Union Enforcement of Production Quota: Westgate Painting</i>	1415
5. <i>Coalition Bargaining: Lynchburg Steel and Shell Oil</i>	1417
B. <i>Employer Discrimination</i>	1420
1. <i>Solicitation/Distribution Rules</i>	1420
2. <i>Racial Discrimination: Farmers' Cooperative Compress</i>	1425
3. <i>Discharge of Managerial Employee: North Arkansas Electric Cooperative</i>	1430
C. <i>Union Discrimination</i>	1431
1. <i>The Conflict within § 8(b)(1)(A): Granite State, Boeing, and General Electric</i>	1431
2. <i>Unlawful Motivation of Union Discipline: Graziano</i>	1439
3. <i>Enforcement of Union Fines by Expulsion: Silas Mason</i>	1440

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D. <i>Economic Strikers</i>	1441
1. <i>Sympathetic Strikers: General Electric and General Tire and Rubber</i> ..	1442
2. <i>Limitation of Reinstatement Rights by Agreement: United Aircraft</i> ..	1445
E. <i>Jurisdictional Disputes: Plasterers' Local</i>	1448
F. <i>Remedies</i>	1452
1. <i>Tiidee</i>	1452
2. <i>Automotive Plating</i>	1455

INTRODUCTION

The goal of this comment—the twelfth in a series of efforts to summarize recent developments in the field of labor law¹—is to assist practitioners to keep abreast of changes in the law which occurred during the twelve months ending on March 31, 1972. Significant decisions of the National Labor Relations Board and the courts are reported in the greatest depth possible in a work of this nature.

Especially noteworthy during the Survey year were the NLRB's repudiation of prior policy with respect to deference to arbitration,² the Supreme Court's announcement of an implied exception to the federal anti-injunction statute,³ Supreme Court development of the preemption doctrine,⁴ and amendment of Title VII of the Civil Rights Act of 1964.⁵

I. EMPLOYMENT DISCRIMINATION

A. *Title VII of the Civil Rights Act of 1964*

Since its enactment, Title VII of the Civil Rights Act of 1964¹ has become increasingly effective as a remedy for minority group employment discrimination. During the Survey year, the most significant development regarding Title VII was enactment of the Equal Employment Opportunities Act of 1972,² which amends Title VII in several important areas, the foremost change being a grant of authority to the

¹ The previous comments are: 1970-1971 Annual Survey of Labor Relations Law, 12 B.C. Ind. & Com. L. Rev. 1026 (1971); 1969-1970 Annual Survey of Labor Relations Law, 11 B.C. Ind. & Com. L. Rev. 916 (1970); 1968-1969 Annual Survey of Labor Relations Law, 10 B.C. Ind. & Com. L. Rev. 785 (1969); Recent Decisions on Jurisdictional Problems, 9 B.C. Ind. & Com. L. Rev. 1059 (1968); 1966-1967 Annual Survey of Labor Relations Law, 8 B.C. Ind. & Com. L. Rev. 771 (1967); 1965-66 Annual Survey of Labor Relations Law, 7 B.C. Ind. & Com. L. Rev. 909 (1966); 1964-1965 Annual Survey of Labor Relations Law, 6 B.C. Ind. & Com. L. Rev. 815 (1965); Recent Developments in Labor Law, 5 B.C. Ind. & Com. L. Rev. 629 (1964); Recent Developments in Labor Law, 4 B.C. Ind. & Com. L. Rev. 661 (1963); Labor's New Frontier; The End of the Per Se Rules, 3 B.C. Ind. & Com. L. Rev. 487 (1962).

² See pp. 1376-81 *infra*.

³ See pp. 1385-88 *infra*.

⁴ See pp. 1381-85 *infra*.

⁵ See pp. 1348-68 *infra*.

¹ 42 U.S.C. §§ 2000e et seq. (1970), as amended Pub. L. No. 92-261 (1972).

² 86 Stat. 103 (1972).

Equal Employment Opportunities Commission (EEOC) to initiate court actions to enforce the Act. Judicial developments during the Survey year include both procedural and substantive interpretations of Title VII.

Title VII's general purpose is the elimination of employer and union practices which discriminate against employees and job applicants on the bases of race, color, religion, sex or national origin.³ The Equal Employment Opportunities Commission was created by the original Act with the power to investigate and informally conciliate grievances alleging racial, religious or sex discrimination.⁴ Where there is a local or state agency to act on such an allegation the EEOC may not act until such agency has done so.⁵ The grievant in a state with an equal employment agency must first file his complaint with that agency. He is then required to wait sixty days or until the termination of state proceedings, whichever is earlier, before he may file a charge with the EEOC.⁶ Upon receipt of a complaint, the Commission investigates to determine whether reasonable cause exists to believe that the charge is true. If reasonable cause does exist, the EEOC attempts to eliminate the unlawful practice through informal conciliation and persuasion.⁷ Prior to the 1972 amendments, if the Commission was unable to resolve the dispute satisfactorily within thirty days, it notified the grievant of his right to sue the respondent in federal court within thirty days of receiving such notice.⁸ The amended Act permits the EEOC itself to initiate and litigate the court action with one proviso—the grievant may do so should the EEOC defer.⁹

The EEOC procedures evidence a congressional preference for informal conciliation of disputes rather than court action.¹⁰ These procedures provide a relatively inexpensive remedy for aggrieved parties and allow an employer to explain his action without the public condemnation resulting from a more formal proceeding. Compliance with these procedures, however, means that in most cases the grievant

³ 42 U.S.C. § 2000e-2 (1970).

⁴ 42 U.S.C. §§ 2000e-4, -5 (1970). The 1972 amendments to Title VII provide the EEOC with authority to enforce the Act in federal court following unsuccessful attempts to conciliate a dispute. See pp. 1366-67 *infra*.

⁵ 42 U.S.C. § 2000e-5(b) (1970).

⁶ 42 U.S.C. § 2000e-5(b) (1970).

⁷ 42 U.S.C. § 2000e-5(a) (1970).

⁸ 42 U.S.C. § 2000e-5(e) (1970). The thirty day period allotted to the EEOC may be extended to sixty days where "further efforts to obtain voluntary compliance are warranted."

⁹ Pub. L. No. 92-261.

¹⁰ *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476, 487, 2 FEP Cases 574, 582 (7th Cir. 1970). But see *Larson, The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 56, 70-71 (1972).

must wait a minimum of ninety days before a complaint can be filed in federal district court alleging a Title VII violation. He then must begin anew, since the record of the EEOC proceedings may not be used as evidence in a subsequent court action.¹¹ Moreover, the EEOC's case backlog results in an eighteen to twenty-four month delay between the filing of a charge and the initiation of the EEOC investigation.¹² This lengthy waiting period, coupled with the EEOC's failure successfully to resolve over half of its cases,¹³ has led grievants to circumvent the Title VII, procedures principally through the utilization of three vehicles: (1) district court action under the Civil Rights Act of 1866, (2) private grievance and arbitration proceedings, and (3) NLRB unfair labor practice proceedings.

1. *Jurisdiction under the Civil Rights Act of 1866*

During the Survey year, the Fifth Circuit, in *Caldwell v. National Brewing Co.*,¹⁴ became the second circuit court to assert jurisdiction of an employment discrimination case based on the Civil Rights Act of 1866 where the plaintiff had intentionally bypassed the Title VII procedures. The Third Circuit had allowed a similar action in *Young v. International Telephone and Telegraph Co.*¹⁵ a few months earlier. *Caldwell* is indicative of an increasing number of lower federal court decisions permitting plaintiffs to bypass completely the procedural requirements of Title VII in the hope of obtaining faster and more effective relief in the federal courts.

Prior to 1968, little use was made of the nineteenth century civil rights laws as remedies for non-governmental discrimination. But in *Jones v. Alfred H. Mayer Co.*,¹⁶ the Supreme Court held that Section 1 of the Civil Rights Act of 1866,¹⁷ and therefore its derivative, 42 U.S.C. § 1982,¹⁸ was an effective bar against private, as well as governmental,

¹¹ 42 U.S.C. § 2000e-5(a) (1970).

¹² Larson, *supra* note 10 at 72.

¹³ The Commission has obtained either partially or completely satisfactory conciliation in less than half the cases brought before it. 77 Lab. Rel. Rep. 202 (News & Backgd. Inf., 1971).

¹⁴ 443 F.2d 1044, 3 FEP Cases 600 (5th Cir. 1971).

¹⁵ 438 F.2d 757, 3 FEP Cases 146 (3rd Cir. 1971).

¹⁶ 392 U.S. 409 (1968).

¹⁷ Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, reenacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, 144 and codified in §§ 1977 and 1978 of the Revised Statutes of 1874, now 42 U.S.C. § 1981 (1970). In its original form, section 1 provided:

That all persons . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts . . . to inherit, purchase, lease, hold and convey real and personal property . . . as is enjoyed by white citizens. . . .

¹⁸ In its original form 42 U.S.C. § 1982 was part of Section 1 of the Civil Rights Act of 1866. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-27 (1968). Section 1982,

discrimination in the sale or rental of property. This interpretation laid the groundwork for utilization of section 1981¹⁹—also a derivative of the 1866 Act—as a jurisdictional basis for private employment discrimination cases.

The Seventh Circuit, in *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*,²⁰ was the first circuit court to assert jurisdiction under section 1981. There, a black employee filed a charge with the EEOC, but the EEOC failed to achieve resolution of the dispute and notified the grievant of his right to sue in federal court. When he brought suit, the district court dismissed the complaint, holding, *inter alia*, that the plaintiff had not complied with Title VII procedural requirements²¹ and that section 1981 did not create a cause of action for non-governmental racial discrimination.²² The Seventh Circuit reversed, holding that section 1981 was applicable to private acts of job discrimination,²³ and that Title VII did not impliedly repeal section 1981 because the two statutes can, in large measure, be reconciled.²⁴ In order to reconcile the congressional intent expressed in Title VII that complaints of this nature be settled through conciliation²⁵ with its holding that actions may be brought under section 1981, the court required that a "reasonable excuse" for the grievant's failure to exhaust EEOC remedies be pleaded.²⁶

Four months after *Waters*, the Fifth Circuit, in *Sanders v. Dobbs Houses, Inc.*,²⁷ agreed with the *Waters* court and allowed jurisdiction under section 1981 where the plaintiff made a good faith effort to comply with Title VII.²⁸ In both *Water* and *Sanders*, the plaintiff attempted

in its present form, provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1970).

¹⁹ Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . ." 42 U.S.C. § 1981 (1970).

²⁰ 427 F.2d 476, 2 FEP Cases 574 (7th Cir. 1970), cert. denied sub nom. International Harvester Co. v. Waters, 400 U.S. 911 (1970).

²¹ The court held that the plaintiff's union was an indispensable party to the adjudication but that the union could not be joined as a defendant because plaintiff, in the EEOC proceeding, had not charged the union with discriminatory practice pursuant to section 706(e) to Title VII. 427 F.2d at 485-86, 2 FEP Cases at 581-82.

²² Id. at 485, 2 FEP Cases at 580.

²³ Id. at 481, 2 FEP Cases at 577.

²⁴ Id. at 484, 2 FEP Cases at 580.

²⁵ See note 10 supra and accompanying text.

²⁶ 427 F.2d at 487, 2 FEP Cases at 582. Although the opinion does not give examples of what would constitute a "reasonable excuse," it would seem that a bona fide effort to exhaust Title VII remedies would satisfy the court.

²⁷ 431 F.2d 1097, 2 FEP Cases 942 (5th Cir. 1970).

²⁸ The plaintiff in *Sanders* had filed her complaint sixteen days after the thirty day statute of limitations imposed by Section 706(a) of Title VII had expired. Id. at 1098, 2 FEP Cases at 942.

to comply with Title VII but through procedural error was foreclosed from enforcing his Title VII rights. These two decisions may be interpreted, then, as having permitted a court action in order to prevent an inequitable outcome. If this was their underlying rationale it would appear that a plaintiff who has not at least filed a charge with the EEOC would fail to satisfy the "reasonable excuse" requirement and thus would be foreclosed from maintaining an action under section 1981.

However, in *Young* the Third Circuit held that even where the plaintiff does not allege that he has taken any action under Title VII, the district court may assert jurisdiction under section 1981. The *Young* court cited both *Waters* and *Sanders* in concluding that section 1981 was applicable to private acts of discrimination and that Title VII did not repeal the 1866 Civil Rights Act.²⁹

However, the *Young* court went significantly farther than these decisions in several respects. First, it refused to apply the proviso of *Waters* that the plaintiff plead a reasonable excuse for his failure to exhaust EEOC remedies.³⁰ Secondly, it suggested that a district court, in prescribing relief in a section 1981 case, may properly accommodate Title VII conciliation procedures with section 1981 jurisdiction.³¹

In *Caldwell*, the Fifth Circuit was faced squarely with the issue it had left open in *Sanders* and that the Third Circuit resolved in *Young*: may a plaintiff deliberately bypass the Title VII administrative remedies and go directly to federal court under section 1981? Indeed, the black employee plaintiff admitted that he had not filed a charge with the EEOC. The district court dismissed the action, holding that the plaintiff must plead a "reasonable excuse" for his failure to exhaust EEOC remedies.³² The Fifth Circuit reversed. It distinguished *Sanders*, noting that there it did not hold that a plaintiff is required to exhaust EEOC procedures. Moreover, it rejected the "reasonable excuse" requirement of *Waters*.³³ The court, however, did not reject the *Waters* rationale that it is necessary in a section 1981 action to afford due regard to the conciliatory policy of Title VII. Rather, like *Young*, *Caldwell* recommends that the district court on remand structure relief consistent with Title VII. In this regard it specifically emphasized section 706(e) of Title VII which permits the court to stay proceedings

²⁹ 438 F.2d at 759-60, 3 FEP Cases at 148-51.

³⁰ Id. at 762-63, 3 FEP Cases at 150.

³¹ This is especially so, stated the court, where the section 1981 action seeks equitable relief. It noted that, "[b]y fashioning equitable relief with due regard to the availability of conciliation and by encouraging in appropriate cases a resort to EEOC during the pendency of § 1981 cases the courts will carry out the policies of both statutes." Id. at 764, 3 FEP Cases at 151.

³² *Caldwell v. National Brewing Co.*, 3 FEP Cases 599 (S.D. Fla. 1970).

³³ 443 F.2d at 1046, 3 FEP Cases at 602.

for sixty days pending the outcome of EEOC conciliation efforts. The court also cited the power of the trial court to preserve the status quo with a preliminary injunction while such conciliation is taking place.⁸⁴ While *Waters* required that a plaintiff make an effort to comply with Title VII prior to filing his complaint, *Caldwell* and *Young* have apparently shifted the point of accommodation of section 1981 and Title VII to the post-complaint stage of the action.

The impact of *Caldwell* and the line of cases discussed herein is still undetermined.⁸⁵ It is likely that recognition of section 1981 as a valid jurisdictional device will attract an appreciable number of plaintiffs desirous of avoiding the delay inherent in the Title VII procedures. However, if the courts adhere closely to the recommendation of *Young* and *Caldwell* that the conciliatory processes of the EEOC be deferred to after section 1981 jurisdiction is asserted, the delay will not be avoided unless courts order the EEOC to dispose of court-referred cases immediately.

2. *Grievance and Arbitration—Effect on Title VII Actions*

In many cases where an employee charges his employer with discriminatory practices he may prefer to seek a remedy through the grievance and arbitration procedures established by the existing collective bargaining agreement. From a practical viewpoint, arbitration may be preferable in that it can be accomplished with far less delay than either Title VII procedures or a suit under the 1866 Civil Rights Act.⁸⁶ The difficulty with arbitration in employment discrimination cases, however, is that the grievant is often left without adequate representation in the arbitral proceeding. This may occur when the union has an

⁸⁴ *Id.*

⁸⁵ At present, only the Third, Fifth and Seventh Circuits have approved jurisdiction of section 1981 employment discrimination cases but district courts subject to review by four other circuits have ruled on the issue. Allowing jurisdiction: *Crosslin v. Mountain States Telephone & Telegraph Co.*, 4 FEP Cases 32 (D. Ariz. 1971); *Taylor v. Safeway Stores, Inc.*, 333 F. Supp. 83, 4 FEP Cases 245 (D. Colo. 1971); *Tolbert v. Daniel Construction Co.*, 332 F. Supp. 772, 3 FEP Cases 1077 (D. S. Car. 1971). Denying jurisdiction: *Brady v. Bristol-Myers, Inc.*, 332 F. Supp. 995, 4 FEP Cases 107 (E.D. Mo. 1971), appeal docketed, No. 71-1589 (8th Cir. 1972), *Tooles v. Kellogg Corp.*, 336 F. Supp. 114, 4 FEP Cases 169 (D. Neb. 1972); *Foye v. United A.G. Stores Cooperative, Inc.*, 336 F. Supp. 82, 4 FEP Cases 172 (D. Neb. 1972). Thus, it is likely that other circuits will be called upon to rule on this issue shortly. In this regard it should be noted that courts may no longer have any basis for refusing to allow section 1981 jurisdiction on the ground that that statute was impliedly repealed by Title VII. Congress rejected an amendment to the Equal Employment Opportunity Act of 1972 which would have made Title VII the exclusive remedy for discriminatory employment practices.

⁸⁶ Title VII procedures are often delayed up to two years due to the EEOC's backlog of cases. See *Larson*, supra note 10 at 72. A discipline case can be disposed of through arbitration in two to three months. *Lev and Fishman, Suggestions to Management: Arbitration v. The Labor Board*, 10 B.C. Ind. & Com. L. Rev. 763 (1969).

interest in perpetuating the discriminatory practice.³⁷ Moreover, labor arbitrators may not be fully competent to deal with racial or religious discrimination grievances, since their expertise is primarily in the more traditional areas of labor relations.

Until recently, an employee, prior to filing a discriminatory employment practice charge in court, was required to make a binding election of remedies between arbitration and judicial action. Hence, an aggrieved employee who invoked plant grievance and arbitration machinery hoping to obtain speedy settlement of his claim would be foreclosed from filing a subsequent Title VII claim. The dilemma of the grievant in this situation is clear. The arbitral process is more expeditious and less complicated than court action, yet the possibility of inadequate union representation or inadequate treatment of the charge by the arbitrator is a real one. On the other hand, while the EEOC and the federal courts provide more sympathetic and competent forums, the procedural requirements of Title VII are complex and entail great delay.³⁸

Courts ruling on the issue of whether a prior arbitral award precludes a Title VII action must consider the following fundamental factors: (1) whether or not the employee's statutory right to be free from discriminatory employment practices³⁹ is fully protected in the arbitral proceeding,⁴⁰ and (2) the degree of deference to be given to arbitration in furtherance of clear congressional preference for private settlement of disputes arising from employment discrimination.⁴¹

During the Survey year, in *Dewey v. Reynolds Metals Co.*⁴² the Supreme Court was presented with the opportunity to resolve a split among three circuits: the Seventh in *Bowe v. Colgate-Palmolive Co.*,⁴³ and the Fifth in *Culpepper v. Reynolds Metals Co.*⁴⁴ and in *Hutchings*

³⁷ The Supreme Court has observed that because the contractual remedies of grievance and arbitration are devised and controlled by the union and the employer, "they may well prove unsatisfactory or unworkable for the individual grievant." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967).

³⁸ The delay inherent in Title VII procedures is discussed in the text accompanying note 13 *supra*.

³⁹ Section 703(a) of Title VII provides: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual because of such individual's race, color, religion, sex or national origin. . . ." 42 U.S.C. § 2000e-2(a) (1970).

⁴⁰ See text accompanying note 1 *supra*. The question of contract rights versus Title VII rights is conceptually similar to the question of contract rights versus NLRA rights discussed in connection with *Collyer Insulated Wire*. See pp. 1376-81 *infra*.

⁴¹ The fact that Congress prefers private, informal settlement of these disputes is evident in the procedural scheme of Title VII. See note 10 *supra*.

⁴² 402 U.S. 689, 3 FEP Cases 508 (1971). Since the Court was evenly divided, the decision is no precedent.

⁴³ 416 F.2d 711, 2 FEP Cases 121 (7th Cir. 1969).

⁴⁴ 421 F.2d 888, 2 FEP Cases 377 (5th Cir. 1970).

v. United States Industries, Inc.,⁴⁵ had allowed district court jurisdiction of a Title VII case brought subsequent to or simultaneously with an arbitral proceeding; the Sixth had denied jurisdiction after an adverse arbitral award in *Dewey*. In a per curiam decision, an evenly divided Supreme Court affirmed this Sixth Circuit holding, thereby sanctioning the minority rule.⁴⁶ A subsequent Sixth Circuit decision, *Newman v. Avco Corp.*,⁴⁷ however, somewhat confused the meaning of the Supreme Court's affirmance in *Dewey* by distinguishing *Dewey* and allowing the plaintiff to bring a Title VII action after receiving an adverse arbitral award.

In *Bowe*, a sex discrimination case, the district court required the plaintiffs to make a binding election to proceed either in court or through arbitration.⁴⁸ They chose to pursue their court action. After trial, the district court held for the defendants on all issues except as to certain layoffs under segregated seniority lists. The Seventh Circuit reversed, holding that it was error to require the plaintiffs to make a binding election of remedies *prior to* adjudication. The court stated that dual prosecution of the claim should have been allowed "so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in . . . [the plaintiffs'] unjust enrichment."⁴⁹ In explaining this holding, the court analogized the problem at hand to the concurrent jurisdiction of the NLRB and private arbitration over unfair labor practices.⁵⁰ Then, stressing the need for concurrent jurisdiction over employment discrimination cases, the court pointed out the "crucial differences" between arbitration and judicial proceedings. The court observed, for example, that an arbitrator may feel bound by the collective bargaining contract and thus may never reach the substantive legal questions inherent in a sex discrimination charge, while a court may not be able to delve into all the ramifications of the contract. Furthermore, an arbitrator might be restrained from granting relief provided for in Title VII, while the court may be unable to grant certain types of relief available through arbitration.⁵¹

⁴⁵ 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970).

⁴⁶ Both the Seventh and the Fifth Circuits had permitted judicial action under Title VII where the arbitral process had previously been invoked. See discussion at 1356-57 *infra*.

⁴⁷ 451 F.2d 743, 3 FEP Cases 1137 (6th Cir. 1971).

⁴⁸ 272 F. Supp. 332, 339-40, 65 L.R.R.M. 2714, 2719, 1 FEP Cases 201, 206 (S.D. Ind. 1967).

⁴⁹ 416 F.2d at 715, 2 FEP Cases at 123.

⁵⁰ In this regard, the court noted: "The analogy to labor disputes involving concurrent jurisdiction of the N.L.R.B. and the arbitration process is not merely compelling, we hold it conclusive." *Id.* at 714, 2 FEP Cases at 122. Since the Seventh Circuit's decision in *Bowe*, the NLRB's position with respect to this issue has moved toward greater deferral to the arbitral process. See discussion at 1376-81 *infra*.

⁵¹ E.g., back pay prior to Title VII's effective dates.

The Fifth Circuit, in *Culpepper* and *Hutchings*, took the position that invocation of the plant grievance machinery tolls the Title VII statute of limitations and that an arbitral award is not per se conclusive of the determination of the grievant's Title VII rights. In *Culpepper*, the plaintiff filed a grievance with the union fifteen days after the alleged discriminatory act occurred.⁵² Following unsatisfactory resolution of the grievance,⁵³ he filed a charge with the EEOC. This filing was within ninety days of the termination of the grievance procedure, but over one hundred days after the alleged discrimination occurred. The district court dismissed the complaint on the ground that the plaintiff had failed to file his charge with the EEOC, as required by statute,⁵⁴ within ninety days of the alleged discriminatory act. The Fifth Circuit reversed, holding that the Title VII statute of limitations was tolled when the plaintiff invoked contractual grievance remedies.⁵⁵ Since the central theme of Title VII is private settlement of employment discrimination cases, the court noted, it would be contrary to the intent of Congress to "penalize a common employee, who . . . attempts first in good faith to reach a private settlement without litigation. . . ."⁵⁶

In *Hutchings*, the Fifth Circuit applied the *Bowe* rationale to a case where an arbitration award had already been rendered. The plaintiff, following an adverse arbitral decision, filed a charge with the EEOC, and subsequently initiated an action in federal district court charging his employer with racially discriminatory promotion practices. The district court held that the plaintiff's utilization of the grievance and arbitration procedures constituted a binding election of remedies which foreclosed his right to pursue Title VII remedies. In reversing, the Fifth Circuit stressed the differences that existed between the functions of arbitrators and of the courts both in their scope of consideration and in their remedial power.⁵⁷ It concluded that:

⁵² The plaintiff, a black employee, charged that he had been discriminated against because of his race in not being promoted ahead of a white employee with less plant seniority. 421 F.2d at 890, 2 FEP Cases at 378.

⁵³ The employer offered, as a compromise settlement, to give the plaintiff a position where he would be trained for the job he desired, but this would be at a lower rate of pay than he was earning at that time. *Id.*

⁵⁴ 42 U.S.C. § 2000e-5(d) (1970).

⁵⁵ 421 F.2d at 891, 2 FEP Cases at 379.

⁵⁶ *Id.*

⁵⁷ The court, citing *Bowe*, noted that:

[T]he arbitrator's role is to determine the *contract rights* of the employees, as distinct from the rights afforded them by enacted legislation such as Title VII The arbitrator, in bringing his informed judgment to bear on the problem submitted to him, may consider himself constrained to apply the contract and not give the types of remedies available under Title VII, even though the contract may contain an anti-discrimination provision. Conversely, of course, a court may not be able to delve into all the ramifications of the contract . . . or to afford some types of relief privately available through arbitration.

428 F.2d at 312, 2 FEP Cases at 731-32 (emphasis in original).

In view of [these differences] . . . it would be fallacious to assume that an employee utilizing the grievance-arbitration machinery . . . and also seeking a Title VII remedy in court is attempting to enforce a single right in 2 forums.⁵⁸

It appears, then, that this holding is based on the assumption that while resort to arbitration is desirable as effectuating congressional preference for private settlement, the Title VII rights of the aggrieved individual are adequately protected only by the courts. Implicit in this rationale is the belief that arbitrators often do not have the power to decide statutory charges.

In *Dewey*, the plaintiff refused to work on Sundays because of his religious beliefs and was discharged by Reynolds for this refusal. Alleging discrimination on account of his religious beliefs, he filed a grievance in accordance with the provisions of the collective bargaining agreement and simultaneously applied to the Michigan Civil Rights Commission for issuance of a complaint against Reynolds.⁵⁹ Following an adverse arbitrator's award and dismissal of his case by the state Civil Rights Commission, Dewey filed a charge with the EEOC, claiming discrimination in violation of Title VII. The EEOC found reasonable cause to believe that Reynolds had engaged in an unlawful practice in discharging Dewey and, after failing to settle the dispute, notified Dewey of his right to sue in federal court. The district court held in favor of Dewey and ordered reinstatement with back pay.⁶⁰

The Sixth Circuit reversed. It held that (1) the district court improperly found the plant rule requiring Sunday work violative of Title VII,⁶¹ and (2) the Title VII action was precluded by the arbitration award.⁶² Regarding the latter holding, the court noted: "Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them."⁶³ In a reference to the *Bowe* court's analogy to concurrent jurisdiction over unfair labor practices, the court stated that it saw no good comparison between the jurisdiction of the NLRB and that of the EEOC.⁶⁴ Thus, the Sixth Circuit rejected the "separate rights" rationale of *Bowe* and *Hutchings*.⁶⁵ In so doing, the court apparently relied upon the hypothesis that

⁵⁸ Id. at 312-13, 2 FEP Cases at 732.

⁵⁹ Title VII requires the grievant to give the state agency sixty days to settle the dispute before filing with the EEOC. 42 U.S.C. § 2000e-5(c) (1970).

⁶⁰ 300 F. Supp. 709, 71 L.R.R.M. 2406, 1 FEP Cases 759 (W.D. Michigan 1969).

⁶¹ The court held that the district court had improperly applied an EEOC regulation retroactively in finding a violation of Title VII. 429 F.2d at 330-31, 2 FEP Cases at 689-90.

⁶² Id. at 332, 2 FEP Cases at 691-92.

⁶³ Id., 2 FEP Cases at 691.

⁶⁴ Id., 2 FEP Cases at 692.

⁶⁵ See text accompanying notes 57-58 *supra*.

an arbitrator is sufficiently empowered to deal with the civil rights guaranteed by Title VII as well as the contract rights preserved by the collective bargaining agreement.⁶⁶

Following the Supreme Court's per curiam affirmance of *Dewey*, the Sixth Circuit again held, in *Spann v. Kaywood Div. Joanna Western Mills Co.*,⁶⁷ that a plaintiff who carried his grievance to arbitration was precluded from maintaining a subsequent Title VII action for racially discriminatory employment practices. In *Spann*, the plaintiff not only had pursued his arbitral remedy, but had received a favorable award. However, the arbitrator awarded only reinstatement, and *Spann* brought a Title VII action seeking back pay as well. In *Spann*, the court reiterated its opinion that the arbitrator was empowered to decide the issue of racial discrimination.⁶⁸

After *Spann*, it appeared that the Sixth Circuit had made its position clear. But in *Newman*, decided less than three months after *Spann*, that court severely limited the *Dewey-Spann* rule by allowing a Title VII action after an arbitrator had rendered an award adverse to the plaintiff. The black plaintiff in *Newman* had been discharged by Avco for allegedly discriminatory reasons. He filed a grievance with the union asserting wrongful discharge and seeking reinstatement. When the union indicated that it would not allege racial discrimination in the proceedings, Newman amended his grievance to include that charge. One week after the arbitration hearing, but prior to the arbitrator's decision, Newman filed charges of racial discrimination against both the employer and the union with the EEOC. Subsequently, the arbitrator found against Newman. A year later the EEOC notified the plaintiff of his right to sue in federal court. The district court held that the plaintiff's resort to arbitration constituted a binding election of remedies and granted the defendants' motion for summary judgment.⁶⁹

The Sixth Circuit reversed. In distinguishing *Dewey*, the court noted that in that case it had before it a full evidentiary record from which it could determine that the employer had not violated Title VII. In *Newman*, it was considering an appeal from a grant of summary judgment and did not have a full record before it. Despite this distinction the court still had to distinguish its holding in *Dewey* that the

⁶⁶ In a separate opinion denying the plaintiff's motion for rehearing, the court expressly rejected *Hutchings*. It held that *Hutchings* did not comport with the Supreme Court's recent observation in *Boys Market, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970), that Congress has attached great importance to private settlement of labor disputes. 429 F.2d at 334, 2 FEP Cases at 872.

⁶⁷ 446 F.2d 120, 3 FEP Cases 831 (6th Cir. 1971).

⁶⁸ The court quoted language from the collective bargaining agreement which requires the employer to act "regardless of race, creed, [or] color." *Id.* at 123, 3 FEP Cases at 833. Such language was not cited by the court in *Dewey*.

⁶⁹ 313 F. Supp. at 1071-72, 2 FEP Cases at 517-18.

arbitral award precluded the plaintiff from bringing a Title VII action. In doing so, the court noted that the *Dewey* holding was not based on an election of remedies theory, but rather on the basis of "estoppel by arbitrator's award."⁷⁰ This must be so, said the court, because "[p]rivate parties cannot by private contract deprive the District Court of jurisdiction . . . conferred by federal statute."⁷¹ The court described the estoppel rationale utilized in *Dewey* as follows: "Where the parties have agreed to resolve their grievances before (1) a fair and impartial tribunal (2) which had *power to decide them*, a District Court should defer to the fact finding thus accomplished."⁷² However, it then held that deference to arbitration was not appropriate in *Newman* because (1) the fairness of the arbitration proceeding was questionable, and (2) *it was doubtful that the arbitrator had the right to decide the racial discrimination issue* because the contract contained no prohibition against such discrimination.⁷³

With respect to the fairness of the arbitration proceedings, the court noted as especially significant that *Newman's* court action named the union and the employer as co-conspirators in the maintenance of a long-standing system of racial discrimination at the plant. Therefore it concluded that since the union had participated on *Newman's* behalf at the arbitration proceedings, and since the arbitrator—whose selection was controlled by the union and the employer—had given weight to the union's refusal to argue the claim of racial discrimination, the fairness of the proceeding was doubtful. The implication of this ruling is that since the union may have had an interest in maintaining the allegedly discriminatory system being attacked by the plaintiff, the impartiality of a forum which is controlled jointly by the union and the employer is to be questioned strenuously.⁷⁴

For purposes of distinguishing *Dewey* and *Newman*, the court could have stopped at this point, since the complaint in *Dewey* charged only the employer with discriminatory practices. However, the *Newman* court went further. It held that the arbitrator lacked the power to decide the question of racial discrimination. *Newman* noted that the arbitration clause in the collective bargaining agreement expressly limited the arbitrator's jurisdiction to questions involving interpretation of the contract, and that the contract contained no provision pro-

⁷⁰ 451 F.2d at 746, 3 FEP Cases at 1139.

⁷¹ *Id.*, 3 FEP Cases at 1140.

⁷² *Id.* at 747, 3 FEP Cases at 1140, citing *United States v. Throckmorton*, 98 U.S. 61 (1878) (emphasis in the original).

⁷³ *Id.* at 748, 3 FEP Cases at 1141.

⁷⁴ The court relied on *Vaca v. Sipes*, 386 U.S. 171 (1967), for its holding that the fairness of the arbitration proceedings was doubtful. For relevant language from that decision, see note 37 *supra*.

hibiting racial discrimination by the employer.⁷⁵ Thus, the court concluded that "major aspects of this . . . complaint were either not submitted to arbitration or were beyond the arbitrator's power of decision. To such issues plainly neither the doctrine of res judicata nor collateral estoppel can apply."⁷⁶ It is submitted, however, that on the basis of the arbitrator's power to decide certain issues, *Dewey* is not distinguishable from *Newman*. In *Dewey*, no contractual clause prohibiting religious discrimination was noted by the court. The only contractual language noted in *Dewey* was language requiring employees to perform all overtime work required by the company "except when the employee has a substantial and justifiable reason for not working."⁷⁷ Although it could be argued that the question of whether religious belief is a "substantial and justifiable excuse" for not working on Sundays and therefore within the scope of contract interpretation, the *Dewey* court gave no indication that its holding was predicated on this theory. Therefore, the *Newman* court's rationale that the discrimination charge was not within the arbitrator's power is equally applicable to the facts of *Dewey*.

Since the doctrine of estoppel applied in *Newman* requires both fairness in the arbitral proceeding and power to decide the question of employment discrimination, the argument that *Dewey* was reversed by *Newman* is persuasive.

There remains, however, one possible basis for distinguishing the two cases on the issue of the arbitrator's power—the nature of the charge filed. In *Newman* the complaint alleged a long-standing system of discrimination, while *Dewey* was concerned with a single work rule of the employer. Assuming that the collective bargaining agreement in both cases provided for some limitation on the employer's right to discipline,⁷⁸ it is far more likely that the allegation in *Dewey* would be within the scope of the arbitrator's power. The *Newman* court, however, did not mention the distinguishable allegations in its discussion of the arbitrator's power. Rather, it limited its discussion of the nature of the charge to the question of fairness and impartiality. Despite the existence of this ground for distinguishing *Dewey*, however, it must be admitted that *Newman* has cast doubt on the continuing validity of the earlier decision.

Although, after *Newman*, the Sixth Circuit's position on the effect of prior arbitration is somewhat unclear, it can be said to be generally in line with the Fifth and Seventh Circuits. Further, the Supreme

⁷⁵ 451 F.2d at 748, 3 FEP Cases at 1141.

⁷⁶ Id.

⁷⁷ 429 F.2d at 328, 2 FEP Cases at 689.

⁷⁸ See Anderson, NLRB and Private Arbitration: Should *Collyer* Be Extended To Employee Discipline Cases?, p. 1465 *infra* at note 24.

Court's decision in *Dewey* has no value as precedent since the court was evenly divided in that case. It is probable that discriminatees in other circuits will follow this trend to invoke arbitration initially in an attempt to expedite their charges and avoid the time consuming Title VII procedures.

3. *Filing Requirement of Title VII*

Section 706(c) of Title VII⁷⁹ provides that no charge shall be filed with the EEOC prior to sixty days after submitting a charge to a state or local agency authorized to remedy employment discrimination, unless the state or local proceedings are terminated before the expiration of sixty days. In *Love v. Pullman Co.*,⁸⁰ decided during the Survey year, the Supreme Court held that a plaintiff who initially files a charge with the EEOC need not re-file with that Commission after a state agency to which he was referred disposes of his case.

The plaintiff in *Love* filed a charge with the EEOC alleging that his employer had engaged in unlawful practices by classifying blacks, who performed the same functions as conductors, as porters-in-charge. This job classification had a lower pay scale than conductors. The EEOC informed the Colorado Equal Employment Opportunity Commission of the plaintiff's complaint. Within two weeks the EEOC received written confirmation that the Colorado Commission was waiving its opportunity to take further action. The EEOC then proceeded, without a re-filing by the grievant, to investigate the charge. Upon a finding of probable cause, the EEOC sought to conciliate the dispute. After unsuccessful conciliation it notified the plaintiff of his right to sue in federal court.

The district court dismissed the complaint, holding that the procedural requirements of Title VII had not been satisfied. The Tenth Circuit affirmed,⁸¹ holding that the plaintiff's discrimination charge had not been "filed" with the EEOC in conformity with Title VII requirements. It reasoned that since section 706(b)⁸² provides that no charge may be filed with the EEOC before the expiration of sixty days after proceedings have been commenced under state or local law, unless such proceedings have been earlier terminated, *Love's* complaint, submitted prior to commencement of the state commission proceedings, did not constitute a "filing" under Title VII.

The Supreme Court reversed, holding that the action should have

⁷⁹ Formerly § 706(b), 42 U.S.C. § 2000e-5(b) (1970). The section was changed to section 706(c) by the 1972 amendments to Title VII, 86 Stat. 103 (1972). The 1972 amendments did not affect the substance of the section.

⁸⁰ 404 U.S. 522, 4 FEP Cases 150 (1972).

⁸¹ 430 F.2d 49, 2 FEP Cases 141, 839 (10th Cir. 1970).

⁸² This case was decided prior to the 1972 amendments to Title VII. See note 79 supra.

been allowed because "the filing procedure followed in this case fully complied with the intent of the Act."⁸³ The EEOC may hold a complaint in "suspended animation" during the state or local agency's proceedings and automatically file it upon termination of such proceedings. The intent of section 706 is to give state agencies the first opportunity to deal with employment discrimination disputes. Since this purpose was fulfilled, the EEOC should not be barred from acting on Love's charges.

The Supreme Court's holding in *Love* has been approved by Congress in the 1972 amendments to Title VII. The Joint Conference Committee's explanatory statement on the Equal Employment Opportunities Act of 1972 states that "the decision in *Love v. Pullman* . . . interpreting the existing law to allow the Commission to receive a charge (but not act on it) during . . . [the] deferral period is controlling."⁸⁴

4. Seniority Systems and the "Business Necessity" Test

Since enactment of Title VII, a fundamental question has existed as to the effect that statute will have on racially neutral post-Act practices which have the effect of perpetuating pre-Act discrimination. In a 1971 decision, *Griggs v. Duke Power Co.*,⁸⁵ the Supreme Court answered that question by holding that an employment practice which has a racially discriminatory effect, even though prima facie neutral, is prohibited by Title VII unless the employer can justify the practice by a showing of "business necessity."⁸⁶ In holding certain employment examinations invalid, the *Griggs* Court reasoned that: (1) since blacks in the locality had historically received inferior education in segregated schools, the effect of the examinations was to bar them from employment and promotion; (2) the fact that the employer may have utilized the testing policy without intent to discriminate was irrelevant when the effect was to discriminate;⁸⁷ (3) the employer failed to prove that the tests bore a demonstrable relationship to successful job performance.⁸⁸

During the Survey year, a number of circuit courts applied the

⁸³ 404 U.S. 522, 4 FEP Cases at 151.

⁸⁴ Joint Explanatory Statement of the Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunity for American Workers, 118 Cong. Rec. 1697-98 (daily ed. Mar. 2, 1972).

⁸⁵ 401 U.S. 424, 3 FEP Cases 175 (1971).

⁸⁶ "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance the practice is prohibited." *Id.* at 431, 3 FEP Cases at 178.

⁸⁷ "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Id.* at 432, 3 FEP Cases at 178.

⁸⁸ *Id.* at 433, 3 FEP Cases at 178.

Griggs criteria to post-Title VII racially neutral seniority systems, thereby clarifying the Supreme Court's "business necessity" criterion.⁸⁰

The seniority and promotion systems in issue in these cases are typical of the departmental craft or class systems presently in effect at a substantial number of industrial plants. These systems provide for parallel lines of seniority in separate crafts or groups. This seniority is applicable only to promotion within a specific job group. Two or more groups of related jobs are organized into separate seniority districts, each of which bears little functional relationship to the other.⁸⁰ The business rationale for this grouping is that an employee with experience in one job group possesses little or no training, by virtue of his experience, for higher paying jobs in the other non-related groups.⁸¹ The collective bargaining agreement usually either prohibits inter-group transfer or provides that a transferring employee forfeits any seniority he has accumulated in his former job category.⁸²

In a plant with a pre-Title VII history of discriminatory hiring policies which limited minority employees to lower-paying job categories, the effect of the craft or class seniority system is to "lock" presently employed minority employees into their present job group. Seniority accumulated by a minority employee in a lower-paying job group cannot be utilized to give him preference over a white employee with a later seniority date in a higher-paying group when both are bidding for promotion to a job in the higher-paying group. The question presented, then, is whether these seniority systems, admittedly racially neutral in the abstract, are violative of Title VII where they have the effect of perpetuating the effects of pre-Act discriminatory hiring policies.

In *United States v. Bethlehem Steel Corp.*,⁸³ *Robinson v. Lorillard Corp.*,⁸⁴ and *United States v. Jacksonville Terminal*,⁸⁵ three circuit courts were required to apply the *Griggs* criteria to a craft or class

⁸⁰ *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 3 FEP Cases 589 (2d Cir. 1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 3 FEP Cases 653 (4th Cir. 1971); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 3 FEP Cases 862 (5th Cir. 1971). Each of these cases considered both the hiring and promotion policies in effect at the defendant's place of business. For purposes of this discussion, however, only the seniority policies will be considered.

⁸⁰ Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260, 1265 (1967).

⁸¹ This rationale was seriously questioned on the facts of the cases herein discussed. See, e.g., the *Robinson* court's conclusion that "the record is barren of any real evidence that the jobs in the formerly all-white departments are so complex and interrelated that progression through a series of jobs is necessary to efficient performance of the more difficult tasks." 444 F.2d at 799, 3 FEP Cases at 658.

⁸² See Note, *supra* note 90 at 1265.

⁸³ 446 F.2d 652, 3 FEP Cases 589 (2d Cir. 1971).

⁸⁴ 444 F.2d 791, 3 FEP Cases 653 (4th Cir. 1971).

⁸⁵ 451 F.2d 418, 3 FEP Cases 862 (5th Cir. 1971).

seniority system. In each case, the court first found, primarily on the basis of statistical evidence, that the effects of pre-Act discrimination were in fact perpetuated by post-Act seniority and promotion systems. Each found that overtly discriminatory pre-Act hiring policies had resulted in minority employees being assigned jobs in lower-paying job categories, and that promotion and seniority systems in effect subsequent to Title VII had effectively "locked" the existing complement of workers into their pre-Act job categories. However, the courts held that a mere showing that present policies had this "locking" effect did not constitute a per se violation of Title VII. Rather, they held that the employer may justify the seniority system, in spite of its discriminatory effect, by a showing of legitimate business necessity.⁹⁶

In determining the meaning and applicability of the "business necessity" criterion, the Fourth Circuit in *Robinson* reviewed *Griggs*. It noted that in *Griggs*, the circuit court had approved the defendant's testing program on the ground that there existed a legitimate business purpose, but that the Supreme Court, in reversing the circuit court, applied the business necessity test. The Fourth Circuit concluded that

the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus . . . there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.⁹⁷

In applying this rationale, the *Robinson* court held that such alleged "business necessities" as maintenance of the status quo, conformance with other plants in the industry and avoidance of union pressure were clearly not sufficient to vindicate the otherwise unlawful promotion and seniority system.⁹⁸ More significantly, the court held that the argument that employees will more efficiently perform a job if they have experience in other jobs in the same department did not sufficiently meet the business necessity criterion because "seniority is necessarily an inefficient means of assuring sufficient prior job experience."⁹⁹ The rationale underlying this finding is that seniority systems, by their nature, do not provide promotion for the "best qualified" employee,

⁹⁶ This holding was merely an application of the black letter law set forth in *Griggs*. See note 86 supra.

⁹⁷ 444 F.2d at 798, 3 FEP Cases at 657-58.

⁹⁸ Id. at 798-99, 3 FEP Cases at 658.

⁹⁹ Id. at 799, 3 FEP Cases at 659.

but rather for the "qualified" employee with the earliest seniority date. Consequently, it will be a rare case in which a craft or class seniority system will be deemed sufficiently connected with job efficiency to vindicate such a system which locks previously discriminated-against employees into lower paying job categories.¹⁰⁰

In *Bethlehem Steel*, the Second Circuit expressed its interpretation of the business necessity rule as follows:

[T]he "business necessity" doctrine must mean more than that transfer and seniority policies serve legitimate management functions. . . . Necessity connotes irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be *essential* to those goals. If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued.¹⁰¹

The *Bethlehem Steel* court then held that this business necessity standard was not satisfied since, as in *Robinson*, the existing seniority system would allow promotion of the "qualified" employee with the earliest seniority date rather than the "best qualified" employee. The court also dismissed the company's argument that to abolish or alter the craft or class seniority system would deteriorate white employees' morale by ruling that this "business purpose" was simply not sufficient to override the public interest in nondiscriminatory policies.¹⁰²

In *Jacksonville Terminal*, the Fifth Circuit followed *Robinson* and *Bethlehem Steel* in holding a craft or class seniority system violative of Title VII.¹⁰³ After quoting with approval the *Bethlehem Steel* interpretation of the "business necessity" doctrine, the court stated: "Crucial to . . . [the defendant's] justification was proof of the unstated predicate—that current occupants of a class or craft are necessarily the *only* employees qualified to fill vacancies in that craft or class."¹⁰⁴ Applying this test, the court noted the trial court's finding that no job at the Terminal required, as a condition precedent, service in a lower

¹⁰⁰ This point was made even more explicitly in the *Jacksonville Terminal* opinion. See text at note 104 *infra*.

¹⁰¹ 446 F.2d at 662, 3 FEP Cases at 596 (emphasis added).

¹⁰² *Id.*

¹⁰³ In a somewhat tangential but significant ruling, *Jacksonville Terminal* held that a court may look to hiring and promotion policies as far as fifty years prior to the bringing of the action in order to determine whether present policies violate Title VII. 451 F.2d 418, 440, 3 FEP Cases 862, 878-9. Previous decisions had limited the period of inquiry to five years, *Georgia Power Co. v. E.E.O.C.*, 295 F. Supp. 950 (N.D. Ga. 1968), and six years, *Dobbins v. Local 212, I.B.E.W.*, 292 F. Supp. 413, 1 FEP Cases 387 (S.D. Ohio 1968).

¹⁰⁴ 451 F.2d at 451, 3 FEP Cases at 889 (emphasis added).

job classification. Therefore, reasoned the court, craft or class seniority could not be determinative of job qualification. Rather, those systems serve to protect employees with job experience in particular crafts or classes without ascertaining whether they are the best qualified to hold positions in those crafts or classes. Thus the court reasoned that since qualification in a craft or class was not a pre-requisite to appointment to a higher-paying job in the craft or class, the current occupants of a craft or class were not the only employees qualified to fill vacancies in their craft or class. Consequently, the court held that the seniority systems were not sufficiently connected with the business necessity of job efficiency to satisfy the *Griggs* test.

It is now clear that the Second, Fourth and Fifth Circuits will interpret the *Griggs* "business necessity" doctrine as meaning "essential" to the achievement of legitimate business goals. A seniority system which serves to perpetuate the effects of pre-Act discriminatory policies will be held violative of Title VII so long as another less discriminatory policy is reasonably available. Furthermore, it can be inferred from the treatment given to the seniority systems in *Robinson* and *Jacksonville Terminal* that the company will be required to show that its seniority system is structured in such a way as to insure that "best qualified" is tantamount to "most experienced" before the plan will receive court approval.

5. 1972 Amendments to Title VII

The Equal Employment Opportunities Act of 1972¹⁰⁶ significantly modified Title VII. The Act authorizes the EEOC to litigate a civil action in federal district court against a respondent charged with employment practices violative of Title VII. Other sections of the 1972 Act enlarge the class of persons covered by Title VII, lengthen the time limitations for filing charges, broaden the scope of religious discrimination protection, and limit back pay remedies.

Enforcement Power. Under the original Act,¹⁰⁷ the EEOC was limited to the investigation and informal conciliation of Title VII disputes. Court action under Title VII had to be initiated by the individual grievant, with one exception—the Attorney General was authorized to initiate actions where a "pattern or practice" of discrimination was alleged. The 1972 revisions grant the EEOC the authority to initiate and litigate civil actions either on behalf of an individual grievant or as a class action.¹⁰⁷ The EEOC is also granted, for two years, authority

¹⁰⁶ 86 Stat. 103 (1972), amending 42 U.S.C. §§ 2000e et seq. (1970).

¹⁰⁷ 42 U.S.C. §§ 2000e et seq. (1970).

¹⁰⁷ 86 Stat. 103 § 4(a) (1972). The sole exception to this grant of authority exists where the defendant in the action would be a federal, state or local governmental body. In such a situation the Attorney General retains exclusive authority to bring the action.

concurrent with the Attorney General to initiate and conduct "pattern or practice" actions. After two years, the EEOC will assume exclusive authority over this litigation.¹⁰⁸ In addition to the power to bring a court action, the Commission is granted authority to petition for preliminary or temporary injunctive relief where an investigation leads it to believe that prompt judicial action is necessary.

To preserve the individual grievant's right to pursue his claim, the 1972 Act provides that he may file an independent action in federal court should the EEOC fail to file one in his behalf. The Commission has been given authority to intervene in an action brought by an individual grievant.

The 1972 amendments provide the EEOC with subpoena power equal to that of the NLRB, augmenting its power under the original Act to "demand" documents and records.

In order to prevent delay in Title VII cases, the 1972 Act requires the judge designated to hear Title VII actions to "assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."¹⁰⁹ The amendments also relax the stringent requirements of Rule 53 of the Federal Rules of Civil Procedure by permitting the judge to appoint a master to expedite the case where it has not been scheduled for trial within 120 days after issue has been joined.¹¹⁰

In order to provide the legal resources necessary to implement the above enforcement powers, the amendments create the Office of General Counsel to the Commission. The General Counsel is to be appointed by the President with the advice and consent of the Senate. He is to be responsible for the conduct of litigation and the supervision of EEOC regional offices.

Coverage. The 1972 Act significantly enlarges the class of persons covered by Title VII. Most important is its inclusion of state and local governments and their political subdivisions in the Act's definition of "persons,"¹¹¹ which makes them "employers" covered by Title VII. The amendments also lower from twenty-five to fifteen the number of employees required to bring their employer or union within Title VII coverage.¹¹² However, the former exemption for the religious activities of religious corporations, societies, and educational institutions is

¹⁰⁸ 86 Stat. 103 § 5 (1972).

¹⁰⁹ 86 Stat. 103 § 4(a) (1972).

¹¹⁰ Joint Explanatory Statement of the Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunity for American Workers, 118 Cong. Rec. 1697-98 (daily ed. Mar. 2, 1972).

¹¹¹ 86 Stat. 103 § 2 (1972).

¹¹² 86 Stat. 103 § 2 (1972).

broadened by the amendments to include all the activities of such organizations.¹¹³

Time Limitations. The new amendments to Title VII extend the basic statute of limitations for filing a charge with the EEOC from 90 to 180 days after the occurrence of the discriminatory act.¹¹⁴ Where a local or state agency exists to handle charges of discriminatory practices, the time limitation is extended from 210 to 300 days after occurrence of the discriminatory act.¹¹⁵ Sections 706(b) and 706(c) of the Act were not amended, but the Joint Conference Committee expressly declared that the rule of *Love v. Pullman*¹¹⁶ allowing the EEOC to receive a charge during the statutory sixty-day period of deferral to local or state agencies should be left intact.

Religious Activities. The 1972 Act amends Title VII's definition of "religion" to include all aspects of religious observance, practice, and belief.¹¹⁷ As a result of this change, employers will be required to make reasonable efforts to accommodate working schedules and conditions to such religious practices as Sabbath observance. The purpose of the amendment is to provide statutory authority for EEOC guidelines on religious discrimination such as that alleged in *Dewey v. Reynolds Metals, Inc.*¹¹⁸

Remedies. The basic remedial powers of a court deciding a Title VII action are retained by the 1972 amendments. One major change limits back pay orders to a period including two years prior to the filing of the charge.¹¹⁹ The deletion by the Joint Conference Committee of the House bill provision that made Title VII the exclusive remedy for unlawful employment practices¹²⁰ is significant in that it clearly exhibits a congressional intent to permit actions for discriminatory employment practices to be brought pursuant to the Civil Rights Act of 1866¹²¹ and the National Labor Relations Act.¹²²

B. The Philadelphia Plan—Affirmative Action Requirement

During the Survey year, in *Contractors Ass'n of Eastern Pennsylvania v. Schultz*,¹²³ the Third Circuit affirmed the legality of the hotly

¹¹³ 86 Stat. 103 § 3 (1972).

¹¹⁴ 86 Stat. 103 § 4(a) (1972).

¹¹⁵ 86 Stat. 103 § 4(a) (1972).

¹¹⁶ See pp. 1361-62 *supra*.

¹¹⁷ 86 Stat. 103 § 2 (1972).

¹¹⁸ Explanatory Report on Proposed Equal Employment Opportunities Act of 1972, submitted to the Senate with the Joint Conference Committee's reported bill by Senators Javits and Williams, 115 Cong. Rec. 3460-63 (daily ed. Mar. 2, 1972).

¹¹⁹ 86 Stat. 103 § 4(a) (1972).

¹²⁰ Joint Explanatory Statement, *supra* note 110.

¹²¹ See pp. 1350-51, *supra*.

¹²² See pp. 1425-1430, *infra*.

¹²³ 442 F.2d 159, 3 FEP Cases 395 (3d Cir. 1971), cert. denied sub nom. *Contractors Ass'n of Eastern Pa. v. Hodgson*, 404 U.S. 854, 3 FEP Cases 1030 (1971).

debated revised Philadelphia Plan which was established to increase the number of minority group employees in the construction trades. This was the first appellate court test of the Philadelphia Plan. The court dealt with all of the principal arguments that have been advanced against the Plan, and in so doing apparently set the stage for Supreme Court determination of its legality. The Supreme Court, however, denied certiorari.¹²⁴

The Philadelphia Plan was initiated in November, 1967, when the Philadelphia Federal Executive Board put into effect the Philadelphia Pre-Award Plan¹²⁵ whose purpose was to effectuate compliance with the "affirmative action" requirement of Executive Order No. 11246 in the construction industry.¹²⁶ This program required each apparent low bidder on a federal construction project to submit a written affirmative action program designed to assure minority group representation in eight construction trades.¹²⁷ The 1967 Plan witnessed some progress,¹²⁸ but was suspended in 1968 after the Comptroller General expressed his opinion that it was inconsistent with the basic principles of competitive bidding.¹²⁹

In response to the Comptroller General's objection, the Labor Department, in the summer of 1969, put into effect the revised Philadelphia Plan. This Plan requires bidders in a five-county area surrounding Philadelphia to include in their bids on federal construction contracts exceeding \$500,000 an affirmative action program for minority employment which meets specific goals established by the Area Coordinator of the Office of Federal Contract Compliance.¹³⁰ The Area Coor-

¹²⁴ *Id.*

¹²⁵ This program was adopted in Philadelphia following successful implementation of a similar one in Cleveland. For a detailed discussion of the development of the original program, see Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 Cornell L. Rev. 84, 89-90 (1970).

¹²⁶ Exec. Order No. 11246 § 202(1) provides for the inclusion of the following language in all government construction contracts: "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin." 3 C.F.R. 339 (1964-65 Comp.), as amended, Exec. Order No. 11375, 3 C.F.R. 320 (1967 Comp.), 42 U.S.C. § 2000e (1970) (hereinafter cited as Exec. Order 11246).

¹²⁷ U.S. Dept. of Labor, *Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction*, § 4 (June 27, 1969), reprinted in 115 Cong. Rec. 21398 (July 30, 1969) and in Lab. Rel. Rep., FEP Manual at 401:251 (hereinafter cited as June 27 Order).

¹²⁸ June 27 Order, *supra* note 127, § 4.

¹²⁹ In so finding, the Comptroller General stated that the basic principles of competitive bidding require that bidders "be assured that award will be made *only* on the basis of the low responsive bid submitted by a bidder meeting established criteria of responsibility . . . and that award will not thereafter be dependent upon the low bidder's ability to unsuccessfully negotiate matters mentioned only vaguely before bidding." 47 Comp. Gen. 666, 670 (1968) (emphasis added).

¹³⁰ June 27 Order, *supra* note 127, § 5.

dinator is directed to specify, after consideration of several factors, the range of minority manpower utilization expected for each of the seven trades.¹³¹ In September 1969, the Labor Department published an order specifying ranges of minority employment to be included in bid invitations on all federal construction projects in the five-county Philadelphia area.¹³² This order set ranges of required minority employment in six trades at increasing intervals for each year up to and including 1973.¹³³

The impact of the revised Plan on contractors and unions in the construction industry was both direct and significant, and its nationwide implications were immediately affirmed by the Labor Department.¹³⁴ Objections were raised immediately by members of Congress who questioned the imposition of "quotas" on federal contractors.¹³⁵ In August, 1969, the Comptroller General issued an opinion which indicated that the revised Plan was inconsistent with the intent of the 1964 Civil Rights Act and Executive Order No. 11246, both of which prohibit the use of race or national origin as a basis of employment.¹³⁶ However, Secretary of Labor Schultz announced his intention to go ahead with the Plan.¹³⁷

The plaintiffs in *Contractors Ass'n*, an association composed of

¹³¹ Id. § 6. The factors to be considered in determining the required ranges of minority employment include: (1) the current extent of minority group participation in the trade, (2) the availability of minority group persons for employment in the trade, (3) the need for minority group training programs in the area, and (4) the impact of the program upon the existing labor force.

¹³² U.S. Dept. of Labor Order, Establishment of Ranges for the Implementation of the Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction (Sept. 23, 1969), reprinted in 115 Cong. Rec. 39953 (Dec. 18, 1969) and in Lab. Rel. Rep., FEP Manual at 401:255 (hereinafter cited as Sept. 23 Order).

¹³³ The following ranges were set by the Department of Labor.

	CALENDAR YEAR			
	until 12/31/70	1971	1972	1973
<i>Trade</i>				
Ironworkers	5%-9%	11%-15%	16%-20%	22%-26%
Plumbers & Pipefitters	5%-8%	10%-14%	15%-19%	20%-24%
Steamfitters	5%-8%	11%-15%	15%-19%	20%-24%
Sheetmetal workers	4%-8%	9%-13%	14%-18%	19%-23%
Electrical workers	4%-8%	9%-13%	14%-18%	19%-23%
Elevator construction workers	4%-8%	9%-13%	14%-18%	19%-23%

Id. at § 4.

¹³⁴ In a June, 1969 briefing of federal contract compliance officers, the Assistant Secretary of Labor, Arthur A. Fletcher, stated that it was anticipated that the Philadelphia Plan would be put into effect as soon as possible in all the major cities in the nation. 1969 Labor Relations Yearbook at 593 (1970).

¹³⁵ See, e.g., Senator Fannin's admonition. Id. at 595.

¹³⁶ 49 Comp. Gen. 59, 65 (1970). The legal arguments upon which the Comptroller General based his opinion were all raised in *Contractors Ass'n* and are discussed infra.

¹³⁷ 1969 Labor Relations Yearbook at 599 (1970).

more than eighty contractors, and eight contractors suing in their individual capacities, regularly employ workers in the six trades specified in the Labor Department Order in the five county area around Philadelphia. Seeking to enjoin the Plan's enforcement, they sued the Secretary of Labor and other federal government officials. They alleged, *inter alia*, that the Plan represents executive action beyond executive power, that it imposes quotas inconsistent with the 1964 Civil Rights Act and that it is inconsistent with the National Labor Relations Act. Furthermore, they alleged that it violates Executive Order No. 11246, the due process requirement of the Fifth Amendment, and the equal protection clause of the Fifth Amendment.¹³⁸ The district court granted the defendants' motion for summary judgment¹³⁹ and the plaintiffs appealed.

1. *Executive Authority*

The plaintiffs contended that the Philadelphia Plan is "legislation . . . enacted by the Executive without the benefit of statutory or constitutional authority."¹⁴⁰ The Government relied on case law to support its contention that the Executive possessed the power to impose fair employment conditions on federally assisted state contracts. The Third Circuit rejected both arguments.¹⁴¹ Rather it surveyed the predecessors to Executive Order No. 11246, and indicated that the orders appeared to be authorized by the congressional grant of procurement authority to the Executive in Titles 40 and 41 of the United States Code.¹⁴² While Titles 40 and 41 are concerned with direct federal procurement, the court observed that under three former presidents federally assisted construction had been sufficiently analogized to federal procurement to allow finding, in Titles 40 and 41, congressional authorization of the Executive to act regarding the latter. Furthermore, if executive action in this regard has not been expressly authorized by Congress, it falls within that area of government activity where the Executive and Congress have concurrent authority.¹⁴³ Thus

¹³⁸ 442 F.2d at 165, 3 FEP Cases at 399.

¹³⁹ 311 F. Supp. 1002, 2 FEP Cases 472 (E.D. Pa. 1970).

¹⁴⁰ 442 F.2d at 166, 3 FEP Cases at 399.

¹⁴¹ The defendants relied on *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3 (3d Cir. 1964) and *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967), cert. denied, 389 U.S. 977 (1967), for this contention. The court distinguished these cases on the grounds that their discussions of the Executive Order were dicta, and by noting that the statutory authorization for the Executive Orders there involved was not relevant to federal assistance programs. *Id.* at 167, 3 FEP Cases at 400.

¹⁴² *Id.* at 169-70, 3 FEP Cases at 402. The broad grant of authority referred to is embodied in 40 U.S.C. § 486(a) (1970), which grants the President authority to "prescribe such policies and directives . . . as he shall deem necessary . . ."

¹⁴³ Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (opinion of Justice Jackson).

the court concluded that the President had implied authority to initiate the Philadelphia Plan unless it was prohibited by a specific congressional enactment.¹⁴⁴

2. *Civil Rights Act of 1964*

The plaintiffs asserted that Executive Order No. 11246 and the Philadelphia Plan are inconsistent with Title VII of the 1964 Civil Rights Act and that therefore the Executive has no authority to put the Plan into effect. In rejecting the argument that Executive Order No. 11246 is inconsistent with Title VII, the court first observed that in Title VII, Congress expressly indicated its approval of the Executive Order program¹⁴⁵ and then noted its holding in *Young v. International Telephone and Telegraph Co.* that Title VII is not the exclusive remedy for discriminatory employment practices.¹⁴⁶

The plaintiffs further argued, however, that the Philadelphia Plan itself requires a violation of Sections 703(a), 703(h) and 703(j) of Title VII. Section 703(j) provides that Title VII does not require any employer or union to grant "preferential treatment" to any individual because of race,¹⁴⁷ and Section 703(h) permits employers to utilize different compensation standards and employment conditions pursuant to a bona fide seniority system.¹⁴⁸ The court held that both these sec-

¹⁴⁴ 442 F.2d at 171, 3 FEP Cases at 403.

¹⁴⁵ Id. at 172, 3 FEP Cases at 404. Section 709(d) of the original Act states in pertinent part:

Where an employer is required by Executive Order 10925, issued March 6, 1961, or by any other Executive order prescribing fair employment practices for Government contractors and subcontractors, or by rules or regulations issued thereunder, to file reports relating to his employment practices with any Federal agency or committee, and he is substantially in compliance with such requirements, the Commission shall not require him to file additional reports pursuant to subsection (c) of this section.

42 U.S.C. § 2000e-8(d) (1970). Following the *Contractors Ass'n* decision, Congress restated its intention that Title VII was not meant to repeal Executive Order No. 11246. It added a new Section 718 to Title VII which provides that, where the Government has accepted an affirmative action program within the previous twelve months, no government contract can be denied or superseded under Executive Order No. 11246 without a full hearing. 86 Stat. 103 (1972).

¹⁴⁶ In *Young*, the Third Circuit approved direct court action bypassing Title VII remedies under 42 U.S.C. § 1981. For a discussion of *Young* and related cases, see text accompanying notes 14-35 supra.

¹⁴⁷ Section 703(j) provides: "Nothing contained in this subchapter shall be interpreted to require any employer . . . [or] labor organization . . . to grant preferential treatment to any individual or to any group of individuals because of . . . race. . . ." 42 U.S.C. § 2000e-2(j) (1970).

¹⁴⁸ Section 703(h) provides: "[I]t shall not be an unlawful employment practice for an employer to employ different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . ." 42 U.S.C. § 2000e-2(h) (1970).

tions limit only Title VII and have no effect on remedies outside that statute.¹⁴⁹

The court also rejected the defendants' argument that section 703(a) prohibits enforcement of the Philadelphia Plan. Section 703(a) makes it an unlawful employment practice to refuse to hire a person because of his race.¹⁵⁰ The plaintiffs argued that the Plan required them to refuse to hire white employees because of their race. The court insisted that this argument ignored the findings which led to the Plan's adoption.¹⁵¹ Specifically, the court pointed to a Labor Department finding that contractors could comply with the specified minority employment goals in the Plan without adverse impact on the existing labor force.¹⁵²

3. *National Labor Relations Act*

The Philadelphia Plan requires the contractor on a federally assisted contract to take affirmative action to meet his goal of minority group employment even if the union hiring hall refers no minority group employees to him.¹⁵³ The plaintiffs argued that this requires the contractor, in effect, to violate the exclusive hiring hall clause which is contained in the collective bargaining agreement and which is validated by Section 8(f) of the NLRA.¹⁵⁴ The court rejected this argument by noting that the Plan sets criteria for government contracts, for which a contractor may or may not bid. If a contractor wishes to participate in an exclusive hiring hall arrangement with a union, he is not precluded from doing so by the Plan, though he may be foreclosed from qualifying for federally assisted contracts if the union refuses, because of the exclusive hiring hall clause, to cooperate with his affirmative action program.¹⁵⁵

¹⁴⁹ 442 F.2d at 172, 3 FEP Cases at 404.

¹⁵⁰ Section 703(a) provides:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire . . . any individual . . . because of such individual's race . . . or (2) to . . . classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's race. . . .

42 U.S.C. § 2000e-2(a) (1970).

¹⁵¹ 442 F.2d at 173, 3 FEP Cases at 404-05.

¹⁵² *Id.* at 174, 3 FEP Cases at 405. The findings of the Department of Labor are detailed in its Sept. 23 Order, *supra* note 132, § 3.

¹⁵³ Section 8(b) of the June 27 Order, *supra* note 127, provides:

It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. . . . To the extent that contractors have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive Order 11246 . . . such contractors cannot be considered in compliance with Executive Order 11246 . . . or the implementing rules, regulations and orders.

¹⁵⁴ 29 U.S.C. § 158(f) (1970).

¹⁵⁵ 442 F.2d at 174, 3 FEP Cases at 406.

4. *Executive Order No. 11246*

The plaintiffs further argued that the language of Executive Order No. 11246 prohibiting discrimination based on race¹⁵⁶ limits the affirmative action mandate to a mere policing against actual present discrimination. Furthermore, they contended that since the Philadelphia Plan requires contractors to discriminate against white applicants, it violates the prohibition of the Executive Order.

The court first admitted that administrative action would be invalid if beyond the scope of the Executive Order. However, it then pointed to the fact that the Secretary of Labor was given a broad grant of discretion in enforcing the Order,¹⁵⁷ and noted that it would give "more than ordinary deference to an administrative agency's interpretation of an Executive Order . . . which it is charged to administer."¹⁵⁸ Therefore, the court held it was proper to defer to the interpretation of Executive Order No. 11246 that the Labor Department had developed in establishing the Philadelphia Plan pursuant to that Order.¹⁵⁹

5. *Due Process*

The plaintiffs also asserted that the Philadelphia Plan violated the due process clause of the Fifth Amendment because (1) it imposes on government contractors contradictory duties impossible of attainment, and (2) it is arbitrary and capricious in singling out the contractors to remedy the *unions'* acts of discrimination. The court dismissed the first of these contentions by observing that since the findings in the Labor Department's September Order indicate that the specific goals can be met without adverse effects on the existing labor force, the duties imposed are not contradictory.¹⁶⁰ With respect to the argument that the Plan is arbitrary in requiring the contractors to remedy union actions, the court noted that the Plan is not punishment for past misconduct, but rather is an exaction of a covenant, no different from other covenants specified in an invitation to bid.¹⁶¹

6. *Equal Protection*

The plaintiffs further argued that the specific goals required by the Plan are racial quotas prohibited by the equal protection clause of

¹⁵⁶ Exec. Order No. 11246, § 202(1), *supra* note 126.

¹⁵⁷ Section 201 of Exec. Order No. 11246, *supra* note 126, authorizes the Secretary of Labor to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate."

¹⁵⁸ 442 F.2d at 175, 3 FEP Cases at 407.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 176, 3 FEP Cases at 407.

¹⁶¹ *Id.*

the Fifth Amendment. The court summarily dismissed this argument by asserting that the Plan is "valid Executive action" aimed at providing jobs for people who have been denied them in the past.¹⁶² This apparently is an implicit holding by the court that, even if the Plan does establish minority quotas and classifications, the governmental interest in promoting minority group employment is sufficiently compelling to justify them.

An additional noteworthy argument in favor of the Philadelphia Plan's validity was overlooked by the Third Circuit in *Contractors Ass'n*. The court, in rejecting the plaintiffs' contention that the Plan violates the general non-discriminatory language in Title VII and in Executive Order No. 11246, failed to refer to the "good faith" proviso in the June 27 Order establishing the revised Philadelphia Plan. This proviso states that "in the event of failure to meet the required goals, the contractor shall be given an opportunity to demonstrate that he made every good faith effort to meet his commitment."¹⁶³ Although the meaning of "good faith effort" as used here has not been interpreted by the courts,¹⁶⁴ it is at least arguable that it would not require a practice that would violate Title VII or Executive Order No. 11246. Indeed, the Labor Solicitor has pointed to the "good faith" aspect of the Plan's compliance criteria in refuting the claim that the Plan would require a contractor to discriminate against a qualified white craftsman in favor of an unqualified non-white applicant.¹⁶⁵

Although the Supreme Court denied certiorari in *Contractors Ass'n*, it is doubtful that the question of the Plan's validity has been laid to rest. Similar plans are now in effect in Washington D.C., San Francisco,¹⁶⁶ and Atlanta¹⁶⁷ and further court tests can be expected, especially in light of a recent report issued by the Senate Subcommittee on Separation of Powers. That Subcommittee charged that the Plan is "a blatant case of usurpation of the legislative function by the executive branch of the Government."¹⁶⁸

¹⁶² Id. at 177, 3 FEP Cases at 408.

¹⁶³ June 27 Order, § 8(a).

¹⁶⁴ In a hearing held by the Department of Health, Education and Welfare regarding a violation of the Philadelphia Plan Order, the hearing officer found that a contractor did not make a "good faith effort" because he failed to attempt to influence the union to invite minority membership or to take other action aimed at encouraging recruitment of minority craftsmen. 76 Lab. Rel. Rep. 332 (News & Backgd. Inf., 1971).

¹⁶⁵ Legal Memorandum submitted by Labor Solicitor Lawrence H. Silberman to the Comptroller General, quoted in part in 1969 Labor Relations Yearbook at 597 (1970).

¹⁶⁶ 77 Lab. Rel. Rep. 124 (News & Backgd. Inf., 1971).

¹⁶⁷ 77 Lab. Rel. Rep. 169 (News & Backgd. Inf., 1971).

¹⁶⁸ 77 Lab. Rel. Rep. 3 (News & Backgd. Inf., 1971).

II. NLRB DEFERRAL TO ARBITRATION:

Collyer Insulated Wire

In *Collyer Insulated Wire*,¹ a landmark decision issued during the Survey year, the National Labor Relations Board (NLRB) refused to consider a section 8(a)(5) unfair labor practice charge because the parties had failed to submit their dispute to arbitration as required by the mandatory grievance and arbitration clause in their collective bargaining contract. This decision extends to cases in which arbitration has been bypassed the NLRB's well established policy of deferring to arbitration where an arbitral award exists.

The dispute in *Collyer* arose when the company unilaterally raised wages and reassigned certain jobs during the term of the collective bargaining contract. The first change was a wage increase for certain skilled maintenance tradesmen whose contractual wage rates were substantially lower than those offered for comparable jobs by other employers in the vicinity. Secondly, the company reassigned a cleaning job from maintenance machinists to machine operators. Third, the incentive wage rate factor for certain machine operators was increased to equalize the pay of the three shifts. The union, without invoking the contractual grievance and arbitration machinery, filed an unfair labor practice charge with the NLRB. It alleged that the company had made unilateral changes in violation of the collective bargaining agreement, and thereby had violated Sections 8(a)(1) and 8(a)(5) of the Act.

The Trial Examiner found that the wage increase for maintenance tradesmen was bargained over during the contract negotiations but was not included in the contract. Furthermore, the company had proposed the rate increase after the agreement went into effect, but the union refused to negotiate increases on other than a plantwide basis. The implicit conclusion in these findings is that the contract foreclosed future wage changes in the absence of union consent. Therefore the Trial Examiner concluded that the company had violated section 8(a)(5) by taking unilateral action prohibited by the collective bargaining agreement. The company's job re-assignment was not sanctioned by the contract, the Trial Examiner found, and thus was also violative of section 8(a)(5). The incentive rate adjustment, however, was found to be contractually authorized and therefore not in violation of the Act.

The company's principal argument was that its actions were sanctioned by the collective bargaining agreement. In support of this argument, it pointed to contractual language stipulating that (1) individual wage rate adjustments "to remove inequities or for other proper reasons" are not prohibited, and that (2) the union may challenge new

¹ 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971).

pay rates for new or changed jobs through the grievance procedure. Moreover, the company contended that any action without contractual authorization should properly be challenged through the grievance and arbitration machinery.

The majority of the Board agreed with the latter contention. It held that since the dispute was essentially over the meaning of the collective bargaining contract, it should have been resolved pursuant to the grievance and arbitration procedures provided for in the contract. The Board insisted that it was properly within its discretion to withhold its unfair labor practice processes in this case² because the contract provided for a quick and fair means of resolving the dispute. The Board noted that an arbitrator's experience and special skills were especially required for satisfactory resolution of the subtle issues of contract interpretation involved in *Collyer*. The Board dismissed the case but retained jurisdiction of it for the limited purpose of permitting the filing of a motion to reopen upon a showing that the arbitration process was unfair or irregular, or that the result reached through arbitration was repugnant to the purposes of the Act.

Prior to *Collyer*, the Board's policy was to hear and decide unfair labor practice cases where no arbitration award had been rendered. However, it would honor existing arbitration awards by deferring to them. In *Timken Roller Bearing Co.*,³ the Board deferred to a previously rendered arbitral award that was adverse to the union even though it believed the employer had violated the Act. The Board set out specific guidelines for future cases involving existing arbitral awards in the well known *Spielberg* case.⁴ There, it indicated that deferral would be appropriate when (1) the proceedings have been fair and regular, (2) all parties had agreed to be bound, and (3) the result was not "clearly repugnant to the purposes and policies of the Act."⁵

In the *Collyer*-type situation where no arbitration had occurred the Board had persisted in hearing and deciding cases even though the alleged unfair labor practice could have been adequately resolved by

² Member Fanning, in a dissenting opinion, argued that the Board's power to withhold its processes is foreclosed by Section 10(a) of the NLRA, which provides that the Board's power to prevent unfair labor practices "shall not be affected by other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 77 L.R.R.M. at 1943.

It has been observed, however, that the circuit courts have consistently enforced decisions in which the Board has relied upon section 10(a) as establishing a discretionary right to exercise its jurisdiction. See Anderson, Concurrent Jurisdiction—NLRB and Private Arbitration: A Pragmatic Analysis, 12 B.C. Ind. & Com. L. Rev. 179, 181 (1970).

³ 70 N.L.R.B. 500, 18 L.R.R.M. 1370 (1946).

⁴ *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

⁵ *Id.* at 1082, 36 L.R.R.M. at 1153. See also *International Harvester Co.*, 138 N.L.R.B. 923, 51 L.R.R.M. 1155 (1962), where the Board stated that it would defer where the arbitrator's award was not "palpably wrong."

an arbitrator's impartial interpretation of the contract. Although there had been indications that a deferral policy might be adopted for this class of cases,⁶ the Board's decision in *Adams Dairy*⁷ concretely established its policy of refusing to defer where no arbitral award existed. The one exception to the *Adams* policy was *Joseph Schlitz Brewing Co.*⁸ There, the Board dismissed the charge because the arbitral process had not been invoked. This exception, however, was made on the basis of the particular facts involved in *Schlitz*,⁹ and prior to *Collyer* the Board had refused to defer in similar cases.

Collyer, then, represents a major shift in Board policy with respect to deferral when no arbitral award has been rendered. The decision is an attempt by the NLRB to accommodate more effectively its obligation to prevent unfair labor practices with the national labor policy stressing private means of conciliating disputes in order to avoid industrial strife. Congress's high regard for private settlement is manifested in Section 203(d) of the NLRA¹⁰ which declares that resolution "by a method agreed upon by the parties" is the preferable means of resolving industrial disputes. Furthermore, in the famous *Steelworkers* trilogy¹¹ and more recently in *Boys Markets, Inc. v. Retail Clerks Local 770*,¹² the Supreme Court indicated that arbitration is central to effectuation of industrial stabilization, an important national labor goal. In *Collyer*, the Board has concluded that where an alleged breach of contract as well as an alleged violation of the NLRA exists, congressional objectives are best furthered by requiring the parties to arbitrate the dispute in accordance with the contractual procedures.

The NLRB's awareness of its statutory duty to prevent unfair labor practices where an arbitrator finds no contractual violation is evidenced by its retention of jurisdiction over *Collyer*. Apparently the Board intends to utilize the *Spielberg* standards in examining the arbitral award once it is rendered to insure that serious unfair labor practices are not allowed to continue.

The future of the deferral policy adopted in *Collyer* is left in doubt since *Collyer* was a 3-2 decision¹³ and the term of Board Member Brown, who voted with the majority, has expired. It is possible that the

⁶ See, e.g., *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 12 L.R.R.M. 44 (1943); *Hercules Motor Corp.*, 136 N.L.R.B. 1648, 50 L.R.R.M. 1021 (1962); *Dubo Mfg. Corp.*, 142 N.L.R.B. 431, 53 L.R.R.M. 1070 (1963).

⁷ *Adams Dairy Co.*, 147 N.L.R.B. 1410, 56 L.R.R.M. 1321 (1964).

⁸ 175 N.L.R.B. 141, 70 L.R.R.M. 1472 (1969).

⁹ *Anderson*, supra note 2 at 187.

¹⁰ 29 U.S.C. § 173(d) (1970).

¹¹ *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

¹² 398 U.S. 235 (1970).

¹³ Members Fanning and Jenkins dissented.

new Board may either reverse itself on this issue, or severely restrict *Collyer's* application. Indeed, the *Collyer* Board expressly stated that the following circumstances weighed heavily in favor of deferral: (1) the dispute arose in the context of a thirty-five year history of amicable collective bargaining between the parties; (2) the union made no charge that the company acted with the intent of undermining the union's strength; (3) the company asserted its willingness to arbitrate the dispute; and (4) the dispute was "eminently well suited to resolution by arbitration" since the essence of the dispute was the meaning of the contract.

Whether *Collyer* will be extended to cases involving alleged violations of sections other than 8(a)(5) has not yet been answered by the Board. In a recent decision, *Tulsa-Whisenhut Funeral Homes, Inc.*,¹⁴ the Board was requested to defer to arbitration a case involving a section 8(a)(3) unfair labor practice charge, but it did not reach this issue. Since the collective bargaining agreement in question did not provide for compulsory arbitration, the Board held *Collyer* inapplicable and ruled on the section 8(a)(3) charge.

In another recent decision, *Coppus Engineering Corp.*,¹⁵ the union, in two separate charges, contended that the employer had violated section 8(a)(5) by taking unilateral action on certain mandatory subjects of bargaining. The union first alleged that the employer had violated the Act by unilaterally discontinuing a past practice of giving employees an annual party. Rather than defer this charge to arbitration, the Board fully considered the issue and held that the company's action had not violated section 8(a)(5) because the collective bargaining agreement contained no reference to the annual party and the issue of the annual party had been bargained over during contract negotiations. The Board apparently decided that since the company's discontinuance of the annual party clearly was not prohibited by either the contract or the Act, requiring arbitration of this issue would be futile. Furthermore, since the contract contained no reference to the annual party, the Board may have decided that an arbitrator would not be empowered to rule on this issue.

However, the Board, citing *Collyer*, did require arbitration of the union's second charge that, by changing Saturday shift hours and employment conditions, the company had taken unilateral action in violation of section 8(a)(5). In determining that arbitration was proper, the Board found that (1) the company's position was not patently erroneous, but was based upon a reasonable interpretation of the contract, (2) the company had expressed its wil-

¹⁴ 195 N.L.R.B. No. 20, 79 L.R.R.M. 1265 (1972).

¹⁵ 195 N.L.R.B. No. 113, 79 L.R.R.M. 1449 (1972).

lingness to arbitrate the dispute, and (3) the contract and its meaning were at the core of the dispute. Because these findings are similar to those made in *Collyer*, *Coppus* appears to be little help in determining the future application of *Collyer*. The only distinction between the two opinions is that *Coppus* contains no reference, as does *Collyer*, to a long and harmonious bargaining relationship between the parties, thereby implying that this factor might not be as significant in the decision to defer as *Collyer* indicates.

The General Counsel of the NLRB has formally indicated that *Collyer's* application will be limited to section 8(a)(5) cases in which a reasonable construction of the collective bargaining agreement precludes a finding that the employer's action violated the NLRA.¹⁶ NLRB Regional Offices have been directed not to defer where there exists substantial dispute as to the existence of the contract as a whole at the time the dispute arose, or where the dispute does not involve a construction of the substantive terms of the contract but which is nevertheless made arbitrable pursuant to a provision making all disputes between the parties arbitrable.¹⁷ Furthermore, in cases where there is evidence that the alleged section 8(a)(5) violation was motivated by anti-union animus or was inherently discriminatory against the union,¹⁸ or where the disputed conduct constitutes a violation of section 8(a)(3), deferral is not recommended by the General Counsel.¹⁹ Other disputes declared inappropriate for deferral by the General Counsel include questions of accretion to the bargaining unit and disputes over a union's request for information necessary to its evaluation and processing of grievances.²⁰ In addition, in order for *Collyer* to apply, the collective bargaining contract must contain a mandatory arbitration clause.²¹ The General Counsel, apparently limiting the *Collyer* policy to the facts of that case, has also directed that deferral is appropriate only where the bargaining relationship has been "successful" and "productive" and the employer has not deliberately interfered previously with the employees' section 7 rights.²²

It is to be hoped that NLRB action in the near future will clarify the policy to be adopted in cases where deference to arbitration is possible. Should the *Collyer* decision be extended to include

¹⁶ Peter G. Nash, General Counsel of NLRB, Memorandum, Arbitration Deferral Policy under *Collyer* 2-3 (Feb. 28, 1972) [hereinafter cited as Nash Memorandum].

¹⁷ *Id.* at 4.

¹⁸ Cf. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

¹⁹ Nash Memorandum at 5.

²⁰ *Id.* at 8.

²¹ Mandatory arbitration clauses may be inferred from contractual language such as "disputes shall be submitted to arbitration," and "all disputes will be submitted to arbitration." *Id.* at 11.

²² *Id.* at 14-15.

other unfair labor practices, a significant reduction in the Board's caseload and concomitant acceleration in the resolution of other Board cases will result.

III. PREEMPTION; BOARD AND COURT JURISDICTION

A. *Motor Coach Employees v. Lockridge*

In *Motor Coach Employees v. Lockridge*,¹ the Supreme Court set out what appears to be the fullest explication of preemption principles since they were enunciated in *San Diego Building Trades v. Garmon*.² Vigorous dissenting opinions by Justices Douglas and White, joined by Chief Justice Burger and Justice Blackmun, took issue with the majority on both practical and legal grounds.

Lockridge, a Greyhound employee and a union member pursuant to a union-security clause in the collective bargaining agreement, requested Greyhound to stop checking off his monthly union dues. Shortly thereafter the union suspended Lockridge from membership on the sole ground that he was in arrears for one month's dues, and simultaneously requested Greyhound to remove him from employment because he was no longer a union member. Within a few days Lockridge tendered his dues, but the union refused to accept them. The union apparently acted on the assumption that its action was justified by the union constitution, which provided that a member whose dues were one month in arrears could be suspended from membership and removed from employment, if the applicable collective bargaining contract required employees to be union members "in good standing."³ In fact, however, the union security clause in the agreement with Greyhound required only that employees be "members" of the union, and the union constitution provided that an employee be suspended from membership only after a two months failure to pay dues.⁴

When Lockridge filed suit against the union⁵ in an Idaho court, the complaint was dismissed on grounds of preemption; the union activity on which the action rested was found to be, in essence, an unfair labor practice and hence within the exclusive jurisdiction of the NLRB. The Idaho Supreme Court reversed,⁶ holding that the state court had jurisdiction under the doctrine, established in *Machinists v. Gonzales*,⁷ that an action based on a wholly internal union matter was

¹ 403 U.S. 274 (1971).

² 359 U.S. 236 (1959).

³ 403 U.S. at 278.

⁴ *Id.*

⁵ The original suit was filed against Greyhound and the union, but the former was then dropped as a party. *Id.* at 281.

⁶ *Lockridge v. Motor Coach Employees*, 84 Idaho 201, 369 P.2d 1006 (1962).

⁷ 356 U.S. 617 (1958).

not preempted.⁸ On remand, Lockridge filed an amended complaint; the first count alleged that the suspension was willful action on the part of the union which resulted in Lockridge's loss of employment, and the second alleged a breach of the contract created between the union and Lockridge by the union constitution. The state district court awarded both a decree restoring Lockridge to union membership and damages for lost wages.⁹ The Idaho Supreme Court affirmed.¹⁰ The Supreme Court granted certiorari on the ground that the Idaho decision "demonstrated the need for . . . a fuller explication of the premises upon which *Garmon* rests" and the extent to which that decision modified *Gonzales*.¹¹ The Court reversed, holding that the action in question was preempted under *Garmon*. *Gonzales* did not apply because Lockridge's employment relationship was in fact involved, even though the action on its face pertained only to internal union matters.

Since the Court's decision in *Lockridge* will presumably be extensively noted, this discussion will be limited to observations on the impact of the decision on labor law generally. In the first place, the majority opinion by Justice Harlan is apparently intended to serve as a textbook statement of the principles of preemption in labor law. It discusses the *raison d'être* of the doctrine and its development in labor law. Turning to the instant case, it refutes the three theories on which the Idaho Supreme Court rested its finding of jurisdiction. The Court holds that since preemption regulates *conduct* it will not be limited by the "formal description" of an action; that for the same reason preemption applies even though the state court may insist that it is dealing with the interpretation of contractual terms, not union discrimination; and that when the employment relationship is involved, as it was here, the action does not concern merely an internal union matter. In sum, so long as the conduct which is at the heart of the action is arguably protected or prohibited by the Act, the Court rules that preemption would apply. *Gonzales* is limited to internal union matters that in no way involve the employment relationship. The few specific exceptions to this doctrine are squarely set out.

Thus *Lockridge* would appear to foreclose the possibility that *Garmon* might come to be narrowly applied.¹² It formally rejects¹³

⁸ In *Gonzales*, the union member sued on a breach-of-contract theory, claiming that he had been expelled from his union in violation of rights conferred upon him by the union constitution. The Supreme Court ruled, *inter alia*, that the suit "did not purport to remedy . . . union conduct on the ground that it was designed to bring about employer discrimination against an employee. . . ." *Id.* at 622. *Lockridge* discusses *Gonzales* and successor cases, underlining their narrow scope. 403 U.S. at 293-97.

⁹ *Id.* at 282.

¹⁰ 93 Idaho 294, 460 P.2d 719 (1969).

¹¹ 403 U.S. at 277.

¹² Cf. Justice Douglas: "While I joined the dissent in *Gonzales*, experience under

Justice White's contention that preemption of "arguably protected" as well as "arguably prohibited" conduct creates the paradoxical situation wherein only by deliberate commission of an unfair labor practice can an employer gain a forum in which to protest "arguably protected" activity.¹⁴ The Court insists upon the overriding importance of developing, through Board preemption, a unified national labor policy. That insistence appears to preclude any chance of future judicial application of another contention of Justice White's, that the current trends of Board deference to arbitration¹⁵ and of judicial broadening of section 301 jurisdiction¹⁶ constitute proof that diverse forums and remedies can coexist comfortably with a single national Board policy. Such coexistence might have justified a moderate narrowing of *Garmon*; that possibility, however, seems finally foreclosed by *Lockridge*.

The decision takes care to set out exactly what forums and remedies do remain outside of the sweep of *Garmon*, and what kinds of pleadings are necessary to keep a claimant within those exceptions to preemption. The Court lays down the elements requisite for a suit against an employer under section 301, a suit against an employer and a union under section 301 and *Humphrey v. Moore*, and a suit for breach of fair representation under *Vaca v. Sipes*.¹⁷ It notes that the instant facts, which would not support a charge of arbitrary or invidious discrimination, would preclude Lockridge's bringing a *Vaca v. Sipes* suit.¹⁸

Garmon convinces me that we should not apply its rule to the grievances of individual employees against a union." Id. at 309 (dissenting opinion). Justice White cites criticism of the *Garmon* "arguably protected" test. Id. at 326-27. A major thrust of his dissent is that so many exceptions have been carved out of the scope of *Garmon* that "the 'rule' of uniformity that the Court invokes today [in *Lockridge*] is at best a tattered one. . . ." Id. at 318 (dissenting opinion).

¹³ Id. at 290.

¹⁴ Id. at 325-28 (dissenting opinion). Justice White quotes the Assistant General Counsel of the NLRB:

The employer cannot obtain relief from the state court . . . , and the only way that he can obtain a Board determination . . . is by resorting to self-help measures; if he guesses wrong, this may subject him not only to a Board remedy but also to tort suits.

Id. at 326 (dissenting opinion).

¹⁵ Id. at 310-13 (dissenting opinion).

¹⁶ Id. at 313-14 (dissenting opinion).

¹⁷ Id. at 298-301. See generally *Humphrey v. Moore*, 375 U.S. 335 (1964); *Vaca v. Sipes*, 386 U.S. 171 (1967).

¹⁸ The Court points out that making out a claim of unfair representation requires proving arbitrary or bad-faith conduct on the part of the union, and that Lockridge had "not even asserted" such facts in the state court proceedings. 403 U.S. at 299-300. It also notes that Lockridge's pleadings below precluded him from claiming jurisdiction under section 301 or *Humphrey v. Moore*. Id. at 300.

Since Lockridge had dropped Greyhound from his complaint, he could not press a section 301 claim; and since neither the facts of the case nor his pleadings suggest breach of fair representation by the union, his action was not within the scope of *Humphrey v.*

That last problem illustrates some of the practical and equitable problems inherent in the decision's logical hammering out of *Garmon*. *Lockridge* requires an employee to take his claim against his union to the Board unless he can fit that claim within the confines of a section 301 suit or an action for breach of the duty of fair representation. Going to the Board, however, can involve delays beyond the average employee's financial capacity to endure, and, because the Board's remedies are limited,¹⁹ cannot ensure eventual satisfaction. Justice Douglas marshals statistics illustrating these problems²⁰ and notes too a threshold obstacle, the wholly discretionary power of the General Counsel to issue or withhold a complaint.²¹ Such burdens, he argues, may be manageable by a union or an employer but rarely by a single employee, and so he would argue that on grounds of equity and practicality the employee should be able, under *Gonzales*, to seek his remedy against a union from the local courts.²² These problems suggest, then, that in some degree *Lockridge* is good law making hard cases.

It is submitted that the majority is not unaware of the damaging impact the decision could have on those employees whose actions, like *Lockridge's*, fail to meet the precise criteria required for safety from the sweep of preemption. In a footnote of startling implications, the Court points out that a new exception to the preemption doctrine possibly could arise "where the Board affirmatively indicates that, in its view, pre-emption would not be appropriate."²³ This note then makes a cross-reference to a note of Justice White which states that Section 10(a) of the Act would allow the Board to cede jurisdiction over labor disputes to state agencies if state law is not inconsistent with federal law.²⁴ Thus a majority of the present Court appears to have offered the Board a weapon, provided for in the Act but never utilized,²⁵ that would cut through some of the problems implicit in *Lockridge*. By following the Court's suggestion, the Board could resolve problems arising from

Moore, which protects from preemption a section 301 suit against the union to redress union interference, in breach of the duty of fair representation, with rights conferred on the employee by the collective bargaining agreement. *Id.* at 298-99.

¹⁹ Cf. *NLRB v. Local 485, IVE (Automotive Plating)*, 454 F.2d 17, 79 L.R.R.M. 2278 (2d Cir. 1972), discussed at 1455-59 *infra*.

²⁰ 403 U.S. at 304 and n.1 (dissenting opinion).

²¹ *Id.* The experience of another Greyhound employee, Elmer Day, whose suspension and discharge were similar to *Lockridge's*, is instructive. When Day filed an unfair labor practice charge, the Regional Director refused to issue a complaint. Day did not seek review from the General Counsel, but brought a court action against the union, alleging tortious interference. The Oregon Supreme Court reversed a judgment in his favor on grounds of preemption. *Id.* at 280 n.3.

²² *Id.* at 308 (dissenting opinion).

²³ *Id.* at 298 n.8.

²⁴ *Id.* at 319 n.2 (dissenting opinion).

²⁵ *Id.*

inadequate remedial power in certain fields²⁰ and relieve employees in Lockridge's position of the necessity of resorting to its "long-drawn, expensive remedy."²⁷ The Board could cede only a narrowly prescribed category of disputes so that such cession would not withdraw Board relief from employees who need it. Finally, such cession would appear to be correlative with the Board's Survey year decision, *Collyer Insulated Wire*,²⁸ in which the Board significantly expanded its long-established policy of deferring to arbitration.

B. *Exception to the Anti-Injunction Statute: Nash Finch*

In *NLRB v. Nash Finch Co.*,²⁹ the Supreme Court found an implied exception to the Federal Anti-Injunction Statute³⁰ and held that the Board could seek a federal injunction to enjoin enforcement of a state court injunction regulating peaceful picketing. The decision apparently allows the Board to seek the injunction even when no unfair labor practice charge has been filed regarding the picketing, despite the NLRA's requirement that a charge be filed before the Board may act in any case.

The facts of the case were that a union seeking to organize a company began peaceful picketing of the company's stores, and the company procured a state court injunction restricting the picketing. No unfair labor practice charge was filed regarding the picketing, but at the time the activity began a Trial Examiner's recommendation that a cease and desist order issue against the same company was pending before the Board; the order related to unfair labor practice charges that the picketing union had earlier filed against the same company. The Board accepted in part the Trial Examiner's recommendations and then filed the instant suit in the federal district court, seeking injunctive relief against the state injunction on the ground that it regulated conduct governed exclusively by the NLRA. Both the district and the appellate courts denied relief. The circuit court held that such relief was precluded by the Anti-Injunction Statute, 28 U.S.C. § 2283 (1970), and that the Board's suit did not fall within any exception to § 2283.³¹

²⁰ Justice Douglas notes that "the Board would not have the power to supply the total remedy which Lockridge seeks even if the employer had committed an unfair labor practice. True, the Board has authority to award back pay but it has no authority to award damages beyond back pay." *Id.* at 307 (dissenting opinion). See also the discussion of *Automotive Plating* at 1455-59 *infra*.

²⁷ 403 U.S. at 304 (dissenting opinion).

²⁸ 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971).

²⁹ 404 U.S. 138 (1971).

³⁰ 28 U.S.C. § 2283 (1970) provides:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

³¹ 434 F.2d 971, 75 L.R.R.M. 2860 (8th Cir. 1970).

The Supreme Court reversed, finding an implied³² exception to § 2283 that allowed the Board to seek injunctive relief against the state court action on the ground that the latter action sought to regulate activities preempted by the Board. The Court declared first that state action against peaceful picketing activity was preempted by the Board's federal power.³³ Accordingly the Court must apply to the Board, as the sole protector of the national interest in this area, the doctrine of *Leiter Minerals, Inc. v. United States*.³⁴ That doctrine finds in § 2283 an implied exception permitting the United States, as sovereign, to seek injunctive relief against state proceedings in order to protect the national interest. To exclude the Board from the *Leiter Minerals* exception, the Court argued, would impute to § 2283 a purpose which would frustrate the federal system of regulation established in the NLRA.

Justice White, in dissent, argued that the Board may not act on its own motion;³⁵ that since the Board's juridical status is not congruent with that of the United States, the *Leiter Minerals* exception to § 2283 does not apply to the Board; and that the enumeration in the NLRA of specific Board powers to seek injunctions, together with the legislative histories of the Act and the Norris LaGuardia Act, precludes the implication of additional injunctive powers.³⁶ He was joined in these arguments by Justice Brennan.³⁷

Whether the majority satisfactorily resolved the issues Justice White raised is questionable.³⁸ However, as a practical means of effecting preemption the decision appears to be sound. If in the future the Board utilizes the power given to it by the decision, a company in the

³² The Court admitted that the action did not come within the *express* exception of § 2283 that permits injunctions "in aid of the federal court's jurisdiction." The Court pointed out that that exception would apply only after a charge had been filed, a complaint had issued, and the Board had sought a federal injunction to restrain those activities upon which the complaint had issued. In such case the vacation of the state injunction would be ancillary to the federal court's issuance of the injunction sought by the Board. 404 U.S. at 141-42.

³³ The Court noted that "[t]he exclusiveness of the federal domain is clear" *Id.* at 147.

³⁴ 352 U.S. 220 (1957).

³⁵ Justice White pointed out that the picketing issue had never been put before the Board. 404 U.S. 148 n.1 (dissenting opinion).

³⁶ Justice White also argued against the decision on the ground that only arguably prohibited activity should be preempted. 404 U.S. at 154-56 (dissenting opinion). Compare his position in *Lockridge*, *supra* at note 14.

³⁷ Justice Brennan did not, however, join Justice White in the argument summarized in note 36 *supra*.

³⁸ The majority did not deal at all with the fact that no charge had been filed. They might have argued that the dispute between the two parties in the picketing was in a sense before the Board by virtue of the union's charge regarding the employer's unfair labor practices, but they did not do so, contenting themselves with observing that the company had filed no charge regarding the picketing. *Id.* at 142.

shoes of *Nash Finch* would presumably decide not to go to a state court in the first place for an injunction against peaceful picketing. The company would realize that a state injunction would be vulnerable to a Board-sought injunction, and presumably would go to the Board for relief by filing a charge against whatever unfair labor practices seemed to be involved in the picketing.³⁹ The picketing union would be relieved of the task of appealing to the higher state courts, on the grounds of preemption, for vacation of a state court's order; prior to the instant decision, such an action would have been the union's only means of securing relief from the state order, so long as the employer did not commit an unfair labor practice.⁴⁰ Accordingly, *Nash Finch* appears to effectuate the purposes of the Act insofar as those purposes entail exclusive Board jurisdiction over peaceful picketing.⁴¹

However, the exclusiveness of the Board's jurisdiction in the area has not been unquestioned. The Supreme Court recognized, in *San Diego Building Trades v. Garmon*, that the states retained jurisdiction over activity of merely peripheral concern to the NLRB, as well as over activity traditionally regulated by the state's police powers.⁴² Those exceptions were again noted in the *Lockridge* decision.⁴³ However, the exact boundaries of these areas of exception remain indefinite; for example, the Court has thus far given no explicit ruling regarding the preemption of picketing alleged to be trespass.⁴⁴

In *Nash Finch*, the Court apparently recognized the need for further definition of the non-preempted area. It explicitly left open for decision on remand the question of "[w]hether there are parts of the state court injunction that should survive our reversal."⁴⁵ Of course, this statement may be merely a reference to those parts of the injunction that regulate arguably non-peaceful activities traditionally susceptible to state regulation.⁴⁶ However, throughout its opinion the Court consistently characterized the injunction as one regulating

³⁹ The General Counsel could then seek injunctive relief against the picketing under section 10(j) or section 10(l). *Id.* at 147 n.5. Cf. dissenting opinion at 152. Cf. also *Terminal Freight Handling Co. v. Solien*, 444 F.2d 699 (8th Cir. 1971), discussed *infra* at 1388-91.

⁴⁰ See 404 U.S. at 154 (dissenting opinion).

⁴¹ Whether such an effectuation is always of practical benefit is another matter. It has long been recognized, for example, that preemption creates a potential no-man's land. See 404 U.S. at 155-56 (dissenting opinion).

⁴² 359 U.S. 236, 243-44 (1959). See Section of Labor Relations Law, American Bar Association, *The Developing Labor Law* 644 (C. Morris ed. 1971) [hereinafter cited as *Morris*].

⁴³ 403 U.S. at 297 and n.7.

⁴⁴ See *Morris* 793-94 and n.64. In *Lockridge*, Justice White discusses the practical effects of the preemption of picketing alleged to be trespass. 403 U.S. at 327.

⁴⁵ 404 U.S. at 147-48.

⁴⁶ Among the activities enjoined by the state court was interference with traffic. *Id.* at 140.

peaceful picketing. Thus the Court's statement may be an invitation to the federal courts to delineate, on the facts of each individual case, those activities within a peaceful picketing action that are properly susceptible to state regulation despite the Board's theoretical preemption of the entire area. Should this assessment of the Court's position be correct, it suggests a practical response on the part of the Court to specific problems left unresolved by the statement of broad doctrine in *Lockridge*.

IV. BOARD PRACTICE AND PROCEDURE

A. Section 10(l): Terminal Freight Handling Co. v. Solien

Section 10(l) of the NLRA imposes on the Board's Regional Officers a mandatory duty to seek provisional injunctive relief for the charging parties, whenever certain specified requirements have been fulfilled.¹ In three Survey year cases arising from a single dispute, the Eighth Circuit clarified both the nature of the Regional Director's duty under 10(l) and the rights of charging parties to intervene in settlement proceedings either preceding or attendant upon a 10(l) suit. The decisions are *Solien v. Drivers Local 610* (Solien I),² *Terminal Freight Handling Co. v. Solien* (Solien II)³ and *Sears, Roebuck & Co. v. Solien* (Solien III).⁴ The second case in the series also deserves notice for its jurisdictional finding, which recognized another exception to the general rule that a federal court may not entertain suits to vacate or direct Board actions. The Supreme Court has denied review of all three cases.⁵

¹ 29 U.S.C. § 160 (l) (1970) provides in part:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) or section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper notwithstanding any other provision of law

² 440 F.2d 124, 76 L.R.R.M. 2780 (8th Cir. 1971), cert. denied sub nom. *Sears, Roebuck & Co. v. Solien*, 403 U.S. 905 (1971).

³ 444 F.2d 699, 77 L.R.R.M. 2625 (8th Cir. 1971), cert. denied, — U.S. —, 92 S. Ct. 1246 (1972).

⁴ 450 F.2d 353, 78 L.R.R.M. 2700 (8th Cir. 1971), cert. denied, — U.S. —, 92 S. Ct. 1252 (1972).

⁵ Certiorari has also been denied in a fourth related case, *Terminal Freight Cooperative Ass'n v. NLRB*, 447 F.2d 1099, 78 L.R.R.M. 2097 (3rd Cir. 1971), cert. denied, — U.S. —, 92 S. Ct. 1252 (1972).

The dispute arose from the problems inherent in the conditional phrase attached to the otherwise straightforward mandate of section 10(l). When a charge has been filed alleging violation of certain provisions of the NLRA, Section 10(l) requires the Director to petition for a federal injunction against the activity if he "has reasonable cause to believe such charge is true and that a complaint should issue." As the instant cases indicate, that condition is interpreted to give the Director broad discretion. Before seeking an injunction, he may negotiate with the alleged offender either a settlement or a cessation of the activity; or, should he petition for the injunction, he may thereafter arrange a settlement and request the judge to approve the settlement in lieu of issuing an injunction. Statistics presented in *Solien II* indicate that the Directors did not seek injunctions in about three-fourths of the cases in which reasonable cause had been shown.⁶ Although presumably such preliminary settlement or voluntary cessation is the appropriate method of resolution in most cases, the instant dispute indicates that in some circumstances the Director's slowness to seek injunctive relief may conflict with the apparent purpose behind 10(l).

The dispute in the three Survey year cases arose when the company filed a charge alleging secondary boycott activity, including picketing, by the unions. Although the Director determined that there was reasonable cause to believe the charge true,⁷ he considered settlement with the union instead of seeking an injunction, since the union assured him that it had eliminated the secondary aspects of the picketing. A week after filing its charge, the company sought, in *Solien II*, a federal injunction compelling the Director to petition for a 10(l) injunction against the picketing. After a second week, it amended its petition to seek, as additional relief, a declaratory judgment that the Director's failure to ask for an injunction violated the mandatory duty imposed in 10(l). Within the next three days the union resolved its primary dispute and, seventeen days after the initial charge had been filed, stopped all picketing. On the same day that the picketing stopped, the Regional Director, having determined that the picketing was secondary, petitioned for a temporary injunction (*Solien I*). The company again amended its *Solien II* complaint by dropping the prayer for injunctive relief, but the district court dismissed the remaining action for declaratory relief as moot.⁸ The company appealed. The Director then made a settlement with the union, and the company sought party status in *Solien I* to contest such a settlement. When party status was denied,⁹ the company unsuccessfully petitioned, in *Solien III*, for a

⁶ 444 F.2d at 704 n.9, 77 L.R.R.M. at 2628 n.9.

⁷ Id. at 703, 77 L.R.R.M. at 2626.

⁸ 321 F. Supp. 248, 76 L.R.R.M. 2251 (E.D. Mo. 1970).

⁹ 321 F. Supp. 245, 75 L.R.R.M. 2846 (E.D. Mo. 1970).

federal order enjoining the Director from approving that settlement. The company appealed all three decisions.

Solien II focuses on the central issue, the nature of the 10(l) duty. In that case, the General Counsel argued that the phrase "and that a complaint should issue" allows the Regional Director virtually complete discretion to make a threshold determination;¹⁰ that is, if the Director fails to determine that "a complaint should issue," the mandatory provision of 10(l) never takes effect. Moreover, within this threshold exercise of discretion the Director has virtually unlimited authority regarding negotiation of settlements.

The Eighth Circuit held that this interpretation was incorrect. The discretionary authority recognized by the phrase "and that a complaint should issue" must be viewed not as the power to make a threshold decision but as a limited area of discretion within a provision whose letter and legislative history show a clear congressional intention to impose a mandatory duty.¹¹ If precise limits are not established for the area of discretion, the mandatory duty becomes meaningless. The court decided that the Director had discretion, after making a reasonable cause determination, to make a summary demand and negotiate for the cessation of the activity. The court indicated that the negotiation must be brief.¹² Should such summary demand and negotiation fail, the Director must seek an injunction.

Although 10(l) has long been recognized as mandatory,¹³ the *Solien II* statistics and the General Counsel's argument¹⁴ show that in some cases Directors have laid more stress on the discretionary than on the mandatory clause. By reversing or limiting that regional practice, the *Solien II* interpretation of 10(l) should have a marked impact on the use of tactics susceptible to 10(l) injunctions in labor disputes. The General Counsel's interpretation, that provides the Director with virtually unlimited discretion to negotiate with the union, could in some circumstances permit an alleged violator to use tactics susceptible to an injunction long enough to gain an edge, if not victory, in the primary dispute. The union in the instant case was able to continue picketing until the primary dispute was concluded.¹⁵ Presumably the Eighth Cir-

¹⁰ 444 F.2d at 705, 77 L.R.R.M. at 2629.

¹¹ Id. at 708, 77 L.R.R.M. at 2632.

¹² The phrase "such summary demand and negotiation" refers back to the phrase "an initial demand upon the union." Id. (emphasis added). "Initial" indicates one short period of negotiation rather than negotiation over a prolonged period, as does "summary."

¹³ See, e.g., *Retail Clerks Local 137 v. Food Employers Council, Inc.*, 351 F.2d 525 (9th Cir. 1965). Section 10230 of the Board's Field Manual was interpreted by the *Solien II* court as imposing a mandatory duty on the Regional Director; the Region had argued that the rule should be interpreted to support the position advocated by the General Counsel in *Solien II*. 444 F.2d at 709, 77 L.R.R.M. at 2632.

¹⁴ See text at note 10 supra.

¹⁵ 444 F.2d at 702, 77 L.R.R.M. at 2627.

cuit's narrowing of the Director's discretion will discourage the use of such tactics by markedly limiting the time during which they could be utilized.

Solien II is also significant for the Eighth Circuit's finding that the district court had jurisdiction over the subject matter of the company's complaint,¹⁶ a decision that recognizes another exception to the general rule that actions of the Board or General Counsel may not be vacated or directed by independent suits.¹⁷ The test for an exception was established in *Leedom v. Kyne*,¹⁸ which held that a district court could entertain a suit to set aside a Board certification order when the Board had plainly exceeded its statutory authority and there was no other adequate remedy. In *Solien II* the Eighth Circuit held that the *Leedom* requirement was fulfilled by the Director's failure to satisfy the mandatory 10(l) duty.¹⁹ That holding, of course, depended on the court's precise limitation of the discretionary area within 10(l), since *Leedom* does not apply to discretionary decisions.

Besides developing *Leedom*, the jurisdictional holding is interesting insofar as it illustrates, in the labor law context, the current trend of extending hospitality to standing for private attorneys general seeking review of administrative decisions.²⁰ The court makes little reference to standing, but it notes that section 10(l) "does afford the charging party certain rights"²¹ and it refers to the protection of public interests,²² thus suggesting that standing here rested on an "interblending" of public and private interests in the NLRA.²³

In *Solien I* and *Solien III*, the company attacked the Regional Director's practice of making a unilateral settlement with the alleged offender. In *Solien I*, the appellate court upheld the district court's refusal to allow the company to intervene as a party litigant in the 10(l) proceeding brought by the Director; the company had sought party status in order to participate in the settlement that the Director nego-

¹⁶ Id. at 703, 77 L.R.R.M. at 2628.

¹⁷ A final Board order is normally reviewable only by appeal to a circuit court under Section 10(f) of the NLRA. The decision of the General Counsel to issue or withhold a complaint is discretionary under section 3(d).

¹⁸ 358 U.S. 184 (1958).

¹⁹ The original requirement of violation of a negative clause was held to be fulfilled by a failure to obey a mandatory provision of the Act. See, e.g., *Miami Newspaper Printing Pressmen's Union Local 46 v. McCulloch*, 322 F.2d 993 (D.C. Cir. 1963).

²⁰ See, e.g., *Scenic Hudson Preservation Conf. v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

²¹ 444 F.2d at 709, 77 L.R.R.M. at 2632.

²² Id.

²³ A recent statement on "interblending," made in a section 10(l) case, *Retail Clerks Local 137 v. Food Employers Council, Inc.*, 351 F.2d 525, 529 n.2 (9th Cir. 1965), was cited with approval in *United Automobile Workers v. Scofield*, 382 U.S. 205, 220 and n.17 (1965).

tiated in lieu of pressing for the injunction.²⁴ Then, in *Solien III*, the circuit court affirmed the district court's dismissal, for lack of jurisdiction, of the company's petition for an order enjoining the Director from approving the settlement agreement and from engaging in further settlement negotiations without the "informed participation" of the charging party.²⁵ The company had claimed that the Director violated a Board rule by denying to the company the right to participate in those negotiations.²⁶

The circuit court ruled that in *Solien III*, in contrast with *Solien II*, the *Leedom v. Kyne* jurisdictional requirements were not met. Since full Board and appellate review of the settlement agreement were available under a Board rule,²⁷ the company had not yet exhausted its administrative remedies, and moreover the Director's conduct here—unlike that in *Solien II*—was not clearly in excess of his power.

The court's decision leaves for the Board determination as to whether the Director's refusal to admit the charging party to negotiations violates Board rules. It is submitted that such refusal does not accord with the rule²⁸ and that the Regional practice should be changed. However, should the Board determine that the practice is lawful; it would seem that the rule as so interpreted is open to attack. The Supreme Court has allowed participation in appellate proceedings by charging parties and has recognized, in dicta, the rights of such parties to intervene in Board proceedings generally.²⁹ Its Survey year decision *Plasterers' Local*³⁰ also reflects construal of the NLRA as hospitable to intervention in Board proceedings by virtually all interested parties.

B. *The Blocking Charge Rule: Templeton v. Dixie Color*

In *Templeton v. Dixie Color Printing Co.*,³¹ the Fifth Circuit affirmed a district court's decision that the Board's blocking charge rule, as applied to an employees' decertification petition, violated section 9(c)(1),³² and that the court had jurisdiction under *Leedom v.*

²⁴ 440 F.2d at 126, 76 L.R.R.M. at 2781.

²⁵ 450 F.2d at 354, 78 L.R.R.M. at 2701.

²⁶ 29 C.F.R. § 101.9 (1971).

²⁷ 29 C.F.R. § 101.9(c)(2) (1971).

²⁸ The rule requires that "all parties [shall be afforded] every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment . . ." in negotiations. 29 C.F.R. § 101.9(a) (1971) (emphasis added).

²⁹ *United Automobile Workers v. Scofield*, 382 U.S. 205, 219 and n.14 (1965).

³⁰ *NLRB v. Plasterers' Local 79*, 404 U.S. 116 (1971), discussed at 1448-52, *infra*.

³¹ 444 F.2d 1064, 77 L.R.R.M. 2392 (5th Cir. 1971).

³² 29 U.S.C. § 159(c)(1) (1970) provides in part:

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their

*Kyne*⁸³ to grant injunctive relief compelling the Board to process the petition. Although the lower court's decision⁸⁴ was reported in the 1970-71 Survey,⁸⁵ its affirmation in an opinion by Associate Justice Clark deserves notice here because this is apparently the first time that a decision invalidating use of the blocking charge rule has been upheld.

The employees in the instant case had filed a petition for an election to decertify the incumbent union, but since the union had filed an unfair labor practice charge against the employer the Board applied its blocking charge rule; that is, it refused to process the election petition because an unfair labor charge had been filed. Although section 9(c)(1) imposes on the Board a mandatory duty to process election petitions, the blocking charge rule has not been decisively held violative of 9(c)(1).⁸⁶ Hence the Board argued that its refusal to process the employees' petition was an appropriate exercise of discretion under the blocking charge rule; and that, since an exercise of discretion is not subject to judicial review in an independent court action, the district court lacked jurisdiction over the employees' action for an injunction to compel the Board to process their petition. The district court had rejected the Board's arguments and granted the injunction.⁸⁷

In affirming, the Fifth Circuit held that application of the blocking charge rule in the instant circumstances was an abuse of discretion and arbitrary. Justice Clark's vigorous opinion pointed out that here the rights of employees rather than those of a union or an employer were involved. An employer could always obtain review of a Board certification by refusing to bargain, but the employees in this case

employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

⁸³ 358 U.S. 184 (1958). See text at note 18 *supra*.

⁸⁴ 313 F. Supp. 105, 74 L.R.R.M. 2206 (N.D. Ala. 1970).

⁸⁵ 1970-71 Annual Survey of Labor Relations Law, 12 B.C. Ind. & Com. L. Rev. 1026, 1033 (1971).

⁸⁶ Compare 313 F. Supp. at 112 ("in those few cases in which the practice has been discussed, the courts have been clear in their criticism") with 444 F.2d at 1069, 77 L.R.R.M. at 2396 ("[t]he Board cites many authorities approving the use of the blocking charge practice").

⁸⁷ 313 F. Supp. 105, 74 L.R.R.M. 2206 (N.D. Ala. 1970).

had no means of obtaining review of certification save by the decertification election procedure. Moreover, the circumstances that might justify use of the blocking charge rule were not present here. The petition in question was not the ruse of an employer who was trying to delay bargaining with a certified representative.³⁸

Rather, Justice Clark wrote, the Board's application of the rule to refuse action on a petition filed by employees denied them their statutory right to bargain through representatives of their own choosing. The union should not be able to avoid the consequences of its loss of majority status by merely filing an unfair labor practice charge against the employer. The Board's refusal to process the petition resulted in an "intolerable" deprivation of the employees' statutory rights.³⁹ Accordingly the Fifth Circuit remanded the case to the district court with instructions to order the Board to proceed promptly under section 9(c)(1) to process the petition.

While striking down use of the rule when an *employees' decertification* petition has been filed, the decision explicitly avoids the question of its valid application under other circumstances. It also retains for the Board some discretion in the actual processing of the petition, by denying the original district court order requiring the Board to hold the election within forty-five days and amending that order to require only that the Board process the petition. This amended order, the appellate court pointed out, did not supplant the Board's expertise.⁴⁰

Thus this decision, like *Terminal Freight v. Solien*, recognizes a discretionary area within a generally mandatory provision, but precisely limits that area in order to prevent the Board from using discretion to preclude entirely the operation of the mandatory clause.⁴¹

V. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. Recognition Without Election—Card-based Bargaining Orders

1. Judicial Development of Gissel

In a celebrated 1969 case, *NLRB v. Gissel Packing Co.*,¹ the Supreme Court attempted to clarify the law regarding NLRB bargaining orders based on authorization cards. There, the Court affirmed the NLRB's policy of looking to the effects of an employer's coercive tac-

³⁸ 444 F.2d at 1069, 77 L.R.R.M. at 2396.

³⁹ *Id.*

⁴⁰ The court ruled that "we do not reach the issue of the extent to which the blocking charge might be validly applied—e.g., against employers, or under what circumstances the Board might justifiably exercise its discretion in refusing to process a representation petition." *Id.* at 1070, 77 L.R.R.M. at 2396.

⁴¹ See text at notes 11-12 *supra*.

¹ 395 U.S. 575 (1969).

tics during a union organization campaign, rather than to his "good faith doubt"² of the union's majority status, in deciding whether a bargaining order is appropriate. *Gissel*, then, affirmed the Board's policy that "the key to issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election."³ It was hoped that *Gissel* would settle the conflict among the Board and the courts in this highly disputed area, but subsequent decisions have again cast the issues into doubt.⁴

In the typical case, the union presents to the employer cards signed by a majority of the employees authorizing the union to serve as their collective bargaining agent and demands recognition. The employer refuses to recognize the union and conducts a campaign, during which he commits unfair labor practices, to persuade his employees to vote against the union in the subsequent representation election. Following a union election loss, the union files unfair labor practice charges with the NLRB. If the NLRB finds that the employer's unfair labor practices had the effect of undermining the union's majority, it will set aside the election and choose one of two remedial alternatives: (1) it may order a re-run election following notice to the employees of their section 7 rights, or (2) if it determines that the employer's coercive activities were so pervasive as to render a fair re-run election unlikely, it may certify the union on the basis of its card-based majority and order the employer to bargain with it. It is this latter remedy—the card-based bargaining order—which was at issue in *Gissel*, and which is still the subject of conflicting judicial and administrative opinions.

Probably the most serious policy question regarding card-based bargaining orders is that of the NLRB's chronological point of reference in determining whether a bargaining order is an appropriate remedy. The question is whether the NLRB should issue a bargaining order based on the fact that an employer's coercive activity undermined the union's majority at some point, even though a fair election is possible at the time of the NLRB hearing. The problem is compounded by the fact that the NLRB often disposes of a case more than a year after the original filing of the unfair labor practice charge,⁵ and occurrences during the pendency of the charge—such as employee turnover—might create a situation in which the majority of employees do not desire union representation by the time a bargaining order is issued. The

² Cf. *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 27 L.R.R.M. 2012 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951).

³ 395 U.S. at 594.

⁴ See 1970-1971 Annual Survey of Labor Relations Law, 12 B.C. Ind. & Com. L. Rev. 1026, 1037-59 (1971).

⁵ 395 U.S. at 611 n.30.

Hobson's choice faced by the Board is either to issue the bargaining order, thereby certifying a union which the employees may not want, or to order a re-run election which the employer may win, thereby permitting him to profit from his unfair labor practices.

The solution to this problem lies in a determination of the purpose of the card-based order to bargain. If the primary function of these orders is to ensure free employee choice on a case-by-case basis, the Board clearly should conduct a re-run election where it determines that the present atmosphere is conducive to fairness. However, if card-based bargaining orders are to be a deterrent to coercive employer activity, or a device for remedying past illegal conduct, the Board is justified in issuing a bargaining order even though the coercive effects of employer unfair labor practices have subsided. The problem can be phrased in terms of a conflict between the statutory right of employees not to be represented by a union⁶ and the principle that an employer should not be permitted to profit from his unfair labor practices.⁷

Since the Supreme Court's decision of *Gissel*, a conflict has arisen between the Fifth Circuit and the NLRB regarding the question of the relevant time frame for consideration of the appropriateness of a card-based bargaining order. In *NLRB v. American Cable Systems, Inc.*,⁸ the Fifth Circuit refused to enforce an NLRB bargaining order because the Board had failed to consider evidence of a complete employee turnover between the commission of the unfair labor practices and the issuance of the order.⁹ The case was remanded to the NLRB for a determination of the *present* election atmosphere. The court insisted that a card-based bargaining order "is not a traditional punitive remedy, but is a therapeutic one," which should not be resorted to unless the electoral atmosphere at the time the Board issues such an order is not conducive to a fair and free election.¹⁰

The NLRB later disagreed with *American Cable* in *Gibson Prod-*

⁶ Section 7 of the NLRA provides:

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 (1970).

⁷ Cf. *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944).

⁸ 427 F.2d 446, 73 L.R.R.M. 2913 (5th Cir. 1970).

⁹ The bargaining order in question was reissued by the NLRB on remand with directions to consider the case in accordance with the standards set forth in *Gissel*. The original order was based upon the pre-*Gissel* standard of "good faith doubt."

¹⁰ 427 F.2d at 448, 73 L.R.R.M. at 2914.

ucts Co.,¹¹ expressing its opinion that the appropriateness of a bargaining order is properly determined by an analysis of the electoral atmosphere as it existed at the time of the unfair labor practice. In support of this position, the Board noted the *Gissel* Court's observation that "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct."¹²

During the Survey year, three circuits dealt with this issue. The Fourth Circuit, in *General Steel Products, Inc. v. NLRB*,¹³ adopted the rationale of *American Cable* and held that the NLRB, on remand, should consider the fact that, subsequent to the unfair labor practice, a change in ownership and management had occurred at the plant. The dispute in *General Steel* arose when the company refused to recognize the union, stating that it did not believe the union's claim of majority status although the union had obtained authorization cards from 120 of the 207 employees in the unit. Following an election favorable to the company, the NLRB, applying the pre-*Gissel* standard, found that the company's refusal to bargain was not based on a "good faith doubt" as to the union's majority and that the company had violated section 8(a)(1) of the Act by engaging in coercive activity. The Board set aside the election and ordered the company to bargain with the union. The Fourth Circuit affirmed the finding that the employer had violated section 8(a)(1), but refused to enforce the bargaining order because the unfair labor practices were not so pervasive as to render a fair re-run election unlikely.¹⁴ On certiorari to the Supreme Court, the case was consolidated with *Gissel* and remanded to the NLRB for "proper findings" in compliance with the standards announced by the Court in *Gissel*.¹⁵ On remand, the NLRB denied the company's petition for a new hearing at which it proposed to present arguments based on the *Gissel* criteria as well as evidence of a turnover in ownership that had occurred after the original Board decision. The Board reaffirmed its bargaining order, and issued a supplemental decision framed in the language of the *Gissel* standards.¹⁶

The Fourth Circuit denied enforcement of the order and criticized the NLRB for its "apparent unwillingness . . . to consider seriously the

¹¹ 185 N.L.R.B. No. 74, 75 L.R.R.M. 1055 (1970).

¹² Id., 75 L.R.R.M. at 1056.

¹³ 445 F.2d 1350, 77 L.R.R.M. 2801 (4th Cir. 1971).

¹⁴ 398 F.2d 339, 68 L.R.R.M. 2639 (4th Cir. 1968).

¹⁵ 395 U.S. at 620.

¹⁶ In explaining its order, the Board stated:

The Respondent's unfair labor practices were so flagrant and coercive in nature as to require, even absent the 8(a)(5) violation we have found, a bargaining order to repair their effect. Our further view is that it is unlikely that the lingering effects of the Respondent's unlawful conduct would be neutralized by resort to conventional remedies which would have produced a fair rerun election.

¹⁸⁰ N.L.R.B. 56, 57; 72 L.R.R.M. 1579, 1580-81 (1969).

new questions raised by *Gissel*.¹⁷ The court observed that the company offered evidence of facts that occurred prior to the original Board hearing, which although not relevant under the "good faith doubt" standard, was "not only relevant, but controlling" under the standards set forth in *Gissel*. Therefore it held that this evidence should have been received and considered by the NLRB. The court also held that the evidence of a management changeover should have been considered by the Board. Although the court recognized the principle that an employer should not be permitted to profit from his own wrongful refusal to bargain, it nevertheless felt compelled to give more weight to the Supreme Court's dictum in *Gissel* that a fair election is generally more reliable than authorization cards in determining the will of the majority of employees.¹⁸ With respect to the function of card-based bargaining orders, the court stated that "the primary purpose of a bargaining order is not punitive; it is to protect the rights of the employees, and to insure that their wishes are carried out."¹⁹ Therefore it held that the evidence of events subsequent to the Board hearing should have been considered by the Board on remand because it might allow the finding that a fair re-run election was no longer precluded by the effects of the unfair labor practices, and thereby permit completion of the "preferred method" of determining the employees' wishes.

The holding in *General Steel* was grounded partly on the rationale that since the NLRB was required to conduct a new hearing on other issues, it should also consider evidence of a subsequent management changeover. However, it is clear that the Fourth Circuit considers the primary function of card-based bargaining orders to be that of ensuring implementation of the employees' will on a case-by-case basis. The Seventh and Eighth Circuits, however, have agreed with the NLRB's position that the card-based order serves a deterrent function, and therefore is appropriate where the employer's conduct tended, *at any time*, to undermine the union's majority.

In *NLRB v. Dixie Steel Buildings, Inc.*,²⁰ the Eighth Circuit held that the employer's showing of a change in the working force between the time of the coercive activities and the election was not sufficient to invalidate the NLRB's bargaining order. The union had obtained authorization cards from 45 of the company's 70 employees and demanded recognition from the company. The company refused to recognize the union, contending that it doubted that the union represented "an uncoerced majority" of the employees. Two months later the union lost the representation election by a vote of forty-one to twenty-nine. Both

¹⁷ 445 F.2d at 1354, 77 L.R.R.M. at 2803.

¹⁸ *Id.* at 1356, 77 L.R.R.M. at 2805.

¹⁹ *Id.*

²⁰ 445 F.2d 1260, 77 L.R.R.M. 3147 (8th Cir. 1971).

before and after the union's recognitional demand, the company conducted a campaign against the union, including speeches and distribution of printed matter which promised benefits to the employees conditioned upon a company victory in the election, a clear violation of Section 8(a)(1) of the Act. The NLRB set aside the election and ordered the company to bargain with the union,²¹ explaining its decision in terms of the "lasting scars and lingering coercive effects upon the employees" which were so substantial as to "preclude the holding of a fair and free election in the reasonably foreseeable future."²²

On the NLRB's petition for enforcement, the company argued that its actions, even if coercive, did not affect the outcome of the election because the union lost its majority solely as a result of employee turnover. The Eighth Circuit disagreed. It held that, although employee turnover is a relevant factor for NLRB consideration, the appropriateness of the remedy rests on "whether the unfair labor practices tended to *undermine* the majority strength and *impede* the election process."²³ The court noted that a bargaining order is justified so long as the union held a majority *at one point*, even though the majority no longer existed at the time of the election. In so holding, the Eighth Circuit cited language from *Gissel* indicating that card-based bargaining orders serve the *dual function* of protecting the majority sentiment reflected in the authorization cards and deterring future unfair labor practices by employers.²⁴

In *NLRB v. Henry Colder Co.*,²⁵ the Seventh Circuit enforced an NLRB card-based bargaining order even though seven years had elapsed since the dispute arose and the employer's work force had changed during that time. Like *General Steel*, *Colder* was originally decided by the Board prior to *Gissel* and was remanded to it for "proper findings" in accordance with the *Gissel* standards. The Board rendered a supplemental decision confirming the bargaining order and requested enforcement. The court rejected the company's argument that the bargaining order was inappropriate because employee turnover since the 1964 violations had nullified the union's majority. It stated that events subsequent to the original order "should not be permitted to preclude enforcement, since the delay is 'the unfortunate but inevitable result of the process prescribed in the Act.'"²⁶ The court, however, did modify the Board's order to include a provision for notifying the employees

²¹ 186 N.L.R.B. No. 25, 76 L.R.R.M. 1855 (1970).

²² 445 F.2d at 1264, 77 L.R.R.M. at 3150-51.

²³ *Id.* at 1265, 77 L.R.R.M. at 3151.

²⁴ The following is the relevant language from *Gissel*: "[A] bargaining order is designed as much to remedy past election damage as it is to deter future misconduct." 395 U.S. at 612.

²⁵ 447 F.2d 629, 77 L.R.R.M. 3153 (7th Cir. 1971).

²⁶ *Id.* at 630, 77 L.R.R.M. at 3153.

of their independent right to petition the Board for a decertification election at an appropriate time.²⁷

Dixisteel and *Colder*, then, accept the NLRB's position that the card-based bargaining order serves a deterrent function as well as a "therapeutic" one, and that therefore such orders may be appropriate even though the present situation is such that the union's majority has deteriorated and a fair election might be held. A number of factors militate in favor of this approach. In *American Cable* and *General Steel*, the courts relied upon the Supreme Court's observation in *Gissel* that authorization cards are inferior to free elections as a method of determining the will of the employees. However, a close reading of *Gissel* discloses that the Court relied heavily on the NLRB's judgment in reaching this conclusion.²⁸ From this it can be inferred that the Supreme Court has deferred to the NLRB's judgment as to which method is preferable. Further, adoption of the *General Steel* rationale could have the effect of encouraging an employer with substantial employee turnover rate to violate the Act, knowing that by the time of the Board hearing he will be able to show that enough of the original employees have left the plant to justify a finding that a fair election is possible. This result would clearly serve to reward the employer for his unlawful refusal to bargain. A final justification for adoption of the NLRB's interpretation is that even if the union certified in the bargaining order is not representative of the majority, the employees have the right to petition the Board for decertification after a reasonable period of time.²⁹

2. NLRB Development of *Gissel*: Restaurant Associates Industries, Inc.

During the Survey year, the NLRB decided *Restaurant Associates Industries, Inc.*,³⁰ which has been interpreted as altering the rule of *Gissel* that a bargaining order is appropriate where the employer's conduct has a tendency to undermine the union's majority.³¹ The employer owned and operated several restaurants. The union requested recognition after obtaining signed authorization cards from seven of the twelve

²⁷ Id. at 631, 77 L.R.R.M. at 3154.

²⁸ The *Gissel* Court stated that an election is, from the Board's point of view, the preferred route for recognition and certification. 395 U.S. at 596. Later, the Court stated: "The Board has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." 395 U.S. at 602 (emphasis added).

²⁹ Section 9(c)(1) of the NLRA directs the Board to direct a secret election if it finds that a valid question of representation exists. 29 U.S.C. § 159(c)(1) (1970).

³⁰ 194 N.L.R.B. No. 172, 79 L.R.R.M. 1145 (1972).

³¹ Speech by Max Zimney, Associate General Counsel, I.C.G.W.U., Boston University Seventh Annual Labor Law Institute (March 25, 1972).

unit employees at one of the company's restaurants. When the company refused to recognize the union, all of the employees went out on strike and began picketing. During the strike, the manager of the restaurant engaged in conversations with various employees in which he promised pay raises as a reward for returning to work. The strikers subsequently returned to work, but the company refused to grant the pay raises it had promised. Consequently, the union filed section 8(a)(1) charges with the Board, requesting it to issue a bargaining order in accordance with *Gissel*.

The NLRB agreed with the Trial Examiner's finding that the company had violated section 8(a)(1) by promising pay raises to the employees, but refused to follow his recommendation that a bargaining order should issue. It reasoned that, although the employer's promises served to undermine the union's majority, the fact that the promises were subsequently broken eliminated any lingering effect they might have. Therefore the Board ordered the employer to cease and desist from further coercive activity and to assure the employees that it would bargain with the union upon certification.³²

In reaching its conclusion, the Board stated that "we have concluded that the unfair labor practices are not so likely to have an inevitably lingering effect as to preclude the holding of a fair election."³³ Board Member Fanning took issue with this statement in his dissent. He argued that, under the criteria of *Gissel*, all that is required is that the employer's activities have the *tendency* to impede the election process.³⁴ The dissent also implied that the majority had permitted the company to profit from its unlawful action, since the primary goal of the promises was to get the strikers back to work.

In *Restaurant Associates*, then, the Board apparently refused to follow its previous interpretation of *Gissel*³⁵ that a bargaining order is appropriate if, *at any time*, the employer's coercive activities undermine the union's majority. Rather, it has adopted the position that only where subsequent events make the likelihood of a fair election impossible is a bargaining order appropriate.

B. Pre-Election Statements

1. *Applicability of § 8(c) to Representation Cases*: Bausch & Lomb, Inc. v. NLRB

In *Bausch & Lomb, Inc. v. NLRB*,³⁶ the Second Circuit affirmed the NLRB's holding that the "free speech" proviso of section 8(c) of

³² 194 N.L.R.B. No. 172, 79 L.R.R.M. at 1147.

³³ Id., 79 L.R.R.M. at 1146 (emphasis supplied).

³⁴ Id., 79 L.R.R.M. at 1147 n.5.

³⁵ Cf. *Gibson Products Co.*, 185 N.L.R.B. No. 74, 75 L.R.R.M. 1055 (1970).

³⁶ 451 F.2d 873, 78 L.R.R.M. 2648 (2d Cir. 1971).

the Act³⁷ is not applicable to representation cases in which an unfair labor practice is not alleged. Two days before a representation election, the employees received a letter from the company informing them that the union local at another company plant had recently agreed to a contract without a Christmas bonus provision.³⁸ The letter, however, failed to mention that the union had obtained a wage increase, extended sick pay, and terminated rest periods for its members in exchange for dropping its demand for a Christmas bonus. The union lost the election and petitioned the NLRB to set it aside, alleging that the letter sufficiently disturbed the desired "laboratory conditions" and that therefore the election was not fairly conducted. The NLRB agreed with the union and ordered a new election which was won by the union. The Board then certified the union as the exclusive bargaining agent of the unit and, when the company refused to bargain, found that it had violated Section 8(a)(5) of the Act. A bargaining order issued, and the NLRB sought enforcement in the Second Circuit.

The appellate court first held that the Board's finding that the letter contained a misstatement of material fact was supported by substantial evidence. Observing that collective bargaining ordinarily entails a process of "give-and-take," the court concluded that the local referred to in the letter had engaged in "package bargaining," and that its demand for a Christmas bonus was dropped in order to gain concessions from the company.³⁹ Consequently, the letter contained a half-truth which the NLRB properly held to be a misstatement.

Regarding the company's allegation that the NLRB had abused its discretion in invalidating the first election, the court noted that the traditional tests for determining the significance of pre-election statements were satisfied. First, the misstatement was of a material fact; the employees would obviously be concerned with the valuable right to a Christmas bonus. Second, the union did not have time to reply; the letter was received only two days prior to the election. Third, the company was in a position to have "special knowledge" of the facts. And fourth, the employees lacked independent knowledge with which to evaluate the statement.⁴⁰ The desired "laboratory conditions" for an

³⁷ Section 8(c) provides that:

The expressing of any views, argument, or opinion or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

³⁹ U.S.C. § 158(c) (1970).

³⁸ The letter stated: "The Local in Minneapolis of the same union trying to represent you agreed last November that the four B & L employees represented by them will not receive a Christmas bonus." 451 F.2d at 875, 78 L.R.R.M. at 2649.

³⁹ *Id.* at 877, 78 L.R.R.M. at 2650.

⁴⁰ These tests have been developed by both the Board and the courts. See, e.g., *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224, 51 L.R.R.M. 1600; 1602 (1962); *NLRB v.*

election were thereby significantly disturbed so that the Board did not abuse its discretion in ordering the new election.

The company argued, however, that imposition of the "laboratory conditions" standard by the Board violates section 8(c)'s free speech proviso and unconstitutionally abridges the right to freedom of speech. The court admitted that Congress could not, through restricting the section 8(c) protection to unfair labor practice determinations, grant the Board discretion to violate the First Amendment. But it observed that a balance must be struck between the interest of the employer in freedom of speech, and that of the public at large in free and informed representation elections. Although the Board's "laboratory" standards may have a chilling effect on both the employer's and union's speech, the court held that in the "highly charged atmosphere" of a representation election, misrepresentations can have a "devastating" effect. Therefore, since permitting election-eve lies or misstatements would undermine the policies of the NLRA, the court held that the Board's laboratory standards do not abridge the constitutional guarantee of freedom of speech.

The rule that section 8(c) applies only to unfair labor practice cases was first adopted by the NLRB in *General Shoe Corp.*,⁴¹ where it noted that "[c]onduct that creates an atmosphere which renders impossible a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice."⁴² Although the *General Shoe* rule was abandoned in 1953,⁴³ it was reinstated by the Board in 1962 in the well-known *Dal-Tex* case,⁴⁴ which again held that section 8(c) has no application to representation cases.

The Second Circuit, in *Bausch & Lomb*, becomes the third circuit to agree with the NLRB's *Dal-Tex* rule.⁴⁵ However, Board Chairman Miller has recently registered his dissent, arguing that section 8(c) protects statements at issue in representation cases, as well as those in unfair labor practice cases.⁴⁶

2. Promise of Benefits; Threat of Reprisals

In *Hineline's Meat Plant, Inc.*,⁴⁷ the NLRB set aside an election where the employer announced to its employees a new profit-sharing

Southern Foods, Inc., 434 F.2d 717, 720 (5th Cir. 1970); *NLRB v. Trancoa Chemical Corp.*, 303 F.2d 456, 460 (1st Cir. 1962).

⁴¹ 77 N.L.R.B. 124, 21 L.R.R.M. 1337 (1948).

⁴² *Id.* at 126, 21 L.R.R.M. at 1340.

⁴³ *National Furniture Mfg. Co.*, 106 N.L.R.B. 1300, 33 L.R.R.M. 1004 (1953).

⁴⁴ *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 50 L.R.R.M. 1489 (1962).

⁴⁵ See *NLRB v. Clearfield Cheese Co.*, 322 F.2d 89 (3rd Cir. 1963); *Sonoco Products Co. v. NLRB*, 399 F.2d 835 (9th Cir. 1968).

⁴⁶ *McLaughlin Co.*, 187 N.L.R.B. No. 131, 76 L.R.R.M. 1317 (1971).

⁴⁷ 193 N.L.R.B. No. 135, 78 L.R.R.M. 1387 (1971).

plan eleven days before the election. The plan had been decided upon prior to the start of the union's organizational campaign and submitted to the Internal Revenue Service (IRS) for approval prior to the filing of the election petition. IRS regulations required the employer to inform his employees of a proposed profit-sharing plan prior to the end of his tax year, which in this case was more than three months after the election.⁴⁸

The Board found that since the announcement could have been delayed until after the election, it was possible that the company had timed the announcement to influence the employees' vote. Consequently it found a violation of Section 8(a)(1) of the Act and set aside the election. The Board relied on the *Exchange Parts* rule that an employer who times a promise of benefits to influence a representation election violates section 8(a)(1).⁴⁹

Hineline's serves as a warning to employers that pre-election announcement of benefit plans, even if the plans are decided upon before the start of the union's organizational campaign, may be sufficient cause to set aside an election.

During the Survey year, the Board also dealt with the question of whether pre-election statements constitute "predictions" or "threats of reprisal." In *Rospatch Corp.*,⁵⁰ the company had in effect a profit-sharing plan to which it paid ten percent of its pre-tax profits for distribution to the employees. Four days before the election, the company held a meeting at which the company president told the employees that selection of the union as exclusive bargaining representative would require the company to incur legal expenses which would come out of profits, and would thereby reduce the profit-sharing fund. The NLRB held that the president's speech was not a threat to reduce the company's contributions to the plan, but merely a "prediction of a possible economic consequence."⁵¹

Although the NLRB resolved *Rospatch* in favor of the employer, the Supreme Court's statement in *NLRB v. Gissel Packing Co.*⁵² that such statements are not statements of fact "unless . . . the eventuality . . . is capable of proof,"⁵³ must still be reckoned with by the courts.

⁴⁸ The election was held on March 9, 1971. The end of the employer's tax year was June 30, 1971.

⁴⁹ *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 55 L.R.R.M. 2098 (1964).

⁵⁰ 193 N.L.R.B. No. 122, 78 L.R.R.M. 1360 (1971).

⁵¹ *Id.*, 78 L.R.R.M. at 1361.

⁵² 395 U.S. 575 (1969).

⁵³ *Id.* at 618-19, quoting from *NLRB v. Sinclair Co.*, 397 F.2d 157, 160 (1st Cir. 1968).

VI. UNFAIR LABOR PRACTICES

A. *The Duty to Bargain*1. *Benefits for Retired Employees: Pittsburgh Plate Glass*

In *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*,¹ the Supreme Court held that benefits of already retired employees were not mandatory subjects of bargaining and that an employer's unilateral modification of a contract term did not breach his duty to bargain, if that modification related to a permissive rather than a mandatory subject of bargaining. The decision is also noteworthy for its sharp reminder to the Board that expertise must operate within the limits imposed by the NLRA.

The employer, Pittsburgh Plate Glass, and the union had negotiated an employee group health insurance plan whose provisions included benefits for already retired workers. When Medicare was enacted, the union sought mid-term bargaining regarding the retirees' benefits, and Pittsburgh Plate responded that it was planning to substitute, in place of the contract benefits, supplemental Medicare coverage. The union challenged the employer's right to do so unilaterally; the employer challenged the union's right to bargain for the retired employees; and when the employer unilaterally proposed changes to the retirees and instituted those changes for the retirees who accepted the proposal, the union filed a refusal to bargain charge.

The Board held² that the employer's refusal to bargain over the changes in benefits violated section 8(a)(5).³ The holding rested on the alternative grounds that retirees are employees within the meaning of the NLRA⁴ for the purpose of bargaining about their benefits, and that retirees' benefits are of sufficient interest to active employees to be a mandatory subject of bargaining. Both theories were supported by the Board's "expertise" finding that bargaining over pensioners' rights had become established industrial practice.

¹ 404 U.S. 157 (1971).

² 177 N.L.R.B. 911, 71 L.R.R.M. 1433 (1969).

³ Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a). . . ." 29 U.S.C. § 158(a)(5) (1970).

⁴ Section 2(3) provides in part:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment

29 U.S.C. § 152(3) (1970).

The Court of Appeals reversed,⁵ holding that retirees are not "employees" within the meaning of the Act and that, accordingly, the company had no duty to bargain about their benefits. The Supreme Court affirmed the appellate decision by a six to one majority, with Justice Douglas dissenting.⁶

Justice Brennan set out three grounds for the decision in an opinion apparently intended as a textbook commentary on the duty to bargain. In the first place, pensioners are not themselves employees, nor may they be considered members of an appropriate bargaining unit. The ordinary meaning of the provision defining "employee," section 2(3), plainly excludes retirees.⁷ Even were the issue in doubt, both the legislative history of section 2(3) and decisions construing that provision reveal that only members of the active work force may be considered as employees. All of the decisions the Board relied on to show that section 2(3) may apply to persons not actually employed, such as hiring hall applicants, involved people who were at least available for hire. Moreover, the section 9(a) requirement of an "appropriate" bargaining unit⁸ would automatically exclude retirees from membership in the unit, since they lack the community of interest with other members that is an essential element of appropriateness.⁹

In the second place, the benefits of already retired workers are not of sufficient interest to the active employees to permit including them among the active employees' "terms and conditions of employment" and accordingly classifying them as mandatory bargaining subjects under section 8(d).¹⁰ To be mandatory subjects, third-party concerns must "vitally" affect the active employees' terms and conditions

⁵ *Pittsburgh Plate Glass Co. v. NLRB*, 427 F.2d 936, 74 L.R.R.M. 2425 (6th Cir. 1970).

⁶ 404 U.S. 157 (1971).

⁷ See note 4 *supra*.

⁸ Section 9(a) provides in part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

29 U.S.C. § 159(a) (1970).

⁹ The Court discusses Board holdings revealing a sharp divergency between the interests of pensioners and those of active employers. 404 U.S. at 172-75. It notes the broad discretion accorded to the Board in making unit determinations but points out that when, in the exercise of that discretion, the Board oversteps the law, it must be reversed. *Id.* at 171-72.

¹⁰ Section 8(d) defines the bargaining obligation as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." 29 U.S.C. § 158(d) (1970). "Terms and conditions of employment," then, are mandatory subjects.

of employment.¹¹ The Board's "expertise" assessment of retirees' rights as "vitally" affecting the active employees' interests is untenable;¹² the Board simply neglected to give the adverb its ordinary meaning, and its citation of industrial practice did not convince the Court that the connection between retirees' benefits and employees' interests is "vital."¹³

Finally, the Court holds, even if the employer's proposal to the retirees constituted a unilateral modification of the contract, such a modification was not an unfair labor practice because it affected only a permissive subject of bargaining.¹⁴ The Court construes section 8(d), including the mid-term contract modification proviso,¹⁵ in terms of the "whole law,"¹⁶ and finds that just as 8(d) defines the bargaining duty with respect to mandatory terms alone, so the duty not to modify a contract unilaterally extends only to mandatory terms. A party injured by the other party's unilateral modification of a permissive term should seek relief, not from the Board, but from the courts in an action for breach of contract.¹⁷

The impact of *Pittsburgh Plate Glass* need not be urged. The decision immediately removes a broad area from the category of *mandatory* subjects. Equally significant, one would think, is the check adminis-

¹¹ The Court agrees with the Board that in determining whether matters involving individuals outside the employment relationship are mandatory subjects, the principle of *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959), and *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), is controlling. That principle was whether "the third party concern . . . vitally affects the 'terms and conditions' of [the bargaining-unit employees] . . . employment." 404 U.S. at 179.

¹² The Court explicitly notes the limits of expertise:

We recognize that "classification of bargaining subjects . . . is a matter concerning which the Board has special expertise." . . . The Board's holding in this cause, however, depends on the application of law to facts, and the legal standard to be applied is ultimately for the courts to decide and enforce.

Id. at 182. See also note 9 *supra*.

¹³ The Court notes that the workers' *own* future retirement benefits may indeed be of concern to them. Such benefits, however, are not the benefits of already retired workers. *Id.* at 182.

¹⁴ In *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), the Court explicitly distinguished between mandatory and permissive subjects of bargaining. A third category, illegal subjects, was also recognized. *Id.* at 360 (concurring opinion).

¹⁵ The proviso stipulates, in part, that "where there is in effect a collective-bargaining contract . . . , the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract" except upon (1) timely notice to the other party, (2) an offer to meet and negotiate, (3) timely notice to the Federal Mediation and Conciliation Service and local agencies regarding the existence of a dispute, and (4) continuation in full force of all the terms of the existing contract until sixty days after notice is given or its expiration date, whichever is later. 29 U.S.C. § 158(d) (1970).

¹⁶ 404 U.S. at 185.

¹⁷ The Court notes that the injured party may bring a § 301 suit. *Id.* at 188 and 181 n.20.

tered to the Board's interpretation of the scope of section 8(d): *Pittsburgh Plate Glass* may be one mark of the end of a trend toward expansive interpretation that the Board has followed since *Fibreboard*,¹⁸ a conjecture supported by another Survey case that followed *Pittsburgh Plate Glass* by several months.¹⁹ Finally, the Court's holding that a unilateral breach of the collective bargaining contract does not violate section 8(a)(5), unless the term involved is a mandatory subject, explicitly limits Board jurisdiction over certain contract issues²⁰ at a time when the Board has tended to expand its reach in the contract area.²¹

2. *Decision to Close: General Motors; Summit Tooling*

In two landmark decisions, *General Motors Corp.*²² and *Summit Tooling Co.*,²³ the Board reversed its previous position respecting an employer's duty to bargain over his decision to close a plant and accepted the rulings of the circuit courts that had consistently refused to accept that position. The Board had held that an employer who closes or moves part of his enterprise was obligated by section 8(a)(5)²⁴ to bargain about his decision. This doctrine, it argued, followed from the Supreme Court's ruling, in *Fibreboard Paper Products Corp. v. NLRB*,²⁵ that an employer must bargain regarding his decision to subcontract work formerly performed by his own employees. The Court had emphasized that its decision was limited to the particular fact situation and should not be applied to all subcontracting decisions.²⁶ The Board, however, considered that *Fibreboard* stood for the doctrine that termination of employment was included within the category of "conditions of employment" which are mandatory bargaining subjects under section 8(d).²⁷ Accordingly, the Board maintained that *Fibreboard* should be interpreted to require bargaining over any decision that terminated employment, whether or not that decision was classified as "managerial."²⁸

¹⁸ See discussion of the development of *Fibreboard* at notes 27-29 infra.

¹⁹ See discussion of *Summit Tooling* at 1409-13 infra.

²⁰ *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), recognizes, as an exception to the general rule that the Board lacks statutory power to interpret and enforce a collective bargaining contract, that the Board may interpret an agreement insofar as it is necessary to do so in order to decide an unfair labor practice case.

²¹ See *NLRB v. Local 485, IUE (Automotive Plating Corp.)*, 454 F.2d 17, 79 L.R.R.M. 2278 (2d Cir. 1972), discussed at 1455-59 infra.

²² 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971).

²³ 195 N.L.R.B. No. 91, 79 L.R.R.M. 1396 (1972).

²⁴ 29 U.S.C. § 158(a)(5) (1970).

²⁵ 379 U.S. 203 (1964).

²⁶ *Id.* at 215.

²⁷ 29 U.S.C. § 158(d) (1970).

²⁸ The Board set out these principles in some detail in *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966). The Board ruled that the employer was

On this ground the Board developed *Fibreboard*, applying it to decisions regarding such matters as plant closings and removals as well as to subcontracting decisions.²⁹ The Eighth and Third Circuits rejected this development, insisting that the entrepreneurial nature of certain decisions, including certain kinds of subcontracting, precluded any finding of an employer's duty to bargain.³⁰ The Board and the courts agreed that the employer had a duty to bargain about the *effects* of the decision,³¹ but they maintained a collision course regarding the duty to bargain on the initial decision. Now, with the Survey year cases, the Board has changed its course. It will be submitted, however, that it may still be steering for the same port.

In the first Survey year case, *General Motors Corp.*,³² the Board considered for the first time an employer's duty to bargain over a decision to sell part of its enterprise, and for the first time turned for authority to the circuit courts rather than to its own *Fibreboard* progeny. The appellate courts had refused to find a bargaining duty concerning financial and managerial decisions that lay "at the core of entrepreneurial control";³³ and this rationale, a majority of the Board ruled in *General Motors*, applied to a decision to sell. Members Brown and Fanning dissented.

In the second case, *Summit Tooling Co.*,³⁴ the employer was a wholly-owned subsidiary of Ace Tools, located on the same premises as Ace and operated as a division of Ace. Summit closed its operations. Although the Board found that Ace and Summit were a single employer, and that the closing could be characterized as a partial closing, a majority held that the company had no duty to bargain over that decision with the union that represented Summit's employees. The fact that the closing was motivated by anti-union animus was not considered. Member Fanning dissented.

Summit Tooling represented even more of a revision of the Board's former position than did *General Motors*, where the "sale" factor was a novel element, on the basis of which the Board could apply the "core of entrepreneurial control" doctrine without wholly forsaking its pre-

obligated to bargain about any management decision that affected employees' jobs and job security, even if that decision involved a sale. See text at notes 35 and 36 *infra*.

²⁹ The dissent in *General Motors* provides a list of cases. 191 N.L.R.B. at — n.12, 77 L.R.R.M. at 1540 n.12.

³⁰ NLRB v. Adams Dairy, Inc., 350 F.2d 108, 60 L.R.R.M. 2084 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 60 L.R.R.M. 2033 (3rd Cir. 1965); NLRB v. Wm. J. Burns Int'l Detective Agency, Inc., 346 F.2d 897, 59 L.R.R.M. 2523 (8th Cir. 1965).

³¹ See, e.g., the cases listed in *General Motors Corp.*, 191 N.L.R.B. at — n.9, 77 L.R.R.M. at 1540 n.9.

³² 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971).

³³ *Id.* at —, 77 L.R.R.M. at 1539.

³⁴ 195 N.L.R.B. No. 91, 79 L.R.R.M. 1396 (1972).

vious position. In *Summit* the closing was, technically, a "partial closing"; and previously, in *Ozark Trailers, Inc.*,³⁵ the Board had held squarely that a decision to close an operation only partially was a mandatory subject of bargaining, even though the decision was economically, not discriminatorily, motivated. The Board had rejected the circuit courts' theory, enunciated in similar cases, that a decision involving a major change in the nature of the business is *ipso facto* freed of the bargaining duty because of its managerial nature; rather, the Board had insisted, the impact of such a decision on employees justifies imposing on the employer the duty to discuss the decision with the employees before finally making it.³⁶

Then, in *Summit Tooling*, the Board not only accepted the courts' rationale but extended it by applying it to a decision that was found to be discriminatorily motivated. The Board ruled that it would inquire only as to the nature of the change resulting from the decision. If the change was "major," reflecting a decision on matters at the core of entrepreneurial control, the Board would not require bargaining on the decision.³⁷ The employer's motive would be irrelevant.

Startling as the Board's forsaking of its *Ozark Trailers* position may appear, it would seem that the new doctrine correlates more than does the old with the scope of the bargaining duty mandated in section 8(d). The old position rested on the hypothesis that any decision that would terminate employment must have a major impact on employees' working "conditions"; accordingly the Board required that the employer bargain about the decision itself. Logically developed, that hypothesis would require bargaining even on major decisions that in practice were so far removed from the subject matter embraced in 8(d) that the limits imposed by 8(d) would be meaningless. That is, the theory of *Ozark Trailers*, if followed, would in effect replace the restricted 8(d) duty with a virtually limitless duty to bargain over every major decision on the ground that it would have a major impact on employees' wages, hours and working conditions. The Supreme Court appears to have precluded such a sweeping extension of the bargaining duty by its warning in *Fibreboard* that that decision did not embrace other forms of subcontracting that "arise daily in our complex economy."³⁸

Summit Tooling now rejects *Ozark Trailers* by imposing on the employer only the long-acknowledged duty to bargain about "effects" of the decision, a requirement nicely correlative with the language of

³⁵ 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966).

³⁶ *Id.* at 566-67, 63 L.R.R.M. at 1269.

³⁷ 195 N.L.R.B. No. 91, 79 L.R.R.M. at 1400.

³⁸ 379 U.S. at 215.

8(d). It could even be argued that the duty to bargain about effects is what the Board was trying to impose in the first place by requiring the employer to bargain about the *decision*. That is, the *Ozark Trailers* doctrine may reflect the Board's determination to make the employer bargain about effects at a time when such bargaining could be genuine negotiation: before the decision itself, which would necessarily freeze certain "effects," was completely fixed. This interpretation of the old position is suggested by the dissent in *General Motors*, wherein Member Fanning forcefully pointed out that genuine bargaining about "effects" required bargaining about the decision itself; that once the decision was made, the employer's capacity to modify its effects on employees was severely circumscribed.³⁹

It is submitted, however, that the Board's position in *General Motors* and *Summit Tooling* may resolve the problem Member Fanning pointed out while at the same time staying within the statutory limits of 8(d). If viewed in conjunction with the remedial policy enunciated in *Summit Tooling*, the Board's imposition of only the long-recognized duty to bargain about effects may be interpreted as the imposition of a very far-reaching duty indeed. In short, the Board appears to be using the duty to bargain about "effects" to require, in practice though not in theory, that the employer negotiate with the union about certain parts of the decision itself, or at least that the employer bargain about the effects before actually closing the operation involved in the decision.

The discussion of remedies in *Summit Tooling* suggests that the Board's new position may be so interpreted. The Board laid down a warning that, should practical considerations so dictate, an appropriate remedy for a clear-cut refusal to bargain over effects could be an order to return to the situation existing before the decision took effect at all.⁴⁰

³⁹ 191 N.L.R.B. at —, 77 L.R.R.M. at 1541 (dissenting opinion).

⁴⁰ The Board stated:

In fashioning his remedy the Trial Examiner concluded that the only effective remedy would be one that required the Respondent to reopen the Summit operation, to offer reinstatement to the employees who were terminated, and to make them whole for any loss they may have sustained by reason of Respondent's discrimination against them. While we are mindful in fashioning our affirmative orders that the remedy should "be adapted to the situation that calls for redress," with a view toward "restoring the situation as nearly as possible to that which would have obtained but for [the unfair labor practice]," and that the nature of the violation could probably best be remedied in directing the Respondent to restore the status quo ante by reestablishing the discontinued operation, we are of the opinion that such reestablishment is not essential in this case to the framing of a meaningful remedy. Aside from the fact that the Trial Examiner has cited no precedent justifying such a drastic remedy in a situation where, as here, the Respondent has discontinued a major operation and its remaining operation is independent of and bears little relationship to the discontinued operation, we believe that practical considerations dictate against

This was the same remedy proposed in *Ozark Trailers* for failure to bargain over the *decision*; and in stating its policy in *Summit Tooling* the Board even quoted the *Ozark Trailers* thesis that the remedy should "restor[e] the situation as early as possible to that which would have obtained but for [the unfair labor practice]."⁴¹ If breach of the duty to bargain about effects will lead to an order requiring him to reinstate a discontinued operation, it would seem that the prudent employer would bargain about effects before making the change, and possibly the decision, in the first place.

In *Summit*, admittedly, the Board did not order a return to the *status quo ante*, but it noted that only the particular facts of the case prevented its doing so; it emphasized the fact that Ace's remaining operations were entirely different from the manufacturing operations that its subsidiary Summit had undertaken, that the latter may now be outmoded, and that the company had announced publicly that it was no longer in the manufacturing business. In short, the decision had been in effect a complete closing decision.⁴² The inference that an order to reinstate operations would follow, were the closing genuinely partial, appears inescapable. Finally, the Board ordered, in addition to traditional remedies, back pay to employees whom the employer had discharged discriminatorily before it made the decision to close. The pay was to run from the time of their discharge until the employer should bargain with the union concerning the effects of the decision on all employees and reach either impasse or agreement. This remedy was imposed in order to restore to the union some of the economic strength that it had lost when the employer terminated operations without bargaining.⁴³

It is submitted that *Summit Tooling* shows that the Board has expanded its remedial policy vis-à-vis the duty to bargain over the effects of a major decision in an attempt to reach the goals that it had formerly tried to achieve by imposing a duty to bargain over the decision itself. By suggesting that it may require employers to reinstate operations in order that they might properly carry out the "effects" bargaining duty,

our ordering the Respondent to reestablish its Summit operation. In reaching this conclusion, we have reviewed the nature of the Respondent's general business operations, considered the possibility that the discontinued operation may now be outmoded, and noted that the Respondent had publicly announced that it is no longer in the manufacturing business and that a major concern of the Union has been an attempt to bargain only about the effect of the shutdown on the employees involved. We shall not, therefore, require reestablishment of the Summit operation.

195 N.L.R.B. at —, 79 L.R.R.M. at 1401 (emphasis added).

⁴¹ Id.

⁴² Id. at —, 79 L.R.R.M. at 1400 and n.3.

⁴³ Id. at —, 79 L.R.R.M. at 1401.

the Board is virtually warning them that they must bargain over those parts of the decision itself that would constitute the subject matter of good-faith "effects" bargaining. Although it is unlikely that the Board would carry out its threat if the closing is complete, it has made no promises, and indeed strongly suggested that, had the facts in *Summit* been even slightly different, a reinstatement order might have issued.

3. Successor Employer: Burns and Ranchway

In a case decided during the 1970-71 Survey year, *William J. Burns Int'l Detective Agency, Inc.*,⁴⁴ the Board held for the first time that a successor employer is obligated by his bargaining duty to honor a collective bargaining contract negotiated by his predecessor. During the present Survey year, the Second Circuit refused to enforce the Board's order requiring Burns to honor its predecessor's contract with the union, holding in *Burns Int'l Detective Agency, Inc. v. NLRB*⁴⁵ that the Board had exceeded its powers in issuing such an order. The Supreme Court granted certiorari. Meanwhile, in another Survey year case, *Ranch-Way, Inc. v. NLRB*,⁴⁶ the Tenth Circuit granted enforcement of an order similar to that issued in *Burns*, and so sharpened the conflict already existing between the Board and the Second Circuit regarding the authority of the Board to require an employer to assume his predecessor's contract. Presumably the three-way conflict will be resolved when the Supreme Court's imminent decision in *Burns* is handed down,⁴⁷ although it is possible that the decision will rely on the threshold question of whether Burns was a successor employer.

It seems probable that the Court will reject the Board's doctrine that a predecessor's contractual obligations can be imposed on the successor employer. That obligation was derived from the Supreme Court's ruling in *John Wiley & Sons, Inc. v. Livingston* that "in appropriate circumstances . . . the successor employer may be required to arbitrate with the union under the agreement [made by the predecessor]."⁴⁸ The Board relied on the Supreme Court's refusal, in *Wiley*, to relieve the successor from an obligation to arbitrate matters arising under a collective bargaining contract on the ground that he had not signed the contract. It interpreted *Wiley* as support for the doctrine

⁴⁴ 182 N.L.R.B. 348, 74 L.R.R.M. 1098 (1970).

⁴⁵ 441 F.2d 911, 77 L.R.R.M. 2081 (2d Cir.), cert. granted sub nom. *NLRB v. Burns Int'l. Security Services*, — U.S. —, 92 S.Ct. 99 (1971).

⁴⁶ 445 F.2d 625, 77 L.R.R.M. 2689 (10th Cir. 1971).

⁴⁷ As this comment goes to press, the Supreme Court has handed down its decision in *Burns*, holding unanimously that an employer had no obligation to honor a collective bargaining agreement made by his predecessor and, by a bare five to four majority, that the successor employer was obligated to bargain with the incumbent union. 40 U.S.L.W. 4499 (U.S. May 15, 1972).

⁴⁸ 376 U.S. 543, 548 (1964).

that an existing collective bargaining agreement could survive a merger where there was substantial continuity in the employing industry.⁴⁹

Rejecting that interpretation, the Second Circuit argued in *Burns* that the policy behind *Wiley* was not maintenance of contracts, but rather the Court's recognition of "the central role of arbitration in effectuating national labor policy."⁵⁰ The court noted that the Supreme Court limited the effect of its holding by repeatedly emphasizing, as the ground of the decision, its policy favoring arbitration.⁵¹

The Second Circuit's rejection of the Board's doctrine rests, however, not on its interpretation of *Wiley* but on its ruling that the Board's action in *Burns* is contrary to the letter and the spirit of *H.K. Porter, Inc. v. NLRB*.⁵² In that case, the Supreme Court held that the limits of the bargaining duty established in section 8(d) prevented both the Board and the courts from compelling either an employer or a union to agree to any substantive contractual provision.

It would appear that the Second Circuit's arguments are more persuasive than the Board's. Whatever possibilities of expansion of the duty to bargain were implicit in *Wiley* appear to have been extinguished permanently by *H.K. Porter*. Moreover, in another Survey year decision, *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*,⁵³ the Supreme Court ruled that unilateral change of a contract term did not breach the duty to bargain unless the term involved were a mandatory subject of bargaining. *Pittsburgh Plate Glass* may not conflict outright with the Board's successor doctrine in *Burns*, but its narrow interpretation of the 8(d) bargaining duty, an interpretation resting on a close and literal reading of the statute, would not appear to correlate with the Board's expansive interpretation of the duty in *Burns*.

Finally, the Board itself has appeared to narrow the applicability of its *Burns* doctrine. The Survey year decision *G.T. & E. Data Services Corp.*⁵⁴ recognizes some of the practical problems implicit in the doctrine. *G.T. & E. Data* had attached to itself a department of the predecessor employer, and was its corporate affiliate. However, *G.T. & E. Data* supplied a wide range of services to a number of unaffiliated companies as well as providing the predecessor with the services once supplied by its erstwhile department. The Board found a successor-employer relationship, but it also found that many provisions of the

⁴⁹ 182 N.L.R.B. at 349, 74 L.R.R.M. at 1100.

⁵⁰ 441 F.2d at 916, 77 L.R.R.M. at 2084, quoting 376 U.S. at 549.

⁵¹ *Id.* at 916 n.3, 77 L.R.R.M. at 2084 n.3.

⁵² *Id.* at 915, 77 L.R.R.M. at 2083.

⁵³ 404 U.S. 157 (1971).

⁵⁴ 194 N.L.R.B. No. 102, 79 L.R.R.M. 1033 (1971). The Board noted that it had already refused to apply *Burns* "in a mechanistic fashion" in earlier cases. *Id.* at —, 79 L.R.R.M. at 1036.

predecessor's contract were not practically applicable to the successor's operation. The Board refused to apportion the successorship obligations on a *pro tanto* basis, on the ground that to do so would be to make a new contract for the parties. Hence the Board held that it would be "inappropriate" to require the successor to honor the contract.⁵⁵ It appears that the specific factors making for "inappropriateness" derived from differences in the nature of the operations. Thus it would appear that in fact, if not in theory, the Board will find a justification for imposing the contract on the successor only when his operation closely resembles that of the predecessor. Such a conclusion correlates with *Wiley's* underlying theory that the employing industry remains, though the employer might change.

G.T. & E. Data suggests, then, that even should the Supreme Court rule in favor of the Board in *Burns*, the Board will gradually narrow its application of the decision. The various factors that made for "inappropriateness" in *G.T. & E. Data* will be found, in various forms, in many successor-employer cases.

4. Union Enforcement of Production Quota: Westgate Painting

In *Painters District Council v. NLRB* (Westgate Painting & Decorating Corp.),⁵⁶ the Second Circuit upheld the Board's finding that a union's enforcement of its production quota violated section 8(b)(3) of the NLRA.

Section 8(b)(3)⁵⁷ establishes a union's duty to bargain collectively with an employer, and section 8(d), which defines the scope of the bargaining duty, requires that neither party modify an existing collective bargaining contract without first offering to bargain over the modification.⁵⁸ In *Westgate*, the union had unilaterally put into effect a union production quota limiting a journeyman painter's work to ten rooms a week. Since the collective bargaining contract provided that journeymen painters work thirty-five hours a week, and the painters had painted an average of 11.5 rooms weekly before the production quota was established, the enforcement of the quota necessarily required those painters who customarily painted more than ten rooms a week to work less than thirty-five hours. Hence the majority of the Board had found that the union's enforcement of the rule constituted a unilateral change of an existing contract term and a violation of 8(b)(3).⁵⁹

⁵⁵ Id., 79 L.R.R.M. at 1036

⁵⁶ 453 F.2d 783, 79 L.R.R.M. 2145 (2d Cir. 1971).

⁵⁷ 29 U.S.C. § 158(b)(3) (1970).

⁵⁸ See summary of the proviso to section 8(d), note 15 supra.

⁵⁹ *Painters District Council* (Westgate Painting and Decorating Corp.), 186 N.L.R.B. No. 140, 75 L.R.R.M. 1465 (1970).

In upholding that decision, the circuit court sustained the Board's interpretation of *Scofield v. NLRB*,⁶⁰ where the Supreme Court had found lawful union fines enforcing a production quota. The Board had refused to allow *Scofield* to protect the *Westgate* quota, relying on the Supreme Court's characterization of the *Scofield* quota as one that did not breach the collective bargaining agreement.⁶¹

Judge Hays, however, rejected in his dissent the Board's interpretation of *Scofield*. He also argued *inter alia* that even assuming that the rule did breach the contract, the Board's remedial order to bargain about the contract modification is itself wrong under section 8(d). The judge pointed out that the order in effect requires the employer as well as the union to bargain about a term in an existing contract, while section 8(d) provides that the bargaining duty does not require either party "to discuss or agree to any modification of the terms . . . contained in a contract for a fixed period, if such modification is to become effective before such terms . . . can be reopened under the provisions of the contract."⁶² Hence, the judge argued, under 8(d) the parties in this case had no duty to bargain further and, indeed, "no right to bargain."⁶³ For that reason, and because under *NLRB v. C & C Plywood Corp.*⁶⁴ the Board has no power to police the enforcement of collective agreements, the company should seek relief from the courts in an action for breach of contract under section 301.

Notwithstanding the arguments of the dissent, it is submitted that the majority's position, and the Board's, appear correct in the light of the Supreme Court's *Survey* year decision, *Allied Chemical Workers v. Pittsburgh Plate Glass*.⁶⁵ There, the Court held, *inter alia*, that unilateral midterm modification of a collective bargaining contract did not constitute a violation of the bargaining duty if the term modified were only a permissive subject of bargaining.⁶⁶ The Court's rationale implies that it does recognize modification of a *mandatory* bargaining subject, such as that involved in *Westgate*, as a violation of the 8(d) bargaining duty. It would follow that the Board has authority to issue its traditional bargaining order remedy for such a violation, and that only if the breach pertained to a *permissive* subject of bargaining should the injured party be required to seek relief from the courts in a 301 action.

⁶⁰ 394 U.S. 423 (1969).

⁶¹ *Id.* at 433.

⁶² 29 U.S.C. § 158(d) (1970), quoted in 453 F.2d at 789, 79 L.R.R.M. at 2149 (dissenting opinion).

⁶³ 453 F.2d at 789, 79 L.R.R.M. at 2149.

⁶⁴ 385 U.S. 421 (1967).

⁶⁵ 404 U.S. 157 (1971). See pp. 1405-08 *supra*.

⁶⁶ See pp. 1407-08 *supra*.

5. *Coalition Bargaining: Lynchburg Steel and Shell Oil*

In the past few years, unions have developed a variety of tactics to enlarge the scope of bargaining. "Coordinated" or "coalition" bargaining by a union team that includes representatives of other unions that bargain with the same company has been recognized as lawful.⁶⁷ On the other hand, in *Phelps Dodge*⁶⁸ the Board found unlawful, as an attempt to create unilaterally a company-wide unit, several bargaining units' insistence on simultaneous settlement of contracts.

During the Survey year, the Board ruled on two techniques that appeared to enlarge the scope of bargaining beyond the single bargaining unit. In *Steelworkers Union* (Lynchburg Foundry Co.),⁶⁹ the Board accepted a "pooled ratification" tactic as lawful, while in *Shell Oil Co.*⁷⁰ it held that Shell was not required to engage in "simultaneous bargaining" on company-wide fringe benefit plans with a committee of union locals representing different units within the company.

In *Lynchburg*, a union whose locals represented two units of the same company submitted to a pooled vote, by the members of both units voting as a single group, the company's proposal regarding wage increases and expiration dates for the contracts between the company and the two units. The employees rejected the proposal. The General Counsel contended that this strategy violated the union's bargaining duty as established in 8(b)(3) by requiring the employer, without his consent, to bargain with the two units jointly rather than separately. The Board, however, accepted the Trial Examiner's argument that distinguished this kind of pooled ratification from the tactics held unlawful in *Phelps Dodge* and similar cases.

The essence of the distinction lay in the union's purpose. In *Phelps Dodge* the unions had insisted on a common expiration date, but the Board had emphasized evidence showing their primary motivation to have been consolidation of the separate units; their interest in a common expiration date was merely "peripheral."⁷¹ Here, in contrast, the Trial Examiner found that each unit had a substantial and direct interest in getting a contract whose expiration date was identical with that of the other unit's contract, and that the union representatives had determined upon the pooled vote as the most feasible means of insuring the common expiration.⁷² In *United States Pipe & Foundry Co. v.*

⁶⁷ See, e.g., *General Electric Co. v. NLRB*, 412 F.2d 512, 71 L.R.R.M. 2418 (2d Cir. 1969).

⁶⁸ AFL-CIO Joint Negotiating Comm. (*Phelps Dodge Corp.*), 184 N.L.R.B. No. 106, 74 L.R.R.M. 1705 (1970).

⁶⁹ 192 N.L.R.B. No. 110, 78 L.R.R.M. 1021 (1971).

⁷⁰ 194 N.L.R.B. No. 166, 79 L.R.R.M. 1130 (1972).

⁷¹ 184 N.L.R.B. at —, 74 L.R.R.M. at 1706.

⁷² 192 N.L.R.B. at —, 78 L.R.R.M. at 1024.

NLRB,⁷³ the Fifth Circuit had found similar insistence on a common expiration date lawful, since each of the units concerned had a direct and important interest in achieving common expiration of their contracts with the company. Accordingly, the *Lynchburg* Trial Examiner held, not only was the purpose underlying the pooled vote lawful, but because each of the units had so vital an independent interest in a common expiration date, any "expansion" of the bargaining unit effected by the tactic was only "apparent,"⁷⁴ not "actual."⁷⁵ Each of the units was merely pursuing its best interest.

A subordinate argument, that utilization of the pooled voting procedure had the "object and effect" of requiring the company to bargain with a single combined unit, was decisively rejected. The *Lynchburg* Trial Examiner refused to treat the technique as per se suspect by inferring any unlawful object, and since the record showed that consolidation of a single unit had not in fact been effected, and that the actual motives were lawful, no violation could be found.⁷⁶

*Shell Oil*⁷⁷ at first appears unrelated to *Lynchburg* in theory and inconsistent with it in that the *Lynchburg* tactics do not appear sufficiently different from the *Shell* strategy to justify the different result. *Shell* had company-wide fringe benefit plans. A union whose locals represented nineteen *Shell* units formed a single committee to bargain on behalf of all the units regarding the uniform plans and requested *Shell* to appoint a similar committee. The union explicitly stated that any agreement reached would be binding on each of the units represented. *Shell* refused to bargain with the committee. The Board accepted the Trial Examiner's conclusion that *Shell* was not obligated to bargain on the ground that the method of bargaining proposed would in fact have removed fringe benefit bargaining from the separate units to a pooled basis. The decision depended upon the Trial Examiner's characterization of the proposed method of bargaining as one whose "actual effect" would have been to merge the separately certified units.⁷⁸

Although *Shell* rested squarely on a finding of "actual effect,"⁷⁹

⁷³ 298 F.2d 873, 49 L.R.R.M. 2540 (5th Cir. 1962).

⁷⁴ 192 N.L.R.B. at —, 78 L.R.R.M. at 1023. The Trial Examiner is quoting from *United States Pipe and Foundry*.

⁷⁵ Id. at —, 78 L.R.R.M. at 1025.

⁷⁶ Id. at —, 78 L.R.R.M. at 1025. The Trial Examiner expressly stipulated that he implied no view regarding the lawfulness of the pooled vote had the employer's proposal not contained a common expiration date or had the problem been of direct concern to one unit only.

⁷⁷ 194 N.L.R.B. No. 166, 79 L.R.R.M. 1130 (1971).

⁷⁸ Id. at —, 79 L.R.R.M. at 1134.

⁷⁹ The Examiner did not reject the union's disclaimer of any purpose to effect a merger. Id. at —, 79 L.R.R.M. at 1133.

and *Lynchburg* relied on "purpose," the two decisions form a consistent pattern. The correlation is evident in the *Lynchburg* examiner's theory that, given each unit's direct and immediate interest in a pooling technique, whatever "merger" that technique produced was only "apparent." Since the technique was simply a procedure by which each unit could best work toward its own interests, the *Lynchburg* examiner found that the technique did not actually effect consolidation. It appears, then, that the "purpose" test is a close correlative if not a duplicate of the "effects" test.

Although superficially the tactics employed in these two cases may resemble each other, the fact remains that the *Shell* Trial Examiner characterized the union's tactic as one neither intended by the union, nor understood by Shell, "as simply calling for concurrent discussions at which, though an agreement common to all units might be sought, the separate unit identity of each unit was to be retained, and both sides were to be left free to negotiate, . . . and to conclude divergent settlements on an individual unit basis."⁸⁰ Indeed, the *Shell* union virtually admitted that whatever benefit each unit would receive from utilization of the tactic would be derived precisely from the fact of common bargaining.⁸¹ The *Shell* union, then, was asking not that its technique be regarded as a non-merger tactic, but that it be allowed as "an exception from the normal rule permitting an employer to limit bargaining strictly to the unit the Board has found appropriate."⁸² This the Trial Examiner refused to do, on the traditional ground that it was not for the Board to "act at large in equalizing disparities in bargaining power."⁸³

It may be thought that the *Lynchburg* strategy failed, as much as did the *Shell* technique, to allow "divergent settlements on an individual unit basis."⁸⁴ However, the *Lynchburg* strategy, unlike the *Shell* tactics, in fact allowed the units to make divergent settlements with the employer. It was only after each unit's representative concluded, in response to the employer's proposal, that a common expiration date was essential to his unit's interests, that the units turned to a tactic devised to pursue that specific and limited goal, common expiration of the contracts.

⁸⁰ Id. at —, 79 L.R.R.M. at 1133.

⁸¹ The Trial Examiner reported that the union asserted that "separate unit bargaining has been demonstrated . . . to be 'sterile and ineffective.'" Id. at —, 79 L.R.R.M. at 1134.

⁸² Id. at —, 79 L.R.R.M. at 1134.

⁸³ Id. at —, 79 L.R.R.M. at 1134.

⁸⁴ Id. at —, 79 L.R.R.M. at 1133.

B. *Employer Discrimination*1. *Solicitation/Distribution Rules*

a. *McDonnell Douglas, Diamond Shamrock*—In two Survey year decisions, the Board and the Third Circuit reached different conclusions regarding the standards applicable to no-solicitation and no-distribution rules directed at activities engaged in by employees outside of their scheduled working hours. The Board's fundamental policy, established in *Stoddard-Quirk Mfg. Co.*,¹ classifies as presumptively invalid employers' rules forbidding employees to distribute union literature or to solicit for a union during nonworking time in nonworking areas. The standard applied to rules regulating activity by non-employees is of course more lenient: in *NLRB v. Babcock & Wilcox Co.*,² the Supreme Court ruled that an employer may forbid non-employees to solicit or distribute on his property, so long as the union organizers can reach the employees through other available means and the employer does not discriminate against the union by allowing other solicitation or distribution on the premises. Thus *Babcock & Wilcox* requires that, when non-employees are involved, the Board balance the section 7 rights of the employees to receive union information against the employer's private property rights.³

The two Survey year cases involved rules that in varying degrees treated employees who were not on their working shifts as though they were non-employees. In *Diamond Shamrock Co. v. NLRB*,⁴ the employer, a chemicals manufacturer, divided his premises into a fenced and an unfenced portion; the former included the production area, lunch room, and locker room, the latter the parking lot. The employer enforced a rule forbidding off-duty employees access to all areas within the fence except during a thirty-minute period before and after their shifts. Since he had no rule forbidding solicitation or distribution, employees could engage in those activities at all times in the unfenced area and, during their shifts, at nonworking times in nonworking areas within the fenced area. The Board nevertheless found the no-access rule violative of section 8(a)(1).⁵ The Third Circuit reversed the Board.

¹ 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962).

² 351 U.S. 105 (1956).

³ *Id.* at 112. In *Food Employees, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Supreme Court permitted picketing by union organizers on a parking lot adjacent to a shopping center on the ground that it was generally open to the public. In its recent decision in *Central Hardware Co. v. NLRB*, however, the Court made it clear that *Logan Valley* will be limited to situations in which the employer's property assumes "to some significant degree the functional attributes of public property devoted to public use." 40 U.S.L.W. 4826, 4828 (U.S. June 22, 1972).

⁴ 443 F.2d 52, 77 L.R.R.M. 2193 (3rd Cir. 1971).

⁵ 181 N.L.R.B. 261, 73 L.R.R.M. 1348 (1970). Section 8(a)(1) provides that it shall

The appellate court noted that there was a substantive difference between the rights of off-duty employees and those of on-duty employees, inferable from the *Babcock & Wilcox* distinction between employees and non-employees; hence the Board should not have treated the no-access rule as presumptively invalid but should instead have applied the *Babcock & Wilcox* balancing test appropriate to non-employee rules. Under that test, the rule in question would appear to be valid, since the company had advanced substantial business reasons in defense of its rule, and the employees had suffered no restrictions during their work shifts. The Board's reliance on *Peyton Packing Co. v. NLRB*,⁶ a progenitor of the *Stoddard-Quirk* presumption, was misplaced because the *Peyton* decision involved on-duty nonworking time. Finally, even were a presumption of invalidity to be allowed, the court intimated that the facts of the case would have overcome it.⁷

In the second case, *McDonnell Douglas Corp.*,⁸ the employer, a manufacturer of aircraft who was required by the government to maintain strict security, promulgated a rule forbidding non-employees from distributing literature or soliciting anywhere on company premises, including the parking lot, at any time. An addendum to the rule stated that employees were allowed on company premises only during their *working hours* "and a reasonable period before and after those hours"; at other times they were to be treated as non-employees.⁹ A two-man majority of the Board found the rule violative of 8(a)(1). Member Kennedy dissented.

The Board ruled that the company had not established sufficient justification for its rule limiting employee solicitation and distribution rights to "some vague, undefined, 'reasonable' period."¹⁰ It ordered that the company modify the rule insofar as it classified employees as non-employees and prohibited solicitation and distribution during non-working time in nonworking areas, "to any greater extent than the employer can establish is required in order to maintain production, discipline, or security. . . ."¹¹ Thus both the holding and the order suggest that the Board would find the rule valid if the employer would modify it to apply to some definite, limited period of time before and after shifts, and could make some showing of business need to justify such a modified rule.

be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. 29 U.S.C. § 158(a)(1) (1970).

⁶ 49 N.L.R.B. 828, 12 L.R.R.M. 183, enforced, 142 F.2d 1009 (5th Cir. 1943), cert. denied, 323 U.S. 730 (1944).

⁷ 433 F.2d at 59-60, 77 L.R.R.M. at 2198.

⁸ 194 N.L.R.B. No. 75, 78 L.R.R.M. 1705 (1971).

⁹ Id. at —, 78 L.R.R.M. at 1705.

¹⁰ Id.

¹¹ Id. at —, 78 L.R.R.M. at 1707.

Both the order and the dictum that "we do not hold . . . that . . . employee rights are necessarily unlimited at all times and in all places"¹² indicate that the Board is softening the *Stoddard-Quirk* presumption when the rule under scrutiny is directed at employee activity *outside* of shift periods. The Board appears to be establishing the policy that an employer may prohibit solicitation and distribution on company property outside of shift periods, so long as he can establish production, discipline or security reasons for so doing; and the Board will be hospitable to entertaining such reasons. In sum, the Board's emphasis on the "vagueness" of the rule in *McDonnell Douglas* strongly implies that that rule would have been found lawful, given the company's security needs, had the before- and after-shift periods been clearly stipulated.

Such an approach, it is submitted, represents a satisfactory adjustment of the *Stoddard-Quirk* standard. Originally developed to protect activity during nonworking time within the shift, it was too rigid to be used to measure rules regulating activity wholly outside of the shift period. In its earlier decision in *Diamond Shamrock* the Board had taken an adamant position, finding the no-access rule unlawful despite the ample business reasons that the company advanced in its defense.¹³ Noting that the employer had cited no specific instances of employee after-shift activity causing problems within the fenced area,¹⁴ the Board had appeared to be relying on a strong *Stoddard-Quirk* presumption that any employer would find difficult to overcome, business needs notwithstanding.¹⁵ The Board's receptivity to employer justification in *McDonnell Douglas* indicates a definite relaxation of the presumption.

Finally, the *McDonnell Douglas* test appears both more practical and more legally proper than the Third Circuit's approach in *Diamond Shamrock*. The latter's virtual identification of non-duty employees with non-employees ignores the NLRA's persistent deference to employee rights. It also ignores such practical factors as the distinctions that should be drawn between non-employee and non-duty employee activity in, for example, a private parking lot.¹⁶ Establishing a business justification for prohibition of the latter activity should rightly entail a heavier burden than that required for prohibition of outsider activity. The Board's retention of the *Stoddard-Quirk* presumption in *McDonnell Douglas* maintains the distinction, while its apparent readiness to let that presumption be overcome, on a case-by-case basis, recognizes

¹² Id. at —, 78 L.R.R.M. at 1706.

¹³ 443 F.2d at 55, 77 L.R.R.M. at 2194.

¹⁴ Id. at 60, 77 L.R.R.M. at 2198.

¹⁵ *Diamond Shamrock Co.*, 181 N.L.R.B. 261, 262, 73 L.R.R.M. 1348 at 1349 (1970).

¹⁶ Cf. *Central Hardware Co. v. NLRB*, discussed at 1423-24 *infra*.

the lesser distinction between nonworking times within and outside of the shift.

b. *Central Hardware Co. v. NLRB*—In *Central Hardware Co. v. NLRB*,¹⁷ the Eighth Circuit held that the Board was warranted in finding violative of section 8(a)(1) a broad no-solicitation rule directed at non-employees. The rule prohibited outsider union organizers from contacting employees on parking lots which were maintained by the employer adjacent to its store and kept generally open to the public. Both the Board¹⁸ and the court decisions relied on *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,¹⁹ where the Supreme Court found non-employee organizational picketing in a shopping center to be constitutionally protected activity. That decision emphasized that the property in question, though private, was generally open to the public.

By relying on *Logan Valley*, the Board and the Eighth Circuit have apparently limited the scope of the leading decision on the legality of employer rules forbidding non-employee activity, *NLRB v. Babcock & Wilcox Co.*²⁰ In *Babcock & Wilcox*, the Supreme Court found lawful employer rules forbidding distribution and solicitation by outside organizers, so long as the organizers, with reasonable efforts, could reach the employees through other channels of communication and the employer did not discriminate against the union by allowing other solicitation or distribution.

The employer in *Central Hardware* argued that the facts of the case met the *Babcock & Wilcox* standards and so required a finding that his rule was not violative of 8(a)(1).²¹ The Board, however, found that the parking lots, though maintained for the use of the employer's customers, were generally open to the public, and accordingly that union activity on that property was protected under *Logan Valley*. It then held that the employer rule forbidding such activity was not merely ineffective under *Logan Valley* but violative of 8(a)(1). In upholding that decision, the Eighth Circuit pointed out that "[t]he essential distinction between *Babcock & Wilcox* and *Logan Valley Plaza* rests upon a determination as to the use of the properties in question."²² Since

¹⁷ 439 F.2d 1321, 76 L.R.R.M. 2873 (8th Cir. 1971). Since completion of this comment, the Supreme Court has reversed the decision of the Eighth Circuit, holding that *Food Employees Local 590 v. Logan Valley Plaza* is limited to situations in which the employer's property has assumed "to some significant degree the functional attributes of public property devoted to public use." 40 U.S.L.W. 4826, 4828 (U.S. June 22, 1972).

¹⁸ 181 N.L.R.B. 491, 73 L.R.R.M. 1422 (1970).

¹⁹ 391 U.S. 308 (1968).

²⁰ 351 U.S. 105 (1956).

²¹ 439 F.2d at 1326, 76 L.R.R.M. at 2876. The employer also relied on *NLRB v. Solo Cup Co.*, 422 F.2d 1149, 73 L.R.R.M. 2789 (7th Cir. 1970).

²² 439 F.2d at 1328, 76 L.R.R.M. at 2877.

the record supported the Board's factual finding that the parking lots had "quasi-public" status, *Logan Valley* controlled.²³

Central Hardware, then, stands for the Board's refusal to allow the *Babcock & Wilcox* rationale to shelter a rule otherwise legal if it pertains to activity in a quasi-public place. It appears to broaden *Logan Valley* by applying Board sanctions to forbid a rule regarding property maintained by the employer for the use of customers, on the ground that such property is as "public" as was the shopping center area in *Logan Valley*.²⁴ Since certiorari has been granted, the Supreme Court's evaluation of the Board's position should be forthcoming within the next Survey year.²⁵

c. *Magnavox Co.*—In *Magnavox Co.*,²⁶ the Board significantly expanded its *Gale Products*²⁷ doctrine, which restricts contractual waivers of employees' statutory rights, by expanding the *Gale Products* remedy. The Board had held in *Gale Products* that a union's contractual waiver of objections to an employer's broad no-solicitation and no-distribution rule unduly interfered with the employees' statutory right to select a bargaining representative. The Board held that the union's contractual waiver was effective only insofar as it limited the rights of the employees to solicit and to distribute literature on behalf of the contracting union itself. It ordered that the employer rescind the rule to the extent that it prohibited employees from engaging in activity on behalf of any other union. *Gale Products* engendered a conflict among the circuits. The Sixth²⁸ and Seventh²⁹ Circuits rejected the doctrine, while the Fifth³⁰ and Eighth³¹ Circuits approved it and the Eighth Circuit expanded the Board's order to insure to all employees equal literature distribution rights "on behalf of any labor organization or in opposition to any labor organization."³²

Faced with this conflict when *Magnavox* presented a clear-cut factual situation involving both a broad no-distribution and no-solicitation rule, and a contractual provision found to signify acquiescence by

²³ *Id.*

²⁴ *Id.*

²⁵ Since completion of this comment, the Supreme Court has reversed the decision of the Eighth Circuit in *Central Hardware*. See note 17 *supra*.

²⁶ 195 N.L.R.B. No. 40, 79 L.R.R.M. 1283 (1972).

²⁷ *Gale Products*, Div. of Outboard Marine Corp., 142 N.L.R.B. 1246, 53 L.R.R.M. 1242, enforcement denied, 337 F.2d 390, 57 L.R.R.M. 2164 (7th Cir. 1964).

²⁸ *Armco Steel Corp. v. NLRB*, 344 F.2d 622 (6th Cir. 1965).

²⁹ The Seventh Circuit denied enforcement of the Board's order in *Gale Products*. See note 27 *supra*.

³⁰ *NLRB v. Mid-States Metal Products, Inc.*, 403 F.2d 702, 69 L.R.R.M. 2656 (5th Cir. 1968).

³¹ *Machinists District 9 v. NLRB (McDonnell Douglas)*, 415 F.2d 113, 72 L.R.R.M. 2206 (8th Cir. 1969).

³² *Id.* at 116, 72 L.R.R.M. at 2208.

the union to the employer's maintenance and enforcement of the rule, the Board decided to adhere to *Gale Products* in the face of the adverse decisions and to adopt the Eighth Circuit's expanded remedy. It ordered the employer to cease and desist from enforcing any rule prohibiting employees from distributing literature in nonworking areas on nonworking time, on behalf of *any* labor organization, relating to the selection or rejection of a bargaining agent. In short, the contractual provision was to be respected only insofar as it waived the employees' right to distribute the union's "institutional" literature;³³ the employees were to be free to engage in other activity in support of the incumbent union.

In support of its position, the Board reiterated the *Gale Products* theory that employees' statutory rights must be accorded paramount weight.³⁴ It acknowledged that in *Mastro Plastics Corp. v. NLRB* the Supreme Court had held binding a contractual waiver of the right to strike, but noted the Court's insistence that the effect of such a waiver is subject to the proviso that "the selection of the bargaining representative remains free."³⁵ The Board also relied on the Fifth Circuit's distinction between statutory rights running to the individual employees, which include distribution and solicitation rights, and the rights which the employees exercise by acting in concert through the collective bargaining agent.³⁶

On these grounds it would appear that the Board's adherence to *Gale Products* and expansion of its remedy are not only reasonable but necessary. Recognition of the employees' right freely to select a bargaining agent, a right emphasized in *Mastro Plastics* as a necessary prerequisite to the bargaining agent's authority to bind the employees in the collective bargaining agreement, apparently requires invalidation of any contractual waiver of that right. Since the old *Gale Products* remedy respected waiver of the right insofar as employees wished to exercise it on behalf of the incumbent union, modification of the remedy was required.

2. *Racial Discrimination: Farmers' Cooperative Compress*

In a 1969 opinion accompanying a remand to the Board, the Circuit Court of Appeals for the District of Columbia appeared to take the position that an employer's racial discrimination necessarily constitutes a violation of section 8(a)(1).³⁷ In its original decision on

³³ 195 N.L.R.B. at — n.9, 79 L.R.R.M. at 1285 n.9.

³⁴ Id. at —, 79 L.R.R.M. at 1284.

³⁵ 350 U.S. 270, 280 (1956).

³⁶ 195 N.L.R.B. at — n.7, 79 L.R.R.M. at 1284-85 n.7.

³⁷ *Packinghouse Workers v. NLRB*, 416 F.2d 1126, 70 L.R.R.M. 2489 (D.C. Cir. 1969).

the case, *Farmers' Cooperative Compress*,³⁸ the Board had found a violation of section 8(a)(5) caused by the employer's refusal to bargain over his allegedly racially discriminatory practices. The District of Columbia Circuit affirmed the Board's findings and in addition accepted the union's argument that the employer's alleged racial discrimination violated 8(a)(1). The court remanded the case to the Board for a factual finding as to whether the employer did indeed pursue a racially discriminatory policy, and, should such a policy be found, for a remedial order to remove the effects of the violation. In a three to one decision on the remand handed down during the Survey year, the Board found no policy or program of discrimination.³⁹

An analysis of the Board's opinion in the context of the District of Columbia Circuit Court's majority and concurring opinions requires the conclusion that the Board does not consider itself authorized to treat employer racial discrimination as per se violative of 8(a)(1). The appellate decision had appeared to lay down an explicit doctrine that discrimination is per se an unfair labor practice:

We remand the case to the Board for a hearing on whether the company has a policy and practice of discrimination against its employees on account of their race or national origin. *We hold that such a policy and practice violates Section 8(a)(1) of the Act.*⁴⁰

The court went on to admit that in order to hold employer discrimination violative of 8(a)(1), "it must be found that . . . it interferes with or restrains discriminated employees from exercising their statutory right to act concertedly. . . ."⁴¹ It then interpreted "concerted activity" as the right of the employees to "asser[t] themselves against their employer to improve their lot,"⁴² and stated that an employer's racial discrimination interferes with such assertion by setting up a clash of interest among employees and inducing an apathy or docility which inhibits them from asserting their rights. The court ruled: "*We find that the confluence of these two factors sufficiently deters the exercise of Section 7 rights as to violate Section 8(a)(1).*"⁴³ Thus in its rationale, as well as in the explicit language of its "holding," the court classified racial discrimination as per se⁴⁴ violative of the NLRA.

³⁸ 169 N.L.R.B. 290, 67 L.R.R.M. 1266 (1968).

³⁹ *Farmers' Cooperative Compress*, 194 N.L.R.B. No. 3, 78 L.R.R.M. 1465 (1971). Chairman Miller and Members Fanning and Kennedy were the majority. Member Jenkins dissented.

⁴⁰ 416 F.2d at 1130, 70 L.R.R.M. at 2490 (emphasis added).

⁴¹ Id. at 1135, 70 L.R.R.M. at 2494.

⁴² Id., 70 L.R.R.M. at 2495.

⁴³ Id. (emphasis in the original).

⁴⁴ The court nowhere used the term "per se violation," but its holding and language

However, despite the decisiveness and clarity of its statements, the court's opinion did not necessarily have to be taken as the teaching of the case. The decision was made by Circuit Judges Wright, Danaher, and Prettyman. Judge Wright wrote the opinion. Judge Danaher joined him in the rationale expressed therein, as well as in the decision to remand, but interpreted that rationale thus:

Our remand, in short, called for hearings and a determination as to whether this employer actually . . . had put that policy into practice so as to result in invidious "discrimination on account of race or national origin." Such is the inquiry which is to be conducted, and properly in my view, with an ultimate conclusion to depend upon the Board's findings. There may not be, but assuredly there "can" be a violation in the respects under discussion and that is what our opinion says. I adhere to it.⁴⁵

Judge Prettyman concurred only in the decision to remand. In a separate opinion, he wrote that the complaints had alleged the existence of a policy that interfered with section 7 rights, and that accordingly the Board should be asked to receive evidence and make findings. It made "no difference what the [employer's] program is called or how it is catalogued" if by pursuing it the employer interfered with the exercise of section 7 rights.⁴⁶ In short, Judge Prettyman considered the remand as one for a traditional 8(a)(1) finding.

A view of the case identical to that expressed by Judge Prettyman was enunciated in the following year by the Sixth Circuit. In *Tipler v. E.I. duPont de Nemours & Co.*,⁴⁷ that court explicitly distinguished the scope of the NLRA from that comprehended in the broad anti-discrimination mandate of Title VII of the 1964 Civil Rights Act.⁴⁸ Moreover, it cited the District of Columbia Circuit's decision as illustrative of that distinction:

This case provides an excellent example of the differences

emphatically defined racial discrimination as necessarily constituting an unfair labor practice. Cf. the statement in the concluding paragraph of the opinion, repeating the "holding" almost verbatim: "[W]e conclude that an employer's policy and practice of invidious discrimination on account of race or national origin is a violation of Section 8(a)(1)." *Id.* at 1138, 70 L.R.R.M. at 2497.

⁴⁵ *Id.* at 1139 (separate opinion). Judge Danaher made this statement in a brief separate opinion relating to his vote to deny the petition for rehearing filed by Farmers' Cooperative Compress.

⁴⁶ *Id.* at 1138.

⁴⁷ 443 F.2d 125, 3 FEP Cases 540 (6th Cir. 1971).

⁴⁸ 42 U.S.C. §§ 2000e et seq. (1970). Current cases involving Title VII in the labor law context are discussed at 1348-75 *supra*.

in two statutes. Racial discrimination in employment is an unfair labor practice that violates Section 8(a)(1) of the National Labor Relations Act if the discrimination is unjustified and interferes with the affected employees' right to act concertedly for their own . . . protection. *United Packinghouse, Food & Allied Workers International Union v. National Labor Relations Board* . . . In contrast racial discrimination in employment is prohibited [sic] by Title VII without reference to the effect on the employees' right to unite. Hence, certain discriminatory practices that are valid under the National Labor Relations Act may be invalid under Title VII.⁴⁹

Thus the Sixth Circuit accepted only the initial axiom of the District of Columbia Circuit's argument: that racial discrimination must be shown to be inhibitive of the exercise of section 7 rights if it is to be adjudged an unfair labor practice. It made no reference to that court's conclusion that racial discrimination necessarily has such an effect and hence is per se in violation of the NLRA.

This, then, was the context in which the Board made its Survey year decision on the remand. It must be presumed that the Board was aware of the conflict between the explicit language of the "holding" in the appellate opinion, the interpretation of that language given to it by one of the two judges on whom the holding depended, and the position taken by the Sixth Circuit as well as by Judge Prettyman. Yet the Board made its factual finding that no discriminatory policy had been practiced by the employer without once referring to the per se violation doctrine expressed in Judge Wright's opinion. Moreover, nowhere did it refer to section 8(a)(1): that is, not even by an isolated reference to 8(a)(1) did the Board imply that it was accepting Judge Wright's "holding" that the alleged racial discrimination under investigation was per se violative of that provision. The Board also refrained from commenting on Member Jenkins' assertion, in his dissent, that "[f]or purposes of this case . . . the law is that racial discrimination violates section 8(a)(1)."⁵⁰

It is submitted that by its careful silence the Board revealed its probably reluctant acceptance of Judge Prettyman's interpretation of the law. It apparently interpreted the remand as a direction to make a determination as to whether the employer had in fact breached

⁴⁹ 443 F.2d at 129, 3 FEP Cases at 542.

⁵⁰ 194 N.L.R.B. No. 3, 78 L.R.R.M. at 1473.

8(a)(1): that is, to discover whether the discrimination had interfered with the employees' exercise of their section 7 rights.

Such an interpretation of racial discrimination as a potential rather than a per se unfair labor practice would appear to be both practical and legally correct. It leaves the Board free to treat employer discrimination on an ad hoc basis, and indeed to develop a presumptive rule that such discrimination interferes with employees' statutory rights. It does not require, however, that the Board become a forum for *all* charges of racial discrimination, including those that apparently involve conduct not within the legitimate scope of the Act. For such charges, developments involving Title VII actions discussed elsewhere in this Survey⁵¹ suggest the usefulness and propriety of a Title VII forum.

Moreover, the policy proposed by Judge Prettyman and apparently accepted by the Board is consistent with the Board's per se doctrine. Traditionally, the Board has required an explicit and necessary causal connection between a violation of statutory rights and activity that it classifies as a per se unfair labor practice. That is, a per se rule is a shorthand statement of a one-step relation between a certain kind of behavior and infringement of a right protected by the NLRA; it may not be a substitute for such a direct and necessary causal link.⁵² Even when an action is condemned as a per se violation because of its psychological effects, it is because those effects are themselves direct inhibitions of statutory rights: for example, an employer's ill-timed promise of benefits before a union election violates 8(a)(1) because it interferes with the employees' freedom of choice for or against unionization by reminding them that the employer can take away what he gives, not because it makes them more docile—or indeed, more friendly—toward the employer.⁵³ The District of Columbia's argument that discrimination induces apathy and docility, and that those qualities in turn produce interference with section 7 rights, does not appear to establish the immediate cause/effect relation underlying per se rules.

By refraining from saying anything that might suggest acceptance of the circuit court's per se doctrine, the Board acted with a nice appreciation of the scope of 8(a)(1) and of its own authority as an instrument of the NLRA rather than of Title VII. At the same time, however, it acted upon the principle that an act of discrimination could *in fact* be found violative of 8(a)(1).

⁵¹ See pp. 1348-75 *supra*.

⁵² Cf. Section of Labor Relations Law, American Bar Association, *The Developing Labor Law* (C. Morris ed. 1971) 322 ff., summarizing per se refusals to bargain.

⁵³ See, e.g., *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944).

3. *Discharge of Managerial Employee*: North Arkansas Electric Cooperative

In *NLRB v. North Arkansas Electric Cooperative, Inc.*,⁵⁴ the Eighth Circuit reversed the Board and held that an employer did not violate Section 8(a)(3)⁵⁵ of the NLRA by discharging a "managerial" employee for aiding a union during an organizational campaign. The decision marks appellate rejection of an attempt by the Board to loosen a long-standing restriction on the scope of the Act.

The NLRA contains no express provision excluding managerial employees from its protection. Section 2(3), which defines "employees," does exclude "supervisors,"⁵⁶ it was passed in 1947 to eliminate the Board's earlier practice of including supervisors in bargaining units.⁵⁷ Since the Board had consistently refused to include managerial employees in bargaining units before section 2(3) was passed,⁵⁸ the provision would appear to indicate congressional satisfaction with such exclusion. The Board consistently maintained its exclusionary policy and, in *Swift and Co.*,⁵⁹ enunciated the broad principle that individuals allied with management could not be considered employees for the purposes of the Act. Thus the exclusion applied to protection from unfair labor practices as well as to membership in bargaining units.

In the instant case, the Board had overruled *Swift*, holding that although a managerial employee might not have the requisite community of interest with other employees to be included in the bargaining unit, he could still be entitled to protection from unfair labor practices as a section 2(3) employee.⁶⁰

The circuit court reasoned that nothing in the Act or its legislative history indicated that Congress intended the word "employee" to have one definition for the purpose of determining an appropriate bargaining unit and another for the purpose of determining which employees are protected from unfair labor practices. Admittedly, the Board-created category of "managerial" employees lacks clear definition; but when

⁵⁴ 446 F.2d 602, 77 L.R.R.M. 3114 (8th Cir. 1971). This was the second time the case had come before the court; its first remand to the Board was *NLRB v. North Arkansas Electric Cooperative, Inc.*, 412 F.2d 324, 71 L.R.R.M. 2599 (8th Cir. 1969).

⁵⁵ 29 U.S.C. § 158(a)(3) (1970) provides that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization"

⁵⁶ 29 U.S.C. § 152(3) (1970).

⁵⁷ See 446 F.2d at 605-06, 77 L.R.R.M. at 3117-19, for a summary of the legislative history of § 2(3).

⁵⁸ See, e.g., *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322, 17 L.R.R.M. 394, 395 (1946).

⁵⁹ 115 N.L.R.B. 752, 37 L.R.R.M. 1391 (1956).

⁶⁰ "[E]ven if we would have found that Lenox had insufficient community of interest . . . to include him [in the unit], we find him to be an 'employee' rather than an 'employer'" *North Arkansas Electric Cooperative*, 185 N.L.R.B. No. 83, 75 L.R.R.M. 1068, 1069 (1967), supplementing 168 N.L.R.B. 921, 67 L.R.R.M. 1193 (1967).

the record shows, as it does here, that the employee would not have been included in the unit, the Board may not utilize imprecise categories as a means of expanding coverage of the Act beyond the scope intended by Congress.⁶¹

The court's reliance on legislative history and on decisions incorporating the *Swift* principle seems well-placed and correlates with the Supreme Court's recent decision in *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*,⁶² where the Court refused to permit the Board to expand the category of "employees" to include retired workers. The decision is also consistent with an earlier Survey year case, *NLRB v. Wheeling Electric Co.*,⁶³ wherein the Fourth Circuit refused to enforce a Board order requiring reinstatement of a confidential employee discharged for refusing to work during a strike; confidential employees, the court held, were not employees within the scope of the Act.

Notwithstanding the legal deficiencies of the Board's position, it would appear that discharges such as that in *North Arkansas Electric* must affect the exercise of section 7 rights. Possibly the Board will respond to the instant reversal by expanding its application of another theory: that the discharge of even a supervisor, who is specifically excluded from protection, may be found to violate the NLRA if the discharge was motivated by the supervisor's engaging in protected concerted activities, and if the effect of such a discharge is to intimidate other employees, who are protected by the Act, in their exercise of the same rights.⁶⁴ Presumably the theory could be applied to "managerial" and "confidential" employees as well as to supervisors.

C. Union Discrimination

1. *The Conflict within Section 8(b)(1)(A): Granite State, Boeing, and General Electric*

During the Survey year a series of Board and appellate cases revealed further movement toward resolution of a major question inherent in section 8(b)(1)(A). The main clause of that provision protects employees' exercise of their section 7 rights from union restraint or coercion.¹ The proviso to 8(b)(1)(A) then removes from

⁶¹ 446 F.2d at 608-10, 77 L.R.R.M. at 3118-20.

⁶² 404 U.S. 157 (1971). See pp. 1405-08 *supra*.

⁶³ 444 F.2d 783, 77 L.R.R.M. 2561 (4th Cir. 1971). The Eighth Circuit relied on this decision in *North Arkansas Electric*, 446 F.2d at 606, 77 L.R.R.M. at 3118.

⁶⁴ See, e.g., *NLRB v. Better Monkey Grip Co.*, 243 F.2d 836, 40 L.R.R.M. 2027 (5th Cir. 1957), cert. denied, 355 U.S. 864 (1957).

¹ 29 U.S.C. § 158(b) (1970) provides in part:

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaran-

the sweep of the provision "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."² The problem inherent in 8(b)(1)(A), then, is that implicit in the potential discrepancy or even conflict between the main clause, which offers to the employee protection of his section 7 rights, and the proviso, which protects from Board sanctions certain union disciplinary rules that may abridge those rights.³ Union discipline will necessarily affect to some extent employees' freedom to participate or engage in concerted activities. The problem is to determine how far 8(b)(1)(A) will be extended to prohibit what kinds of discipline, or, conversely, when such discipline will be removed from the sweep of the main provision, either on the grounds that the proviso protects it or because it is found to be excluded from the range of activity Congress intended to prohibit.

The 8(b)(1)(A) problem is of course a reflection of a dilemma at the heart of the national labor policy. Underlying the proviso is the principle that statutory protection of collective bargaining must include protection of collective action necessary to enforce the union's status as bargaining agent. Yet the *raison d'être* of labor law is protection not of the union but of the individual employee's rights. Although *J.I. Case Co. v. NLRB*⁴ established the doctrine that the employee's *bargaining* rights must be subsumed by the bargaining rights of the collective representative, the employee's *other* rights are carefully delineated and protected by the labor laws. Section 7 above all establishes his right to participate in and to refrain from concerted activities; and section 8(b)(1)(A) and other NLRA provisions restrict the broad *J.I. Case* principle that, if logically extended, would allow unions to limit unduly, by the collective bargaining contract, section 7 rights.⁵

ted in section 157 of this title: *Provided*, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . .

Section 7 of the NLRA provides:

Employees shall have the right to self-organization, to form, join, 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 (1970).

² 29 U.S.C. § 158(b)(1)(A) (1970). See note 1 *supra*.

³ In *NLRB v. Allis-Chalmers Co.*, 388 U.S. 175 (1967), the Supreme Court included within the scope of the proviso disciplinary rules other than expulsion and admission rules.

⁴ 321 U.S. 332 (1944).

⁵ Cf. *Magnavox Co.*, discussed at 1424-25 *supra*, wherein the Board held invalid

Such restrictions on union power must necessarily exist in tension with the protection given to union rules by the 8(b)(1)(A) proviso and court decisions.

Three Supreme Court cases, *NLRB v. Allis-Chalmers Mfg. Co.*,⁶ *NLRB v. Marine & Shipbuilding Workers*,⁷ and *Scofield v. NLRB*,⁸ attempted to resolve or at least reduce that tension. *Allis-Chalmers* held that a union could lawfully fine a member employee who crossed a picket line to return to work during a lawful strike. Although the holding rested on a broad ruling that Congress did not intend 8(b)(1)(A) to prohibit a fine that enforced a legitimate union rule, the key reasoning was that the proviso's protection of union expulsion power must necessarily protect the less coercive power to impose reasonable fines in order to maintain the strike weapon.⁹ *Scofield* then developed *Allis-Chalmers* by ruling that union fines imposed on members who exceeded a union piecework rule were lawful, primarily on the grounds that the kind of piecework rule involved was traditionally necessary to the union's collective bargaining strength and that enforcing such a rule by a reasonable fine was lawful under *Allis-Chalmers*.¹⁰ In contrast, the Court in *Marine & Shipbuilding Workers* found an 8(b)(1)(A) violation in a union's enforcement of a rule requiring members to exhaust internal union remedies before filing an unfair labor practice charge with the Board.¹¹ Such a rule, the Court held, would frustrate the overriding statutory policy of allowing unimpeded access to the Board.

It appeared that these three decisions delineated questions rather than finally resolving them. *Allis-Chalmers* and *Scofield* protected certain rules from the reach of 8(b)(1)(A), but they also required that those rules meet certain standards in order to qualify for such protection. *Scofield* dicta summarized those standards: "§ 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule."¹²

The two latter standards posed major questions. The last one apparently requires voluntary union membership, a requirement under-

a union's contractual waiver of employees' rights to solicit and distribute literature on behalf of the union.

⁶ 388 U.S. 175 (1967).

⁷ 391 U.S. 418 (1968).

⁸ 394 U.S. 423 (1969).

⁹ This was the reasoning relied on by Justice White, who cast the swing vote in the 5-4 decision. 388 U.S. at 198 (concurring opinion).

¹⁰ 394 U.S. 423 (1969).

¹¹ 391 U.S. at 422 (1968).

¹² 394 U.S. at 430.

lined by the statement in *Allis-Chalmers* that that decision implied no view on the lawfulness of union discipline of "members" whose membership was limited to paying monthly dues.¹³ One fundamental question, then—the membership question—was whether union disciplinary rules could be lawfully imposed on employees for activities engaged in after they had resigned from the union.

The second standard, which summarizes the *Marine & Shipbuilding* doctrine, goes to the heart of the conflict within 8(b)(1)(A). It poses the question whether a union's enforcement of a rule that infringed section 7 rights would be held violative of 8(b)(1)(A), despite the proviso and the *Allis-Chalmers* test, on the ground that such restraint would frustrate a policy imbedded in the labor laws. The question may be put thus: will the proviso protect a rule that meets the first and third *Scofield* tests and frustrates no policy aside from that established in 8(b)(1)(A); that is, assuming that the proviso and 8(b)(1)(A) meet head on, should the proviso yield? Or, if the question is framed in terms of congressional purpose, will legislative intent to remove wholly internal union matters from Board jurisdiction be found to override the legislative intent, expressed in 8(b)(1)(A), to preserve section 7 rights from union restraint or coercion?

The Board made innovative decisions involving both questions during the 1970-71 Survey year. In *Textile Workers, Local 1029* (Granite State),¹⁴ and *Booster Lodge 405, Machinists* (Boeing),¹⁵ it developed to a logical conclusion the *Scofield* dictum on the contractual nature of union membership, ruling that even legitimate union discipline could not be imposed on an employee who had resigned his union membership before undertaking the activities for which the discipline was imposed. In both cases the Board held that a union violated 8(b)(1)(A) by fining individuals who had resigned from the union before crossing a picket line and returning to work during a lawful strike, and by instituting a court action to collect the fines.¹⁶ In a third case, *Machinists Local 504* (Arrow Development), the Board found similar fines lawful where the employees involved had crossed the picket lines without resigning.¹⁷

In *Arrow Development*, and then in *Boeing*, the Board also attacked the second, more fundamental problem when it dealt with the

¹³ 388 U.S. at 197. Such membership is required by a union security clause in the collective bargaining contract. The Court stressed that the employees in *Allis-Chalmers* were presumably "full" union members. *Id.* at 196.

¹⁴ 187 N.L.R.B. No. 90, 76 L.R.R.M. 1246 (1970).

¹⁵ 185 N.L.R.B. No. 23, 75 L.R.R.M. 1004 (1970).

¹⁶ Consistently with *Allis-Chalmers*, the Board also held in *Boeing* that the union could lawfully fine other employees, who had crossed the picket lines before resigning, for activity engaged in up to the time of their resignations.

¹⁷ 185 N.L.R.B. No. 22, 75 L.R.R.M. 1008 (1970).

question of unreasonable fines. It was argued that the fines, though found to be lawfully imposed on members as sanctions for violations of a legitimate union rule,¹⁸ were violative of 8(b)(1)(A) because they were so unreasonably large as to be coercive.¹⁹ Since the only ground on which the fines could be found unlawful was their restraint on exercise of section 7 rights, this argument forced a confrontation between the policy of protecting those rights and the policy of immunizing from Board sanctions purely internal union matters. The Board gave priority to the latter, holding in *Arrow Development* that once the purpose of a union rule was found lawful under *Scofield*, the severity of otherwise lawful discipline was not a question that Congress intended the Board to consider.²⁰ Member McCulloch, dissenting, argued that unreasonably large fines do frustrate legislative policy in that their unreasonable size indicates that the union's purpose is not legitimate and their impact on employees is necessarily coercive.²¹

During the current Survey year, the appellate decisions on *Boeing*²² and *Granite State*²³ and a new Board case, *Machinists, District Lodge 99* (General Electric Co.),²⁴ further clarified both the membership and the reasonable fine issues. The First Circuit reversed the Board in *Granite State*, relying on a novel interpretation of the union-employee contract. The court ruled that the NLRA permits employees to waive their section 7 rights: that is, employees who agree to undertake specific union activities should be held to have waived their right to refrain from those activities.²⁵ Such an interpretation, the court argued, would reconcile the policy of allowing unions to maintain strike discipline with that of allowing employees to refrain from concerted activities. However, the court explicitly restricted its holding to cases where employees have voluntarily undertaken specific actions, as they had in *Granite State*.²⁶

¹⁸ In *Boeing*, the fines involved were those imposed on employees for activity engaged in prior to resignation. See note 16 supra.

¹⁹ The \$500 fine in *Arrow Development* was approximately equal to the net amount earned by the strikebreakers after crossing the picket lines. 185 N.L.R.B. at —, 75 L.R.R.M. at 1008.

²⁰ Id. at —, 75 L.R.R.M. at 1010.

²¹ Id. at —, 75 L.R.R.M. at 1011-14.

²² *Booster Lodge 405, Machinists v. NLRB* (Boeing), 459 F.2d 1143, 79 L.R.R.M. 2443 (D.C. Cir. 1972).

²³ *NLRB v. Textile Workers, Local 1029*, 446 F.2d 369, 77 L.R.R.M. 2711 (1st Cir. 1971).

²⁴ 194 N.L.R.B. No. 163, 79 L.R.R.M. 1208 (1972).

²⁵ The court quoted the Trial Examiner's finding that "practically all the members" had attended the meeting at which the union took the strike vote and that only one member dissented. After the strike began, the members voted unanimously to impose heavy fines on strikebreakers. 446 F.2d at 370, 77 L.R.R.M. at 2712.

²⁶ The court reached its conclusion "[i]n light of our analysis of the specific obligation to strike undertaken in this case. . . ." Id. at 374, 77 L.R.R.M. at 2715.

In *Boeing*, the District of Columbia Circuit not only supported the Board's decision on the membership issue but went beyond it by insisting that the Board had a duty to consider the reasonableness of union fines.²⁷ The court held, first, that although fines for pre-resignation conduct are lawful under *Allis-Chalmers* and *Scofield*, resignation terminates the employees' obligations to observe union rules. The court also rejected the union's argument that an obligation to support a strike, once undertaken, should be held by implication to continue until the end of the strike, resignation notwithstanding; the court refused to imply offenses not specified in the union's constitution or by-laws. The court also pointed out that nothing in *Allis-Chalmers* or *Scofield* implied any restrictions on an employee's right to refrain from concerted activities after resigning from the union.

The court then held that the Board had an obligation to examine the reasonableness of the fines imposed on those employees who engaged in strikebreaking *prior* to resignation. The court reasoned that *Allis-Chalmers* did not protect an unreasonably large fine, since such a fine could place a greater burden on the disciplined employee than would mere expulsion from the union. Moreover, *Allis-Chalmers* and *Scofield* expressly refer to "reasonable" fines as those which are protected.²⁸ In another argument, reminiscent of Member McCulloch's dissent in *Arrow Development*, the court pointed out that when the amount of the fine is "inordinately disproportionate to the needed protection," an inference is warranted that it is motivated not by a legitimate intent but rather in reprisal for a member's exercise of section 7 rights.²⁹ Neither the possibility of conflicts between the Board and the state courts—which would have to examine the reasonableness of fines in actions brought by the union to collect them—nor questions of preemption sufficed to negate the Board's duty to determine whether the fines were reasonable. Finally, the court suggested standards that the Board might consider in determining reasonableness on a case-by-case basis. It also suggested that the Board consider whether a fine might be so large as to frustrate the congressional policy protecting an employee's employment status from union restraint under section 8(b)(2).³⁰

Less than a month before the District of Columbia Circuit handed down its decision in *Boeing*, the Board had independently affirmed its commitment to the doctrine that union fines could not lawfully be imposed for post-resignation activities. The case, *Machinists, District*

²⁷ 459 F.2d at 1155, 79 L.R.R.M. at 2452.

²⁸ *Id.* at 1156, 79 L.R.R.M. at 2451.

²⁹ *Id.* at 1159, 79 L.R.R.M. at 2453.

³⁰ *Id.*

Lodge 99 (General Electric Co.),⁸¹ arose in the First Circuit after that circuit had reversed the Board in *Granite State*. The union had fined employees who crossed picket lines after resigning from the union and in addition had barred them from union activity for five years. Members Fanning and Jenkins found, despite the *Granite State* reversal, that both the fines for post-resignation conduct and the five-year bar from membership were violations of section 8(b)(1)(A). They adopted the Trial Examiner's proposed order, which required rescission not only of the fines but also of the five-year suspensions insofar as they applied to employees who had resigned before engaging in any strikebreaking activity.⁸² Chairman Miller dissented from the holding and the remedial order insofar as they pertained to the five-year suspension, arguing that a literal reading of the 8(b)(1)(A) proviso precluded Board interference with union rules regarding admission or suspension of employees, so long as the employee's employment relationship was not involved.⁸³

By ordering rescission of the suspensions, the majority is holding only that the union may not discipline employees for post-resignation activity. However, the practical result of the decision is that a disciplinary rule protected by the letter of the proviso is being subordinated to the guarantee of employee rights given in the main provision of section 8(b)(1)(A). Thus the majority's rejection of the suspension sanction suggests further development of the theory, evident in *Boeing*, that protection of section 7 rights prevails over immunity of internal union discipline when the two policies cannot be accommodated. It should be noted, however, that the decision rests on two members: should another two Board members agree with Chairman Miller in a future decision, unions could discipline resigned members, who will be immune to fining discipline if *Boeing* is sustained, by refusing to readmit them to membership for a long time subsequent to resignation.⁸⁴

The coming Survey year should bring a final resolution of the membership and reasonable fine issues. Certiorari has been granted in *Granite State*⁸⁵ and will probably be sought on the reasonable fines issue in *Boeing*. It is submitted that the Board's membership doctrine will be upheld as a logical derivative of *Scofield* and a necessary corollary to section 7. The right to refrain must include the right to resign, and,

⁸¹ 194 N.L.R.B. No. 163, 79 L.R.R.M. 1208 (1972).

⁸² The requirement that the five-year suspensions be rescinded was expressed in the general command that the union "[r]escind fines and other sanctions imposed on former members . . . and amend records to reflect such rescission." Id. 79 L.R.R.M. at 1211.

⁸³ Id. at —, 79 L.R.R.M. at 1211-12 (dissenting opinion).

⁸⁴ See discussion of *Silas Mason* at 1440-41 *infra*.

⁸⁵ — U.S. —, 92 S. Ct. 1247 (1972).

unless such resignation ends an employee's duty to the union and the union's corresponding right to discipline him, the section 7 guarantee would be nugatory. If the First Circuit's ruling in *Granite State* is upheld it will presumably be limited to those situations where employees had expressly undertaken specific concerted activities.

However, affirmation of the membership doctrine will leave derivative problems unanswered. Should *Boeing* be applied where union constitutions prohibit or severely limit opportunities for resignation? The *Scofield* standard suggests that fines might not be lawful if they are imposed on members not free to leave the union.⁸⁶ The District of Columbia Circuit Court asserted in *Boeing* that it intimated no view regarding the appropriate treatment of fines imposed on members where the union constitution limited their right to resign during an ongoing strike or required even resigned members to refrain from strikebreaking if the strike commenced prior to resignation.⁸⁷

A Supreme Court decision on the reasonable fines issue will entail either permanently immunizing from the 8(b)(1)(A) prohibition all union discipline that remains "internal" or, conversely, recognizing that protection of section 7 rights requires subjecting such discipline to Board scrutiny, the proviso notwithstanding. The broad theory of *Marine & Shipbuilding*, that no lawful discipline may frustrate a policy embedded in the labor laws, supports the latter alternative. In *Boeing* the District of Columbia Circuit outlined several specific ways in which unreasonable fines could be found to frustrate the NLRA policy of protecting an employee's section 7 rights.⁸⁸ It seems probable, then, that the circuit court's doctrine will be upheld and the Board required to inquire whether union disciplinary fines are reasonable.

Such a ruling would permit a practical case-by-case resolution of the conflict in section 8(b)(1)(A). It would not provide a final resolution of the tension between 8(b)(1)(A) and the protection of union discipline—that is, between the main provision and the proviso—since that tension is inherent in the NLRA. It would, however, permit the Board to apply to the inevitable conflicts between union discipline and employee rights the same balancing tests by which it decides, in a case-by-case fashion, other unfair labor practice issues that reflect the tension between employer and union rights.⁸⁹ In sum, the Board would have the power to find violations of section 8(b)(1)(A) wherever particular discipline in particular circumstances showed a purpose or effect that restrained or coerced section 7 rights.

⁸⁶ See text at note 12 *supra*.

⁸⁷ 459 F.2d at 1154 n.20, 79 L.R.R.M. at 2449 n.20.

⁸⁸ See text at notes 29 and 30 *supra*.

⁸⁹ For example, the Board uses a balancing test with regard to the rights of the employer during an economic strike; cf. discussion of economic strikers at 1441-48 *infra*.

2. *Unlawful Motivation of Union Discipline: Graziano*

In *Carpenters Local 22* (Graziano Construction Co.),⁴⁰ a case decided shortly after *General Electric*,⁴¹ the Board applied the *Marine & Shipbuilding* principle⁴² to a fine whose apparent purpose was lawful but whose real motive frustrated national labor policy. The Board found that a union fine had been imposed on a member who had in fact violated legitimate union rules, but that notwithstanding its technical propriety the fine violated Section 8(b)(1)(A) because the actual motivation behind it was unlawful. The union's true motive was not to discipline the member for breaking the rules but to retaliate for his opposition to incumbent union officials. Hence, the Board held, the fine sought to frustrate a policy embedded in the labor laws—the Landrum-Griffin Act's guarantee of a union member's right to participate fully and freely in intra-union activities.⁴³ Accordingly the discipline was unlawful under *Marine & Shipbuilding*.

By applying the *Marine & Shipbuilding* doctrine to find unlawful a method of discipline that on its face satisfies the *Scofield* and *Allis-Chalmers* tests,⁴⁴ the Board appears to have moved appreciably nearer the District of Columbia Circuit's position in *Boeing*.⁴⁵ That court's holding that unreasonably large fines raise the inference of an unlawful purpose and must not escape Board scrutiny correlates with the Board's insistence in *Graziano* that an unlawfully motivated disciplinary action will not be held immune from Board review, even though technically it deals with internal union matters lawful under *Scofield*.

The decision is also significant in that the policy that the Board seeks to protect pertains to the Landrum-Griffin Act rather than the NLRA. Thus *Graziano* marks continued development of a trend toward Board reliance, in unfair labor practice decisions, on the "full panoply of labor law"⁴⁶ rather than on the NLRA alone. One of the first full statements encouraging such reliance was Justice Goldberg's concurring opinion in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,⁴⁷ in which he insisted that the Supreme Court look to the labor statutes as a whole rather than rely only on the statute immediately pertinent to the action. Justice White, dissenting in the Survey year *Lockridge* decision, urged the Court to consider the Landrum-Griffin

⁴⁰ 195 N.L.R.B. No. 5, 79 L.R.R.M. 1194 (1972).

⁴¹ See text at notes 31-34 *supra*.

⁴² See text at note 11 *supra*.

⁴³ 195 N.L.R.B. at —, 79 L.R.R.M. at 1195.

⁴⁴ See text at note 12 *supra*.

⁴⁵ See text at notes 27-30 *supra*.

⁴⁶ "[T]he Board is charged with considering the full panoply of congressional labor policies in determining the legality of a union fine." 195 N.L.R.B. at —, 79 L.R.R.M. at 1196.

⁴⁷ 381 U.S. 676, 709 (1965) (concurring opinion).

"bill of rights" in ruling on an issue involving the Board's preemptive reach under the NLRA.⁴⁸ Now *Graziano's* application of the *Marine & Shipbuilding* doctrine to protect a Landrum-Griffin policy, an application that will result in a significant expansion of the sweep of *Marine & Shipbuilding*, illustrates the practical impact of the "full panoply of labor law" theory.

3. *Enforcement of Union Fines by Expulsion: Silas Mason*

The issue implicit in the Board majority's suspension of the union membership bar in *General Electric*⁴⁹ was thrust into prominence by a case handed down as the Survey year closed, *Local 1255, Machinists v. NLRB* (Silas Mason Co.),⁵⁰ where the Fifth Circuit found lawful a union fine, imposed for post-resignation activity, enforceable by expulsion from the union.

The employee had resigned from the union after crossing a picket line, and the union fined him and gave him the choice of paying the fine or of being "expelled" or denied readmission to membership in any local of the union.⁵¹ The fine was levied on the strikebreaking activity engaged in after resignation as well as before. The Board, relying on *Boeing*, found the fine violative of section 8(b)(1)(A) insofar as it sought to punish the employee for post-resignation activity, and ordered the union to rescind that portion of the fine attributable to such activity.⁵² The Board's opinion reveals no explicit argument on the legality of the expulsion enforcement method; indeed, the union rested its whole case on the theory that a union member cannot relieve himself of his obligations in a strike situation by resigning, a position that the Board struck down as directly in conflict with its *Boeing* doctrine.

When the case came before the Fifth Circuit, the union relied on both its original theory and, alternatively, on the argument that the proviso to 8(b)(1)(A), by extending protection to a union's expulsion power, permitted it to punish even post-resignation strikebreaking activity by giving an employee a choice between resignation and expulsion. The Board reiterated its *Boeing* doctrine, that "post resignation acts are wholly beyond the pale of union discipline."⁵³ The court accepted the union's second contention and denied enforcement of the Board's order, holding that the union had an absolute right under the

⁴⁸ *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 321 (1971) (dissenting opinion).

⁴⁹ See p. 1437 *supra*.

⁵⁰ 456 F.2d 1214, 79 L.R.R.M. 2787 (5th Cir. 1972).

⁵¹ The union used the term "expelled," which the court interpreted as equivalent to "denied readmission." *Id.* at 1217, 79 L.R.R.M. at 2787-88.

⁵² *Machinists, Local 1255 (Silas Mason Co.)*, 188 N.L.R.B. No. 135, 76 L.R.R.M. 1456 (1971).

⁵³ 456 F.2d at 1217, 79 L.R.R.M. at 2788.

proviso to bar an employee from membership, whether for acts done as a member or for those done while not a member:

Either [category of act] may be taken into consideration in determining who is to be admitted to membership or retained as a member. There is no doubt that the Union could have expelled . . . [the employee] unconditionally for strikebreaking. It seems that if the Union may absolutely bar him from membership it may conditionally bar him subject to the payment of a fine.⁵⁴

Thus the court held squarely that as long as the discipline imposed is protected by the proviso, the proviso prevails over the guarantee of section 7 rights as interpreted in *Boeing*. Should that holding stand, the power to admit and expel may be used to impose a fine that otherwise would fall under *Boeing*; accordingly, *Silas Mason* offers a strategy by which unions can circumvent the thrust of *Boeing* in all situations where membership in the union is desirable or necessary to the employee. *Silas Mason* would appear to mean that in such situations the proviso wins outright over the guarantee of rights in section 8(b)(1)(A).

Apparently the Board flatly opposes that doctrine. In its argument before the appellate court, it lay down the doctrine foreshadowed in the majority holding in *General Electric*:⁵⁵ that even discipline by expulsion—i.e., discipline explicitly protected by the proviso—is illegal if imposed for post-resignation activities. In other words, the right of the member to resign, not the right of the union to expel, is the absolute: the proviso does not even begin to operate whenever the discipline is imposed for post-resignation conduct.

The conflict between the Board and the Fifth Circuit presumably will provoke, in the future, a fuller explication of the Board's position; in the instant case, the Board simply reiterated its *Boeing* doctrine without explicating it *vis à vis* discipline by expulsion. It is possible, of course, that fuller explanation will be obviated if the forthcoming Supreme Court decision in *Granite State* lays down principles sufficiently broad to resolve this and other subordinate issues arising from the conflict inherent in section 8(b)(1)(A).

D. Economic Strikers

In two Survey year decisions, the Board and the First Circuit clarified the rights of sympathetic strikers in an economic strike, and in a third the Board broke new ground by ruling that an employer

⁵⁴ Id., 79 L.R.R.M. at 2789.

⁵⁵ See p. 1437 *supra*.

and a union could limit the duration of the reinstatement rights of strikers if their agreement met certain standards.

The decisions further develop doctrines enunciated in two seminal cases, *NLRB v. MacKay Radio & Telegraph Co.*¹ and *NLRB v. Great Dane Trailers, Inc.*² In *MacKay*, the Supreme Court held that an employer struck for economic reasons may protect his business by hiring replacements or discontinuing jobs for business reasons. In *Great Dane Trailers*, the Court held that economic strikers retain their status as "employees" until they find substantially equivalent positions elsewhere, and that failure to reinstate economic strikers upon termination of the strike will be construed presumptively as an unfair labor practice because such failure tends to discourage employees from engaging in protected concerted activity. However, the employer may rebut the presumption by showing that his failure to reinstate strikers was motivated by "legitimate and substantial business justifications."³

1. *Sympathetic Strikers*: General Electric and General Tire and Rubber

One of the questions deriving from the *MacKay* and *Great Dane* doctrines involves the right of an employer to require nonstriking employees to do the work of the strikers and the degree of protection afforded the employees who refuse to perform the struck work and thereby become sympathetic strikers. Two Survey year cases distinguish earlier cases dealing with this question and, in conjunction with the older cases, appear to compose a fairly rounded answer as to the rights of both the employer and the sympathetic striker.

In *General Electric Co.*,⁴ a three-man panel of the Board held that the company did not violate section 8(a)(1) by laying off, for the duration of the strike, seven clerical employees who were not members of the striking unit and who refused to perform production work normally done by the strikers. The employer had told the clerical workers that it intended to continue operations during the strike and that supervisory, management, and clerical employees would each have to take a turn doing production work. When the seven affected employees were given their production assignments and refused them, they were laid off. Adopting the Trial Examiner's decision, the Board found that the company had "legitimate and substantial business justifications" for its action, which were paramount in importance to any possible re-

¹ 304 U.S. 333 (1938).

² 388 U.S. 26 (1967).

³ *Id.* at 34.

⁴ 193 N.L.R.B. No. 56, 78 L.R.R.M. 1241 (1971).

straining effect such action may have had on the exercise of office clerical employees of their Section 7 rights."⁵

The fact that the employees' refusal was protected concerted activity did not protect them from layoff for the duration of the strike. The Board emphasized the specific business reasons that the employer had advanced for requiring all nonstriking employees to take turns doing production work, the absence in the record of "any basis for inferring [a discriminatory motive],"⁶ and the nature of the employer's action. The employer neither discharged the employees, an action unlawful under *Cooper Thermometer Co.*,⁷ nor laid them off for a period beyond the duration of the strike.⁸ Rather it "merely treated them as sympathy strikers who by their own choice elected to stay away from work for the duration of the strike rather than assist [the company] . . . in performing whatever duties might be assigned to them in order to minimize the effect of the strike on [the company's] . . . business."⁹ Finally, although the General Counsel argued that the company had sufficient clerical work available to permit the seven to do that work instead of production tasks, the company was found to have divided production work among all nonstriking employees in the interest of preserving the efficient operation of its business.

In sum, the Board's holding indicates that it will apply the *Great Dane* balancing test to the employer's actions *vis à vis* employees who refuse to perform strike work. Here the employer advanced substantial business reasons for utilizing clerical employees as replacements; when the employees refused, he treated that refusal as an election to join the strike, and the subsequent layoff merely reflected that election. By dealing with the employees as sympathy strikers, who by traditional Board rule¹⁰ are entitled to neither more nor less protection than are the strikers themselves, he passed the Board's test. Had the employer's action taken another, more severe form, such as a discharge, the Board would presumably have found the effect on section 7 rights to have outweighed the business justifications; or, conversely, had the business justifications for utilizing the nonstrikers as replacements been weaker, the Board might not have accepted them as sufficient reasons for requiring the employees to do struck work in the first place.

⁵ Id. at —, 78 L.R.R.M. at 1242. The Board is quoting *Great Dane Trailers*, 388 U.S. at 34.

⁶ Id.

⁷ 154 N.L.R.B. 502, 59 L.R.R.M. 1767 (1965).

⁸ This practice was ruled unlawful in *Montana-Dakota Utilities Co.*, 189 N.L.R.B. No. 111, 77 L.R.R.M. 1029 (1971).

⁹ 192 N.L.R.B. at —, 78 L.R.R.M. at 1242.

¹⁰ See, e.g., *NLRB v. Southern Greyhound Lines*, 426 F.2d 1299, 74 L.R.R.M. 2080 (5th Cir. 1970).

In the second case, *General Tire & Rubber Co. v. NLRB*,¹¹ the First Circuit upheld a Board finding that a company violated section 8(a)(1) by discharging a clerical employee who, after crossing a picket line of striking production employees, refused to do struck production work. The company admitted that, had the employee refused to cross the picket line, she would not have been subject to discharge under *NLRB v. Union Carbide Corp.*,¹² but it argued that once she had crossed the line she was subject to penalties for insubordination and could not enjoy the status of sympathetic striker. The court rejected this argument, pointing out that the picket line was no Rubicon beyond which alteration of commitment was impossible. The court also insisted that the employee did not become a "partial striker," and so lose her position as a sympathy striker, because she was willing to do her regular work while rejecting struck work. Finally, the court rejected flatly the company's attempt to justify the discharge by compelling business reasons, finding that the company had shown no such exceptional circumstances as would "justify removing an employee from the protection against discharge which the Act affords employees exercising their section 7 rights."¹³

The rationale and the remedial policy of the First Circuit in *General Tire and Rubber* are correlative with, or indeed subsumed by, the Board's doctrine in *General Electric*. The court's central point, recognizing an employee's sympathetic striker status although the employee refused to work *after* crossing the picket line, duplicates the Board's position in *General Electric*.¹⁴ The court's second argument, that a sympathetic striker retains his protected status even though he is willing to do his own—as contrasted with replacement—work, mirrors the Board's finding of sympathetic striker status among the General Electric clerical workers who were willing to do their customary tasks but refused production work. Finally, the First Circuit imposed a remedy that could provide a useful reinforcement to the balancing doctrine used by the Board in *General Electric*. The court not only enforced the Board's order¹⁵ that the employer reinstate the

¹¹ 451 F.2d 257, 78 L.R.R.M. 2836 (1st Cir. 1971).

¹² 440 F.2d 54 (4th Cir.), cert. denied, 404 U.S. 826 (1971). *Union Carbide* held that a worker who refuses to cross a picket line is not subject to discharge.

¹³ 451 F.2d at 259, 78 L.R.R.M. at 2837.

¹⁴ The court qualified its position on this point by stating that it did not determine whether the company's Rubicon position would have validity had the company proved that the employee knew before crossing that she would be obliged to do struck work. *General Electric* appears to have given the Board's answer to this potential issue by recognizing the employees in that case as sympathetic strikers even though they apparently knew in advance—that is, before the day when they crossed the picket line and refused to do struck work—that they were going to be asked to do struck work. 192 N.L.R.B. at —, 78 L.R.R.M. at 1241.

¹⁵ *General Tire & Rubber Co.*, 190 N.L.R.B. No. 44, 77 L.R.R.M. 1215 (1971).

employee with back pay, but it awarded costs, including counsel fees, against the employer, because the court found his position "frivolous."¹⁶ Such a remedial policy could discourage smaller employers, at least, from bringing before the Board "business justifications" that are essentially "frivolous."¹⁷

2. *Limitation of Reinstatement Rights by Agreement: United Aircraft*

In its 1968 decision, *Laidlaw Corp.*,¹⁸ the Board held that economic strikers remain employees, under the protection of the NLRA, even after they have been replaced during the strike. Accordingly they must be reinstated as vacancies occur unless they have obtained regular and substantially equivalent employment elsewhere or unless the employer can establish substantial business reasons to justify a failure to offer reinstatement. *Laidlaw* is derived from a correlative of *Great Dane Trailers*,¹⁹ *NLRB v. Fleetwood Trailer Co.*,²⁰ where the Supreme Court held that an employer's refusal to reinstate economic strikers whenever jobs become available constitutes an unfair labor practice unless the employer can show that his action was based on legitimate and substantial business justifications. Now, in a Survey year decision, *United Aircraft Corp.*,²¹ the Board has recognized a method of limiting the protection afforded economic strikers under the *Laidlaw* doctrine.

The case arose from an economic strike by several unions against an aircraft manufacturer, which ended when the unions and the employer entered into a settlement agreement that included a formula for the recall of strikers. The formula provided that if neither of two alternative routes to recall produced a job for a striker who wished to return to work, he would be placed on a preferred hiring list and would be recalled to any job openings in his occupational group and seniority area which developed prior to January 1, 1961.²² Pursuant to the agreement, the employer treated strikers who were put back to work on January 1, 1961, or later, as new employees without seniority. In a decision issued in 1969, the Trial Examiner found that by following such a policy the employer had run afoul of *Laidlaw*; that is, he had

¹⁶ 451 F.2d at 259, 78 L.R.R.M. at 2837. Compare the Board's remedial policy in *Tiidee Products Inc.*, discussed at 1452-55 *infra*.

¹⁷ The court found that General Tire's invocation of business reasons meant only that "it does not like strikes." 451 F.2d at 259, 78 L.R.R.M. at 2837.

¹⁸ *Laidlaw Corp.*, 171 N.L.R.B. 1366, 68 L.R.R.M. 1252 (1968), enforced, 414 F.2d 99, 71 L.R.R.M. 3054 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1971).

¹⁹ See text at note 2 *supra*.

²⁰ 389 U.S. 375 (1967).

²¹ 192 N.L.R.B. No. 62, 77 L.R.R.M. 1785 (1971). The case involves several discrete issues and holdings. This discussion is limited to the ruling on the strike settlement agreement.

²² The agreement was made in August, 1970. *Id.* at —, 77 L.R.R.M. at 1785.

discriminated against the strikers by terminating their employment preference rights as of December 31, 1960, and so had violated Sections 8(a)(1)²³ and 8(a)(3)²⁴ of the NLRA.

A three-man majority²⁵ of the Board rejected that finding, but it did not do so on the ground that *Laidlaw*, a 1968 decision, should not be applied retroactively.²⁶ Rather, it enunciated a broad doctrine that an employer and a union could agree, in a strike settlement, to limit the reinstatement rights of economic strikers, so long as that agreement met certain standards. Specifically, they may agree that reinstatement rights will terminate after a specified period if that period (1) is not unreasonably short, (2) is not intended to be discriminatory or misused by either party with the intent of accomplishing a discriminatory objective, (3) was not insisted upon by the employer to undermine the union's status, and (4) was the result of good-faith bargaining.²⁷

The Board ruled that the instant agreement met all of these standards. Moreover, the employer, in settling the strike issues, had made concessions to the unions which it might not have been willing to make had it known that the unions would repudiate part of the recall agreement. The Board also emphasized that the unions had accepted the benefits of the agreement, and that the recall provision had been entered into in good faith by both parties and performed in good faith by the employer. In short, the Board found that both parties had intended that the employer could terminate reinstatement rights as of December 31, 1960,²⁸ that the agreement met the Board's standards, and that accordingly the employer's termination actions taken pursuant to the agreement did not violate the Act.

The majority's rationale underlines an issue inherent in one of the major developments in labor law today: the limitation of employees' statutory rights by contractual agreement. This development is, of

²³ 29 U.S.C. § 158(a)(1) (1970).

²⁴ 29 U.S.C. § 158(a)(3) (1970).

²⁵ The majority consisted of Chairman Miller and Members Jenkins and Kennedy, the minority of Members Brown and Fanning.

²⁶ This factor was explicitly mentioned by the Board although it was not used as a ground of decision. 192 N.L.R.B. at —, 77 L.R.R.M. at 1792.

²⁷ *Id.*, 77 L.R.R.M. at 1793. The dissent apparently accepted the broad principles underlying the four standards but argued that the recall period in the instant agreement was unreasonably short: that any settlement that purported to terminate reinstatement rights in less than one year from agreement "would create a serious conflict with Section 9(c)(3) of the NLRA, which provides for the eligibility of economic strikers to vote in a representation election for a period of twelve months after the commencement of a strike." *Id.*, 77 L.R.R.M. at 1799. The dissent also found the majority decision in conflict with the principles of *Fleetwood*. *Id.*

²⁸ One of the two major grounds of dissent (cf. note 27 *supra*) was the minority's rejection of this finding. The dissent's view of the agreement was "that all strikers would be recalled until the . . . [employer] reached its prestrike complement, which occurred on April 30, 1961." *Id.* at —, 77 L.R.R.M. at 1798.

course, most evident in the Board's arbitration policy as set forth in *Collyer Insulated Wire*,²⁰ discussed elsewhere in this Survey.⁸⁰ In the instant case, as in *Collyer*, the Board has apparently taken the position that the unions are responsible parties; if they enter into fair agreement on certain issues, and the agreement meets Board standards, they should be bound by it. Hence, the *United Aircraft* decision reflects a firm Board position on the binding effect of a union's contractual agreement.

Underlying such a policy, however, is a major question: to what extent may a union contract away employees' statutory rights? Does *United Aircraft* illustrate a broad policy stand, whereby the Board gives priority to its policy favoring resolution of labor disputes through settlements reached by collective bargaining, and subordinates thereto its policy of protecting the rights of employees guaranteed by Section 7 of the Act? Discrete statements in the majority rationale in *United Aircraft* appear to give encouragement of the bargaining process a very broad priority over protection of statutory rights. Citing the Board's past recognition of union waivers of the right to strike and its deferral to arbitration,⁸¹ the majority stressed the Board's duty to pursue the public policy embodied in the Act which favors collective bargaining, and went on to emphasize that one particular manifestation of such collective bargaining was the voluntary strike settlement.⁸² The Board ought to accept the instant agreement "as effectuating the policies of the Act which . . . includes as a principal objective encouragement of . . . collective bargaining as a means of settling labor disputes."⁸³

On the other hand, this broad hospitality to settlement agreements appears tempered by a conception of the Board as watchdog over such agreements. At the outset of the policy argument, the opinion points out that the Board is bound by no private adjustment of rights guaranteed by the Act and that it accepts such particular adjustments at its discretion.⁸⁴ The same theme is again emphasized at the end of the opinion where, in accepting the instant agreement "as effectuating the policies of the Act," the Board grounds that acceptance on the fact that the particular agreement met the four standards that the Board set up as prerequisites for its approval.⁸⁵ That the agreement resolved a dispute by peaceful bargaining was insufficient qualification. Rather,

²⁰ 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971).

⁸⁰ See pp. 1376-81 *supra*. See also *Magnavox Co.*, 195 N.L.R.B. No. 40, 79 L.R.R.M. 1283 (1971).

⁸¹ 192 N.L.R.B. at —, 77 L.R.R.M. at 1791.

⁸² *Id.* The Board cited *Retail Clerks Locals 128 and 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 27 (1962).

⁸³ 192 N.L.R.B. at —, 77 L.R.R.M. at 1793.

⁸⁴ *Id.* at —, 77 L.R.R.M. at 1791.

⁸⁵ *Id.* at —, 77 L.R.R.M. at 1793.

the standards show Board deference to statutory rights, and reveal a policy of scrutinizing every agreement to see if its general thrust is respectful of fundamental statutory rights, even though its details might waive specific rights in the interest of obtaining a general good.

Finally, the general impact of the Board's holding must be qualified by the nature of the particular right involved in the case. Citing *Fleetwood*, the Board pointed out that an economic striker's right to reinstatement was not absolute, but rather subject to the Board's balancing test.⁸⁶ In contrast, the Board refused in another Survey year case, *Magnavox*,⁸⁷ to approve a contractual waiver of a right that it considered central and, by implication, absolute: the employee's right to distribute literature or to solicit on behalf of a union.

Hence the priority seemingly assigned by *United Aircraft* to the bargaining process is, in fact, limited by the Board's insistence on its discretionary power to approve only those agreements whose impact on statutory rights is acceptable by Board standards. In a decision handed down on the same day as *United Aircraft*, the Board refused to give effect to a settlement agreement whose reinstatement provision it found wanting.⁸⁸

E. Jurisdictional Disputes: Plasterers' Local

When a charge is filed under Section 8(b)(4)(D) of the NLRA, the provision banning jurisdictional disputes,¹ Section 10(k) requires

⁸⁶ Id., 77 L.R.R.M. at 1791. The Board noted too that in *Fleetwood* the Supreme Court had "specifically reserved the question of whether a union could waive the right of strikers to reinstatement ahead of new applicants." Id.

⁸⁷ See pp. 1424-25 supra.

⁸⁸ *Laher Spring & Electric Car Corp.*, 192 N.L.R.B. No. 65, 77 L.R.R.M. 1800 (1971). The Board found that the employer's discriminatory misuse of the agreement placed it outside of the scope of *United Aircraft*: "[T]he policies of the Act would hardly be effectuated by our deferring to an agreement, the terms of which have been utilized . . . to cloak discrimination against strikers." Id. at —, 77 L.R.R.M. at 1802.

¹ 29 U.S.C. § 158(b)(4)(D) (1970) provides that it shall be an unfair labor practice for a labor organization

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

...

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. . . .

the Board to "hear and determine the dispute out of which [the] unfair labor practice shall have arisen, unless . . . the parties to such dispute" adjust or agree upon a method for the voluntary adjustment of the dispute.² Ever since 10(k) was enacted, the Board has consistently interpreted the term "parties to such dispute" to include the employer as well as the disputing unions and has refused to dismiss the 10(k) proceedings when the unions, but not the employer, have agreed to settle.³ In *NLRB v. Plasterers' Local 79*,⁴ the Supreme Court upheld the Board's traditional interpretation and reversed a District of Columbia Circuit ruling that the employer had no right to insist upon participation in a 10(k) proceeding.⁵

The dispute in *Plasterers' Local* arose when the Plasterers began picketing the job sites of two employer contractors, claiming for their union work performed by the Tile Setters under collective bargaining agreements with the contractors. Before the Plasterers had begun picketing, however, they had submitted their claim to the National Joint Board for Settlement of Jurisdictional Disputes, a body established by the AFL-CIO's Building Trades Department to which both the Plasterers and the Tile Setters belonged and by whose decision both unions were accordingly bound. The Joint Board had awarded the work to the Plasterers, basing its decision upon a 1917 agreement. When the Tile Setters refused to acquiesce in the Joint Board decision, the Plasterers began picketing, and one of the contractors filed an 8(b)(4)(D) charge against the latter union. The Board held a 10(k) proceeding that included both employers as parties, found that the Joint Board decision lacked controlling weight, and awarded the work to the Tile Setters. When the Plasterers indicated that they would refuse to agree to the award, an 8(b)(4)(d) complaint was issued against them and they were found in violation of that provision.

In making both the 10(k)⁶ and the 8(b)(4)(D)⁷ decisions, the Board adhered to its traditional definition of "parties to the dispute"

² 29 U.S.C. § 160(k) (1970) provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

³ *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 126-27 and n.18 (1971).

⁴ 404 U.S. 116 (1971).

⁵ *Plasterers' Local 79 v. NLRB*, 440 F.2d 174, 74 L.R.R.M. 2575 (D.C. Cir. 1970).

⁶ The 10(k) proceeding is reported at 167 N.L.R.B. 185, 66 L.R.R.M. 1012 (1967).

⁷ 172 N.L.R.B. Nos. 70, 72; 68 L.R.R.M. 1401 (1968).

and included the employers as parties. The Plasterers, however, contended that since the competing unions had agreed upon a voluntary method of adjustment—submission of competing claims to the Joint Board—the provisions of 10(k) precluded a Board proceeding. That is, the unions should be deemed the only “parties” to the dispute, and since the Joint Board process was a method of settlement agreed upon by those parties, the 10(k) proceeding was obviated. The Board rejected this contention, but the District of Columbia Circuit accepted it, holding that “[i]t is not the employer but the rival unions . . . who are parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question.”⁸

In reversing the appellate decision,⁹ the Supreme Court held, first, that interested employers, non-neutral as well as neutral, are parties in 10(k) proceedings. This conclusion is dictated both by the employers’ economic stake in the 10(k) decision and by congressional intent. Evident in the legislative history of both sections 10(k) and 8(b)(4)(D) is that 10(k) should protect the employer as well as the public from jurisdictional strikes. Moreover, the Court’s previous construals of the term “party” as used in other provisions of the NLRA,¹⁰ require inclusion of the employer as a 10(k) party.

Accordingly, the Court reasoned, employers must also be deemed parties to the settlement, or to the agreement to settle, a jurisdictional dispute.¹¹ This position is wholly consistent with the established policy favoring arbitration, since the Court’s hospitality to arbitration is predicated on the view that the parties have voluntarily bound themselves at the bargaining table to use the arbitral mechanism.¹² Here the employers had entered into no such agreement. They did not even have a collective bargaining contract with the Plasterers. The Court holds that “we decline to narrow the Board’s powers under 10(k) so that employers are coerced to accept compulsory private arbitration when Congress has declined to adopt such a policy.”¹³ It follows that any agreement or settlement made without the employer may not preclude a 10(k) determination.

Finally, the Board’s *Safeway* rule is held to be inapplicable here. That rule holds that 10(k) proceedings are aborted if one of the

⁸ *Plasterers’ Local 79 v. NLRB*, 440 F.2d 174, 180; 74 L.R.R.M. 2575, 2579 (D.C. Cir. 1970).

⁹ 404 U.S. 116 (1971). The Supreme Court remanded the cause to the circuit court, which subsequently found the Board’s 10(k) determination valid and enforced its order against the Plasterers’ picketing. *Plasterers’ Local 79 v. NLRB*, ___ F.2d ___, 79 L.R.R.M. 2768 (D.C. Cir. 1972).

¹⁰ 404 U.S. at 128-30 and n.24.

¹¹ 404 U.S. at 131.

¹² *Id.* at 133.

¹³ *Id.* at 133-34.

competing unions effectively renounces its claim to the work.¹⁴ The Court of Appeals would extend the *Safeway* rule to foreclose Board decision where the two unions have agreed to arbitrate; that is, it would deem inter-union agreement equivalent to an effective disclaimer by one of the unions. This view is inconsistent both with the Board's consistently narrow application of the *Safeway* rule and with the rationale of the rule: that when one union disclaims the work the dispute has actually and effectively ceased to exist. In other words, the functions of 10(k) and 8(b)(4)(D) evaporate when the underlying dispute disappears.¹⁵

Assuming that sections 10(k) and 8(b)(4)(D) do give rights to the employer—an assumption required by the legislative history relied on by the Court—*Plasterers' Local* constitutes a refusal to subordinate statutory rights to voluntary agreements unless the party to whom the statutory right runs has definitely waived the right. Not even the Court's favored policy of deferring to arbitration was held sufficient to overcome the interested employer's right under the statute to participate in 10(k) proceedings.¹⁶ Hence the decision indicates that such recent decisions as *Magnavox*,¹⁷ where the Board refused to allow contractual waiver by a union-employer agreement of the employees' solicitation and distribution rights, are correct. The Court's emphasis on contractual agreement as a necessary prerequisite for deferral to arbitration also implies that the Court will not favor any doctrines that involve binding a non-contracting party by another's agreement, such as the Board's new rule that would require a successor-employer to honor his predecessor's contract.¹⁸

Finally, the decision appears not only correct but necessary from a practical point of view. The Court stresses that the employer's survival may depend upon the outcome of such disputes and that any decision made without consideration of his interest could lead to a marked decline in the amount of work the employer could offer.¹⁹ Although the Circuit Court had argued that its interpretation of section 10(k) would encourage employers to take part in private settlement mechanisms, the Supreme Court pointed out that, if union agreements were found sufficient to terminate 10(k) proceedings, there was no way

¹⁴ Highway Truckdrivers, Local 107 (*Safeway Stores, Inc.*), 134 N.L.R.B. 1320, 49 L.R.R.M. 1343 (1961).

¹⁵ 404 U.S. at 135.

¹⁶ Id. at 136-37.

¹⁷ See discussions of *Magnavox* at 1424-25 *supra* and *United Aircraft* at 1445-48 *supra*.

¹⁸ William J. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. 348, 74 L.R.R.M. 1098 (1970).

¹⁹ 404 U.S. at 125. The companies in the instant case claimed that they would lose 30-40% of their work to contractors who had contracts with the plasterers.

of assuring that such private procedures would be open to employers.²⁰ The Court emphasized the Board's practice of considering "all relevant factors" in making a 10(k) determination, and pointed out that excluding the employer would hardly ensure that all relevant factors would indeed be taken into account.²¹ This last point suggests that in the final analysis *Plasterers' Local* stands for the Court's firm adherence to congressional preference for Board expertise in jurisdictional disputes notwithstanding the current policy of deferring to arbitration.²² Hence the decision may come to be regarded as a watershed between the long line of cases extending hospitality to arbitration²³ and a new line in which the Court is called upon to fix limits to such hospitality on a case-by-case basis.

F. Remedies

1. *Tiidee*

The Board's remedial powers are limited to those explicitly set out in Section 10 of the NLRA. Aside from the right to seek provisional injunctions,¹ its power to remedy unfair labor practices is restricted under section 10(c) to the issuance of cease and desist orders to take "such affirmative action as will effectuate the policies of the Act."² Lacking punitive power, the Board has had to exercise considerable ingenuity in finding ways to discourage the commission of those unfair labor practices which by their nature may bring to the violator benefits that the Board's subsequent affirmative orders fail to eliminate.

One such unfair labor practice is an employer's refusal to bargain. An employer in a strong position can successfully erode a union's majority position by a sustained refusal to bargain. When the case finally reaches the Board after the long delay entailed by current procedural requirements,³ the traditional affirmative remedies, such as cease and

²⁰ Id. at 132.

²¹ Id. at 132 and n.26.

²² The Court pointed out the Congress had expressed a clear preference for Board decision as compared with Board-compelled arbitration at the time when 10(k) was passed. Id. at 133.

²³ Among recent landmarks in this line is *Boys Market, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970), cited in *Plasterers' Local*, 404 U.S. at 133. Cf. the Court's reminder: "Our conclusion . . . is wholly consistent with federal policy with respect to voluntary arbitration In the case before us, the LMRA requires that the Board defer [to arbitration] only when all of the parties have agreed on a method of settlement" 404 U.S. at 136-37 (emphasis in the original).

¹ 29 U.S.C. § 160(j) (1970) gives the Board such authority.

² 29 U.S.C. § 160(c) (1970).

³ Statutory measures currently ensuring due process include such procedural steps as (1) de novo examination of the Trial Examiner's record by the Board whenever a party excepts to the Examiner's recommendations, (2) petition by the Board to the Circuit Court for enforcement of an order that a party chooses not to obey, and (3)

desist and post-notice orders, fail to repair the results of years of refusal to bargain. A remedy that would effectively cure the situation, a make-whole order imposing on the employer the obligation to pay the employees what he would have paid them absent his refusal to bargain, has been considered unavailable. Not only does section 10(c) stipulate that the Board may issue only affirmative, not punitive, orders, but section 8(d) explicitly states that the duty to bargain does not compel a bargaining party to make concessions.⁴ The latter provision, then, apparently has prevented the Board from issuing a make-whole order in a refusal-to-bargain case. Such an order would in effect require the employer to agree to a substantive contract term—in other words, to make a concession—and hence would violate section 8(d).

In response to this dilemma, the District of Columbia Circuit attempted to find authority for the Board to issue make-whole orders and prompted a series of Board, appellate, and Supreme Court decisions that apparently reached a final conclusion during the Survey year. In the seminal case on the issue, *H.K. Porter, Inc. v. NLRB*,⁵ the Supreme Court rejected the District of Columbia Circuit's initial position that section 8(d) defines only the scope of the duty to bargain, not the scope of possible Board remedies for violation of that duty.⁶ *Porter* held that the Board could not order an employer to grant a check-off he had previously refused to agree to; the Court ruled that section 8(d) explicitly denied to the Board power to require agreement on a substantive term of the contract.

A subsequent case permitted the District of Columbia Circuit to propose another theory. In *Electrical Workers, IUE v. NLRB* (Tiidee),⁷ the appellate court ruled that although under *H.K. Porter* the Board could not determine what the employer and union "should" have agreed on, it could decide what they "would" have agreed on had they bargained in good faith. Moreover, the court found justification for a make-whole order in the motivation underlying the employer's refusal to bargain. The Board had found that the employer had refused to bargain, not in order to test the Board's certification of the

petition for review by one of the parties. 29 U.S.C. § 160(c), (e), (f). In his dissent in *Motor Coach Employees v. Lockridge*, Justice Douglas gives statistics on the delays entailed in seeking relief from the Board. 403 U.S. 274, 303-04 and n.1 (1971) (dissenting opinion).

⁴ 29 U.S.C. § 158(d) (1970) provides that "such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

⁵ 397 U.S. 99 (1970).

⁶ *H.K. Porter Co. v. NLRB*, 329 F.2d 295, 302, 66 L.R.R.M. 2761, 2765 (D.C. Cir. 1967).

⁷ 426 F.2d 1243, 73 L.R.R.M. 2870 (D.C. Cir. 1970), cert. denied, 400 U.S. 950 (1970).

union as bargaining representative,⁸ but simply as a delaying tactic. The court ruled that a remedy limited to a cease and desist order would merely reward the employer for his "brazen" refusal. Therefore the Board should determine on remand what backpay the employees were entitled to, and issue a make-whole order.

Subsequently, but before the Board had heard the *Tiidee* remand, the circuit court refined its theory by distinguishing "patently frivolous" refusals to bargain from those motivated by fairly debatable objections to certification; only "frivolous" motivation would justify a make-whole order.⁹ Meanwhile the Board had held in *Ex-Cell-O Corp.*¹⁰ that *H.K. Porter* precluded issuance of make-whole orders in refusal-to-bargain cases. The union then appealed the *Ex-Cell-O* decision to the District of Columbia Circuit, and the court remanded the case to the Board for a determination of the employer's motivation and a decision not inconsistent with the court's holding in *Tiidee*.¹¹ *Ex-Cell-O* was resolved without open conflict on the grounds that the employer's refusal had been "debatable" rather than brazen.¹² However, in the *Tiidee* remand the court and Board were bound to collide head on.

The Board's decision in remand, made during the Survey year, appears to have settled once and for all the central issue of the validity of make-whole orders and the subordinate question of the motive test. In *Tiidee Products, Inc.*,¹³ the Board held unanimously that it does not have the authority to issue a make-whole order, even where the employer's refusal to bargain is "flagrant." The make-whole order, then, appears to be dead as a remedy in a refusal-to-bargain situation. The result seems to be practical as well as consistent with both *H.K. Porter* and section 8(d). Although the need for a new remedy was clear, a make-whole order might have provoked as many difficulties as it would have resolved. Since an employer can challenge a certification only by refusing to bargain, threatening him with a make-whole order could be regarded as having an unlawful chilling effect upon his right to challenge. A series of definitional problems would have arisen when the Board sought to determine under what narrow and specialized cir-

⁸ An employer who has a good faith doubt as to the majority status of the union can obtain review by refusing to bargain.

⁹ *Steelworkers v. NLRB (Quality Rubber Mfg. Co.)*, 430 F.2d 519, 521, 74 L.R.R.M. 2747, 2749 (D.C. Cir. 1970).

¹⁰ 185 N.L.R.B. No. 20, 74 L.R.R.M. 1740 (1970).

¹¹ *Auto Workers v. NLRB (Ex-Cell-O)*, 449 F.2d 1046, 76 L.R.R.M. 2753 (D.C. Cir. 1971).

¹² *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058, 1065, 77 L.R.R.M. 2547, 2552 (D.C. Cir. 1971). The court accepted the Board's refusal to issue a make-whole order on the grounds that the refusal to bargain was not "frivolous" or in bad faith.

¹³ 194 N.L.R.B. No. 198, 79 L.R.R.M. 1175 (1972).

cumstances the remedy could properly be used, a determination that advocates of the make-whole order admitted would have to be made.¹⁴

However, in *Tiidee* the Board did more than kill the make-whole order. It went on to devise a novel remedial approach aimed at the evils endemic in a "frivolous" refusal to bargain.¹⁵ In addition to issuing its initial bargaining order, it required the employer to reimburse both the Board and the union for all expenses incurred in the investigation, preparation, and conduct of the cases at both the Board and the court levels. The Board justified this unusual¹⁶ order as a means of discouraging frivolous litigation that serves merely to prolong the employer's refusal to bargain. Moreover, the employer was required to undertake certain actions that would give the union opportunity to restore the majority position that had been destroyed by his years of refusal to bargain. The employer was directed to give the union access to its bulletin boards and to furnish names and addresses of employees. These remedies, the Board held, went "as far as we can go."¹⁷

That the remedies may not go far enough, particularly as a means of restoring the union's status, does not necessarily indicate inadequate statutory authorization of remedies. The problem may be primarily one of Board backlog: had the Board been able to act on the original complaint before 1969, the damage done by the original 1967 violation¹⁸ would have been more amenable to traditional remedies. It might be said, then, that *Tiidee* stands in part for a wholesome refusal to strain the NLRA in order to conceal or repair faults not in the Act itself but in its administrative application.

2. *Automotive Plating*

In *NLRB v. Local 485, IUE* (Automotive Plating),¹⁹ the Second Circuit denied enforcement of a Board order requiring a union to make an employee whole for wages lost due to the union's breach of its duty of fair representation. This decision questions the Board's power to issue a backpay order when the employee's claim against the union involves an alleged breach of the collective bargaining contract by the employer, and casts doubt on the desirability of taking such an action

¹⁴ See, e.g., Note, The Supreme Court, 1969 Term, 84 Harv. L. Rev. 30, 208-09 (1970).

¹⁵ The circuit court had invited the Board to devise lesser alternative remedies if it did not issue a make-whole order. 449 F.2d at 1064-65.

¹⁶ The Board noted that "[n]ormally, . . . litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board." 194 N.L.R.B. at —, 79 L.R.R.M. at 1179.

¹⁷ Id. at —, 79 L.R.R.M. at 1178.

¹⁸ Id. at —, 79 L.R.R.M. at 1179.

¹⁹ 454 F.2d 17, 79 L.R.R.M. 2278 (2d Cir. 1972).

to the Board rather than to the courts. The court's action is especially significant in view of the fact that the Board's order has already been cited in an authoritative work.²⁰

The Board had held that the union violated section 8(b)(1)(A)²¹ by refusing to process an employee's wrongful discharge grievance against his employer.²² After issuing an original order requiring the union to process the grievance and after failing to seek enforcement of that order, a divided Board issued a supplemental order²³ directing the union to make the employee whole for loss of earnings from the time he requested the union to challenge his discharge until such time as the union should fulfill its duty or the member obtain equivalent employment.

The circuit court enforced the initial order but denied enforcement of the supplemental order on two grounds. First, the Board may not find the union liable for *all* of the back pay due the employee. In *Vaca v. Sipes*, the Supreme Court had held that a court awarding back pay in a section 301 suit should "apportion liability between the employer and the union according to the damage caused by the fault of each,"²⁴ if the court found that the employee's losses were caused in part by the union's breach of its representation duty. In the instant case, the Second Circuit pointed out, the Board adopted as an unfair labor practice remedy the *Vaca* damage remedy, but by failing to apportion the liability for back pay between the union and the employer, it exceeded the express limitation imposed by *Vaca*.²⁵ In the second place, the court pointed out, no tribunal had decided that the employee was indeed discharged in violation of the collective bargaining agreement. Until such violation should be found, any assessment

²⁰ Section of Labor Relations Law, American Bar Association, *The Developing Labor Law* (C. Morris ed. 1971) 748 and nn.105, 106. The editorial comment in note 106 refers to the problems that the Second Circuit analyzed in the instant case: "These remedial difficulties, attributable to limitations on the Board's jurisdiction, were foreseen and commented upon in Morris, *Procedural Reform in Labor Law—A Preliminary Paper*, 35 J. Air L. & Com. 537, 538, n.143 (1969)."

²¹ 29 U.S.C. § 158(b)(1)(A) (1970).

²² In *IUE, Local 485 (Automotive Plating Corp.)*, 170 N.L.R.B. 1234, 67 L.R.R.M. 1609 (1968), the Board found that the refusal was motivated by the employee's outspoken opposition to a policy of the union business manager. Such criticism was protected activity under section 7, so the union's refusal to process the grievance violated section 8(b)(1)(A). The Second Circuit pointed out that "[s]ince the Local's action was calculated retaliation against Barclay for exercise of a right clearly protected by section 7 . . . , we are not forced to reconsider this court's controversial disposition of the Board's broader theory in *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963), that any arbitrary or invidious action which violates a union's duty of fair representation is prohibited by § 8(b)(1)(A)." 454 F.2d at 21 n.6, 79 L.R.R.M. at 2281 n.6.

²³ 183 N.L.R.B. No. 131, 74 L.R.R.M. 1396 (1970).

²⁴ 386 U.S. 171, 197 (1967).

²⁵ 454 F.2d at 22-23, 79 L.R.R.M. at 2281.

of back pay against the union would be speculative and punitive and hence beyond the scope of the Board's remedial powers. Enforcement of the order must accordingly be denied.²⁶

However, the court then suggested that correction of these two deficiencies would not necessarily justify enforcement: in an action of this kind, the Board might lack authority to issue any back pay order at all. The Board had claimed in its original order that it had authority under *NLRB v. C & C Plywood Corp.*²⁷ to make the determination—which the circuit court considered an essential preliminary to the back pay order—that the employer had indeed breached the collective bargaining agreement, and that it refrained from so determining only in deference to the arbitral process.²⁸ In *C & C Plywood* the Supreme Court had recognized, as an exception to the general rule that the Board lacks statutory power to interpret and enforce a collective bargaining contract, that the Board may interpret an agreement “only so far as . . . [is] necessary to determine . . . [an unfair labor practice case].”²⁹ Whether this exception would indeed embrace the Board's action here was, the court pointed out, “at least a substantial question.”³⁰ Moreover, the court noted, *Vaca* explicitly denies to the Board authority to remedy injuries arising out of breach of contract,³¹ a point that Board Chairman McCulloch had made in his dissent to the back pay order.³² There would seem to be, then, a real question as to whether the back pay order were beyond the Board's authority as an attempt to remedy the employer's breach of contract.

Although the court expressly refuses to resolve the question,³³ its doubts as to Board jurisdiction would appear to be more justified than are the Board's assertions of authority. In the Survey year decision *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*,³⁴ the Supreme Court underlined the limits on the Board's authority regarding contractual issues by holding, *inter alia*, that an employer's unilateral change of a contract term was not an unfair labor practice if that term were merely a permissible subject of bargaining. Also, a Second Circuit judge recently pointed out that a Trial Examiner who had

²⁶ Id. at 23, 79 L.R.R.M. at 2281-82.

²⁷ 385 U.S. 421 (1967).

²⁸ 170 N.L.R.B. at 1234, 67 L.R.R.M. at 1610.

²⁹ 385 U.S. at 428.

³⁰ “There is at least a substantial question whether the reasoning of *NLRB v. C & C Plywood*, . . . applies where the Board seeks to ‘interpret and give effect to the terms of a collective bargaining contract’ only for the purpose of invoking a back pay remedy.” 454 F.2d at 23-24, 79 L.R.R.M. at 2283.

³¹ 386 U.S. at 187-88.

³² 183 N.L.R.B. No. 131, 74 L.R.R.M. at 1398 (dissenting opinion).

³³ 454 F.2d at 24, 79 L.R.R.M. at 2283.

³⁴ 404 U.S. 157 (1971). See pp. 1405-08 *supra*.

awarded back wages against a union in a fair representation case involving a question of improper discharge, "was in fact deciding that the discharge was wrong . . .";⁸⁵ the statement implies serious doubts as to the Examiner's authority to make such a decision.

The legal question as to the Board's authority does not stand alone but, as *Automotive Plating* reveals, incorporates several practical problems. Since the employee in the instant case must come away relatively empty-handed if the Board in fact lacks power to award back pay, it would seem that he should go to the courts rather than to the Board. In any case, several details in the Board and court opinions on the case suggest that the employee might have to bring a court action even though he had originally gone to the Board. Chairman McCulloch, dissenting, had written that the desirable alternative to what he considered an illegal back pay order would be an order directing the union to furnish legal fees to the employees so that he might undertake a section 301 action against the employer and the union, in which action the court could decide on the propriety of the discharge and apportion damages by the *Vaca* principle.⁸⁶ The Second Circuit noted that the union would probably now have to bring a section 301 suit against the employer in order to obtain arbitration after the long delay ensuing since the original discharge.⁸⁷ The court also set out the three types of court action that the employee might have brought, thus prompting the inference that the employee should have taken the court route in the first place.⁸⁸ It should be observed, however, that the opinion explicitly denies suggesting that his choice of the Board was unwise, and it notes Professor Wellington's preference for that tribunal in unfair representation cases generally.⁸⁹

Finally, the court implied that the Board does not lack the tools necessary for providing practical relief: that the problems evident in *Automotive Plating* have arisen from administrative more than statutory inadequacy. The opinion suggests that the Board might have supplied adequate relief had it used its traditional remedies promptly and perhaps in conjunction with its little-used power to seek contempt sanctions. The court notes, for example, that various problems occasioned by delay could have been obviated had the Board immediately

⁸⁵ Hays, Some Observations on the Rights of a Union Member against his Union, ABA Section of Labor Relations Law, 1 Report of 1971 Proceedings 25, 33 (1971).

⁸⁶ 183 N.L.R.B. No. 131, 74 L.R.R.M. at 1399.

⁸⁷ 454 F.2d at 22, 79 L.R.R.M. at 2281.

⁸⁸ *Id.* at 21, 79 L.R.R.M. at 2281. The employee could have brought a § 301 suit against the employer for breach of a promise in the collective bargaining agreement running to the individual employees, or he could have sued the union for breach of its duty of fair representation, or he could have joined the employer and the union in a § 301 suit under the principle of *Humphrey v. Moore*, 375 U.S. 335 (1964).

⁸⁹ 454 F.2d at 22, 79 L.R.R.M. at 2281.

petitioned for enforcement of its first order and made use of the court's contempt sanctions.⁴⁰ The opinion also refers with apparent regret to the Board's failure to take Chairman McCulloch's suggestion that it order the union to furnish the employee with reasonable legal fees so that he might bring a section 301 suit.⁴¹ It is submitted that use of such a remedy would combine, for the employee, the advantages of a Board suit—e.g., having the General Counsel prosecute his original cause—with the availability of the judicial back pay order authorized by *Vaca v. Sipes*.

However, the apparent advantages of combining Board and court actions are diminished by the long delay involved in taking a case to the Board. The extent of such delay is apparent not only in the Second Court's expression of regret that the Board had failed to seek prompt enforcement of its original order but in other cases noted in this Survey. Justice Douglas, dissenting in *Lockridge*, pointed out the impact of delay on Board actions and the advantages in time and money that an employee would gain if he could bring his suit initially in the local court.⁴² It would appear, then, that practical as well as legal considerations urge an employee to go to the courts rather than to the Board if his claim of action involves both an employer's breach of contract and a union's breach of its duty of fair representation.⁴³

FRANCIS J. CONNELL
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⁴⁰ Id. at 24 n.18, 79 L.R.R.M. at 2283 n.18.

⁴¹ "But the Board has not so ordered and, accordingly, we will be forced to deal with any inadequate representation claims [either in the § 301 suit that the union may have to bring in order to compel arbitration, or in the arbitration proceeding itself] in the context of contempt proceedings." Id. at 22 n.9, 79 L.R.R.M. at 2281 n.9.

⁴² *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 303-05 (1971) (dissenting opinion). Justice Douglas wrote: "If he musters the resources to exhaust the administrative remedy, the chances are that he too will be exhausted." Id. at 304.

⁴³ See note 38 *supra*. The requirements for such a suit are summarized in *Motor Coach Employees v. Lockridge*, 403 U.S. at 299.