

1970-1971 ANNUAL SURVEY OF LABOR RELATIONS LAW

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INTRODUCTION*

This comment is the tenth in a series of annual efforts by the *Law Review* to provide students and practitioners with a survey of significant developments in the field of labor relations law.¹ The subject matter of the Survey consists of decisions of the National Labor Relations Board and the courts which clarify, add substance to, or repudiate prior policy in the application of the Labor Management Relations Act,² the Norris-La Guardia Act,³ and other relevant federal statutes.

It is not the purpose of the Survey to offer in depth analysis or criticism of all cases reported. Some developments, however, were of unusual significance, and thus warranted rather detailed treatment. For instance, the Supreme Court, in a landmark decision, upheld the power of federal courts to provide injunctive relief to enforce no-strike agreements.⁴ The Court also began to establish standards under Title VII of the Civil Rights Act of 1964 for employment testing.⁵

Significant developments also occurred in the courts of appeals. The effect of arbitration on Title VII rights,⁶ the extent of the Board's remedial powers under section 10(c) of the LMRA,⁷ and the standards for requiring recognition of unions without elections have been the subject of a number of controversial decisions.⁸

* The authors wish to express their appreciation to Professor Richard S. Sullivan of the Boston College Law School, and to Mr. Robert F. Fuchs, Regional Director of Region One of the National Labor Relations Board, for their helpful comments on a number of cases discussed herein. The criticisms which appear in this Survey do not, of course, necessarily reflect the opinions of either Professor Sullivan or Mr. Fuchs.

¹ The previous comments are: 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 29 U.S.C. §§ 141-87 (1964).

³ 29 U.S.C. §§ 101-15 (1964).

⁴ See p. 1083 *infra*.

⁵ See p. 1059 *infra*.

⁶ See p. 1073 *infra*.

⁷ See p. 1122 *infra*.

⁸ See p. 1037 *infra*.

I. BOARD AND COURT JURISDICTION

A. Board Jurisdiction

1. NLRB Jurisdiction over Colleges and Universities

In *Cornell University*,¹ decided during the Survey year, the NLRB for the first time asserted jurisdiction over a non-profit institution of higher education. In taking this action, the Board specifically overruled the long-standing policy enunciated in *Trustees of Columbia University*.² Under the *Columbia University* doctrine, the Board would not assert jurisdiction over any activity which was "non-commercial in nature and intimately connected with the charitable purposes and educational activities of [an] institution."³

The Board's holding in *Columbia University* was influenced by the legislative history of Section 2(2) of the Labor Management Relations Act.⁴ This section specifies those persons who are "employers" for purposes of the Act, and thus subject to the Board's authority. The section also specifically excludes certain activities, such as the operation of non-profit hospitals, from the law's purview. Other non-profit activities were not accorded this explicit legislative exemption, but the Board noted that a conference report on the bill⁵ which enacted section 2(2) indicated a congressional belief that the Board would decline jurisdiction where a non-commercial, non-profit organization was involved.⁶ Accordingly, in *Columbia University*, and in numerous cases that followed, the Board uniformly declined to assert jurisdiction where a connection could be demonstrated between the labor activity in question and the charitable or educational function of the institution.⁷

In *Cornell*, the Board emphasized that its prior refusal to assert jurisdiction over this type of activity was entirely discretionary. It noted, for instance, that the congressional conference report relied upon in *Columbia University* singled out only non-profit hospitals for statutory immunity. Thus, the Board reasoned that the determination of whether jurisdiction should be asserted over other types of non-profit enterprises remained within the discretion of the Board.⁸

¹ 183 N.L.R.B. No. 41, 74 L.R.R.M. 1269 (1970).

² 97 N.L.R.B. No. 72, 29 L.R.R.M. 1098 (1951).

³ Id., 29 L.R.R.M. at 1099.

⁴ 29 U.S.C. § 152(2) (1964).

⁵ H. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947).

⁶ 97 N.L.R.B. No. 72, 29 L.R.R.M. at 1099.

⁷ See, e.g., *Leland Stanford University*, 152 N.L.R.B. No. 73, 59 L.R.R.M. 1161 (1965) (jurisdiction declined over federally subsidized linear accelerator center because activities of center were related to educational purposes); *University of Miami*, 146 N.L.R.B. No. 169, 56 L.R.R.M. 1085 (1964) (jurisdiction declined over federally subsidized marine science institute because activities were primarily educational rather than commercial).

⁸ 183 N.L.R.B. No. 141, 74 L.R.R.M. at 1271-272.

Essentially, the *Cornell* decision resulted from a "change in circumstances." The Board seemed greatly impressed by the fact that today, educational institutions have a substantial impact on interstate commerce. The extent of this impact is evidenced by the fact that in the United States there are over 1,450 private colleges and universities which employ more than one-half million individuals.⁹ The Board pointed out, for instance, that the combined annual income and expenditures of these institutions exceeded \$12 billion.¹⁰ The impact on commerce of individual institutions also was found to be great. Cornell, for example, was cited as the largest single employer in Tompkins County, New York, with assets of over \$282 million and annual expenditures in excess of \$142 million.¹¹

Additional factors which, according to the Board, warranted reconsideration of the *Columbia University* doctrine included the expanded involvement of the federal government in higher education, and an increased congressional concern for according employees of non-profit institutions the same statutory benefits available to employees in the profit-making sector. Also, the Board noted that "union organization is already a *fait accompli* at many universities." It concluded that this development, together with the eruption of labor disputes at several universities, and the lack of any indication that they will not recur, militated against continuing the *Columbia University* doctrine.¹²

The legality and wisdom of the Board's decision in *Cornell* seems unquestionable. Many of the functions involved in the operation of an institution of higher learning, though tangentially related to the educational process, are essentially activities necessary to the conduct of any business. As such, unless there is substantial justification, it is patently unjust to deny workers at non-profit institutions the protection and benefits accorded by the Act. Additionally, the tremendous growth of higher education during the past two decades, with the concomitant increase in the effect this class of activity has on interstate commerce, certainly suggests that the Board's continued discretionary refusal would be improper.

When the Board rendered its decision in *Cornell*, it refrained from announcing any specific standards for general application. It merely pointed out that the figures elucidated at the hearing clearly established that Cornell University produced a sufficient impact on

⁹ The Board noted, for instance, that presently included on college payrolls are 247,000 full-time professors and 263,000 full and part-time nonprofessional employees. *Id.*, 74 L.R.R.M. at 1273.

¹⁰ *Id.*, 74 L.R.R.M. at 1271.

¹¹ *Id.*, 74 L.R.R.M. at 1273.

¹² *Id.*, 74 L.R.R.M. at 1275.

interstate commerce to warrant the assertion of jurisdiction. Determination of a dollar volume standard, the Board stated, would be left for future adjudication.¹³ Later, however, the Board changed its position,¹⁴ and decided to utilize its rule-making powers under the Administrative Procedure Act.¹⁵

In accordance with these procedures, the Board published announcements of its proposed rule in the Federal Register, and invited testimony from interested parties.¹⁶ After evaluating the responses, the Board announced that it would assert jurisdiction in any proceeding arising under Sections 8, 9 and 10 of the Act involving any private non-profit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitations by the grantor, are not available for use for operating expenses) of not less than \$1 million.¹⁷ Under this standard, the Board estimates that eighty percent of all private colleges and universities and ninety-five percent of nonprofessional personnel will be brought under the Act.¹⁸

2. NLRB Jurisdiction over Non-Profit Nursing Homes

In *Drexel Home, Inc.*,¹⁹ decided during the Survey year, the NLRB asserted jurisdiction over a non-profit nursing home. In addition, the Board officially abandoned the non-profit status of an activity as a determining criterion for refusing to assert jurisdiction.

The genesis of the *Drexel* case occurred during the latter part of 1967 when the Drexel employees were organized by the American Federation of State, County and Municipal Employees. The union petitioned the NLRB for certification as the exclusive bargaining agent but the regional director dismissed the petition. On review, the regional director's action was sustained by the Board.²⁰ Both the regional director and the Board justified the dismissal by referring to *University Nursing Homes, Inc.*,²¹ where the Board asserted jurisdiction over a *proprietary* nursing home, but implicitly excluded non-profit establishments.

Following the Board's dismissal of its certification petition, the union filed a complaint in federal district court charging the Board

¹³ Id.

¹⁴ 74 Lab. Rel. Rep. 270 (1970).

¹⁵ 5 U.S.C. § 553 (Supp. V, 1970).

¹⁶ 35 Fed. Reg. 11270 (1970).

¹⁷ 29 C.F.R. § 103.1 (1970).

¹⁸ 186 N.L.R.B. No. 153, 75 L.R.R.M. 1442 (1970) (notice of issuance of rule).

¹⁹ 182 N.L.R.B. No. 151, 74 L.R.R.M. 1232 (1970).

²⁰ For a discussion of the Board's rationale see *AFSCME, Council 19 v. NLRB*, 296 F. Supp. 1100, 69 L.R.R.M. 2275 (N.D. Ill. 1968).

²¹ 168 N.L.R.B. No. 53, 63 L.R.R.M. 1263 (1967).

with arbitrary and discriminatory action. The complaint specifically alleged that the Board illegally distinguished non-profit from proprietary nursing homes. The complaint requested that the court compel the Board to assert jurisdiction. The Board countered the union's complaint with a motion to dismiss.

In a memorandum opinion which was severely critical of the Board position, the district court denied the Board's motion.²² In the text of its opinion, the court considered the nature of the Board's discretionary authority to refuse to assert jurisdiction. It conceded that, under Section 14(c)(1) of the Act, the Board may

decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. . . .²³

The court noted, however, that the Board had already determined in *University Nursing Homes* that this class of employers had a sufficient impact on commerce to warrant an assertion of jurisdiction. The refusal to assert jurisdiction over the Drexel home, therefore, constituted an impermissible discrimination against an entire category of employers within that class.

Rather than contest the matter further, the Board reconsidered its position and announced in *Drexel Homes* that it would entertain the union's petition. In addition, the Board thoroughly repudiated the non-profit status of an activity as a determining jurisdictional factor. The Board stated:

[W]e reject the . . . arguments that an institution's effect on commerce may be measured by its nonprofit status, its title, its religious affiliation, or its occupants. Therefore, . . . we are constrained to agree with the Court that the Employer's nonprofit status is irrelevant and that no proper basis exists for declining the assertion of jurisdiction in this proceeding under the provisions of Section 14(c)(1) of the Act.²⁴

²² 296 F. Supp. 1100, 69 L.R.R.M. 2275. The court conceded that, as a rule, judicial review of Board actions in representation petitions cannot be obtained in a district court. Citing *Fay v. Douds*, 172 F.2d 720, 23 L.R.R.M. 2357 (2d Cir. 1949), however, the court observed that a district court may intervene if the Board action results in plaintiff's denial of a constitutional right. In the present case, the union had complained that the Board's action contravened its statutory right to represent the Drexel employees. The union also asserted that the Board's refusal to assert jurisdiction over non-profit nursing homes, while extending it to proprietary ones, violated Section 2(2) of the Act. 296 F. Supp. at 1104, 69 L.R.R.M. at 2278.

²³ 29 U.S.C. § 164(c)(1) (1964).

²⁴ 182 N.L.R.B. No. 151, 74 L.R.R.M. at 1235.

The decision in *Drexel* is in keeping with the position adopted in *Cornell*; that is, jurisdiction will be asserted or denied on the basis of the impact which the activity in question has on interstate commerce, without regard to the profit status of the employer.

3. NLRB Jurisdiction over Law Firms

While *Cornell* and *Drexel* illustrate the NLRB's willingness to abandon previously enunciated discretionary policies and to assert jurisdiction where circumstances warrant, the Board need not entertain all disputes that arguably fall within its jurisdiction.²⁵ During the Survey year, a trial examiner for the NLRB recommended that the Board exercise its discretionary authority and refuse to assert jurisdiction over a labor dispute involving a law firm.²⁶

The dispute that gave rise to the trial examiner's recommendation involved three secretaries who complained to the NLRB that they had been discharged from a Phoenix, Arizona law firm for engaging in activity allegedly protected under the Act. The firm's motion to dismiss the secretaries' complaint was denied, and the case was placed before the trial examiner. The Board instructed the trial examiner to limit the hearing to the jurisdictional issues involved.

At the hearing, the law firm argued that for a number of reasons it would be improper for the Board to assert jurisdiction. For instance, the firm asserted that the practice of law is local in character, and thus, labor disputes involving lawyers or law firms lack the requisite impact on commerce called for in the Act. The firm also argued that since legal secretaries have access to privileged communications, they are confidential employees and, therefore, should be exempted from the Act. Any other result, the firm urged, would impair the clients' right to effective representation.

The General Counsel countered these arguments by noting that like many others, this particular law firm met the Board's existing jurisdictional standards for non-retail operations.²⁷ Further, the General Counsel alleged that the practice of law can no longer be considered an essentially local enterprise. With respect to the confidential status of the secretaries, the General Counsel stated that their responsibilities did not warrant the use of that term as defined by the Board for purposes of exclusion from the Act.²⁸ It was also contended that assertion

²⁵ 29 U.S.C. § 164(c)(1) (1964).

²⁶ 75 Lab. Rel. Rep. 350, 351 (1970).

²⁷ *Id.*

²⁸ *Pacific Maritime Ass'n*, 185 N.L.R.B. No. 114, 75 L.R.R.M. 1195 (1970), expresses the Board's current definition of "confidential employee" for purposes of exclusion from the provisions of the Act. The definition includes "[o]nly employees who assist and act in a confidential capacity to persons who formulate, determine and effectuate manage-

of jurisdiction would in no way deny clients effective representation. The General Counsel concluded by noting that refusal to assert jurisdiction over law firms would deny thousands of persons the protection afforded by the Act.²⁰

The trial examiner conceded the strength of the arguments advanced by both parties, but was convinced that the possible conflict between the privilege accorded attorney-client communications and the information demands that might be required if law firms were subject to Board jurisdiction outweighed the considerations advanced by the General Counsel. For example, the mere attempt to establish the degree of interstate business in which a firm is engaged could generate a demand for confidential information.⁸⁰ The problems entailed in such possibilities, the trial examiner noted, are magnified by the fact that secretaries and stenographers employed by law firms are considered to be within the scope of the attorney-client privilege. The trial examiner considered these possibilities undesirable and recommended that jurisdiction be declined.

B. District Court Jurisdiction to Order Decertification Election

In *Templeton v. Dixie Color Printing Co.*,¹ a United States District Court determined that it had jurisdiction to order the NLRB to conduct a decertification election. The employees' petition for the election had been held in abeyance for over two years solely because of the Board's "blocking charge" rule. Under this rule, the Board will take no action on matters pertaining to representation so long as there are unfair labor practice charges pending against the employer.²

ment labor relations policies affecting directly the Employer's own employees." 185 N.L.R.B. No. 114, 75 L.R.R.M. at 1196.

²⁰ 75 Lab. Rel. Rep. at 351.

⁸⁰ In order to establish that a given firm has met the Board's jurisdictional standards, it might be necessary to disclose information pertaining both to the identity of an attorney's clients and the size of his fee.

¹ 313 F. Supp. 105, 74 L.R.R.M. 2206 (N.D. Ala. 1970), motion to dismiss and motion for summary judgment denied, 313 F. Supp. 105, 74 L.R.R.M. 2319 (N.D. Ala. 1970).

² The "blocking charge" rule, which the Board relied upon to justify its failure to process the employees' petition, is contained in Appendix B of the Board's *Field Manual*: The [NLRB] has a general policy of not proceeding in any representation cases . . . or union deauthorization case . . . where charges of unfair labor practices affecting some or all of the same employees are concurrently pending and where the charging party is a party to the . . . case.

.....
The pendency of a charge, as used here, includes all stages in the life of a charge up to and including a dismissal, on the one hand; or, on the other, up to and including a court decree with which there has not been full compliance.

Section 11730 of NLRB *Field Manual* as cited by the court at 313 F. Supp. at 107, 74 L.R.R.M. at 2208.

The events leading up to *Templeton* began in late 1964 when the International Typographical Union (ITU) demanded recognition on the basis of signed authorization cards. The company refused and the union called a strike. The strike failed to induce the employer to grant recognition, but it did generate employer unfair labor practices that led to the issuance of a card-based bargaining order. The order was enforced³ and negotiations commenced. When the negotiations failed to produce agreement, the union filed additional unfair labor practice charges with the Board, and petitioned for the institution of contempt proceedings against the company.

In early 1968, a number of Dixie employees who were not union members filed a decertification petition. The Board, however, refused to act on this petition because of the unresolved unfair labor practice charges against employer. The employees then filed a class action in federal district court, alleging that the Board's refusal to process the decertification petition deprived them of their statutory rights under both the Labor Management Relations Act⁴ and the Administrative Procedure Act.⁵ The Board responded to the complaint by moving to dismiss the action for want of jurisdiction. The court, however, determined that the jurisdictional criteria set forth by the Supreme Court in *Leedom v. Kyne*⁶ had been met, and, therefore, denied the Board's motion.

Under *Leedom*, a district court can entertain a suit involving the NLRB if there has been unlawful Board action that has inflicted an injury upon the plaintiff for which the law, apart from the review provision of the Act, affords a remedy.⁷ Addressing itself to the first of these criteria, the *Templeton* court found that there could be no doubt that the Board's action was both unlawful and the cause of injury to the plaintiff. Section 9(c)(1) of the Act, the court noted, accords employees a statutory right to a decertification election.⁸ This

³ *International Typographical Union v. NLRB*, 371 F.2d 347, 63 L.R.R.M. 2534 (D.C. Cir. 1966).

⁴ 29 U.S.C. § 141 et seq. (1964).

⁵ 5 U.S.C. § 551 et seq. (Supp. V, 1970).

⁶ 358 U.S. 184 (1958).

⁷ *Id.* at 188.

⁸ 29 U.S.C. § 159(c)(1) (1964). This section provides in pertinent part:

(1) 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 . . . (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 [the Act];

[T]he Board shall investigate such petition and if it has reasonable cause

right had been denied for over two years solely because of a Board rule issued unilaterally by the General Counsel pursuant to the authority conveyed by Section 3(d) of the Act⁹ to establish "instructions" for "guidance" purposes.¹⁰ The court emphasized the limited effect that should be given the rule by pointing out that the Board itself did not consider the blocking charge "instruction" to be of any legal significance.¹¹

Because of the severe substantive effects of the blocking charge rule on employees' rights generally, the *Templeton* court made it clear that the Board should have adhered to the rule-making procedures of the Administrative Procedure Act in its formulation. Adopting the rationale of the Supreme Court in *NLRB v. Wyman-Gordon Co.*,¹² the *Templeton* court noted that the rule-making procedures of the Administrative Procedure Act were intended to assure fairness and mature consideration by administrative agencies when formulating rules of general application. Therefore, there was "no warrant in law" for the Board's utilization of an internally generated rule or 'instruction' to deprive [the] plaintiffs of their statutory rights."¹³

The court next addressed itself to the second part of the *Leedom* test and noted that Section 10 of the Administrative Procedure Act conferred jurisdiction upon district courts for the purpose of compelling agencies to perform functions which were "unlawfully withheld or unreasonably delayed."¹⁴ Concluding that two years was adequate time for the Board to have disposed of the unfair labor practice charges and to conduct a decertification election, the court found that the failure to do so, or even to indicate that it had any inclination to do so, clearly established the type of recalcitrance at which section 10 was directed.

While the analysis offered in *Templeton* provides a persuasive argument for requiring the Board to give priority to representation matters, the rationale behind the "blockage rule" also should be considered. The Board attempts to conduct elections under laboratory conditions. Unremedied unfair labor practices may very well interfere with those laboratory conditions. Thus, in one respect, it is important that the Board dispose of the unfair labor practice charges. On the other hand, in a case such as *Templeton*, where the incumbent union

to believe that a question of representation . . . exists, it shall direct an election by secret ballot and shall certify the results thereof. (Emphasis added.)

⁹ 29 U.S.C. § 153(d) (1964).

¹⁰ There was no dispute regarding the employees' compliance with the prerequisites for a valid decertification petition. 313 F. Supp. at 111, 74 L.R.R.M. at 2211.

¹¹ *Id.*

¹² 394 U.S. 759 (1969).

¹³ 313 F. Supp. at 112, 74 L.R.R.M. at 2212.

¹⁴ 5 U.S.C. § 706(1) (Supp. V, 1970).

has achieved its recognized status through a card-based bargaining order, and thus has never been subjected to a secret ballot test of employee support, undue delay in processing a decertification petition may well do a disservice to the employees. Perhaps, as the district court suggests in *Templeton*, resort to the rule-making procedures of the Administrative Procedure Act will lead to an effective compromise.

II. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. *Authority of Regional Director to Determine Appropriate Bargaining Unit*

Section 9 of the Labor Management Relations Act¹ sets out the powers and obligations of the NLRB in representation disputes. Under this section, whenever a representation petition is filed, the Board must investigate and, if it appears that a valid dispute exists, schedule a hearing on the matter.² The hearing may be conducted by an officer or employee of a regional office, but according to section 9(c)(1), his function is limited to compiling a record of the proceedings to be forwarded, without comment, to the Board for final disposition.³

In 1959, however, Congress amended Section 3(b) of the Act⁴ to permit the Board to delegate to regional directors certain powers previously exercised only by the Board. This amendment specifically included the power

to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot . . . and certify the results thereof ⁵

In *Magnesium Casting Co. v. NLRB*,⁶ decided during the Survey year, the Supreme Court resolved a conflict between the First and Second Circuits over the scope of the regional directors' powers under section 3(b). The narrow issue was whether a regional director's unit determinations are subject to mandatory plenary review by the Board. A unanimous Court held that they were not.

The dispute in *Magnesium Casting* concerned three employees whom the company claimed were supervisors under Section 2(11) of the Act, and thus excludable from the bargaining unit. The regional

¹ 29 U.S.C. § 159 (1964).

² 29 U.S.C. § 159(c)(1) (1964).

³ *Id.*

⁴ 29 U.S.C. § 153(b) (1964).

⁵ *Id.*

⁶ 401 U.S. 137 (1971).

director, acting pursuant to a designation of authority from the Board, found the three to be properly within the unit. The employer asked the Board to review the regional director's findings, but its petition was denied. An election was held and the union was certified as the exclusive bargaining representative of the employees.

Thereupon the employer invited an unfair labor practice charge by refusing to bargain with the newly certified union. Relying on a Second Circuit decision, *Pepsi-Cola Buffalo Bottling Co. v. NLRB*,⁷ the company claimed that the Board could not find an unfair labor practice based upon a regional director's representation determination without first granting plenary review. The Board rejected the company's arguments and, noting that it disagreed with the *Pepsi-Cola* decision, found a violation of section 8(a)(5) and issued a bargaining order. The First Circuit enforced the order.⁸

In affirming the Board and the First Circuit, the Supreme Court noted that in *Pittsburgh Plate Glass Co. v. NLRB*⁹ it had held that matters once fully litigated before the Board in a representation proceeding could not be relitigated in an unfair labor practice proceeding.¹⁰ Therefore, the sole issue in *Magnesium Casting* concerned the power of the Board to delegate to regional directors the authority to make such final determinations.

Justice Douglas, speaking for the Court, noted that the legislative history of the 1959 amendment indicated that Congress intended to utilize the regional directors' expertise concerning unit determinations to lighten the Board's workload and to expedite its processes. If it were not for the 1959 amendment, Justice Douglas pointed out, the Board would have to decide the almost two thousand representation cases per year that were currently disposed of by regional directors.¹¹ Justice Douglas concluded that Congress had made a clear choice, and under section 3(b) the Board need exercise only discretionary review of the determinations of the regional director.

B. *Recognition Without Election*

1. *The Law Before Gissel*

A fundamental element of a union organizational drive is the solicitation of signed statements from employees authorizing the

⁷ 409 F.2d 676, 70 L.R.R.M. 3185 (2d Cir. 1969).

⁸ 427 F.2d 114, 74 L.R.R.M. 2234 (1st Cir. 1970).

⁹ 313 U.S. 146 (1941).

¹⁰ *Pittsburgh Plate Glass* was decided before the 1959 amendment of section 3(b).

¹¹ Justice Douglas noted that of 1,999 representation decisions issued in fiscal 1969, 1,872 were rendered by regional directors and 127 by the Board. 401 U.S. at 142.

union to act as their exclusive bargaining agent. Acquisition of authorization cards from thirty percent of the employees in an appropriate unit permits the union to petition the NLRB for a representation election.¹ If the union is successful in the representation election, the Board will certify it as the exclusive representative of the employees, and will instruct the employer to commence bargaining.² A Board-conducted election, however, is not the only procedure available to a union which is attempting to establish a bargaining relationship with an employer. A union instead may solicit authorization cards from a majority of the employees in the proposed bargaining unit, present these cards to the employer as evidence of the employees' sentiment, and request immediate recognition as the exclusive bargaining representative. The statutory authority for this method of acquiring recognition is found in Section 8(a)(5) of the Act.³ This section obligates the employer to bargain with the representative of his employees subject to the provisions of section 9(a).⁴ Section 9(a) requires that the representative shall be selected by a majority of the employees, but does not require Board certification.

A closely supervised Board election is concededly the preferable procedure for assessing employee sentiment.⁵ Consequently, employers faced with a card-based demand for recognition are often reluctant to grant immediate recognition to the union, and instead prefer to wait until the union is certified following a Board-conducted election.

The Board itself prefers the election procedure as a means of ascertaining employees' representation desires, and, as a rule, will not accept authorization cards as evidence of a union's majority status.⁶ Nonetheless, on occasion the Board will forego an election in favor of a card check. If the card check reveals that a majority of the employees in the unit have designated the union as their representative, the Board will order the employer to commence bargaining.⁷

Because the accurate determination of a union's majority status is of vital concern to employees and employers alike, it would seem that the Board would resort to the concededly inferior card check method only in limited and clearly defined circumstances. Unfortunately, this has not been the case. During the past two decades, the NLRB has issued card-based bargaining orders in a manner that has

¹ See 29 C.F.R. § 101.18 (1970).

² 29 U.S.C. § 159(c) (1964).

³ 29 U.S.C. § 158(a)(5) (1964).

⁴ 29 U.S.C. § 159(a) (1964).

⁵ See, e.g., *Aaron Bros. Co.*, 158 N.L.R.B. No. 108, 62 L.R.R.M. 1160 (1966).

⁶ *Id.*

⁷ See discussion at pp. 1039-45 *infra*.

generated confusion, discontent and litigation.⁸ By 1969, the Board's practices had even led to a sharp split among the courts of appeals.⁹

In *NLRB v. Gissel Packing Co.*,¹⁰ the Supreme Court reviewed the practice of issuing card-based bargaining orders and resolved the circuit conflict in favor of the Board. It was hoped the *Gissel* decision at last would clarify the uncertainty in this area of labor law. However, during the Survey year, a number of decisions of the Board and the courts of appeals indicated that *Gissel* has not provided the harmony that was anticipated. In some cases, the Board and the courts differed markedly in their interpretation of *Gissel*. The NLRB seems to be of the opinion that it retains the same prerogatives that it had prior to this decision of the Supreme Court. The courts of appeals, on the other hand, are not so willing to read *Gissel* as a *carte blanche* affirmation of Board discretion in the authorization card area. This discussion will trace the development of the Board's policy toward card-based bargaining orders up to and including *Gissel*, and will analyze the recent decisions of the Board and courts in an attempt to define the present areas of conflict.

For many years, the NLRB's policy toward card-based bargaining orders focused upon the employer's frame of mind when he rejected the union's recognition demand. If the employer maintained a "good faith doubt" that the union actually represented the majority of the employees, the Board would permit him to test his doubts in an election.¹¹ If, however, the initial refusal to bargain was predicated upon "bad faith," the Board would resort to the authorization cards. In *Joy Silk Mills v. NLRB*,¹² the Court of Appeals for the District of Columbia described the Board's position as follows:

[A]n employer may refuse recognition to a union when motivated by a good faith doubt as to that union's majority status. . . . When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority; the refusal is no longer justifiable and constitutes a violation

⁸ For an excellent discussion of the litigation that has arisen due to the Board's issuance of card-based bargaining orders, see Comment, Union Authorization Cards, 75 Yale L.J. 805 (1966).

⁹ Affirming the Board's policy was *NLRB v. Sinclair Oil*, 397 F.2d 157, 68 L.R.R.M. 2720 (1st Cir. 1968). Opposing the Board's policy were *NLRB v. Gissel Packing Co.*, 398 F.2d 336, 68 L.R.R.M. 2636 (4th Cir. 1968); *NLRB v. Heck's Inc.*, 398 F.2d 337, 68 L.R.R.M. 2638 (4th Cir. 1968); *General Steel Prods., Inc. v. NLRB*, 398 F.2d 339, 68 L.R.R.M. 2639 (4th Cir. 1968).

¹⁰ 395 U.S. 575 (1969).

¹¹ *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 1-A L.R.R.M. 585 (2d Cir.), cert. denied, 304 U.S. 576 (1938).

¹² 185 F.2d 732, 27 L.R.R.M. 2012 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951).

of the duty to bargain set forth in section 8(a)(5) of the Act.¹³

The doctrine advanced in *Joy Silk Mills* was applied by the Board to two types of cases.¹⁴ The first featured conduct by the employer, contemporaneous with the initial refusal to bargain, that tended to establish bad faith. For example, the employer might refuse even to consider the union's card offering,¹⁵ or, as in the case of *Fred Snow & Sons*,¹⁶ the employer might agree to be bound by a card check, but then renege and insist upon an election when the results of the check substantiate the union's claim.

In the second class of cases, the Board would look to employer conduct *subsequent* to the initial refusal to bargain. If the Board determined that there were violations of sections 8(a)(1) or 8(a)(3), it would draw an inference that the prior refusal to bargain was not due to a good faith doubt of the union's majority, but was merely a delaying tactic to give the employer time to undermine the union's majority status.¹⁷

The Board's application of the *Joy Silk* doctrine left employers faced with card-based recognition demands, yet who still desired a Board-conducted certification election, in a rather precarious position. Failure to consent to a card check could be construed as a sign of bad faith, and thus lead to a bargaining order. On the other hand, if a card check were conducted, the employer would be bound by the result. Furthermore, if the employer questioned any of the employees in order to verify that the cards accurately reflected their wishes, his actions might be construed as unlawful interrogation in violation of section 8(a)(1). This in itself could give rise to a bargaining order under *Joy Silk*.¹⁸ Compounding the employer's dilemma was the fact that the *Joy Silk* test operated as a per se rule.¹⁹ That is, any unfair labor practice, however slight, committed by an employer, gave rise to an inference that the refusal to bargain was in bad faith.²⁰

Bargaining orders issued under the *Joy Silk* doctrine often gave

¹³ Id. at 741, 27 L.R.R.M. at 2018.

¹⁴ For a thorough discussion of the Board's application of the *Joy Silk* doctrine see Comment, Union Authorization Cards, 75 Yale L.J. 805, 810 (1966).

¹⁵ See, e.g., *NLRB v. C.J. Glasgow Co.*, 356 F.2d 476, 61 L.R.R.M. 2406 (7th Cir. 1966).

¹⁶ 134 N.L.R.B. No. 57, 49 L.R.R.M. 1228 (1961), enforced, 308 F.2d 687, 51 L.R.R.M. 2199 (9th Cir. 1962).

¹⁷ See, e.g., *New England Liquor Sales Co.*, 157 N.L.R.B. No. 16, 61 L.R.R.M. 1315 (1966).

¹⁸ *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 66 L.R.R.M. 2596 (4th Cir. 1967).

¹⁹ See Comment, Union Authorization Cards, 75 Yale L.J. 805, 814 (1966).

²⁰ Id.

rise to litigation. Especially subject to criticism were bargaining orders predicated upon an inference of bad faith drawn from the employer's unfair labor practices. In *Aaron Bros. v. NLRB*,²¹ the Board modified the *Joy Silk* doctrine. Under this new policy, only the more serious unfair labor practices—those that tended to undermine the union's majority—would result in a bargaining order.

A prerequisite to the finding of a violation of section 8(a)(5), and to the issuance of a bargaining order, is a determination by the Board that the cards actually established that the union represents a majority.²² In making this determination, the Board will discount any cards found to have been obtained through fraud or coercion.²³ Even where the cards are concededly uncoerced, there remains some question as to the subjective motivation of the employee in signing. This stems from the fact that an employee may have thought that he was contributing merely toward the thirty percent showing needed to secure a Board election.²⁴

For a number of years, the Board was receptive to any evidence supporting a charge that contested cards were signed for the limited purpose of securing an election. Upon an offering of such evidence the disputed cards would not be included when deciding the union's majority status.²⁵ The present Board policy, which was announced in *Cumberland Shoe Corp.*,²⁶ is considerably less discriminating. Under *Cumberland*, any card which on its face authorizes the union to act as bargaining representative for the signer will not be discounted unless it is established that the signer was told that the sole purpose of the card was to seek an election.²⁷ This sole purpose test, however, is rather severe in that it does not pursue the subjective intent of the card signer. The Board, however, has cautioned trial examiners against too mechanical an application of the *Cumberland* rule. At all times, the Board emphasizes, trial examiners should endeavor to assure employee free choice.²⁸

The *Joy Silk* and *Cumberland* decisions received considerable

²¹ 158 N.L.R.B. No. 108, 62 L.R.R.M. 1160 (1966).

²² The duty to bargain does not arise unless the union is the majority representative. But see *J. P. Stevens v. NLRB*, — F.2d —, 76 L.R.R.M. 2817 (5th Cir. 1971), where the Board issued a bargaining order as a remedy for an employer's "egregious" unfair labor practices. Granting enforcement, the court of appeals stated that the order was warranted even if the union never attained majority status.

²³ *Cumberland Shoe Corp.*, 144 N.L.R.B. No. 124, 54 L.R.R.M. 1233 (1963).

²⁴ The issue of the employees' subjective intent becomes more complex when ambiguous authorization cards are used, i.e., cards that indicate that they may be used both to gain an election and to designate the signer's bargaining representative.

²⁵ *Englewood Lumber Co.*, 130 N.L.R.B. 48, 47 L.R.R.M. 1304 (1961).

²⁶ 144 N.L.R.B. No. 124, 54 L.R.R.M. 1233 (1963).

²⁷ *Id.*, 54 L.R.R.M. at 1233.

²⁸ *Levi Strauss & Co.*, 172 N.L.R.B. No. 57, 68 L.R.R.M. 1338 (1968).

criticism from the courts²⁹ and from law review commentators.³⁰ In *Gissel Packing Co. v. NLRB*, the Supreme Court attempted to clarify the law regarding card-based bargaining orders. In *Gissel*, the Court consolidated for decision three opinions from the Fourth Circuit, and a conflicting opinion from the First Circuit.³¹ In each of these cases, the union presented to the employer authorization cards which purportedly established that a majority of the unit employees had designated the union as their representative. Without exception, the employers refused to recognize the unions and countered with intensive anti-union campaigns. In the course of the anti-union drives, the employers engaged in conduct which the unions alleged violated Sections 8(a)(1) and 8(a)(3) of the Act. In two of the cases, the union also charged the employers with violating section 8(a)(5), and sought immediate recognition through a 10(c) bargaining order. The other two unions proceeded to election and were defeated. They too then alleged section 8(a)(5) violations and requested bargaining orders. In each case, the Board found in favor of the union, and ordered the employers to engage in collective bargaining upon request. The employers refused, and the four cases were appealed to the respective circuits. The First Circuit accepted the Board's assertion that the 8(a)(1) and 8(a)(3) violations warranted the finding of an 8(a)(5) violation, and the issuance of the bargaining order. The Fourth Circuit, however, cited to the rationale of *NLRB v. S.S. Logan Packing Co.*,³² and denied enforcement of the bargaining order. In *S.S. Logan*, the Fourth Circuit decided that authorization cards were inherently unreliable as an indication of employee wishes, and thus could not give rise to a duty to bargain.³³ Therefore, the court concluded that a bargaining order could not properly be issued on a card majority.

The Supreme Court, in *Gissel*, specifically reversed the Fourth

²⁹ See *S.S. Logan Packing Co.*, 386 F.2d 562, 66 L.R.R.M. 2596 (4th Cir. 1967); *Engineers & Fabricators, Inc. v. NLRB*, 376 F.2d 482, 64 L.R.R.M. 2849 (5th Cir. 1967) (enforcement denied).

³⁰ There have been a number of comprehensive treatments of the Board's pre-*Gissel* authorization card policy. Articles critical of the policy include: Browne, *Obligation to Bargain on Basis of Card Majority*, 3 Ga. L. Rev. 334 (1969); and Comment, *Union Authorization Cards*, 75 Yale L.J. 805 (1966). Articles more receptive to the Board's policy are: Lesnick, *Establishment of Bargaining Rights Without an Election*, 65 Mich. L. Rev. 857 (1967); Welles, *The Obligation to Bargain on the Basis of a Card Majority*, 3 Ga. L. Rev. 349 (1969); and Comment, *Union Authorization Cards: A Reliable Basis for an NLRB Order to Bargain?*, 47 Texas L. Rev. 87 (1968).

³¹ See note 9 supra.

³² 386 F.2d 562, 66 L.R.R.M. 2596 (4th Cir. 1967).

³³ In arriving at this conclusion, Judge Haynsworth, speaking for the court, noted that unions successful in obtaining authorization cards from 30 to 50% of the employees won only 19% of the elections; those holding cards from 50 to 70%, won 48% of the elections; those holding cards from over 70% won 74% of the elections. *Id.* at 565, 66 L.R.R.M. at 2598.

Circuit and affirmed the Board's current policy on authorization card-based bargaining orders. In arriving at its decision, the Court did not look to the *Joy Silk-Aaron Bros.* doctrine previously employed by the Board, but instead relied upon a new policy. Under the Board's new policy, the Court noted, the *Joy Silk* doctrine was virtually abandoned and now

an employer's good faith doubt is largely irrelevant, and the key to the 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.³⁴

The Court interpreted this policy as meaning that an employer could respond to a union's card-based recognition demand with a simple "no comment" and, regardless of his subjective motivation, insist upon an election. The Court qualified this interpretation, however, by noting that under the new policy the Board would not tolerate a refusal to bargain where the employer had *actual* knowledge of his employees' support for the union.³⁵

With this policy in mind, the Court addressed itself to the long-questioned issues presented in *Gissel*. Initially, the Court stated that a valid bargaining relationship could be effectuated through procedures other than a Board-conducted election.³⁶ Citing its decision in *United Mine Workers v. Arkansas Oak Flooring Co.*,³⁷ the Court emphasized that when there is no "bona fide dispute" as to the union's majority, a duty to bargain arises. Thus, a refusal to fulfill this obligation is a violation of section 8(a)(5) that may be remedied by a bargaining order.³⁸

The Court also held, contrary to the position taken by the Fourth Circuit, that authorization cards are not "inherently unreliable" as indicia of employee desires.³⁹ Therefore, the Court agreed with the Board that when the election process has been interfered with, a card check might be the only way of determining employee choice.⁴⁰ Thus, *Gissel* clearly and specifically decided that a duty to bargain can arise without a Board election, and that union authorization cards solicited

³⁴ 395 U.S. at 594.

³⁵ *Id.* The Court considered *Fred Snow & Sons* to be that type of case.

³⁶ In *S.S. Logan*, the Fourth Circuit had advanced the argument that the 1947 Taft-Hartly Amendments, which provided that an election was necessary prior to Board certification, precluded bargaining orders based upon authorization cards.

³⁷ 351 U.S. 62 (1956).

³⁸ 395 U.S. at 597-98.

³⁹ *Id.* at 601-04.

⁴⁰ *Id.* at 602. The Court's affirmation of the use of authorization cards was limited to situations in which the cards themselves were not ambiguous, and clearly stated that they were to designate the union as representative. 395 U.S. at 606.

in accordance with the Board's standards are reliable to provide an alternate route for determining majority status.

The controversial portions of the *Gissel* opinion concern those situations in which the Board, by issuing a 10(c) bargaining order, may compel an employer to bargain with an uncertified union. In oral argument the Board explained its policy to mean that a bargaining order would issue where the employer had committed "independent and substantial unfair labor practices disruptive of election conditions," or where the employer had actual knowledge of the union's status from sources independent of authorization cards.⁴¹ However, because all of the cases consolidated in *Gissel* involved unfair labor practices, the Court chose to address itself only to the former issue.⁴²

The Court pointed out that both the Board and the lower courts were in agreement that "exceptional" cases, marked by 'outrageous' and 'pervasive' unfair labor practices," can validly give rise to a bargaining order.⁴³ The Court went so far as to indicate that where the violations were so coercive that they could not be remedied, a bargaining order would be appropriate, although the union had *never* acquired majority support.⁴⁴ The heart of the *Gissel* decision, however, is contained in its analysis of the Board's powers in cases involving less serious unfair practices. On this issue, the Court stated:

The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehaviour. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effect of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present is slight and that employee

⁴¹ See discussion at p. 1043 *supra*.

⁴² 395 U.S. at 601 n.18.

⁴³ *Id.* at 613.

⁴⁴ *Id.*

sentiment once expressed through cards would on balance, be better protected by a bargaining order, then such an order should issue.⁴⁵

The *Gissel* Court emphasized that there exists another category of cases involving minor unfair labor practices that have little effect on the election process. In these cases, a bargaining order is inappropriate.⁴⁶

It would seem apparent from the above analysis that the Court prefers the election procedure, and approves of resorting to cards only where a fair election cannot be assured. It is also clear that the Court has left this determination to the NLRB.⁴⁷ In its discussion of the Board's authority to issue bargaining orders the Court gave no indication as to what specific factors, if any, the Board should consider when evaluating the lingering effect of an employer's unfair practices on the electoral atmosphere. The absence of such a clearly defined standard has generated much of the post-*Gissel* litigation.

2. The Law After *Gissel*

In *NLRB v. American Cable Systems, Inc.*,⁴⁸ the Court of Appeals for the Fifth Circuit refused to enforce a bargaining order issued by the Board because of the Board's alleged failure to adhere to the Supreme Court's decision in *Gissel*. The events upon which the bargaining order was predicated occurred in 1965. The employer, American Cable, operated a community antenna television business in Mississippi with seven employees and a general manager. The union contacted the employer and requested immediate recognition as the employees' exclusive bargaining representative. It offered to prove its majority status by a show of authorization cards. The employer denied the union's request and commenced activities that the Board found violated sections 8(a)(1) and 8(a)(3).⁴⁹ These violations, to-

⁴⁵ Id. at 614-15.

⁴⁶ Id. at 615.

⁴⁷ According to the Fourth Circuit, bargaining orders are unduly harsh remedies in this type of situation because "in the great majority of cases a cease and desist order, with the posting of appropriate notice" would expunge the effects of unfair labor practices and permit a fair election. *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 570, 66 L.R.R.M. 2596, 2603 (4th Cir. 1967). The Supreme Court, however, observed that the NLRB, and not the courts, should evaluate the effects on the election process of unfair labor practices. In fashioning its remedies under section 10(c), the Court continued, the Board "draws on a fund of knowledge and expertise all its own" Consequently, its determinations are to be accorded special respect by reviewing courts. 395 U.S. at 612 n.32.

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

⁴⁹ *American Cable Sys. Inc.*, 161 N.L.R.B. No. 28, 63 L.R.R.M. 1296 (1966). In *American Cable*, the employer violated § 8(a)(1) by interrogating employees about their union affiliation, by suggesting that they form a company union, and by promising

gether with the fact that the union possessed valid cards from the majority, caused the Board to find that the employer's refusal to bargain was in bad faith, and, therefore, in violation of section 8(a)(5). Accordingly, the Board issued an order requiring American Cable to bargain with the union on request.⁵⁰

The company refused to comply with the order, and the Board petitioned the Court of Appeals for the Fifth Circuit for enforcement.⁵¹ The court determined that the employer had violated sections 8(a)(1) and 8(a)(3), but refused to endorse the Board's finding of a section 8(a)(5) violation because it was phrased in terms of good or bad faith, instead of the standard set forth in *Gissel*.⁵² Accordingly, the court remanded the case to the Board for further findings in accordance with the *Gissel* standards.

The Board responded by affirming its prior ruling.⁵³ In arriving at this decision, however, the Board did not rely upon its earlier finding that American Cable had acted in bad faith. Instead, it found that the violations of sections 8(a)(1) and 8(a)(3) were so egregious and pervasive that a bargaining order was warranted. The Board also found that by engaging in the unfair labor practices the employer had undermined the union's majority, and thus made an election a less reliable method of ascertaining employee sentiment than a check of authorization cards.⁵⁴

The Board again petitioned for enforcement, and once again the court of appeals remanded for a determination of the precise nature of the *present* election atmosphere.⁵⁵ The court took this action because upon the previous remand, the Board had refused to consider evidence offered by the American Cable Company proving that there had been a complete turnover of employees since the 1965 unfair labor practices, and that the only management official involved in the incident

benefits and threatening reprisals. Section 8(a)(3) was violated when two employees were discharged after admitting their union affiliation.

⁵⁰ *Id.*, 63 L.R.R.M. at 1298.

⁵¹ *NLRB v. American Cable Sys., Inc.*, 414 F.2d 661, 71 L.R.R.M. 2979 (5th Cir. 1969).

⁵² *Id.* at 663, 71 L.R.R.M. at 2980.

⁵³ *American Cable Sys., Inc.*, 179 N.L.R.B. No. 149, 72 L.R.R.M. 1524 (1969).

⁵⁴ *Id.*

⁵⁵ *NLRB v. American Cable Sys., Inc.*, 427 F.2d 446, 73 L.R.R.M. 2913 (5th Cir. 1970). The court's opening remarks indicated its displeasure with the Board's disposition of the previous remand:

In the first act of what we trust will be only a two-act play and not a drama of Shakespearian proportions, we remanded this case to the National Labor Relations Board for additional findings in light of *NLRB v. Gissel Packing Co.* [We have] determined that these findings of the Board are still insufficient under the teachings of *Gissel* to justify a bargaining order

Id.

had departed. The company argued that these factors indicated that a free election could now be held.

In finding the refusal of the Board to consider this evidence improper, the court distinguished *American Cable* from *NLRB v. L.B. Foster Co.*⁵⁶ which held it to be inappropriate for an appellate court to consider developments which occur between the issuance of a bargaining order and the enforcement proceedings. The *Foster* case, the court noted, did not involve a remand for additional findings, whereas *American Cable* did.

The *American Cable* court also refused to follow precedent holding that developments such as loss of union majority occurring subsequent to an unfair labor practice do not warrant denying enforcement of Board orders.⁵⁷ Justification for this practice is based upon the belief that the unlawful refusal of an employer to bargain with the representative of his employees "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions."⁵⁸ Therefore, the loss in the union's majority might be the direct result of the employer's wrongful conduct, and any consideration given to the change in status would permit the employer to benefit from his wrongful refusal to bargain.⁵⁹

The court in *American Cable* expressed the opinion that this reasoning was inapplicable due to the policy espoused by the Supreme Court in *Gissel*. According to the Fifth Circuit, *Gissel* placed card-based bargaining orders in a special category. They were now

an extraordinary remedy available to the Board to overcome the polluting effects of the employer's unfair labor practices on the electoral atmosphere. The order is not a traditional punitive remedy, but is a therapeutic one. It is not, therefore, the type of remedy which is automatically entitled to enforcement at any time after the occurrence of the unfair labor practice. . . . On the contrary, the Supreme Court indicated that an open free election rather than a bargaining order is the preferred remedy if such an election is possible. We think it clear from the foregoing that the Court in *Gissel* clearly contemplated that no bargaining order should be issued unless at the time the Board issues such an order it finds the electoral atmosphere unlikely to produce a fair election.⁶⁰

⁵⁶ *NLRB v. L.B. Foster Co.*, 418 F.2d 1, 72 L.R.R.M. 2736 (9th Cir. 1969).

⁵⁷ *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563 (1950); *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944).

⁵⁸ 321 U.S. at 704.

⁵⁹ *Id.*

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

It was for the purpose of determining the current electoral atmosphere that the Fifth Circuit had remanded the case initially. The Board, however, merely applied the *Gissel* standards to the electoral atmosphere as it existed in 1965—a response the court viewed as a “litany, reciting conclusions by rote without factual explication.”⁶¹

The Board issued its response to the Fifth Circuit’s interpretation of *Gissel* in its decision in *Gibson Products Co.*⁶² In *Gibson*, the Board, after a consideration of *American Cable*, stated, “[w]e respectfully disagree. In our view, the holding of the court misconceives the rationale of the *Gissel* decision. . . .”⁶³ The Board noted that adoption of the *American Cable* rationale would unduly limit the situations in which bargaining orders might issue. According to the Board, the validity of determining the need for a bargaining order by an analysis of the electoral atmosphere as it existed at the time of the unfair labor practice, is evidenced by the Supreme Court’s affirmation, “without qualification,” of the principle that a union’s loss of majority status between the time of the unfair labor practice and Board’s decision will not render an order inappropriate.⁶⁴ The Board was also of the opinion that the Court in *Gissel* had rejected what appeared to be the underlying consideration of the *American Cable* decision. That is, that the imposition of a bargaining order when the employees may no longer desire the union is an unduly harsh remedy that works to the detriment of their section 7 rights.⁶⁵ The Board pointed out that in *Gissel* the Court stated that “a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct.”⁶⁶

It appears from *Gibson* that the Board considers a union to be vested with an absolute right to a card-based bargaining order if *at any time* an employer’s unfair labor practices become serious enough

⁶¹ Id.

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

⁶³ Id., 75 L.R.R.M. at 1056.

⁶⁴ Id. The Board cited from *Gissel*:

We have long held that the Board . . . has authority to issue a bargaining order without requiring the union to show that it has been able to maintain its majority. . . . [T]he Board has the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. *NLRB v. Gissel Packing Co.*, 395 U.S. at 610.

⁶⁵ Id. Section 7 also guarantees to employees the right to refrain from union activity. In *American Cable*, the court of appeals seemed to be alluding to this when it concluded its decision by stating:

Since *Gissel* teaches us that authorization cards are not as trustworthy as ballots all concerned must be particularly careful lest the principles of majoritarianism in union representation be unnecessarily frustrated by the cavalier use of bargaining orders.

NLRB v. American Cable Sys., Inc., 73 L.R.R.M. 2913, 2914-915 (1970).

⁶⁶ 185 N.L.R.B. No. 74, 75 L.R.R.M. at 1056.

to cloud the outcome of an election. Although this interpretation may seem to conflict with the language in *Gissel* which instructs the Board to use its "traditional remedies" to erase the effects of past practices, it is submitted that it is in keeping with *Gissel's* rationale. For if an employer's unfair practices are so severe that, at the time they are committed, they cannot be corrected by the traditional Board remedies, valid authorization cards then become the best source for ascertaining employee sentiment. The fact that it takes some time for the Board to process the action should not change this fact any more than would Board delay in counting the ballots cast in an election.

In *Gissel*, the Supreme Court noted that the propriety of a bargaining order in cases not involving egregious unfair labor practices would depend upon whether the Board found that these lesser unfair labor practices were, nonetheless, serious enough to make it unlikely that they could be offset by traditional remedies and thus permit a fair election.⁶⁷ The Court also emphasized that "[i]t is for the Board and not the courts . . . to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity."⁶⁸ During the Survey year three circuits dissented from the finality of Board determination in this type of case. The Second and Eighth Circuits rejected completely a Board finding that employer unfair labor practices interfered with the election process, and refused to enforce the bargaining orders;⁶⁹ the Seventh Circuit, although granting enforcement of the Board's bargaining order, ordered modification of the Board's order to include notice to employees that they could petition independently for a new election.⁷⁰

In *Drives, Inc.*,⁷¹ the Board set aside a consent election, wherein the union had been defeated, on the grounds that the employer's unfair labor practices influenced the outcome.⁷² The Board also determined that the employer's misconduct was so prejudicial to the union that a fair election could not now be conducted, and, therefore, issued a bargaining order. On petition for enforcement, the court of appeals expressed dissatisfaction with the initial finding by the Board that the employer's misconduct contributed to the union defeat. The court suggested that valid arguments advanced by the employer in opposition to the union, rather than the unfair labor practices, may have induced the employees to vote against the union.⁷³ Accordingly, the court re-

⁶⁷ 395 U.S. at 614.

⁶⁸ *Id.* at 612 n.32.

⁶⁹ *NLRB v. General Stencils, Inc.*, 438 F.2d 894, 76 L.R.R.M. 2288 (2d Cir. 1971); *Arble Mineral Feed Co. v. NLRB*, 438 F.2d 940, 76 L.R.R.M. 2613 (8th Cir. 1971).

⁷⁰ *NLRB v. Drives, Inc.*, 440 F.2d 354, 76 L.R.R.M. 2296 (7th Cir. 1971).

⁷¹ 172 N.L.R.B. No. 101, 68 L.R.R.M. 1428 (1968).

⁷² *Id.*, 68 L.R.R.M. at 143.

⁷³ 440 F.2d at 365, 76 L.R.R.M. at 2306.

jected the Board's finding of a section 8(a)(5) violation. The court did agree, however, that the conduct of the employer *subsequent* to the election was such as to preclude a fair determination of employee sentiment by ballots. The court noted that under *Gissel* the election atmosphere is the crucial factor in determining the legitimacy of a bargaining order. Thus, the court agreed to grant enforcement.

The *Drives* court was concerned that the union might never have represented a majority of the employees. In *Gissel*, the Supreme Court had considered this possibility, and stated that a bargaining order might still issue because the disenfranchisement was only temporary. If the majority truly did not want the union to represent them, the *Gissel* Court reasoned, they could petition the Board for an election.⁷⁴ The issue of majority disenfranchisement was considered especially important in *Drives* because of the possibility that the union's election defeat was not precipitated by employer misconduct, but merely reflected the true, uncoerced desires of the employees. For this reason, the *Drives* court felt it important to assure that the employees accurately understood their right to petition for an election, and thus ordered the modification of the Board order.⁷⁵

In *NLRB v. General Stencils, Inc.*,⁷⁶ the Second Circuit was faced with the issue of whether the employer's unfair labor practices were serious enough to warrant issuance of a bargaining order. The events which gave rise to the litigation occurred in 1967, when a union attempted for the third time to organize a General Stencils plant.⁷⁷ The union presented the employer with signed authorization cards from a majority of the employees and demanded immediate recognition. When the employer refused, the union filed a complaint with the Board charging the employer with violations of sections 8(a)(1) and 8(a)(5). The case went before a trial examiner who agreed with the union that certain section 8(a)(1) offenses had occurred. He concluded, however, on the basis of pre-*Gissel* reasoning, that a finding of a section 8(a)(5) violation was not warranted. The trial examiner's decision rested on the fact that the employer presented sufficient evidence to establish his "good faith doubt" as to the union's majority status, and that the section 8(a)(1) violations were not so great as to justify rejection of this evidence. Accordingly, the trial examiner did not recommend issuance of a bargaining order.

When the Board reviewed the trial examiner's decision, the *Gissel* standards were in force. Looking to these standards, the NLRB

⁷⁴ 395 U.S. at 613.

⁷⁵ 440 F.2d at 367, 76 L.R.R.M. at 2307.

⁷⁶ 438 F.2d 894, 76 L.R.R.M. 2288 (2d Cir. 1971).

⁷⁷ In the two previous attempts, the unions lost Board-conducted certification elections. *Id.* at 896, 76 L.R.R.M. at 2289.

determined that the employer's conduct was "of such a nature as to have a lingering effect and make a fair or coercion-free election quite dubious, if not impossible."⁷⁸ Therefore, the Board ordered the employer to bargain with the union on request.

On petition for enforcement, the court of appeals sharply criticized the Board's handling of the case. Initially, the court disagreed with the Board on its findings pertaining to the section 8(a)(1) violations. The Board had based its charge, in part, upon the employer's unlawful interrogation of three employees. Two employees were questioned about their union membership, and a third about a conversation he had with an NLRB agent. The court, however, pointed out that an employer's questioning will not constitute unlawful interrogation unless it meets the five-part test formulated in *Bourne v. NLRB*.⁷⁹ Applying this test, the court determined that the employer had not violated the Act by attempting to ascertain his employees' union sentiment. Accordingly, it refused to enforce that part of the Board's cease and desist order which applied to this activity. The court did find, however, that there could be no justification for the employer's interest in the conversation with the NLRB agent, and, therefore, sustained the Board on that issue. The Board also had claimed that the employer's threats to close the plant, or reduce existing economic benefits in the event of a union victory, were violations of section 8(a)(1). The court evaluated these findings and determined that they were substantiated.⁸⁰

With these findings in mind, the court considered whether a bargaining order was warranted under the *Gissel* standards. In considering this aspect of the case, the court noted that it was aware of the admonition in *Gissel* that the Board is to determine how severe an effect unfair labor practices have on the election atmosphere, and that because of the special knowledge and expertise the Board possesses, its

⁷⁸ General Stencils, Inc., 178 N.L.R.B. No. 18, 71 L.R.R.M. 1652, 1654 (1969).

⁷⁹ 332 F.2d 47, 56 L.R.R.M. 2241 (2d Cir. 1944). The court held that interrogation was not threatening unless it met "certain fairly severe standards." These were found to include:

- (1) The background, i.e., is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e., how high was he in the company hierarchy?
- (4) Place and method of interrogation, e.g., was the employee called from work to the boss's office? Was there an atmosphere of "unnatural formality?"
- (5) Truthfulness of the reply.

Id. at 48, 71 L.R.R.M. at 2242.

⁸⁰ 438 F.2d at 900, 76 L.R.R.M. at 2293.

choice of remedies must be accorded "special respect."⁸¹ The court emphasized, however, that this admonition was not meant to overrule completely the Supreme Court's statement in *Universal Camera Corp. v. NLRB*⁸² to the effect that reviewing courts have a responsibility under the Administrative Procedure Act⁸³ "to prevent capricious determinations by administrative agencies."⁸⁴ Comparing *General Stencils* to three other post-*Gissel* cases⁸⁵ which involved similar or more serious unfair labor practices, and in which the Board did not issue bargaining orders, the court concluded that "[b]argaining orders are not immune from the great principle that like cases must receive like treatment."⁸⁶ Because no justification or explanation had been offered for the dissimilar treatment accorded *General Stencils*, the court refused to enforce the Board's order.

It seems quite clear that the Supreme Court, when it emphasized the deference to be accorded Board decisions, did not intend to relegate the courts of appeals to the role of "rubber stamping" agency determinations. Under the Second Circuit's holding in *General Stencils*, not only will the Board have to establish the existence of unfair labor practices, but in close cases, it also will have to offer evidence of why a bargaining order is required.

In *Arbie Mineral Feed Co. v. NLRB*,⁸⁷ a case which bore some factual similarities to *General Stencils*, the Eighth Circuit also refused to enforce a Board bargaining order. In addition, the court announced a set of guidelines which it would employ when evaluating the propriety of future bargaining orders.

The Arbie Company was found by the Board to have violated Sections 8(a)(1) and 8(a)(3) of the Act. The section 8(a)(1) violations, which consisted of the interrogation of employees and the threat of economic reprisals, were substantiated by the record, and thus were affirmed by the court. The section 8(a)(3) violations related to the discharge of two employees; one for "bad attitude" and the use of improper language in front of a female employee, the other for drinking beer while driving a company vehicle. Both employees had been active in the union's organization drive. The court thought that the evidence supported a finding that the "bad attitude" discharge

⁸¹ Id. at 901, 76 L.R.R.M. at 2293.

⁸² 340 U.S. 474 (1951).

⁸³ 5 U.S.C. § 706(2)(A) (Supp. V, 1970).

⁸⁴ 438 F.2d at 904, 76 L.R.R.M. at 2296.

⁸⁵ *Stout Co., Inc.*, 180 N.L.R.B. No. 11, 73 L.R.R.M. 1107 (1969); *Schrementi Bros., Inc.*, 179 N.L.R.B. No. 147, 72 L.R.R.M. 1481 (1969); and *Blade-Tribune Pub. Co.*, 180 N.L.R.B. No. 56, 73 L.R.R.M. 1041 (1969), cited in 438 F.2d at 903, 76 L.R.R.M. at 2295.

⁸⁶ 438 F.2d at 904-05, 76 L.R.R.M. at 2296.

⁸⁷ 438 F.2d 940, 76 L.R.R.M. 2613 (8th Cir. 1971).

was actually motivated by the employer's desire to discourage union activity, thus constituting a section 8(a)(3) violation. It disagreed with the Board, however, on the beer-drinking incident. According to the court, the enforcement of safety rules is properly considered by employers, even when it involves the discharge of a union adherent.⁸⁸

The court proceeded to evaluate the effects of the employer's unfair labor practices on the election atmosphere, and determined that they had not reduced the union's majority, but, on the contrary, had spurred on the organizational effort. The unfair labor practices, the court noted, *preceded* the union's most successful card solicitation period.⁸⁹

Because there was no indication that a fair election could not be held, the court concluded that a bargaining order was not supportable under the *Gissel* standards. Furthermore, the court felt that enough cases had been decided since *Gissel* to set down the following guidelines for enforcement:

- (1) Where the underlying facts affirmatively show that the unfair labor practices have in fact undermined a union majority, typically evidenced by the union losing an election or the employees seeking to withdraw from the union following the occurrence of the conduct in question, we grant enforcement;
- (2) Where the record is silent concerning the actual impact of the employer's unfair labor practices, we defer to the Board's exercise of discretion and grant enforcement; and
- (3) Where the evidence establishes that the unfair labor practices produced little or no impact upon the employees' allegiance to the union, we deny enforcement.⁹⁰

It was hoped that the *Gissel* decision would end the confusion surrounding card-based bargaining orders. *Drives*, *General Stencils* and *Arbie* show clearly that *Gissel* has failed in this respect. The continued uncertainty, however, can be attributed to the Board's unwillingness to explain in any detail its decision to issue a bargaining order in a given case. In *General Stencils*, the Second Circuit suggested that the NLRB implement its rule-making powers under the Administrative Procedure Act, and develop at least general guidelines for the benefit of unions, employers and the courts.⁹¹ Absent this, the court suggested that a comparable statement issue from the full five-man Board, or, at the very least, that individual decisions be accompanied by a compre-

⁸⁸ Id. at 943, 76 L.R.R.M. at 2615.

⁸⁹ Id. at 944, 76 L.R.R.M. at 2617.

⁹⁰ Id. at 945, 76 L.R.R.M. at 2617.

⁹¹ 438 F.2d 894, 901-02, 76 L.R.R.M. 2288, 2293.

hensive explanation of why the bargaining order remedy was selected. This suggestion is indeed well founded. If the Board is fulfilling its obligation under *Gissel* to evaluate each case to determine the extent of damage on the electoral atmosphere as a result of an employer's unfair practices, it should not be overly burdensome for it to share its analysis with the courts and the interested parties.

3. *Bargaining Orders Based upon Independent Knowledge*

In *Pacific Abrasive Supply Co.*,⁹² the NLRB issued a bargaining order in the absence of any employer unfair labor practices. The Board justified its action on the basis of the language in *Gissel* indicating that an employer has a duty to recognize a union when he possesses knowledge of its majority status from sources independent of authorization cards.

The unit over which the representation dispute centered contained four employees, all of whom had signed unambiguous authorization cards. The union presented these four cards to a management representative with a demand for immediate recognition. The representative conceded that the cards were genuine, but insisted that the President of the company had to be consulted prior to the signing of any recognition agreement. When contacted, the President expressed the opinion that an election held less than one year before, in which the union was rejected,⁹³ more accurately expressed employee sentiment. Accordingly, he refused either to grant the union recognition or to bargain with it.

Meanwhile, the company official to whom the cards were first shown conducted a personal poll of the four employees involved. All four reaffirmed their desire that the union represent them for collective bargaining purposes. Later, when the employees learned that the President had refused to recognize the union, they reemphasized their demands by walking off the job and picketing.⁹⁴ When the company official again questioned the four employees, the union filed a complaint with the Board charging the employer with conducting interrogation in violation of section 8(a)(1).

The union complaint was investigated by a trial examiner who concluded that the section 8(a)(1) charge was unfounded. However, the trial examiner did find that the employer had factual knowledge of

⁹² 182 N.L.R.B. No. 48, 74 L.R.R.M. 2113 (1970).

⁹³ The unit in which the earlier election was held was larger than the present one. Id., 74 L.R.R.M. at 1114.

⁹⁴ The strike began on April 25, 1968, less than one year after the prior election, which had been held on April 27, 1967. The company argued that the picketing was in violation of Section 8(b)(7)(B) of the Act. The Board, however, did not consider it necessary to resolve this question because the strike continued after April 27, 1968, at which time it became protected activity. Id., 74 L.R.R.M. at 1115 n.12.

the union's majority status, which, under "controlling Board law . . . rebuts any claim by an employer that it entertains a good faith doubt as to [the employees' representative]." ⁹⁵ Accordingly, he recommended that a bargaining order be issued. After the trial examiner issued his decision, the Supreme Court decided *Gissel*. Therefore, when the Board decided to adopt the examiner's recommendation, it looked to *Gissel* to determine if a bargaining order was permissible.

The Board noted that in *Gissel* the Supreme Court left unanswered the question of whether an employer who rejected a union's recognition demands, and refrained from committing unfair labor practices that would tend to impede the election process, could always demand an election determination of a union's status. ⁹⁶ The Board pointed out, however, that the *Gissel* Court implicitly affirmed the propriety of foregoing an election where it could be established that the employer had actual knowledge of the union's majority status. It was noted, for instance, that *Gissel* expressly reaffirmed *United Mine Workers v. Arkansas Oak Flooring Co.*, ⁹⁷ where the Court held that a

"Board election is not the only method by which an employer may satisfy itself as to the union's majority status," and that "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees the employer's denial of recognition of the union would have violated Section 8(a)(5) of the Act." ⁹⁸

In addition to this specific approval by the Court of non-election-created bargaining relationships, the Board also cited the Court's approving reference to the authorization card policy that had been announced in *Gissel* during oral argument. Under that policy, an employer who possessed "knowledge independently of the cards that the union represented a majority" ⁹⁹ could not refuse a union request for recognition. The Board then looked to the facts in *Pacific Abrasive* and concluded that the information gathered from the indepen-

⁹⁵ Id., 74 L.R.R.M. 1114.

⁹⁶ Id., 74 L.R.R.M. at 1115. To support this proposition, the Board cited to *Gissel* where the Court stated:

We thus need not decide whether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless of his earlier good faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute.

⁹⁷ 351 U.S. at 601 n.18.

⁹⁸ 351 U.S. 62 (1956).

⁹⁹ 74 L.R.R.M. 1115, citing 351 U.S. 62 n.8., id. at 69.

¹⁰⁰ 395 U.S. at 594.

dent polling of the card signers, together with their walkout and picketing, precluded the employer from asserting that there was any "bona fide dispute" with respect to the union's majority status. The Board reasoned, therefore, that a bargaining order was appropriate.

Although *Pacific Abrasive* emphasized evidence from sources independent of authorization cards, it still left the employer with a *Joy Silk* type task of establishing a good faith doubt in order to justify an election. In *Wilder Manufacturing Co.*,¹⁰⁰ the Board clarified its independent knowledge test.

In 1965, the union presented eleven signed and two unsigned authorization cards to the general manager of the Wilder Company, and requested recognition as the production and maintenance employees' bargaining representative.¹⁰¹ The general manager examined the cards, but insisted that he was not authorized to grant the union's demand. However, he did promise to provide an answer the following day. Unsatisfied with this response, all of the employees who had signed cards walked off their jobs and began picketing. On the next day, the general manager reported to the officers of the company both the union's demand and the independent actions of the employees in support of the union. He also reported that of the thirty individuals employed by the company, only ten or eleven were on the picket line. He suggested that this indicated that the union did not represent a majority. The officers of the company decided to deny recognition. The union then charged the employer with violating Section 8(a)(5) of the Act.

An NLRB trial examiner found that the appropriate bargaining unit consisted of eighteen employees and that the employer knew that the union represented an uncoerced majority of this number. Accordingly, the trial examiner concluded that the employer did not have a "good faith doubt" when it rejected the union's recognition request, and, therefore, under the principles of *Joy Silk*, it had violated section 8(a)(5).¹⁰² A bargaining order was the suggested remedy.

The Board, however, in a decision issued prior to *Gissel*, refused to adopt the recommendation of the trial examiner and dismissed the complaint. It noted that under the *Joy Silk* rationale, the General Counsel has the dual burden of establishing that the union did in fact represent a majority of the employees in the bargaining unit and that the employer's refusal to bargain stemmed from "bad faith." Evidence of bad faith, the Board suggested, would be either a complete rejection of the collective bargaining principle or the commission of unfair labor practices intended to undermine the union and dissipate its majority.

¹⁰⁰ 185 N.L.R.B. No. 76, 75 L.R.R.M. 1023 (1970).

¹⁰¹ See *Wilder Mfg. Co.*, 173 N.L.R.B. No. 30, 69 L.R.R.M. 1322 (1968).

¹⁰² *Id.*, 69 L.R.R.M. 1322 n.5.

The trial examiner's record in *Wilder*, the Board stated, indicated that the employer had neither rejected the collective-bargaining principle nor engaged in any interference, restraint or coercion of employees intended to undermine the union. Further, the Board noted that there was no evidence of any conduct by the employer which would prevent the holding of a representation election. Therefore, the Board found that the charge of bad faith was unsubstantiated.¹⁰³

The General Counsel appealed the Board's decision to the Court of Appeals for the District of Columbia Circuit. While the appeal was pending, *Gissel* was decided. Because *Gissel* had not definitively addressed itself to situations devoid of unfair labor practices, the court of appeals chose to remand *Wilder* to the Board for reconsideration. Looking to the same record upon which its earlier decision was based, the Board determined that under *Gissel* a section 8(a)(5) violation had occurred because of the employer's "independent knowledge" of the union's majority. As in *Pacific Abrasive*, the Board found that evidence existed from sources other than the authorization cards sufficient to convey to the employer "convincing knowledge" of the union's majority status. According to the Board, the active demonstration of union support made by the card signers clearly established that the employer had the requisite knowledge. Unlike in *Pacific Abrasive*, however, the Board implied that, in addition to a finding of independent knowledge, there would have to be an absence of any genuine willingness on the part of the employer to resolve any "lingering doubts" of the union's majority by resort to the Board's election procedures. In *Wilder*, the Board noted, the company had neither filed for an election on its own, nor suggested to the union that it seek Board certification. The importance which the Board accorded this apparent rejection of the election process is evident:

In the interest of encouraging all parties to avail themselves of our election procedures, we would not be inclined to enter a bargaining order if, absent independent unfair labor practices, the record supported a finding that Respondent had in good faith indicated a willingness to utilize those procedures, since, as the Supreme Court has said [in *Gissel*] a Board-conducted election is indeed the "preferred route" for determining employee desires.¹⁰⁴

Thus, it appears from *Pacific Abrasive* and *Wilder* that when an

¹⁰³ Id., 69 L.R.R.M. at 323.

¹⁰⁴ 185 N.L.R.B. No. 76, 75 L.R.R.M. at 1024-025. This interpretation is supported by the statement in *Pacific Abrasive* that the participation by all four employees in the strike and picketing precluded any "bona fide dispute." 182 N.L.R.B. No. 48, 74 L.R.R.M. at 1115.

employer is faced with substantial evidence of the union's representation status from sources independent of the authorization cards, he will be subject to a bargaining order even though he commits no unfair labor practices. Such an order can be avoided only if he takes affirmative action to bring into play the Board's election machinery.

On the other hand, *Pacific Abrasive* may stand for the proposition that when a very small unit is involved, and the members unanimously demonstrate union support, the Board will forego an election in favor of a bargaining order despite a willingness on the part of the employer to utilize the Board's procedures. *Wilder*, then, would mean that in cases where the unit is somewhat larger, and the independent showing of union support is substantial, but not unanimous, the Board will proceed to an election if the employer expressed any lingering doubts and takes affirmative action toward resolving the dispute.

The Board's interpretation of "independent knowledge" was defined further in *Redmond Plastics*,¹⁰⁵ where the Board issued a bargaining order despite the absence of election-interfering unfair labor practices, and over the employer's request for a Board-conducted election. In *Redmond*, the union presented the authorization cards to the President of the employer company and requested immediate recognition. Meanwhile, twelve employees remained off their jobs on instructions from the union. The President checked the authorization cards and expressed the belief that the union did in fact represent the employees. Furthermore, he indicated that he recognized the union, and settled upon a specific date to commence bargaining. Later, however, the President consulted with his attorney who advised him to seek an election. Although he still did not doubt the union's majority status,¹⁰⁶ the President then refused to bargain with the union and instead sought the recommended election.

The Board found that the facts as presented in the record comported with the well established principles of *Fred Snow & Sons*.¹⁰⁷ In *Snow*, the employer had agreed to be bound by an independent card check, but when that check substantiated the union's claim of majority support, the employer reneged and demanded an election. The Board concluded from this that the employer had no reasonable doubt of the union's majority and, therefore, issued a bargaining order. In *Redmond*, the Board noted that the facts were stronger than those in *Snow*. Not only had the President substantial independent evidence of union support, but he actually had recognized the union and had

¹⁰⁵ 187 N.L.R.B. No. 60, 76 L.R.R.M. 1035 (1970). As was the case in *Wilder* and *Pacific Abrasive*, the *Redmond* decision followed a reconsideration in light of *Gissel*.

¹⁰⁶ The Board noted that even after petitioning for an election, the President continued to profess his belief that the Union had majority status.

¹⁰⁷ 134 N.L.R.B. No. 57, 49 L.R.R.M. 1228 (1961), enforced, 308 F.2d 687, 51 L.R.R.M. 2199 (9th Cir. 1962).

agreed upon a date to commence bargaining. Consequently, the Board felt that any claim of "good faith doubt" such as to justify an election was "clearly contrived and wholly specious and should, therefore, be given no credence."¹⁰⁸ The Board concluded that to ignore this clear evidence "would be to make a mockery of the Board's orderly election processes"¹⁰⁹

Chairman Miller disagreed with the majority's conclusion. He was of the opinion that the employer had not agreed to recognize the union, and, therefore, the election request was proper. Citing to *Gissel*, Miller emphasized that an employer "may, but need not, accept cards as proof of majority status."¹¹⁰ Then, turning to the *Wilder* decision, he noted that the Board would not issue a bargaining order even where an employer is presented with evidence in addition to the authorization cards so long as the employer expresses a willingness to utilize the election process. For these reasons, Chairman Miller felt the complaint in *Redmond* should be dismissed.

The crucial element of *Redmond* is the factual determination by the majority that the President of the employer company had actually granted recognition to the union. This factor brought the decision out from under the policy statement contained in *Wilder* which suggests that any reasonable doubt entertained by an employer is entitled to resolution by a Board election so long as the employer refrains from unfair labor practices and actively suggests or seeks use of the Board procedures. Although Chairman Miller properly cited to *Gissel* when he noted that an employer may but need not rely upon cards, *Redmond* establishes that if he does choose to rely upon cards that choice is irrevocable.

III. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Discrimination in Employment Testing

The general purpose of Title VII of the Civil Rights Act of 1964¹ is to eliminate all employment practices which discriminate against, or impose limitations upon, employees or job applicants because of their race, color, religion, sex or national origin.² However, the pro-

¹⁰⁸ 87 N.L.R.B. No. 60, 76 L.R.R.M. at 1037.

¹⁰⁹ Id.

¹¹⁰ Id.

¹ 42 U.S.C. § 2000e et seq. (1964).

² The scope of Title VII is set out in § 703(a) as follows:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would

ponents of Title VII recognized that there are certain justifiable employer practices which unavoidably result in discrimination against employees. One such employer practice is the legitimate use of employment testing which necessarily results in discrimination against members of racial minorities who have been deprived of competitive educational advantages. When it became apparent that broad anti-discrimination prohibitions such as those found in Title VII could be construed as prohibiting all legitimate yet discriminatory testing,³ Congress reacted by adding an explicit exception from prohibition under Title VII for bona fide employment testing in Section 703 (h), which provides:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or nation origin.⁴

The application of section 703(h) has resulted in controversy with respect to the meaning of "professionally developed ability test" within that section. At least one court has held that this phrase includes any general intelligence test that has been prepared by a qualified test expert.⁵ However, the Equal Employment Opportunity Commission⁶ (EEOC) has held that to come within section 703(h) a test must

deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1964).

³ Apparently the enactment of § 703(h) was prompted by congressional reaction to a finding of the Illinois Fair Employment Practices Committee. A black job applicant was required to take an intelligence test prior to being hired. The applicant contended that his subsequent rejection was due to the allegedly discriminatory effect of the test. The hearing examiner held that the testing practice was unlawful. *Myart v. Motorola, Inc.* (set out in full in 110 Cong. Rec. 5662-664 (1964)). This decision was interpreted by Congress as implying that all employment tests which discriminate, regardless of their legitimate use, could be found to be unlawful employment practices. This result was declared to be beyond the intended purpose of Title VII by the supporters of § 703(h). See 110 Cong. Rec. 13492 (1964) (remarks of Senator Tower).

⁴ 42 U.S.C. § 2000e-2(h) (1964).

⁵ *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1234 (4th Cir. 1970), rev'd, 401 U.S. 424 (1971).

⁶ The EEOC is the agency created to administer Title VII. Its powers are limited to the authority to accept complaints alleging violations of Title VII, to hold hearings on the alleged violations, and to act as mediator and counsel in attempts to effect voluntary settlement by the employer. The EEOC is limited to these informal methods and possesses no powers of enforcement. 42 U.S.C. § 2000e-5(a) (1964). If informal mediation fails, the only recourse available to the EEOC is to notify the complainant

be related to a specific skill or ability that the job applicant will require.⁷

In *Griggs v. Duke Power Co.*,⁸ the Supreme Court upheld the interpretation of the EEOC that tests must be job-related to come within the section 703(h) exception. The employer, Duke Power Co., had, prior to the effective date of Title VII, overtly discriminated against black employees by limiting their employment to the lowest paying department in the company (the labor department). In 1955, Duke instituted the requirement of a high school education for initial assignment to any department except labor, and for transfer within the company to higher paying departments. In 1965, after the effective date of Title VII, the company added the additional requirement that for initial assignment to any department except labor, a job applicant must score satisfactorily on two standardized professionally developed aptitude tests as well as have a high school education. Shortly thereafter, Duke began a policy of allowing incumbent employees without a high school education to transfer to higher paying departments by scoring satisfactorily on the aptitude tests. The required scores on the tests corresponded approximately to the national median score attained by high school graduates.

The Court found that whites scored better on the standardized tests used by Duke than did blacks. This disparity was traced to the history of inferior education available to blacks because of the long-standing practice of segregated schooling. Thus, the consequences of the testing program at Duke were found to operate with built-in discriminatory effects toward blacks. The Court held that the discriminatory impact of these tests brought them within the prohibition of Title VII whether or not the testing requirement was motivated by discrimination on Duke's part.

Having found that the testing requirement was a discriminatory practice within the general prohibition of Title VII, the Court considered the employer's contention that the tests came within the specific exception granted by Section 703(h). In construing section 703(h), the Court adopted the EEOC's interpretation that tests within that section must be job-related. The Court stated:

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress

of his personal right to bring an action in federal district court. 42 U.S.C. § 2000e-5(e)-(f) (1964).

⁷ The EEOC requires that employers be able to prove that "the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs . . . being evaluated." EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12334, § 1607.4 (c) (Aug. 1, 1970).

⁸ 401 U.S. 424 (1971).

has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.⁹

The Court noted that the tests used by Duke were adopted without any significant attempt to determine their effectiveness in measuring one's ability to perform on the job. Neither test was designed to evaluate the ability to perform a specific job or a category of jobs. One test used was designed to measure general intelligence, while the other measured basic mechanical ability. However, Duke contended that such general criteria were needed to evaluate employees for the company's announced policy of advancement within the company. The Court rejected this argument as unsupported by the evidence since it was shown that employees without a high school education who had not taken the tests nonetheless satisfactorily advanced within the company. Therefore, because the testing requirements were not related to job performance, the Court found the testing practice beyond the exception provided by Section 703(h) and prohibited by Title VII.

The decision in *Griggs* clearly recognizes the congressional intent that not all standardized employment tests which produce a discriminatory effect are prohibited by Title VII. Moreover, while the Court in *Griggs* did adopt a requirement of job-relatedness for otherwise prohibited tests to come within the section 703(h) exception, the Court did not indicate that a test must measure the ability to perform a specific job to be lawful. The Court stated that

it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long range requirements fulfill a genuine business need.¹⁰

Thus, the Court has left open the question of whether a standardized general intelligence test might in some circumstances be adequately job-related. However, the position of the EEOC seems to be that the job-relatedness requirement is satisfied only by a correlation of the testing criteria to fairly specific employment skills.¹¹ The

⁹ Id. at 436.

¹⁰ Id. at 432.

¹¹ The EEOC's position has been stated as follows:

The Commission accordingly interprets "professionally developed ability test"

Court's reliance in *Griggs* upon the expertise and the authority of the EEOC indicates that the EEOC interpretation may be followed in future cases. If the Court does adopt the narrower interpretation of the EEOC, it is suggested that few employment needs will be approved as justifying the use of general intelligence tests or basic aptitude tests that are inherently discriminatory toward minority groups.¹²

B. *Discrimination on the Basis of Sex*

An exception to the basic anti-discriminatory provision of Title VII is provided where an employer can establish that discrimination by sex is a "bona fide occupational qualification" (BFOQ) for his business. Section 703(e) of Title VII establishes the BFOQ exception as follows:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .¹

The scope of the exception granted by section 703(e) was considered by the Fifth Circuit in *Diaz v. Pan American World Airways, Inc.*² Plaintiff Diaz had applied for a job as a flight cabin attendant with Pan Am but was rejected pursuant to Pan Am's policy of hiring only females for that position. He then filed a complaint with the EEOC charging unlawful discrimination on the basis of sex by Pan Am. The EEOC found reasonable cause to support the complaint but was unable to reach a voluntary settlement with Pan Am. Diaz then brought a class action in the United States District Court for the Southern District of Florida alleging that Pan Am had violated Title VII's prohibition against discrimination in hiring.³ The district court found that Pan Am's actions were within the exception granted by

to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. (Emphasis added.)

EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966, cited in 401 U.S. at 433 n.9.

¹² For a more complete discussion of discriminatory employment testing, see Comment, Employment Testing Under Title VII of the Civil Rights Act of 1964, 12 B.C. Ind. & Com. L. Rev. 268 (1970).

¹ 42 U.S.C. § 2000e-2(e) (1964).

² 442 F.2d 385 (5th Cir. 1971).

³ 311 F. Supp. 559 (S.D. Fla. 1970).

Section 703(e) and, consequently, were not in violation of Title VII. The district court accepted Pan Am's contention that the qualifications for cabin attendant should be recognized as including the non-mechanical duties of "providing reassurance to anxious passengers, giving courteous personal service and, in general, making flights as pleasurable as possible. . . ."⁴ The court accepted the evidence offered by Pan Am that females as a class were superior to males in providing these non-mechanical services. In addition, Pan Am offered the testimony of a psychiatrist that an aircraft cabin presents a unique environment giving rise to special psychological needs in passengers. The court agreed with Pan Am's contention that these special needs are better met by females than by males. Pan Am further supported its argument that females were superior to males as cabin attendants by means of a survey which demonstrated that Pan Am's passengers overwhelmingly preferred females as cabin attendants.

However, the district court held that evidence establishing that females were on the average superior to males as cabin attendants would not in itself justify a finding that sex was a BFOQ for that position. If it were practicable to select those exceptional males who could perform adequately as cabin attendants, then Pan Am could not justify its refusal to consider any male for the job. However, the court held that the requirements of section 703(e) are satisfied if it is highly impracticable to select employees on an individual basis with no discrimination by sex. The court found that while it might be theoretically possible to select those few males who possess the traits required of a cabin attendant, such selection is not practical under hiring practices now available. Thus, the court held that to eliminate sex as a qualification for cabin attendant would remove "the best tool available for screening out applicants likely to be unsatisfactory and thus reduce the average level of performance."⁵ Therefore, since the sex requirement was reasonably designed to improve the performance of Pan Am's flight attendants, the practice of hiring only females for that position was reasonably necessary to the operation of Pan Am's business within the meaning of section 703(e).

The Court of Appeals for the Fifth Circuit reversed this finding and held that Pan Am's refusal to hire males for the position of flight cabin attendant was not a BFOQ as provided by Section 703(e) and was, therefore, prohibited by Title VII. This holding was based upon the following strict interpretation of section 703(e):

[T]he use of the word "necessary" in section 703(e) requires that we apply a business *necessity* test, not a business

⁴ Id. at 563.

⁵ Id. at 567.

convenience test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.⁶

The court held that the primary business of Pan Am was to transport passengers safely by air from one place to another. The presence of female cabin attendants was recognized by the court as lending to a more pleasant environment during air travel. However, this effect was held to be "tangential to the essence of the business involved."⁷ In support of this conclusion the court noted that at the time suit was instituted Pan Am employed two hundred and eighty-three male stewards on certain foreign flights.⁸ Therefore, the court held that since having male cabin attendants would not affect Pan Am's ability to provide safe transportation, the exclusion of male applicants from consideration for that position was not "necessary" within the meaning of section 703(e).

Based upon this finding, the court held that proof that all or substantially all men could not adequately perform the non-mechanical tasks of cabin attendants would fail to justify discrimination against males as a BFOQ. The court held that "it must not only be shown that it is impracticable to find the men that possess the abilities that most women possess, but that the abilities are *necessary* to the business, not merely tangential."⁹ Similarly, the court rejected evidence of passenger preference for females as grounds for justifying the rejection of all males applying for jobs as cabin attendants. The court held that "customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers."¹⁰

Thus, because the non-mechanical functions of cabin attendants were seen as merely tangential to Pan Am's business, the court concluded that sex was not a BFOQ for that position. However, the court did not rule out the possibility that Pan Am could lawfully reject job applicants on the grounds that they did not possess these abilities. The court stated:

We do not mean to imply, of course, that Pan Am cannot take into consideration the ability of *individuals* to perform the non-mechanical functions of the job. What we hold is that because the non-mechanical aspects of the job of flight

⁶ 442 F.2d at 388.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 389.

¹⁰ *Id.*

cabin attendant are not "reasonably necessary to the normal operation" of Pan Am's business, Pan Am cannot exclude *all* males simply because *most* males may not perform adequately.¹¹

The *Diaz* court correctly recognized that the legislative history of section 703(e) is minimal and offers no clear guidelines for the application of that section. However, an examination of the legislative history suggests that section 703(e) was designed to have broader application than that indicated in the *Diaz* decision. The proponents of section 703(e) offered the following as examples of employer practices that would fall within the BFOQ exception:

... the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion.¹²

Applying the *Diaz* rationale, it would seem that the "essence" of the business operation of a major league baseball team is playing competition baseball. Further, it is unlikely that sex could be established as an essential quality for playing baseball. Since sex, therefore, would be "tangential" to the athletic ability required, the *Diaz* court would presumably require that major league teams interview female job applicants to determine if they as individuals are able to perform adequately as professional baseball players.

The narrowness of the *Diaz* opinion becomes even more apparent when one tries to envision those businesses whose "essence . . . would be undermined by not hiring members of one sex exclusively."¹³ It is difficult to imagine such occupations beyond the obvious examples of topless waitresses, actors and actresses, washroom attendants, or fitters of girdles and bras.¹⁴ These occupations could hardly have been viewed by Congress as needing legislative action to justify the exclusion of job applicants by sex since in practice it would be highly unlikely that any individual member of the excluded sex would apply or could qualify for such a job. It is, therefore, unrealistic to infer from the passage of section 703(e) the narrow range of intended application determined by the court in *Diaz*. Moreover, the requirement in *Diaz* that sex affect the "essence" of a business before discrimination is lawful under sec-

¹¹ Id. at 388.

¹² 110 Cong. Rec. 7213 (1964) (Interpretive Memorandum submitted by Senators Clark and Case).

¹³ 442 F.2d at 388.

¹⁴ See Note, Sex Discrimination and the Bona Fide Occupational Qualification, 12

tion 703(e) appears to contradict the language of the section itself. Section 703(e) requires that sex be "*reasonably necessary* to the normal operation of that particular business or enterprise." (Emphasis added.) However, the *Diaz* court, in effect, read the section as requiring that sex be *absolutely necessary* to the normal operation of the business involved.

It is suggested, therefore, that the court in *Diaz* was incorrect in interpreting section 703(e) as requiring that sex be essential to a particular business to come within that section. A requirement that sex have a reasonably necessary relationship to a particular business is more consistent with the language of section 703(e) and the implicit assumption that Congress did not intend the passage of section 703(e) to be merely a gesture with no practical application. However, the result in *Diaz* appears to be correct even in terms of a requirement of reasonable, rather than absolute, necessity. The *Diaz* court is perhaps overly restrictive in holding that "[t]he primary function of an airline is to transport passengers safely" and that a pleasant environment is "merely tangential" to the airline business.¹⁵ However, it does appear that a sufficiently pleasant environment can be reasonably maintained without the necessity of rejecting all male candidates for the position of cabin attendant. Pan Am's policy of rejecting all male applicants for this job is, therefore, beyond the limits of reasonable necessity imposed by section 703(e).

In *Diaz*, the issue of whether there was in fact discrimination on the basis of sex within the terms of section 703(a) was never in doubt. However, the threshold question of what types of employment practices constitute discrimination on the basis of sex was raised before the Supreme Court in *Phillips v. Martin Marietta Corp.*¹⁶ A female job applicant had been rejected in accordance with the employer's policy of not hiring women with pre-school-age children. However, at the time of her rejection, the employer did employ men with pre-school-age children. In an action alleging a violation of section 703(a), the district court granted summary judgment for the employer, and the Court of Appeals for the Fifth Circuit affirmed.¹⁷

The court of appeals noted that the prohibitions of Title VII are limited to discrimination on the basis of race, color, religion, sex or national origin. It was held that "[w]hen another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin."¹⁸ In the instant case, the court noted, the job

¹⁵ 442 F.2d at 388.

¹⁶ 400 U.S. 542 (1971).

¹⁷ 411 F.2d 1 (5th Cir.), petition for rehearing denied, 416 F.2d 1257 (1969).

¹⁸ 411 F.2d at 3-4.

applicant had been disqualified not only because she was a woman, but also because she had pre-school-age children. The court reasoned that this "two-pronged qualification"¹⁹ was not discrimination on the basis of sex within the meaning of section 703(a).

In a per curiam decision, the Supreme Court held that the court of appeals had erred in construing section 703(a) "as permitting one hiring policy for women and another for men—each having pre-school-age children."²⁰ However, the Court noted that such family commitments could have more effect upon the job performance of a woman than of a man and that, therefore, sex could arguably be a BFOQ under section 703(e) in this instance. Since the court of appeals had not considered the employer's policy as being within Title VII at all, however, the record did not provide a sufficient factual basis for consideration of the possible application of Section 703(e). The Court, therefore, vacated the judgment of the court of appeals and remanded for a fuller development of the record and consideration of the issues in light of section 703(e).

The result reached by the Supreme Court is clearly a proper interpretation of the basic scope of section 703(a). Title VII was designed to reach all employer practices which do in fact discriminate on the basis of sex regardless of their superficial appearances. To hold that an employer may avoid the prohibitions of Title VII by simply adding an additional factor such as having children to the underlying, determinative factor of sex would insulate many covert discriminatory practices that Title VII was intended to eliminate. Such a "sex-plus" standard is indeed a "palpably wrong" interpretation of the intended scope of section 703(a).²¹

IV. ARBITRATION

A. *Exhaustion of Grievance and Arbitration Procedures As a Prerequisite for Judicial Remedies*

Section 203(d) of the LMRA¹ expressly declares that voluntary settlement is the approved method for the resolution of disputes concerning collective bargaining agreements. Furthermore, it is now settled law that the congressional grant in Section 301 of the LMRA²

¹⁹ Id. at 4.

²⁰ 400 U.S. at 544.

²¹ 416 F.2d at 1259 (dissenting opinion).

¹ Section 203(d) provides in part:

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement

²⁹ U.S.C. § 173(d) (1964).

² 29 U.S.C. § 185 (1964).

of federal court jurisdiction over suits for violation of collective bargaining agreements was "a direction to develop a federal common law in connection with the rights of the parties"³ to the agreement. The development of federal law in section 301 suits led to the Supreme Court's recognition, in *Textile Workers Union of America v. Lincoln Mills*,⁴ that arbitration is the favored method for the settlement of labor disputes. The importance of arbitration was further emphasized by the holding in *Republic Steel Corp. v. Maddox*,⁵ that under normal circumstances an aggrieved employee must attempt to seek redress through available contract grievance procedures before he may bring suit under section 301.

In *Maddox*, an employee brought suit in a state court to recover severance pay under the terms of a collective bargaining agreement between the employee's union and the employer. The employee had been laid off as a result of a mine shutdown, and he based his suit upon a clause in the collective bargaining agreement which required the payment of severance pay in the event of a permanent shutdown. The contract also provided for grievance procedure leading to binding arbitration of contract disputes. The employee made no attempt to utilize the contractual grievance procedure and recovered a state court judgment in his favor.

On certiorari, the Supreme Court held that the issues were to be decided in accordance with federal law in compliance with the statutory policies of the LMRA. The Court concluded that the state court decision must be overturned since implementation of the policies of the LMRA requires that employees exhaust available contract grievance and arbitration procedures before seeking judicial redress. The Court described the controlling policy considerations as follows:

Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. . . . And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it

³ *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 139 (D. Mass. 1953).

⁴ 353 U.S. 448 (1957).

⁵ 379 U.S. 650 (1965).

would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement.⁶

The requirement of exhausting contractual grievance procedures before bringing suit was again discussed by the Supreme Court in 1967 in *Vaca v. Sipes*.⁷ There, an employee brought suit in a state court against officers of his union, alleging that he had been discharged by his employer in violation of the collective bargaining agreement, and that the union had arbitrarily refused to take his grievance through the fifth and final step of the grievance procedure to arbitration. The employee had a strenuous job at a meat packing plant and had been discharged on the grounds of poor health. He had initiated grievance procedures, and, at the fourth step in that process, was sent by the union to a physician. Upon receiving an unfavorable report from the physician, the union decided not to take the grievance to arbitration. The employee then sought redress in the state courts and eventually was awarded damages against the union.

The Supreme Court reversed the decision against the union, holding that as a matter of controlling federal law the evidence was insufficient to support the charge that the union had acted arbitrarily and in bad faith in breach of its duty of fair representation.⁸ The Court also discussed the right of an employee to sue an employer for breach of a collective bargaining agreement and stated that

if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement.⁹

During the Survey year, the Supreme Court in *United States Bulk Carriers, Inc. v. Arguelles*¹⁰ considered the exhaustion requirements

⁶ Id. at 653.

⁷ 386 U.S. 171 (1967).

⁸ Id. at 193.

⁹ Id. at 184.

¹⁰ 400 U.S. 351 (1971).

developed in *Maddox* and *Vaca* in light of the right of seamen to sue for wages and damages under 46 U.S.C. § 596, which provides:

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages . . . within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court.¹¹

The respondent seaman was employed by the petitioner ship owner for a six-month period at a monthly wage under a collective bargaining agreement between the respondent's union and the ship owner. The ship on which the seaman was employed anchored off South Vietnam the day after the seaman's shipping papers had expired. The owner conceded that the ship was delayed in Saigon harbor because of the congested condition of the harbor. During the delay, Saigon port officials refused to grant quarantine clearance to the ship's crew members. However, the respondent seaman insisted that he be discharged or granted shore leave. Both requests were denied. Shortly thereafter, the ship received clearance and entered the harbor. After a few days of unloading cargo, the respondent seaman and other crew members were discharged and given vouchers for their wages.

Upon his return to the United States, the seaman notified his union's local that he challenged the ship owner's refusal to honor certain wage claims relating to the period after his request for shore leave had been denied. Respondent was advised by local union officials to contact his union representative and utilize the grievance procedures leading to arbitration under the collective bargaining agreement. However, the seaman instead chose to institute suit in federal district court under the maritime jurisdiction provisions of 28 U.S.C. § 1333.¹² The district court relied upon *Maddox* and granted summary judgment in favor of the employer. The Court of Appeals for the Fourth Circuit reversed the judgment of the district court on the ground that the

¹¹ 46 U.S.C. § 596 (1964).

¹² 28 U.S.C. § 1333 (1964).

Maddox requirement of exhaustion of grievance procedure does not apply to seamen bringing suit under section 596.¹³

On certiorari, the Supreme Court, with four members dissenting, affirmed the decision of the court of appeals, and held that the seaman could maintain suit under section 596 despite his failure to utilize the grievance procedures provided in the collective bargaining agreement. The Court held that there is no indication from the passage of Section 301 of the LMRA that grievance procedures and arbitration were meant to replace the right of recovery under Section 596. Moreover, the holding in *Maddox* was distinguished by the Court on the ground that in that case the employee's right to recover was non-statutory. In the instant case, the employee's right to recover was based upon an express judicial remedy under section 596. The Court concluded that since the legislative history of section 301 "is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them."¹⁴ Thus, the Court held that seamen are not bound to bring suit under section 596 as their exclusive remedy for wage claims, but may choose the processes of grievance and arbitration. Moreover, it was held that failure to choose contractual grievance procedure as a method of settlement will not bar a suit under section 596.

In a dissenting opinion, Justice White, joined by three other Justices, argued that the seaman's recovery under section 596 was dependent upon questions of fact¹⁵ or interpretation of provisions of the collective bargaining agreement with respect to whether the respondent was paid all wages due to him in a timely manner. The dissent viewed these questions as being "particularly within the competence of the contractually established grievance procedure of the collective-bargaining agreement."¹⁶ Thus, since the availability of the remedies under section 596 was seen to rest upon issues within an applicable arbitration clause, the dissent urged that under the holding in *Maddox*

¹³ 408 F.2d 1065, 1071 (4th Cir. 1969).

¹⁴ 400 U.S. at 357.

¹⁵ These underlying factual questions included:

(a) whether the respondent performed overtime work with the authorization of the master; (b) whether the crew was confined to ship because of the actions of government officials and if so whether respondent can base his claim on the alleged failure of the master to show the required documents to the crew, and (c) whether the ship arrived "in port" . . . so that respondent was entitled to discharge and payment, or, in the alternative, whether the fact that respondent's shipping articles expired by their terms . . . entitled him to discharge against petitioner's claim that where the cargo is still aboard in such cases the articles are automatically extended. An additional question is [at what time] respondent was "paid" . . . since the penalty accrues only until the date of payment.

Id. at 371 (dissenting opinion).

¹⁶ Id.

the seaman was required to exhaust the available internal contractual remedies before bringing suit.

The majority's holding in *Arguelles* has the effect of preventing the enforcement of mandatory grievance procedures against seamen in disputes over wage claims that are within section 596.¹⁷ The exception from the duty to be bound by contractual obligations that the Court has created for certain wage claims by seamen in *Arguelles* is questionable in light of strong policy considerations favoring the arbitration process and the enforceability of collective bargaining agreements. It is suggested, therefore, that the Court's limitation of *Maddox* to employee claims resting solely upon contractual rights should not be extended beyond the instant case of a direct application of section 596. In all other cases, the dissent's view that *Maddox* applies "at least where . . . the availability of the statutory remedy rests on disputed issues that are cognizable under the arbitration clause,"¹⁸ should be followed. To do otherwise and extend the majority's narrow limitation of *Maddox* may have "devastating implications for the enforceability of arbitration agreements."¹⁹

B. Arbitration of Civil Rights Disputes

The question of whether an arbitrator's award bars an employee from bringing suit on the same dispute under Title VII of the Civil Rights Act of 1964¹ has resulted in a conflict of opinions between the Courts of Appeals for the Fifth and Sixth Circuits. In *Dewey v. Reynolds Metals Co.*,² the Sixth Circuit held that an arbitrator's final award forecloses a later suit on the same matter under Title VII. Dewey was an employee of Reynolds at a "job type" plant which produced aluminum products on order to meet delivery dates set out in customers' contracts. Overtime work had been done on a voluntary basis at the plant until Reynolds signed a collective bargaining agreement with the union representing Dewey, which agreement contained a provision regulating overtime work assignments. Under the contract, the company had the right to establish overtime schedules binding all employees who could not demonstrate a significant reason why they should not be bound. It was also provided in the contract that any employee assigned overtime work could arrange for another qualified employee to substitute for him. Dewey refused to work on a Sunday be-

¹⁷ See Note, Union Grievance Procedure Not Mandatory Substitute for Wage Statute, 38 Geo. Wash. L. Rev. 305, 308-09 (1967).

¹⁸ 400 U.S. at 374 (dissenting opinion).

¹⁹ Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 247 (1970).

¹ 42 U.S.C. § 2000e et seq. (1964).

² 429 F.2d 324 (6th Cir. 1970), cert. granted, 91 S. Ct. 566 (1971).

cause of his religious beliefs. Since he refused to work, and since he failed to find a replacement, he was discharged.

Dewey then filed a grievance, under the provisions of the collective bargaining agreement, which was processed and resulted in an award by an arbitrator denying Dewey's claim. He later filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming religious discrimination under Title VII. The EEOC found reasonable cause to believe that Reynolds had unlawfully discriminated against Dewey and authorized suit in a federal district court. The district court rejected Reynolds' argument that the suit should be dismissed on the grounds that the arbitrator's award was a bar to the action. The district court then found that Reynolds had unlawfully discriminated against Dewey and ordered that he be reinstated with back pay.³

The Court of Appeals for the Sixth Circuit reversed the district court decision, holding that Reynolds had not unlawfully discriminated against Dewey,⁴ and that the arbitrator's award should have been upheld as final settlement of the dispute. The court noted that if the arbitrator had upheld Dewey's claim, Reynolds would not have been permitted to relitigate the award in a court action. The court reasoned that to allow Dewey to bring suit when the employer could not have done so would destroy the effectiveness of arbitration since employers would not agree to arbitration clauses which have the effect of binding them but not their employees.

Moreover, the court held that the arbitrator had proper jurisdiction of the dispute since it arose from an interpretation of the contract. The fact that the award adjudicated both contractual and statutory rights was seen by the court as being within the approved practice of settling mixed questions of law and fact by arbitrators. Therefore, in light of the need to preserve the efficacy of the arbitration process, and since the court saw no national policy for ousting arbitrators from jurisdiction over questions involving civil rights issues, it was held that the complaint should be dismissed.

The Court of Appeals for the Fifth Circuit, in *Hutchings v. United States Industries, Inc.*,⁵ reached the opposite conclusion with respect to the effect of an arbitration award upon an employee's right to bring suit under Title VII. Hutchings, a black employee of U.S. In-

³ 304 F. Supp. 1116 (W.D. Mich. 1969).

⁴ The court held that the overtime requirement did not unlawfully discriminate under Title VII since the contract provision allowing substitution by employees was a reasonable accommodation to the religious needs of the employees. Moreover, the court found that Reynolds did not have the intent to discriminate required under Title VII before relief may be awarded. 429 F.2d at 330-31.

⁵ 428 F.2d 303 (5th Cir. 1970).

dustries, had applied for promotion to a higher paying job when the employee who held the job resigned. The company did not question Hutchings' qualifications for the position, but denied his request for promotion on the grounds that the job had been abolished. Hutchings then filed a grievance under the procedures provided by the collective bargaining contract then in force. This grievance was processed up to the arbitration stage where the arbitrator held that the company had not violated the collective bargaining agreement by refusing Hutchings' request for promotion. Hutchings then filed a complaint with the EEOC which held that there was reasonable cause to believe that the company had violated Title VII. After efforts by the EEOC failed to result in conciliation, Hutchings instituted suit in a federal district court alleging violation of Title VII. The district court⁶ granted the company's motion for summary judgment on the grounds that the arbitration award denying Hutchings' claim was a bar to court action under Title VII.

The court of appeals reversed the district court and held that Hutchings was entitled to bring an action under Title VII independent of an arbitration award under the collective bargaining agreement. The court recognized that in this case the basic dispute was concurrently within the scope of the arbitration procedures and the jurisdiction of the federal courts under Title VII. However, the court stressed the fact that "determinations under a contract grievance-arbitration process will involve rights and remedies separate and distinct from those involved in judicial proceedings under Title VII."⁷ The distinction between these rights was illustrated by analysis of the roles of a judge under Title VII and an arbitrator. The court noted that a judge under Title VII acts to provide public relief and to "vindicate the policies of the Act, not merely to afford private relief to the employee."⁸ An arbitrator, however, is limited to the role of carrying out the terms of a collective bargaining contract. Thus, the court noted that an arbitrator may feel limited to enforcement of the provisions of the contract even though it may contain anti-discrimination provisions, whereas a judge under Title VII has wide discretion to enforce the policies of the Act.

For these reasons, the court held that it is incorrect to interpret an employee's utilization of grievance procedure, and a later suit under Title VII, as an attempt "to enforce a single right in two forums."⁹ Yet, the court did not hold that matters relating to civil rights should

⁶ 309 F. Supp. 691 (E.D. Tex. 1969).

⁷ 428 F.2d at 311.

⁸ *Id.*

⁹ *Id.* at 313.

not be taken up in the arbitral process. The court recognized that such treatment was proper in view of the goal of Title VII to eliminate discrimination by voluntary settlement whenever possible. However, the court was explicit in holding that "the arbitrator's determination under the contract has no effect upon the court's *power* to adjudicate a violation of Title VII rights."¹⁰ Thus, the court concluded that even though an employee utilizes the contractual grievance procedure to its conclusion, he is not foreclosed from maintaining suit under Title VII.

The decision in *Hutchings* was considered by the Sixth Circuit upon a petition for rehearing in *Dewey*.¹¹ The court denied the petition and re-affirmed its earlier position that an arbitral award bars resort to court action under Title VII. The court disagreed with the decision reached in *Hutchings* on the grounds that it did not comport with the Supreme Court's recent emphasis of the importance of arbitration in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*.¹² The court held that to adopt the holding in *Hutchings* and allow employees to maintain Title VII suits after an arbitration award has been granted would undermine the arbitral process by making arbitration agreements unattractive to employers in the same fashion that the lack of enforceability of no-strike clauses was recognized in *Boys Markets* as making arbitration agreements unattractive to employers.

It is suggested that the reasoning of the Court of Appeals for the Fifth Circuit in *Hutchings* is correct and should be adopted by the Supreme Court. Criticism of the result in *Hutchings* on the grounds that it "does not comport" with the Supreme Court's emphasis of the importance of arbitration in *Boys Markets*¹³ is based upon an incorrect interpretation of *Boys Markets*. It is true that *Boys Markets* stressed "the importance which Congress has attached generally to the voluntary settlement of labor disputes . . . and more particularly to arbitration as a means to this end."¹⁴ However, this policy is directed toward settlement of disputes arising from the employment relationship and based upon collective bargaining agreements. The policy of industrial stabilization expressed in *Boys Markets* presents a different goal from the preservation of the right to equal employment under Title VII. This basic right is not derived from the employment relationship nor from the terms of a collective bargaining agreement. It follows that the protection of this right should not be limited to procedures concerned primarily with the enforcement of contractual rights. Indeed, the pas-

¹⁰ *Id.*

¹¹ 429 F.2d 324 (1970).

¹² 398 U.S. 235 (1970).

¹³ 429 F.2d at 336.

¹⁴ 398 U.S. at 252.

sage of Title VII was in itself an implicit recognition by Congress that available contractual remedies were inadequate and ill-suited for the elimination of inequality in employment.¹⁵

Moreover, independent enforcement of the right to equal employment under Title VII would not interfere with the objectives of arbitration as outlined in *Boys Markets*. The Court there stressed the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes "without resort to strikes, lockouts or other self-help measures."¹⁶ These goals are related to the crippling results of large-scale economic warfare. Clearly, the policy considerations of avoiding strikes and lockouts will not be undermined by individual suits to protect the right to equal employment.

The distinction between contractual disputes and violations of civil rights also has relevance to the application of the holding in *Republic Steel Corp. v. Maddox*¹⁷ that an employee must exhaust contractual grievance procedures before bringing court action in contract disputes. The authors of this Survey have suggested that the *Maddox* exhaustion requirement should not be limited to disputes based solely upon the interpretation of collective bargaining agreements.¹⁸ Thus, we questioned the Court's holding in *United States Bulk Carriers, Inc. v. Arguelles*¹⁹ that a seaman, although bound to a contract with grievance procedures, may nonetheless bring suit under 46 U.S.C. § 596 without first exhausting the available contract grievance procedures. We urged that the holding in *Arguelles* be limited to cases directly involving section 596,²⁰ and adopted the dissent's view that grievance procedures must be exhausted "where . . . the availability of the statutory remedy rests on disputed issues that are cognizable under the arbitration clause."²¹ Following this reasoning, it could be argued that Title VII rights should in some instances be conclusively settled through arbitration.

However, in *Arguelles*, the seaman's right to certain wage claims was dependent upon his contractual relationship with his employer. Section 596 merely provided a statutory remedy to enforce that contractual right. In *Hutchings* and *Dewey* the right to equal employment was not dependent upon a contractual relationship. Title VII provides an independent basis for the right to equal employment in addition to

¹⁵ Gould, Labor Arbitration of Grievances Involving Racial Discrimination, 118 U. Pa. L. Rev. 40, 55 (1969).

¹⁶ 398 U.S. at 249.

¹⁷ 379 U.S. 650 (1965).

¹⁸ See p. 1072 *supra*.

¹⁹ 400 U.S. 351 (1971).

²⁰ See p. 1073 *supra*.

²¹ 400 U.S. at 374 (dissenting opinion).

providing remedies for its enforcement. Thus, the broad application of the *Maddox* exhaustion requirement to all basically contractual disputes should not be interpreted as extending to controversies over discrimination in employment since they have a basis independent of the employment relationship.

The nature of a dispute grounded upon a violation of Title VII is further distinguished by the public rights protected by Title VII. Concern for the elimination of discrimination in employment reaches beyond an individual employer-employee controversy. The public policy objective of eliminating inequality in employment should not be abdicated to an arbitration process designed to reach reconciliation limited to the parties involved.²² Therefore, the court in *Hutchings* was correct in its basic holding that no arbitrator "has the power to make the ultimate determination of Title VII rights."²³

V. FEDERAL INJUNCTIVE ENFORCEMENT OF NO-STRIKE AGREEMENTS UNDER SECTION 301 OF THE LMRA

Section 301(a) of the LMRA¹ expanded the jurisdiction of the federal courts to include suits concerning violations of collective bargaining agreements. This initial jurisdictional grant soon became the source of a body of substantive federal labor law following the holding in *Textile Workers Union of America v. Lincoln Mills*² that suits under section 301 would be governed by federal law. As federal courts developed a body of law through adjudication of section 301 suits, arbitration emerged as the favored method for settling labor disputes. The Supreme Court, in the *Steelworkers Trilogy*,³ clearly established, through the application of section 301, that the effectiveness of the arbitration process was essential to the federal policy of peaceful industrial stabilization.⁴

In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,⁵ the

²² Gould, *supra* note 15, at 58.

²³ 428 F.2d at 314.

¹ Section 301(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

² 353 U.S. 448 (1957).

³ 353 U.S. 448 (1957).

⁴ *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).

⁵ 398 U.S. 235 (1970).

For a more complete examination of this decision, see Note,

Supreme Court reemphasized the importance of the effective enforcement of arbitration agreements, and held that the Norris-La Guardia Act does not bar injunctive relief for strikes in breach of no-strike clauses in collective bargaining agreements which contain provisions for mandatory grievance adjustment or binding arbitration. In reaching its decision, the Court expressly overruled its decision in *Sinclair Refining Co. v. Atkinson*.⁶ The dispute in *Boys Markets* arose from the employer's use of non-union workers to pack a frozen food container despite union demands that the container be emptied and refilled by union workers. The union and the employer were bound by a collective bargaining agreement which contained provisions for grievance hearings, binding arbitration and a no-strike clause. Following the employer's refusal to allow union members to empty the food cases, the union called a strike and picketed the employer's place of business.

The employer then obtained a temporary restraining order from a state court forbidding continuation of the strike. The union removed the case to federal district court and requested that the state order be quashed. The district court enjoined the union from striking and ordered both parties to arbitration under the agreement. The Court of Appeals for the Ninth Circuit reversed this order on the grounds that the federal injunction violated the Norris La-Guardia Act as applied by *Sinclair*.⁷ On certiorari, the Supreme Court reversed the court of appeals and remanded with instructions to reinstate the district court order.

The Court's reversal of *Sinclair* was based in part upon the effect of the holding in *Avco Corp. v. Aero Lodge No. 735*⁸ that section 301 suits could be removed from state courts to federal courts. It was found that removal in effect negated state jurisdiction of 301 suits since federal courts felt bound by *Sinclair* to dissolve state injunctions brought before them. This result was seen by the Court as being contrary to the congressional intention that section 301 supplement but not displace state jurisdiction over collective bargaining agreements. In addition, the Court noted that the availability of the federal courts to circumvent state injunctions would lead to a practice of forum shopping that would hinder the goal of uniformity in national labor policy.

However, the Court recognized that the effect of *Avco* and *Sinclair* upon state court jurisdiction and uniformity in labor law could be remedied by an extension of *Sinclair* to hold that state as well as federal courts were prohibited from enjoining breaches of no-strike

Federal Courts May Enjoin Strikes in Breach of No-Strike Agreements, 12 B.C. Ind. & Com. L. Rev. 295 (1970).

⁶ 370 U.S. 195 (1962).

⁷ 416 F.2d 368, 370 (9th Cir. 1969).

⁸ 390 U.S. 557 (1968).

clauses under section 301. This suggestion was rejected by the Court since neither the Norris-La Guardia Act nor section 301 were meant to impose such a limitation upon state courts. More importantly, the Court noted that such an extension of *Sinclair* would result in "devastating implications for the enforceability of arbitration agreements and their accompanying no-strike obligations."⁹ Therefore, since *Sinclair* after *Avco* seriously undermined the effectiveness of arbitration as the primary method for settling labor disputes, the Court held that the *Sinclair* holding must be overturned.

The Court reasoned that these policy objectives could be achieved, and federal courts could be granted the power to enjoin strikes under section 301, despite the explicit language of Section 4 of the Norris-La Guardia Act¹⁰ that no federal court may issue an injunction against a strike growing out of a labor dispute. It was held that "[t]he literal terms of § 4 of the Norris-La Guardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration."¹¹ The Court noted that the Norris-La Guardia Act was designed to correct abusive practices that no longer exist in the federal courts. As labor organizations grew in strength, the congressional purpose in labor legislation moved from protection of labor groups to enforcement of the collective bargaining process. The Court noted that since this transition was made without altering older statutes, the courts were given the responsibility of effectuating this legislation by accommodating the older statutes to the newer statutes.

The Court found precedent for such accommodation in the holding of *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*¹² that federal courts were not barred by the Norris-La Guardia Act from enjoining a strike which violated the statutory duty to arbitrate under the Railway Labor Act.¹³ In that case, it was held that strikes in violation of the duty to arbitrate imposed by the Railway Labor Act did not present the type of situation that the Norris-La Guardia Act was designed to remedy. Thus, it was held that the anti-injunction prohibitions of the Norris-La Guardia Act could be accommodated with the statutory policy of settling the dispute through arbitration to allow injunctive relief.

The Court recognized the fact that the arbitration procedures in *Chicago River* were statutorily created under the Railway Labor Act, whereas the arbitration procedures in *Boys Markets* arose from a col-

⁹ 398 U.S. at 247.

¹⁰ 29 U.S.C. § 104 (1964).

¹¹ 398 U.S. at 250.

¹² 353 U.S. 30 (1957).

¹³ 45 U.S.C. § 151 et seq. (1964).

lective bargaining agreement. However, the Court held that effective enforcement of voluntary arbitration is as essential to federal labor policy as was the enforcement of the statutory duty to arbitrate in *Chicago River*. Moreover, the Court noted that the core purpose of the Norris-La Guardia Act—the protection of organized labor—would not be sacrificed by the enforcement of no-strike obligations freely entered into by unions. The Court concluded that since the enforcement of no-strike clauses was vital to national labor policy, and since the core purpose of the Norris-La Guardia Act would not be defeated by such enforcement, the Norris-La Guardia Act did not bar injunctive relief in the situation presented in *Boys Markets*.

The Court stated that its holding was limited to cases involving collective bargaining contracts which contain provisions for mandatory grievance adjustment or binding arbitration procedure. In addition, the Court noted that even if these requirements were met, injunctive relief should not be granted as a matter of course in all cases of strikes in breach of no-strike clauses. The Court adopted the following guidelines from the dissenting opinion in *Sinclair* as outlining the proper circumstances for granting injunctive relief:

A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-La Guardia Act. When a strike is sought to be enforced because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.¹⁴

The most direct impact of the *Boys Markets* decision will, of course, be the increased enforceability of no-strike clauses. Consequently, as the majority in *Boys Markets* indicated, arbitration provi-

¹⁴ 398 U.S. at 254, citing 370 U.S. at 228 (dissenting opinion).

sions should become more attractive to employers.¹⁵ In addition, the method of statutory accommodation used by the Court may have significant impact upon future developments in labor law. The accommodation approach is not unprecedented, as demonstrated by the Court's analogy to *Chicago River*. However, the Court's accommodation of a specific statutory mandate of the Norris-La Guardia Act to a policy favoring contractual arbitration must be recognized as a significant expansion of the accommodation approach used to reconcile conflicting statutory designs in *Chicago River*.

Moreover, it is significant that the Court in *Boys Markets* chose the accommodation method rather than a re-evaluation of its interpretation in *Sinclair* of the scope of a "labor dispute" as defined in Section 13 of the Norris-La Guardia Act.¹⁶ In both *Sinclair* and *Boys Markets* the Court treated a breach of a no-strike clause in a collective bargaining agreement containing provisions for binding arbitration as a "labor dispute" within the meaning of the Norris-La Guardia Act. Of course, it is only after this initial determination has been made that it becomes necessary to reconcile the plain anti-injunction language of the Norris-La Guardia Act with federal attempts to enjoin strikes in breach of no-strike clauses. Yet, it would seem that the Court's recognition that the Norris-La Guardia Act was designed to meet a situation different from that presented today would support a finding that breaches of no-strike clauses in the narrow circumstances outlined by the Court in *Boys Markets* are beyond the scope of a "labor dispute" as originally intended by Congress.¹⁷ A finding that strikes in breach of no-strike clauses in contracts with arbitration provisions were not "labor disputes" within the meaning of the Norris-La Guardia Act would have had a relatively narrow range of application. For the most part, such an interpretation would be limited to cases involving the Norris-La Guardia Act itself.

However, by holding that the literal anti-injunction prohibition of the Norris-La Guardia Act did apply, but was negated through a process of accommodation, the Court in *Boys Markets* has approved a method of statutory interpretation of much broader significance. The accommodation approach used in *Boys Markets* could be applied to

¹⁵ 398 U.S. at 252.

¹⁶ Section 13 of the Norris-La Guardia Act defines "labor dispute" as including any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

²⁹ U.S.C. § 113(c) (1964).

¹⁷ See Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 645-46 (1959); Rice, *A Paradox of Our National Labor Law*, 34 Marq. L. Rev. 233, 250 (1951).

virtually every instance of conflict between a strong federal labor policy and an otherwise controlling statutory provision. Thus, the holding in *Boys Markets* raises the possibility of further judicial accommodation of other statutes and policies beyond the instant reconciliation of the Norris-La Guardia Act with federal injunctive relief against strikes in breach of no-strike clauses under section 301.

VI. FEDERAL INJUNCTIVE RELIEF AGAINST THE ENFORCEMENT OF STATE COURT INJUNCTIONS IN LABOR DISPUTES

During the Survey year, the Supreme Court, in *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*,¹ considered the validity of a federal district court injunction against the enforcement of a state court injunction in a labor dispute under 28 U.S.C. § 2283 (Federal Anti-Injunction Act of 1793) which 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.²

The dispute in *Atlantic Coast Line* arose in 1967 when the Brotherhood of Locomotive Engineers (BLE) began picketing the Moncrief Yard, a switching yard operated by the Atlantic Coast Line Railroad Co. (ACL). After being denied relief in federal district court, ACL obtained an injunction in a state court against the picketing. Neither party instituted any other legal proceedings until 1969, after the Court in *Railroad Trainmen v. Jacksonville Terminal Co.*³ held that BLE picketing at a yard next to the Moncrief Yard was federally protected under the Railway Labor Act⁴ against state court interference. Based upon the *Jacksonville Terminal* holding, BLE brought an action in state court to dissolve the injunction against the Moncrief Yard picketing. The state court refused to grant relief, and BLE then obtained a federal district court injunction against enforcement of the state court injunction. The issues before the Supreme Court were limited to the questions whether the federal district court injunction in 1969 was valid under section 2283 either because it was "necessary in aid of the district court's jurisdiction," or "to protect or effectuate the judgments" of the district court in its 1967 order allowing picketing at the Moncrief Yard.

A majority of the Court held that the district court injunction in

¹ 398 U.S. 281 (1970).

² 28 U.S.C. § 2283 (1964).

³ 394 U.S. 369 (1969).

⁴ 45 U.S.C. § 151 et seq. (1964).

1969 was not "necessary in aid of its jurisdiction" of the dispute in 1967. While it was recognized that the federal district court did have jurisdiction in the dispute, the Court held that section 2283 requires more than that the requested injunction be merely related to the federal court's jurisdiction. It was held that a federal court can enjoin state court proceedings only if the state action seriously impedes the federal court's ability and authority to decide the case. However, the majority held that in the instant case the state court also had jurisdiction over the dispute. Since the federal and the state courts had concurrent jurisdiction it was held that the state proceedings did not unduly interfere with federal jurisdiction.

The Court also held that the 1969 district court injunction was not granted "to protect or effectuate" the 1967 judgment of the district court within the meaning of section 2283. The majority's determination of this issue rested upon its interpretation of the meaning of the district court's 1967 order denying an ACL request for a federal injunction against the picketing. The union argued before the Court that the district court's 1967 order should be interpreted as a determination by the district court that the union had a federally protected right to picket that could not be abrogated by state court proceedings. The majority of the Court rejected this interpretation and held that the district court order in 1967 defined a right to picket free from federal interference only and left undecided the question of state interference. In support of this interpretation, the majority noted that the union had based its argument before the district court on the theory that the Norris-La Guardia Act prevented the district court from enjoining the picketing. Moreover, the majority held that the district court finding that the union had fulfilled its obligation under the Railway Labor Act and was, therefore, free to engage in self-help meant only that the union was free from federal court interference.

The majority also rejected the union's argument that the wording of the district court's 1969 injunction against enforcement of the state injunction indicated that the 1967 district court order was meant to protect the union's right to picket from state as well as federal interference. In his 1969 order, the district court judge stated:

In its Order of April 26, 1967, this Court found that Plaintiff's Moncrief Yard, the area in question, 'is an integral and necessary part of [ACL's] operations'. . . . The Court concluded furthermore that Defendants herein 'are now free to engage in self-help'. . . . The injunction of the state court, if allowed to continue in force, would effectively nullify this Court's findings and delineation of rights of the parties. The

categorization of Defendants' activities as "secondary" does not alter this state of affairs. See [*Jacksonville Terminal*].⁵

The majority interpreted this reference to *Jacksonville Terminal* as indicating only that the district court, in 1969 concluded that *Jacksonville Terminal* had amplified its 1967 order with the result that state as well as federal interference with picketing at the Moncrief Yard was prohibited in 1969. The Court rejected the argument that the 1969 reference to *Jacksonville Terminal* indicated that the 1967 order was meant at that time to prohibit both state and federal interference. The majority held that it was only the 1969 amplification of the 1967 district court order that needed protection from state court interference within the terms of section 2283. The unmodified 1967 order was interpreted as prohibiting only federal interference, and, therefore, the 1969 injunction against state court interference with that order was held to be beyond the "protect or effectuate" exception of section 2283.

In a dissenting opinion, Justice Brennan argued that the 1969 injunction against state court interference should have been upheld as being necessary to "protect or effectuate" the district court's 1967 judgment within the meaning of section 2283. In Justice Brennan's view, the 1967 district court order, by finding that the union had a federally protected right to picket, necessarily decided by implication that this protected right could not be defeated by state court proceedings. Moreover, the language of the district court's 1969 order was seen by Justice Brennan as supporting the interpretation of the 1967 order as protecting the picketing from state as well as federal interference. He would also find that the union's argument before the district court in 1967 should be interpreted as outlining a broader request for protection than merely an assertion of the Norris-La Guardia prohibition against federal injunctive relief.

Beyond disagreeing with the majority's interpretation of the language of the district court orders, Justice Brennan criticized the majority's reasoning that any doubts of the validity of injunctions against state proceedings under section 2283 should be decided against upholding the federal order. He pointed out that in addition to the limitations imposed by section 2283, that section also represents a congressional intent that federal judgments be upheld and effectively implemented. In the instant case, the district court's basic determination that the union could picket was rendered ineffectual by the state court injunction. Justice Brennan argued that this result places restrictions upon the district court that are contrary to the language and policies of section 2283.

⁵ 398 U.S. at 292.

The decision in *Atlantic Coast Line* is unusual in that it relies so heavily upon the interpretation of the language of a district court judge's order and the arguments raised by counsel at the lower court hearing. Moreover, the factual setting of the case is virtually unique in that a substantively similar controversy was decided by the Court at a site next to the locus of the present dispute after the lower court proceedings in the instant case had been initiated. The decision in *Atlantic Coast Line* thus appears to be extremely limited because it is essentially an application of section 2283 made noteworthy by the unusual underlying factual circumstances. The limited scope of the decision is evidenced by Justice Brennan's remark that his disagreement with the Court was "a relatively narrow one."⁶ His dissenting opinion substantiates this comment by its intense concentration upon the question of the scope of the district court order.

However, the decision may have broader impact in that it seems to run contrary to a current emphasis in recent Court decisions involving questions of statutory interpretation in the labor law area. In the recent *Boys Markets*⁷ decision, also decided during the Survey year, the Court, in a majority opinion written by Justice Brennan, heavily stressed the importance of considering "the total corpus of federal labor law"⁸ when deciding the effect of one piece of labor legislation upon another. Similar stress was placed upon the need for uniformity in the administration of national labor policy. This reasoning supported the Court's conclusion in *Boys Markets* that the plain anti-injunction language of Section 4 of the Norris-La Guardia Act could be accommodated with Section 301 of the LMRA to allow federal injunction relief in certain 301 suits.

Of course, the accommodation reached in *Boys Markets* concerned the interaction between two congressional enactments that had evolved in the context of a developing web of federal control of labor relations. The argument for accommodation of two federal labor law statutes is more persuasive than a similar argument directed toward the accommodation of a general jurisdictional statute such as section 2283 and federal district court enforcement of national labor policy. Furthermore, as Justice Brennan pointed out, "federal courts do not have authority to enjoin state proceedings merely because it is asserted that the state court is improperly asserting jurisdiction in an area pre-empted by federal law or federal procedures"⁹ such as labor law. Nevertheless, it is submitted that many of the policy considera-

⁶ Id. at 297 (dissenting opinion).

⁷ 398 U.S. 235 (1970).

⁸ Id. at 250.

⁹ 398 U.S. at 289-90 (dissenting opinion).

tions behind the decision in *Boys Markets* have application to the issue presented in *Atlantic Coast Line*. In an area such as labor law, there are present considerations of the effectiveness of a national policy, and uniformity of administration of that policy, that are absent in other areas. While the reliance upon these policy considerations in *Boys Markets* was limited to the reconciliation of two federal labor statutes, these policy considerations do not lose their relevance when applied to the question of the limitations under section 2283 of federal court authority in labor disputes.

Thus, it is at least arguable that the goal of uniformity in national labor policy should be considered when applying section 2283 to cases involving federal proceedings in labor disputes. The majority in *Atlantic Coast Line*, however, treated section 2283 almost exclusively in the context of the problem of the separation of federal and state authority. The Court stated that

any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.¹⁰

While this interpretation is a proper assessment of the basic purpose of section 2283, it is an interpretation that does not consider the need for uniformity through federal enforcement in the area of labor relations.

The majority's emphasis on respect for the integrity of state court authority as the controlling consideration in the application of section 2283 is also apparent from the Court's statement that:

Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much and the fundamental principle of a dual system of courts leads inevitably to that conclusion.¹¹

¹⁰ Id. at 287.

¹¹ Id. at 297.

The majority's emphasis upon the integrity of the state court system may readily apply to questions of state versus federal jurisdiction which do not affect a body of law designed to promote nationwide uniformity. However, it is questionable whether this approach should be followed in cases involving labor disputes where uniformity demands that federal court enforcement be supported. In this context, Justice Brennan's criticism of the "crippling restrictions"¹² imposed by the majority in *Atlantic Coast Line* assumes a greater significance than his "narrow" dissent from the conclusion reached in that case. It is submitted that Justice Brennan's criticism of the approach used by the majority is correct because the majority rationale fails to give sufficient weight to policy considerations peculiar to cases which affect national labor policy. The majority's application of section 2283 to cases involving labor disputes as if those cases are no different from other jurisdictional controversies under section 2283 ignores the importance of the policy of uniformity in labor relations through federal enforcement that was recently reemphasized in *Boys Markets*. Where, as in *Atlantic Coast Line*, the question of the validity of a federal injunction in a labor dispute "is by no means an easy one,"¹³ the issue should be resolved in light of policy considerations in favor of federal enforcement that are not necessarily overborne by the jurisdictional limitations of section 2283.

VII. UNFAIR LABOR PRACTICES

A. Duty to Bargain

1. Mandatory Subjects of Bargaining

An employer is required under section 8(a)(5) to bargain collectively with the representatives of his employees. His duty to bargain is mandatory as to "wages, hours and other terms and conditions of employment" as provided in section 8(d). In *McCall Corp. v. NLRB*,¹ decided during the Survey year, the Court of Appeals for the Fourth Circuit reversed the Board and held that the price of food served from vending machines in the employer's plant was not a "condition of employment" when the machines were owned by an independent contractor and when other food sources were available.

The majority of the court stressed the fact that the employees were not limited to the vending machines as a source of food for lunches. The plant itself was not isolated and outside eating places were accessible. In addition, facilities were available to employees who

¹² Id. at 305 (dissenting opinion).

¹³ Id. at 296.

¹ 432 F.2d 187, 75 L.R.R.M. 2223 (4th Cir. 1970).

brought their own lunch. The dissent, however, would uphold the Board's finding that the alternative food sources were not an adequate alternative to in-plant facilities, and that prices of the vending machine food, therefore, materially affected the conditions of employment. Furthermore, the dissent noted that while the machines themselves were owned by an outside contractor, the employer furnished the food for the machines and set the prices for the food itself. These two elements of materiality and control by the employer led the dissent to find that the price of the vending machine food was a mandatory subject of bargaining under section 8(d).

In *Pittsburgh Plate Glass Co. v. NLRB*,² the Court of Appeals for the Sixth Circuit reversed the Board and held that unilateral changes in retirement benefits affecting retired employees are not mandatory subjects of bargaining within section 8(d). The court noted that it is well established that retirement benefits to be paid following termination of employment constitute "conditions of employment," and are mandatory subjects of bargaining while the employees are active. However, once retirement benefits have been negotiated, further changes may be unilaterally proposed by the employer. Thus, the court held that retirees are not "employees" within the meaning of section 2(3).

In *Pittsburgh Plate Glass*, the employer and union had reached agreement upon a pension plan that called for monthly payments by the employer to retired workers. After agreement had been reached, the employer notified the union that it intended to substitute supplemental Medicare for the negotiated health plan. The company planned to mail letters to individual retirees offering withdrawal from the negotiated plan and acceptance of company contributions to Medicare. The union objected to this unilateral action and insisted that any change affecting the retired employees must be the subject of bargaining. The company proceeded with the mailing and accepted a number of retired employees into the supplemental program. This unilateral action was approved by the court on the ground that the retirees were not "employees" for the purposes of mandatory bargaining.

The Board has not followed the Sixth Circuit's holding that retired employees are not "employees" in terms of section 2(3). In *Union Carbide Corp.*,³ the union requested from the employer information concerning retirees so that the union could bargain effectively concerning proposed changes in an existing pension plan. However, unlike the situation in *Pittsburgh Plate Glass*, the union here sought this information for the preparation of future negotiations, rather than

² 427 F.2d 936, 74 L.R.R.M. 2425 (6th Cir. 1970).

³ 187 N.L.R.B. No. 10, 75 L.R.R.M. 1548 (1970).

for application directly to retirees. The Board adopted the trial examiner's holding that retirees are "employees" within the meaning of section 2(3), and that information concerning them is, therefore, presumptively relevant unless the employer can present convincing evidence to the contrary. In upholding the trial order to furnish the requested information, the Board expressly declined to reconsider its *Pittsburgh Plate Glass* holding in light of the Sixth Circuit's reversal of that decision.

2. *Unilateral Union Regulation of Production*

Under section 8(b)(3), unions are required to bargain collectively as to "wages, hours and terms of employment" as stated in section 8(d). A union's obligation to bargain thus parallels the duty to bargain that an employer is bound to recognize under section 8(a)(5). However, the scope of the union's duty to bargain must also be defined in light of section 8(b)(1)(A) which protects a union's right to establish and enforce its own rules with respect to the acquisition or retention of union membership.

The effect of a union's right to regulate internal affairs upon its duty to bargain was initially considered in *Associated Home Builders of Greater East Bay, Inc. v. NLRB*.⁴ The union was bound to a collective bargaining agreement which contained no provisions for production quotas. While the agreement was still in force, the union, without notifying the employer, set quotas and fined members for failures to observe maximum and minimum limits. The case reached the court of appeals upon a complaint alleging only a violation of section 8(b)(1)(A). However, the court held that such unilateral adoption of production quotas must also be considered in terms of a failure to bargain, and remanded to the Board for adjudication under section 8(b)(3). The establishment of employee production quotas was then held to affect "terms and conditions of employment" subject to the duty to bargain.

A union's right to regulate the production of its members was again considered in *Scofield v. NLRB*.⁵ The respondent union had begun state court proceedings to collect fines against members who had exceeded production quotas. The Board had reviewed a union member's complaint against these proceedings and held that the union's activity was properly within the provisions of section 8(b)(1)(A). The Supreme Court upheld this determination, holding that a union's suit to collect fines from members for failing to adhere to union production limits does not constitute unlawful restraint or coercion within the meaning of section 8(b)(1)(A).

⁴ 352 F.2d 745, 60 L.R.R.M. 2345 (9th Cir. 1965).

⁵ 394 U.S. 423 (1969).

During the Survey year, the Board, in *Painters District Council*,⁶ considered the union's duty to bargain regarding production regulation as affected by the Supreme Court's interpretation of the union right to regulate production in *Scofield*. The respondent union, while bound to a collective bargaining agreement containing no quota provisions, unilaterally instituted production quotas among its members. The collective bargaining agreement provided for payment on a weekly salary basis. Under the quota system, each member was prohibited from painting more than ten rooms per week. The union claimed that the quota was designed to provide better quality, not less work. Prior to the institution of the quota, production had averaged over eleven rooms per week. A majority of the Board held that this unilateral change sufficiently affected the terms and conditions of employment so as to violate section 8(b)(3).

The majority relied upon the reasoning in *Associated Home Builders* that union production rules are not per se violations of section 8(b)(1)(A). The *Scofield* holding was not seen as determinative of bargaining problems under section 8(b)(3). However, dissenting Member Fanning interpreted *Scofield* as controlling the issue of whether union production regulations violate section 8(b)(3). He cited the following language from *Scofield* as being determinative:

The union rule here left the collective bargaining process unimpaired, breached no collective contract, required no pay for unperformed services, induced no discrimination by the employer against any class of employees, and represents no dereliction by the union of its duty of fair representation. In the light of this, and the acceptable manner in which the rule was enforced, vindicating a legitimate union interest, it is impossible to say that it contravened any policy of the Act.⁷

As Member Fanning pointed out, the production regulations in *Scofield* had as direct a bearing upon the terms of employment as did the quotas in the case before the Board. It would follow, therefore, that the regulations in *Painters District Council* met the standards expressed in *Scofield*, and that they should likewise be protected from prohibition by "any policy of the Act." Member Fanning would thus rely upon *Scofield* as a basis for approving the instant quotas in terms of 8(b)(3) as well as 8(b)(1)(A).

However, the position taken by the majority in distinguishing

⁶ 186 N.L.R.B. No. 140, 75 L.R.R.M. 1465 (1970).

⁷ 394 U.S. at 436, cited in 186 N.L.R.B. No. 140, 75 L.R.R.M. at 1469 (dissenting opinion).

Scofield from the facts of *Painters District Council* is more convincing. The majority points out that "in *Scofield* there was no 8(b)(3) charge, and the Supreme Court found that the employer had virtually acquiesced and cooperated in the application and implementation of the rule."⁸ While the broad language in *Scofield* does significantly reinforce a union's right to regulate production in terms of 8(b)(1)(A), the majority appears to be correct in holding that *Scofield* does not control questions concerning section 8(b)(3).

If limitation of *Scofield* to 8(b)(1)(A) violations is correct, the reasoning in *Associated Home Builders* should maintain its viability. Production quotas should be viewed as getting to the essence of the terms and conditions of employment for which both unions and employers are bound to bargain. Limitations upon this essential aspect of employer-employee relations are not exclusively the concern of internal union regulation. The majority's holding in *Painters District Council* properly recognizes that production regulations should be the subject of mutual control through bargaining by both employers and unions.⁹

3. *Duty of Successor Employers to Honor Existing Contracts*

In 1963, the Supreme Court, in *John Wiley & Sons, Inc. v. Livingston*,¹⁰ held that in appropriate circumstances a purchasing employer is bound to arbitrate matters arising within the scope of an arbitration clause in a pre-existing collective bargaining agreement. The Court noted that collective bargaining agreements represent more than a consensual relationship between the immediate parties. Collective bargaining agreements must be considered in the context of a national labor policy favoring arbitration that is not necessarily overborne by the fact that the successor employer has not signed the existing agreement. Upon this reasoning, the Court held that the disappearance by merger of a corporate employer bound by a collective bargaining agreement does not terminate that agreement, and, under the proper circumstances, the successor employer is required to arbitrate under the agreement. In *John Wiley & Sons*, the Court found the requisite "proper circumstances" since there was a continuity of the identity of the business after the change in ownership, as evidenced by the transfer of employees from the old operation to the new merged business, and since the union had made its bargaining position known prior to the merger.

During the Survey year, the Board, in *Burns Int'l Detective*

⁸ 186 N.L.R.B. No. 140, 75 L.R.R.M. at 1467 n.6.

⁹ See Note, Unilateral Imposition of Production Quotas by a Union, 52 Va. L. Rev. 711, 716 (1966).

¹⁰ 376 U.S. 543 (1964).

Agency, Inc.,¹¹ relied upon the rationale in *John Wiley & Sons* to hold that in certain circumstances a successor employer must honor the entire collective bargaining agreement signed by his predecessor. In *Burns*, the security services for an aircraft company had been performed by the Wackenhut company, whose employees were covered by a collective bargaining agreement with the petitioning union. As provided in the contract with the aircraft company, the security contract was let out for bids. The prospective bidders, including Burns, were advised by the aircraft company that the security guards then employed by Wackenhut were members of a certified union and were covered by a collective bargaining agreement with the petitioning union. When Burns formally took over the security service, a majority of Burns' work force consisted of guards who had worked for Wackenhut and the nature of the service remained the same as under Wackenhut. Burns refused demands that it recognize the pre-existing collective bargaining agreement with Wackenhut, whereupon the union filed charges alleging violation of section 8(a)(5).

The Board held that Burns was obligated under section 8(a)(5) as if it had been a signatory of the collective bargaining agreement. The Board stressed the fact that Burns had been aware that the business operated under a collective bargaining agreement, and that the operation of the business remained essentially the same after change in ownership. Furthermore, the Board noted that under such circumstances there is no reason to believe that union members would not accept continuation of the terms of the existing agreement. Binding a successor employer to an existing contract in this situation, therefore, was held to achieve the goal of promoting industrial stability without acting inequitably toward the incoming employer.

The scope of the successor employer's obligation was held in *Burns* to include the duty to negotiate proposed changes in existing terms and conditions of employment. Furthermore, the successor employer was held to be prohibited from unilaterally changing wages and other benefits established by the prior agreement even though that agreement has expired. Thus, under the Board's holding, a successor employer is bound to the terms of an expired contract in the same manner as employers who have signed contracts are bound during periods between collective bargaining agreements.

In *Davenport Insulation*,¹² the Board clarified its holding in *Burns*. The union had insisted that the successor employer adhere to an existing contract which had been entered into without certification of majority status of the union under the exception granted by sec-

¹¹ 182 N.L.R.B. No. 50, 74 L.R.R.M. 1098 (1970).

¹² 184 N.L.R.B. No. 114, 74 L.R.R.M. 1726 (1970).

tion 8(f).¹³ The Board held that a contract entered into under section 8(f) does not give rise to the presumption of a continuing majority as in *Burns*. It was held, therefore, that where a predecessor has entered into a contract under section 8(f), a successor employer is not bound to honor the agreement unless there is independent proof of the union's actual majority, and that the successor employer unlawfully refused to bargain.

B. Employer Discrimination

1. Economic Lockouts

The Supreme Court, in *American Ship Building Co. v. NLRB*,¹ held that an employer may temporarily lock out employees to bring economic pressure to bear upon a union during an impasse in bargaining without violating Sections 8(a)(1) or 8(a)(3) of the LMRA,² provided that the employer does not act with a discriminatory motive. However, the Court noted that "there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required."³ The Supreme Court later held in *NLRB v. Great Dane Trailers, Inc.*,⁴ that employer practices which are inherently destructive of important employee rights are unlawful without proof of anti-union motivation, whereas practices whose destructive effects are "comparatively slight" will not be held unlawful if the employer comes forward with evidence of legitimate and substantial business justification for the conduct.⁵

During the Survey year, the Board applied these principles to a

¹³ Section 8(f) provides in part:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement . . . with a labor organization . . . because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement

29 U.S.C. § 158(f) (1964).

¹ 380 U.S. 300 (1965).

² Section 8 provides in part:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7];

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

29 U.S.C. § 158(a)(1)(3) (1964).

³ 380 U.S. at 311.

⁴ 388 U.S. 26 (1967).

⁵ *Id.* at 34.

partial economic lockout in *Laclede Gas Co.*⁶ The employer, a public utility, selectively began laying off employees in anticipation of a strike after an impasse had been reached in negotiations for a new contract. All employees engaged in excavation and construction in the street department were locked out, while employees in other areas continued working. As a consequence of this selectivity, some employees were locked out contrary to seniority provisions which normally would have allowed them to "bump" into other jobs. The employer asserted that this action was taken to leave as little street excavation open as possible in order to reduce danger to the public and to lessen chances of sabotage in the event of a strike after the impending expiration date of the contract.

The Board examined the effects of this lockout in terms of the standards established in *Great Dane*. It was found that while the action may have adversely affected some employees with seniority preference, the lockouts were without regard to union status and were determined entirely by the individual's job assignment. The Board held that such lockouts, even though in contravention of normal seniority practices, had only peripheral effects on the employees' rights. Since there was no proof of anti-union motivation, and since the effects of the lockout on employee rights were "comparatively slight," the Board held that the lockout was not unlawful under *Great Dane*. The Board further stated that even if the lockout were held to be seriously destructive of employee rights, the company had sustained its burden of demonstrating legitimate business objectives for the lockout. The construction work had become unproductive as the contract expiration deadline drew near, and excavations left open during a strike would be potentially dangerous to the public. A temporary lockout under these conditions was held to be essentially defensive in nature and within the scope of unlawful bargaining tactics.

However, dissenting Member Fanning was unconvinced that the employer's action only peripherally affected important employee rights. In his opinion, the employer's disregard of seniority rights by locking out some but not all employees in the unit raised questions of legality in light of the holding in *Great Dane*. Accordingly, since the issue of the lawfulness of the lockout had not been fully treated,⁷ he would remand the case for further determination by a trial examiner.

⁶ 187 N.L.R.B. No. 32, 75 L.R.R.M. 1483 (1970).

⁷ The case had originally been treated by the Board as a refusal to bargain under § 8(a)(5). 173 N.L.R.B. No. 35, 69 L.R.R.M. 1316 (1968). However, on appeal, the Board's finding of a bargaining violation was reversed and the case was remanded for consideration of whether the lockout violated §§ 8(a)(1) or 8(a)(3). 421 F.2d 610, 73 L.R.R.M. 2364 (8th Cir. 1970).

2. Regulation of Union Solicitation

Although an employer has the basic right to exclude non-employees from his property, the exercise of this property right must be accommodated with the right of employees to organize under Section 7 of the LMRA. Included within the right of employees to organize is their right to learn the advantages of organization from outside, non-employee sources. In *NLRB v. Babcock & Wilcox Co.*,⁸ the Supreme Court held that an employer could prohibit non-employee distribution of union literature on his property only "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution."⁹ This second requirement of non-discrimination was indirectly amplified by the Court's holding in *Amalgamated Food Employee's Local 590 v. Logan Valley Plaza, Inc.*¹⁰ In *Logan Valley*, the Court held that the owner of a shopping center could not bar the picketing of a store in the center by non-employee union organizers. The center was found to be "quasi-public" in nature, and the owners, therefore, could not discriminatorily interfere with the union's First Amendment right to picket.

In 1968, the Board, in *Solo Cup Co.*,¹¹ applied the rationales of *Babcock & Wilcox* and *Logan Valley* to a case involving prohibition of union solicitation of employees who worked at a plant located in a privately owned industrial park. The industrial park had privately maintained streets, street signs, speed zone signs and water lines. Virtually all employees of employers in the park entered the area through an intersection of a major public highway and a private street (Dorchester Avenue) running through the park. Because of traffic conditions, it was unsafe for organizers to stand outside the entrance to the park at the intersection of the highway and Dorchester Avenue. When union organizers attempted to enter the industrial park and distribute leaflets on the premises of the Solo plant, they were ordered to leave by representatives of both Solo and the park management.

The Board found that since it was unsafe to stand at the Dorchester Avenue intersection at the entrance to the park, the only other method of solicitation short of entering the industrial park itself would be to use mass media to reach the employees at home. However, unlike the situation in *Babcock & Wilcox*, the employees in *Solo* lived in

⁸ 351 U.S. 105 (1956).

⁹ Id. at 112.

¹⁰ 391 U.S. 308 (1968).

¹¹ 172 N.L.R.B. No. 110, 68 L.R.R.M. 1385 (1968).

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widely separated sections of a large metropolitan area.¹² The Board found that solicitation through mass media under these circumstances would not permit the union to reach the employees effectively. The Board held, therefore, that prohibition of non-employee solicitation on the premises of the plant violated section 8(a)(1).

Alternatively, the Board held that the industrial park in the instant case was analogous to the "quasi-public" shopping center in *Logan Valley*. There were no fences, guard posts or other indications that the industrial park was not freely accessible to the public. In addition, catering services were freely allowed to enter the park area. The Board found that these facts established the park as a "quasi-public" area and, therefore, determined that denial of access to the premises to union solicitation was unlawful within the holding in *Logan Valley*. Upon these findings, the Board ordered the union organizers be allowed to distribute union literature and other information on Solo's plant premises outside the plant itself.

During the Survey year, the Court of Appeals for the Seventh Circuit, in *NLRB v. Solo Cup Co.*,¹³ denied enforcement of the Board's order. The court held that the Board's finding that the park was "quasi-public" in nature was not supported by the evidence. Unlike the shopping center in *Logan Valley*, it was held that the industrial park was not held out as being open to the public. The court further held that the serving of the park by industrial caterers did not alter the private nature of the area.

The court also held that the *Babcock & Wilcox* rationale had become inapplicable since after the Board decision, the owners of the industrial park consented to allow union organizers to solicit Solo employees within the park on Dorchester Avenue. It was held that this type of solicitation would be practical since Solo employees quit work at a time different from other employees within the park, and would thus be easily identifiable. The court concluded that since this reasonable method of solicitation was now available, it would be unwarranted to enforce the Board's order allowing solicitation of employees on the premises of Solo's plant.

The court's finding that the industrial park in *Solo* was not a "quasi-public" place in terms of the *Logan Valley* decision appears correct. The nature of an industrial park, whose tenants are mainly manufacturing companies, is distinguishable from the consumer-oriented nature of a public shopping center, as was the case in *Logan*

¹² In *Babcock & Wilcox*, 40% of the employees lived in a nearby town of only 21,000 people. In *Solo Cup*, the employees lived in the greater Chicago area which had a population of over 4,000,000 people. 172 N.L.R.B. No. 110, 68 L.R.R.M. at 1386 n.2.

¹³ 422 F.2d 1149, 73 L.R.R.M. 2789 (7th Cir. 1970).

Valley. However, it is unclear to what extent the court rejected the Board's finding that solicitation through the media would be ineffective in the present case and, therefore, that solicitation on the premises was required under the holding in *Babcock & Wilcox*. The Board's reading of *Babcock & Wilcox* as requiring *effective* alternative methods of communication, and not merely *available* alternative methods, is significantly broader than prior interpretations of *Babcock & Wilcox*.¹⁴ The court did expressly hold that this extension of *Babcock & Wilcox* was unnecessary in the instant case because organizers were allowed to solicit within the industrial plant limits. However, the court did not comment upon the Board's underlying rationale that the *Babcock & Wilcox* standard may not be satisfied even when the alternative of mass media communication is available if that method is ineffective because the employees are dispersed throughout a heavily populated metropolitan area. Thus, the reversal of the Board in *Solo Cup* does not diminish the prospect that the Board's expansive reading of *Babcock & Wilcox* may significantly affect future decisions weighing the right of employers to exclude non-employee organizers from plants located in large metropolitan areas.

3. *The Scope of Protected Activity*

Under section 7, employees are guaranteed the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Supreme Court has recognized that there is a broad range of activities that are protected under section 7. In *NLRB v. Washington Aluminum Co.*,¹⁵ the Court held that a walkout by several employees in protest of poor heating conditions was protected under section 7 despite the fact that the employees had not presented a specific demand to their employer at the time of the walkout. The Court held that the protection of section 7 extends to concerted activities whether they occur before, after, or at the time a demand is made.

The issue of what type of a demand is required to bring a concerted activity within the protection of section 7 arose in *AHI Machine Tool & Die, Inc. v. NLRB*.¹⁶ In response to a reprimand, an employee of AHI struck and knocked down his foreman. The foreman immediately fired the employee who had assaulted him. As the foreman emerged from a discussion with a management official, another employee asked the foreman to discuss the previous events leading to

¹⁴ Note, Nonemployee Union Organizers Granted Access to Company Property for Solicitation Purposes, 67 Mich. L. Rev. 573, 579 (1969).

¹⁵ 370 U.S. 9 (1962).

¹⁶ 432 F.2d 190, 75 L.R.R.M. 2353 (6th Cir. 1970).

the discharge. The foreman declined the invitation and four employees shortly thereafter walked out along with the employee who had hit the foreman. The four employees were required to sign "quit" slips prior to receiving their final paychecks. Later, when the four employees were not offered immediate reinstatement, they filed charges claiming a violation of section 8(a)(1). In support of this charge, the union claimed that the discharge of the employee was unwarranted because the foreman had continually harassed the employees.

The court of appeals reversed the Board's finding that the walkout was protected activity to protest the firing of a fellow employee. The majority of the court held that *Washington Aluminum* did not apply since, in that case, the employees, prior to the walkout, had complained repeatedly to the employer about poor heating. The present case was distinguished by the fact that there were no complaints at any time concerning alleged harassment by the foreman. The court held that the management learned that the employees were protesting the discharge of a fellow employee only after the walkout and the signing of the "quit" slips. The majority held that, partly because of this failure to communicate their grievance to the management, the employees' walkout was not within section 7.

In a dissenting opinion, Judge Celebrezze agreed with the Board's finding that there was sufficient management awareness of the reasons for the walkout to bring the activity within the protection of section 7. In his view, the company officials were aware of the fact that some of the employees believed that the foreman had provoked the assault through his attitude and harassment. Moreover, the lack of formal grievance procedures in the shop, coupled with the earlier request to discuss the events, created a reasonable inference that management knew that the walkout was in protest of the discharge. For these reasons, Judge Celebrezze would find the activity within the scope of section 7 as defined in *Washington Aluminum*.

C. *Economic Strikers*

1. *Retroactive Application of Laidlaw*

In *NLRB v. Great Dane Trailers*,¹ the Supreme Court held that economic strikers retain their status as "employees" under Section 2(3) of the LMRA until they have found substantially equivalent positions elsewhere. The Court held that failure to reinstate economic strikers upon termination of a labor dispute presumptively will be construed as an unfair labor practice because of its tendency to discourage employees from engaging in protected concerted activity. In

¹ 388 U.S. 26 (1967).

order to rebut the presumption, the employer has the burden of offering "legitimate and substantial business justifications"² such as the elimination of the strikers' jobs or permanent replacement of the strikers. The scope of section 2(3) was further amplified by the holding in *NLRB v. Fleetwood Trailer*³ that the "employee" status of economic strikers does not terminate solely because their initial application for reinstatement has been legitimately denied by the employer. Employers are required to offer as yet unreplaced strikers preference for any positions which become available until the striker accepts regular and substantially equivalent employment elsewhere.

Following the reasoning of *Fleetwood Trailer*, the Board held in *Laidlaw Corp.*⁴ that economic strikers who apply for reinstatement at a time when their positions are filled by permanent replacements are entitled to reinstatement when the replacements leave, unless the strikers have accepted employment elsewhere or the employer can prove that his failure to offer reinstatement was for legitimate and substantial business reasons.⁵ Thus, an employer must offer full reinstatement (including undiminished seniority benefits, etc.) to economic strikers as appropriate job vacancies occur. Furthermore, the Board held that where economic strikers have made unconditional applications for reinstatement and are readily available to return to work, the employer must seek them out as job openings become available.

During the Survey year, the Board, in a two to one decision, in *Coca Cola Bottling Works*,⁶ held that the *Laidlaw* decision could be applied retroactively. In *Coca Cola*, the union, after engaging in an economic strike for several months, notified the employer that the strike was being ended and requested reinstatement of the striking employees. The company replied that reinstatement was impractical until the union could furnish a list of those strikers who desired to be re-employed. The union complied with this request and submitted the names of 137 strikers who desired to be reinstated. The employer replied that 12 of the 137 strikers would be reinstated and that of the remaining strikers, either their jobs had been abolished or they had been permanently replaced. The union alleged that this offer of reinstatement violated sections 8(a)(1) and 8(a)(3). However, at an unfair labor practice hearing, the trial examiner found that with regard to the reinstatement issue, the employer had not acted unlawfully.

The Board agreed with the trial examiner's findings that of all

² Id. at 34.

³ 389 U.S. 375 (1967).

⁴ 171 N.L.R.B. No. 175, 68 L.R.R.M. 1252 (1968).

⁵ Id., 68 L.R.R.M. at 1258.

⁶ 186 N.L.R.B. No. 142, 75 L.R.R.M. 1551 (1970).

strikers denied reinstatement, either their jobs had been abolished or they had been permanently replaced at the time reinstatement was requested. However, the Board noted that the trial examiner's approval of the employer's reinstatement offer was necessarily based upon pre-*Laidlaw* considerations. Therefore, the Board granted the employer's petition to reconsider the reinstatement issue in light of *Laidlaw*. Further findings by a trial examiner disclosed that job openings had become available after the union's initial request for reinstatement. The employer had not notified the union of the subsequent openings, nor could he offer substantial business justifications for his failure to reinstate strikers to these openings. This failure to recall and reinstate strikers as jobs became available was held, in light of *Laidlaw*, to be a violation of sections 8(a)(1) and 8(a)(3).

In a dissenting opinion, Chairman Miller objected to the retroactive application of *Laidlaw* as unfair since the employer had acted in good faith and in accordance with prevailing Board precedent. Furthermore, Chairman Miller criticized such retroactive application as leading to confusion and uncertainty. He adopted the comment of Judge Major who stated in *Laidlaw Corp. v. NLRB*:⁷

Enforcement of the Board's order means from now on that an employer when faced with the problem of his rights and obligations in a labor dispute cannot safely rely on the advice of counsel, pronouncements of the Labor Board or court decisions for the law by which he should charter his course. Instead, he must be endowed with a power of prophecy sufficiently great to enable him to anticipate that the Board may change the law and make illegal that which was legal.⁸

2. Continued Membership in Bargaining Unit

Under the National Labor Relations Act, workers who engage in an economic strike may be permanently replaced by the employer so that he may continue his operations.⁹ At the termination of the strike, the employees that have been replaced retain their status as "employees" until they find substantially similar work.¹⁰ This continued "employee" status requires employers to accord replaced eco-

⁷ 414 F.2d 99, 71 L.R.R.M. 3054 (7th Cir. 1969).

⁸ Id. at 118, 71 L.R.R.M. at 3070 (dissenting opinion), cited in 186 N.L.R.B. No. 142, 75 L.R.R.M. at 1558.

⁹ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

¹⁰ 29 U.S.C. § 152(3) (1964) provides:

The term "employee" . . . 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. . . .

conomic strikers preference in hiring for any positions that may become available and for which they are qualified.¹¹

In *Stoner Rubber Co.*,¹² the NLRB qualified the "employee" status of permanently replaced economic strikers by ruling that such status did not entitle them to be considered part of the bargaining unit for purposes of determining a union's continued representational status. The Board reasoned that Section 9(c)(3) of the Act,¹³ which then stated that striking employees not entitled to reinstatement were not entitled to vote, compelled this result. Thus, at the termination of an economic strike during which a substantial number of permanent replacements had been hired, an employer might validly assert a "good faith doubt" that the union continued to represent the employees and, therefore, refuse to bargain.

Subsequent to the *Stoner* decision, however, Congress amended Section 9(c)(3) of the Act to provide that economic strikers could vote in any election conducted within twelve months after the commencement of the strike. Further, the amended provision empowers the Board to issue such regulations as would effectuate the purpose of the amendment. The Board complied with this legislative mandate and, on occasion, has articulated principles governing voter eligibility.¹⁴ Nevertheless, the *Stoner* ruling remained intact, and economic strikers continued to be excluded from the bargaining unit for purposes of determining the validity of an employer's alleged good faith doubt.¹⁵

During the Survey year, in *Pioneer Flour Mills v. NLRB*,¹⁶ the Board successfully urged the Court of Appeals for the Fifth Circuit to enforce a ruling that departed from the policy announced in *Stoner*. In *Pioneer Mills*, the employer refused to bargain with the union at the termination of an economic strike because the appropriate unit, which included sixty-two employees, consisted of forty-six permanent replacements and sixteen regular workers who refused to strike.¹⁷ At the Board level, the employer contended that this indicated that the union no longer represented the employees in the unit, and, therefore, that there was no obligation on its part to bargain. The Board, however, found that the seventy-nine workers who actively participated in the strike, and unconditionally sought reinstatement upon termination of the work stoppage, would have been allowed to

¹¹ *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

¹² 123 N.L.R.B. No. 152, 44 L.R.R.M. 1133 (1959).

¹³ 29 U.S.C. § 159(c)(3) (1964).

¹⁴ See NLRB Twenty-Fifth Annual Report 47 (1960), and NLRB Twenty-Eighth Annual Report 54-55 (1963).

¹⁵ See, e.g., *Titan Metal Mfg. Co.*, 135 N.L.R.B. No. 22, 49 L.R.R.M. 1466 (1962).

¹⁶ 427 F.2d 983, 74 L.R.R.M. 2343 (5th Cir. 1970).

¹⁷ *Pioneer Flour Mills*, 174 N.L.R.B. No. 174, 70 L.R.R.M. 1433, 1434 (1969).

vote in an election under Section 9 of the Act, and, therefore, were properly includable in the unit for the purpose of ascertaining the union's majority status.¹⁸

The Board admitted that its action was a departure from *Stoner* and later cases, but it noted that the 1959 amendments to Section 9(c)(3) compelled the revision. The Board reasoned that:

[a]lthough Section 9(c)(3) deals with representation matters and the eligibility of voters in a Board conducted election, we consider the provision pertinent to a Section 8(a)(5) allegation in determining whether an employer has a reasonable basis for questioning an incumbent union's presumed majority status, since the ultimate basis for the employer's asserted doubt here is that a majority of the employees in the *unit* are not union adherents.¹⁹

The Board continued by noting that failure to include economic strikers when determining the representative status of a union would defeat the purpose of the 1959 amendment.

On appeal, the company attacked the Board's action on two grounds. First, it asserted that the abandonment of the *Stoner* policy was tantamount to formulating a rule of continued prospective effect. Therefore, the company urged, the requirements contained in the Administrative Procedure Act should have been followed. Secondly, the company contended that at the time of its refusal to bargain *Stoner* was still good law, and that bad faith could not be inferred retroactively.

The court of appeals found both of these arguments untenable. The choice between rule-making by adjudication or by the provisions of the APA, the court noted, is a question of judgment for the Board.²⁰ Absent an abuse of discretion, or a clear violation of the APA, the Board's choice will not be disturbed. As for the question of retroactive application, the court adopted the position advanced in *SEC v. Chenery Corp.*,²¹ where the Supreme Court stated that "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."²²

It seems clear that the abandonment of the *Stoner* doctrine was not only proper, but long overdue. The 1959 legislative amendment

¹⁸ Id., 70 L.R.R.M. at 1435.

¹⁹ Id., 70 L.R.R.M. at 1434.

²⁰ For an excellent discussion of the Board's rule-making powers, see Comment, Rule-Making and Adjudication in Administrative Policy Making: *NLRB v. Wyman-Gordon Co.*, 11 B.C. Ind. & Com. L. Rev. 64 (1969).

²¹ 332 U.S. 194 (1947).

²² Id. at 203.

to Section 9(c)(3) clearly evidences the protection the Act is intended to accord economic strikers.

D. Union Discipline

1. Fines Against Members

Under section 8(b)(1)(A) it is an unfair labor practice for a union to restrain or coerce employees in the exercise of the rights guaranteed in section 7. However, section 8(b)(1) provides that this limitation upon union discipline shall not impair the right of a union to regulate union membership. In *NLRB v. Allis-Chalmers Mfg. Co.*,¹ the Supreme Court balanced these two protected interests and held that a union may fine members who cross a picket line to work for a struck employer. The fines were held to be within the scope of protected union regulatory activity since the union action did not affect the member's status as an employee, but was related to proper union concern for the effectiveness of the strike. The holding in *Allis-Chalmers* was expanded in *Scofield v. NLRB*² where the Court held that union fines for violation of production quotas were protected within the proviso of section 8(b)(1). The Court recognized that the production quotas were a bargainable issue and not a purely internal union matter. However, union limitation of production was found to be sufficiently related to the union's traditional function of protecting the economic well being of its members to justify its enforcement as a lawful union regulation.

During the Survey year, the Board, in two decisions, further clarified the scope of permissible union discipline of strike-breaking members who cross union picket lines. In *Machinists, Local Lodge 504 (Arrow Development Co.)*,³ the Board, with Member McCulloch dissenting, held that a union fine of \$500 on a member for crossing a picket line did not violate section 8(b)(1)(A). The Board held that the union action was properly related to the legitimate area of internal union matters as defined by *Allis-Chalmers* and *Scofield*. The reasonableness of the amount of the fines was held to be beyond the purview of the Board once the activity has been held to be lawful under section 8(b)(1)(A). Thus, the Board interpreted *Allis-Chalmers* and *Scofield* as establishing distinctions between lawful and unlawful discipline in terms of section 8(b)(1)(A), but not as extending that section to regulate the severity of otherwise lawful fines.

Dissenting Member McCulloch viewed the reasonableness of union fines as relevant to the question of their validity under section

¹ 388 U.S. 175 (1967).

² 394 U.S. 423 (1969).

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

8(b)(1)(A). He noted that in both *Allis-Chalmers* and *Scofield* the Court frequently referred to the fines at issue as being "reasonable." These cases, he argued, should not be read as supporting the majority's holding that the Supreme Court has treated lawfulness apart from reasonableness in applying section 8(b)(1)(A). Further, abdication of the responsibility for determining the reasonableness of disciplinary actions to the state courts was seen as inconsistent with the established goal of uniformity in national labor law. Additional considerations, such as the Board's expertise and the often prohibitive costs of state court litigation, were urged by Member McCulloch as support for Board adjudication of the question of the reasonableness of union fines.

The Board was again presented with the question of the lawfulness of union fines against members who crossed picket lines in *Machinists, Lodge 405 (Boeing Co.)*.⁴ The union began a lawful strike upon the expiration of the collective bargaining agreement then in force. A number of employees, all of whom had been union members during the contract period, crossed the picket line and reported for work. Some of the strike-breaking employees resigned from the union before crossing the picket line, while others resigned after crossing the picket line but before institution of union disciplinary proceeding against them, and others crossed the picket line without resigning from the union at all. The union imposed fines on all strike-breaking employees regardless of whether or when they had resigned. The Board, with Member Brown dissenting in part, upheld the fines against those employees who did not resign from the union, or who resigned only after crossing the picket line. However, the fines against those employees who had resigned before crossing the picket line were held to be in violation of section 8(b)(1)(A).

The Board held that the membership relationship is critical in determining the lawfulness of union sanctions against employees. Membership was held to bind each member contractually to the constitution and by-laws of the union he has chosen to join. Once this relationship has been terminated (as by letters of resignation in the instant case), the employee's contractual consent to submit to union discipline is retracted. The Board held that employees who had so renounced membership were not "union members" within the holdings in *Allis-Chalmers* and *Scofield*. Therefore, from the moment the contractual bond between union and employee was severed, union attempts to discipline the employee were in violation of section 8(b)(1)(A).⁵

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

⁵ The importance of the exact timing of the resignation is evidenced by the order

Member Brown dissented from the majority's strictly contractual approach. He argued that the duty owed by a member to his union arises from the time a strike is declared, and that this duty is not severed by a resignation from the contractual relationship of membership at a later time. In his view, a resignation after a strike is called, is, at that point, already a disloyal act subject to union discipline. Thus, he would find that the union fines against all the strike-breaking employees, including those who resigned from the union prior to crossing the picket line, were not prohibited by section 8(b)(1)(A).

The result reached by the majority in *Boeing* appears to be correct. Union sanctions against employees who refuse to honor an authorized strike while retaining full union membership are within the scope of lawful union discipline under the holdings in *Allis-Chalmers* and *Scofield*. However, it is questionable whether the proper standard for the application of section 8(b)(1)(A) should be heavily grounded upon contract concepts. As the Board has noted in cases dealing with problems other than union discipline, labor contracts must be construed not on the basis of contract theory alone, but in the context of national labor policy.⁶ Therefore, it is submitted that the question of whether an employee is a "union member" for purposes of section 8(b)(1)(A) should not be determined in all cases by the status of the contractual relationship between the union and the employee. Rather, the membership relationship should be viewed as one of many factors to be considered in the broader determination of whether a particular union sanction "reflects a legitimate union interest"⁷ in regulating internal union affairs. In this respect, Member Brown's dissenting opinion properly focuses upon the questionable validity of relying upon an employee's resignation as the test of lawfulness under section 8(b)(1)(A).

2. *Sanctions for Seeking Decertification*

The Board has in the past held that the proviso to section 8(b)(1)(A) allows a union to discipline members who file petitions for decertification of the union. Thus, it has been held a union may lawfully *expel* a member who has filed a decertification petition since expulsion of a member who seeks to destroy the union is clearly a self-protective action not prohibited by section 8(b)(1)(A).⁸ On the other hand, a

issued by the Board. As to employees who had resigned after crossing the picket line, the Board ordered the union "to remit a pro rata portion of the fine, so that what remains reflects only preresignation conduct." 185 N.L.R.B. No. 23, 75 L.R.R.M. at 1007.

⁶ See, e.g., *Burns Int'l Detective Agency, Inc.*, 182 N.L.R.B. No. 50, 74 L.R.R.M. 1098, 1100 (1970).

⁷ 394 U.S. at 430.

⁸ *Tawas Tube Prods. Inc.*, 151 N.L.R.B. No. 9, 58 L.R.R.M. 1330 (1965).

union may not *fine* a member seeking decertification since the effect of the fine is not to protect the integrity of the union but merely to punish the employee.⁹

The Board further limited the right of a union to sanction a member for filing a decertification petition in *Steelworkers, Local 4186 (McGraw Edison Co.)*.¹⁰ Following disciplinary proceeding, the union suspended a member's rights to attend meetings for one year and indefinitely to hold office as sanctions against the member's filing an unsuccessful petition for decertification. The member initially refused to pay his union dues while these limitations upon his membership were in effect. The union then threatened to invoke the union security clause in force to secure the member's discharge for failure to pay dues. Following this threat, the member paid his dues.

The Board found that this activity was in violation of section 8(b)(1)(A). The Board recognized that a reduction in membership rights alone would not necessarily be unlawful activity. However, the combination of impaired membership and the threat of discharge was held to be unlawful coercion upon access to the Board's processes. Furthermore, the threat of discharge while the employee's membership rights had already been limited was held to be unnecessary to protect the integrity of the union. Thus, the Board based its finding of unlawful activity on the grounds that the sanctions unduly coerced access to Board relief, and that the union had acted beyond legitimate self-protection.

3. *Judicial Review of Union Disciplinary Hearings Under Section 101(a)(5) of LMRA*

During the Survey year, the Supreme Court, in *Boilermakers v. Hardeman*,¹¹ considered the issue of the proper standard of review for cases under Section 101(a)(5) of the Labor Management Reporting and Disclosure Act which provides:

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.¹²

The companion section 102¹³ provides that a suit for damages result-

⁹ *Blackhawk Tanning Co., Inc.*, 178 N.L.R.B. No. 25, 72 L.R.R.M. 1049 (1969).

¹⁰ 181 N.L.R.B. No. 162, 73 L.R.R.M. 1570 (1970).

¹¹ 401 U.S. 233.

¹² 29 U.S.C. § 411(a)(5) (1964).

¹³ 29 U.S.C. § 412 (1964).

ing from a violation of section 101(a)(5) may be brought in a United States District Court.

In *Hardeman*, a union member became involved in an altercation over a lack of job assignments with a union officer in charge of referrals through a union hiring hall. The disagreement led to a fistfight between the union member and the official. The union member was tried by the union for this conduct upon the separate charges of creating dissension among union members and of restraining a union officer from discharging his duties. These offenses were proscribed by two distinct provisions of the constitution and by-laws of the union.¹⁴ However, the union trial committee returned a general "guilty as charged" verdict that did not disclose whether the union member had been found guilty of both charges or of one charge only. As a result of this verdict, the union member was expelled from the union for an indefinite period. When further internal union appeal proved fruitless, the union member brought suit in federal district court under section 101(a)(5). This action resulted in a substantial jury award to the sanctioned member which was affirmed by the Court of Appeals for the Fifth Circuit.¹⁵

In reversing the decision of the court of appeals, the Supreme Court first considered the union's argument that the controversy was within the exclusive competence of the Board. The union claimed that the conduct involved was at least arguably unlawful discrimination in job referral and was, therefore, an unfair labor practice under Sections 8(b)(1)(A) and 8(b)(2) of the LMRA. The Court rejected this contention, noting that the issue raised by the member's complaint was the procedural fairness of the discipline proceedings, and was not directed toward any underlying unfair labor practice. The Court held that the question of procedural fairness fell squarely within the scope of section 101(a)(5) and the action was, therefore, within the competence of the district court.

The Court then considered the findings of the district court to determine the validity of the judgment against the union. The Court noted that the trial judge apparently had relied upon the holding in

¹⁴ The charge of creating dissension was based upon a union constitutional provision which provided in part that "[a]ny member who endeavors to create dissension among the members or who works against the interest and harmony of [the union] . . . shall upon conviction thereof be punished by expulsion from the union." The charge of interference with a union officer was based upon a union by-law which provided in part that "[i]t shall be a violation of these By-laws for any member through the use of force or violence . . . to restrain, coerce, or intimidate . . . any official of [the union] . . . or to prevent him from properly discharging the duties of his office." Both provisions are cited in 401 U.S. at 236 nn.3,4.

¹⁵ 420 F.2d 485, 73 L.R.R.M. 2208 (5th Cir. 1969).

*Boilermakers v. Braswell*¹⁶ that union penal provisions must be strictly construed. This holding led the trial court to construe the union provisions against dissension as being limited to threats against the union as an organization and not including merely personal altercations. Upon this reasoning, the trial judge held that there was no evidence to support a finding of guilty against the accused member on the charge of creating dissension in the union. The trial court then held that the union member had been denied a fair hearing within the meaning of section 101(a)(5) since the general union verdict failed to disclose that the guilty finding was not based upon the unproven charge of the two separate charges brought.

This reasoning, which was affirmed by the court of appeals, was rejected by the Supreme Court as contrary to the legislative intent of section 101(a)(5). The holding of the lower court was reversed as an unjustified "substitution of judicial for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members."¹⁷ The Court limited judicial review in section 101(a)(5) suits to considerations of the fairness of the union proceedings themselves. The courts may examine specific union provisions to determine if a union member has been misled in preparation of his defense. However, the Court held that this procedural supervision does not warrant scrutiny of union regulations in order to determine whether the particular conduct is punishable. The Court held that the proper standard for review of sufficiency of evidence in section 101(a)(5) suits is whether there is "some evidence at the disciplinary hearing to support the charges made."¹⁸ Applying this standard, the Court held that the uncontroverted evidence of the union member's assault of the union official was sufficient to qualify the union's guilty verdict as fair within the meaning of section 101(a)(5).

Justice Douglas dissented from the majority's limitation upon the scope of review in section 101(a)(5) suits. In his view, a "fair hearing" under that section requires that there be some evidence directed toward the specific charges in issue. While a reviewing court under section 101(a)(5) should not review the merits of the dispute, nor grant a hearing de novo, the court must determine whether a charge is supported by the evidence. The finding of "guilty as charged" in the instant case, Justice Douglas argued, does not disclose whether the suspension was supported by the evidence since it is impossible for the reviewing court to determine the charge (or whether it was both charges) upon which the guilty finding was based. Such a pro-

¹⁶ 388 F.2d 193, 67 L.R.R.M. 2250 (5th Cir. 1968).

¹⁷ 401 U.S. at 242-43.

¹⁸ *Id.* at 246.

cedural infirmity is, in Justice Douglas's view, squarely within the competence of a reviewing court under section 101(a)(5) and should lead to a finding that the disciplinary proceeding cannot stand.

E. Secondary Boycotts

1. Common Situs Picketing

The thrust of section 8(b)(4)(ii)(B),¹ is to protect neutral employers from the effects of labor disputes between other employers and their employees. This protection, however, has been limited by rulings which have recognized the right of striking employees, under certain circumstances, to picket "common situs" locations where neutral as well as primary employer activity is present. In *Moore Dry Dock Co.*,² the Board attempted to establish a set of standards outlining what types of picketing are permissible in common situs situations. The Board ruled that picketing is primary and beyond the prohibitions of section 8(b)(4)(ii)(B) if:

- (a) the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises;
- (b) at the time of the picketing the primary employer is engaged in its normal business at the situs;
- (c) the picketing is limited to places reasonably close to the location of the situs; and
- (d) the picketing discloses clearly that the dispute is with the primary employer.³

These criteria were relied upon as a basis for the Supreme Court's holding in *Electrical Workers v. NLRB (General Electric)*⁴ that striking employees may lawfully picket an entrance reserved for use by outside contractors whose work is necessary to the normal operations of the primary employer.

¹ Section 8(b)(4)(ii)(B) provides in part:

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

....

(4) ... (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—

....

(B) forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person

²⁹ U.S.C. § 158(b)(4)(ii)(B) (1964).

² 92 N.L.R.B. No. 93, 27 L.R.R.M. 1108 (1950).

³ Id., 27 L.R.R.M. at 1110.

⁴ 366 U.S. 667 (1961).

In *Auburndale Freezer Corp. v. NLRB*,⁵ decided during the Survey year, the scope of permissible common situs picketing was again questioned. The common situs issue in *Auburndale Freezer* arose when striking employees of Cypress Garden Citrus Products picketed a warehouse owned by Auburndale and used by Cypress for storage purposes. The Board, with two members dissenting, found that the picketing of the Auburndale warehouse by Cypress employees was within the common situs guidelines of *Moore Dry Dock* and, therefore, was not prohibited by section 8(b)(4)(ii)(B).⁶ The majority of the Board concluded that the control by Cypress over the storage and eventual shipment of its products at the warehouse constituted sufficient presence of the primary employer at the neutral site to justify the picketing as primary activity. Use of the warehouse was seen as an integrated step in the Cypress production process.

The Court of Appeals for the Fifth Circuit overturned the Board's decision and remanded the case with instructions to enter a cease and desist order against the picketing.⁷ In reaching its decision, the court stressed the fact that no employees of Cypress had ever worked at the warehouse, the amount of Cypress products in the warehouse constituted less than ten percent of the total warehouse capacity, and the primary situs of the dispute, Cypress' processing plant, was readily available for picketing only five miles from the warehouse. The court further noted that nineteen other citrus producers were using the Auburndale facilities at the time of the disputed picketing.

Upon these facts, the court held that the inescapable purpose of the picketing was to interfere with the other producers using ninety percent of the warehouse space, and who were total strangers to the primary dispute. This object was held to be prohibited by the plain terms of section 8(b)(4)(ii)(B). Moreover, the court viewed its decision as being of supreme public importance since to allow picketing upon these facts would subject operators of public warehouses to the labor disputes of all their customers. This result was viewed as having a potentially critical impact upon the general welfare, especially in those cases where picketing could tie up the shipment of perishable goods.

The distinction between the holding of the Board and that of the majority of the court in *Auburndale Freezer* centers upon the effect given to the presence of Cypress products in the neutral warehouse. Both opinions agreed that the *Moore Dry Dock* characterization of

⁵ 434 F.2d 1219, 75 L.R.R.M. 2752 (5th Cir. 1970).

⁶ 177 N.L.R.B. No. 108, 71 L.R.R.M. 1503 (1969).

⁷ 434 F.2d at 1222, 75 L.R.R.M. at 2755.

permissible common situs picketing is not dependent upon the presence of primary employees at the neutral situs.⁸ However, the court in *Auburndale Freezer* refused to accept the Board's holding that the presence of the primary employer's goods alone in this case outweighed the congressional intent to protect neutral employers. The court's holding rested primarily upon the fact that picketing directed at the relatively minimal presence of Cypress products could effectively tie up a majority of the users of the warehouse who were neutrals to the dispute. The *Auburndale Freezer* decision thus does not present an addition to the specific requirements found in *Moore Dry Dock*, but rather, is limited to a balancing of interests that is heavily dependent upon the particular facts of the case. The decision leaves unanswered the question of whether a more significant presence of a primary employer's products in a neutral warehouse would support picketing of the warehouse as lawful primary activity.

2. *Neutrality of Secondary Employers*

In *Vulcan Materials Co. v. United Steelworkers of America*,⁹ the Court of Appeals for the Fifth Circuit considered the question of whether the requirement that a primary employer obtain written consent from the secondary employer before making certain changes in the business operation destroyed the secondary employer's neutrality for purposes of section 8(b)(4)(ii)(B). For years prior to the present dispute, Vulcan owned and operated a ready-mix concrete plant and an adjacent slag plant which utilized materials from a nearby steel company. The employees in the two operations were represented under the same bargaining agreement. This agreement expired by its terms in December, 1967. In November, 1967, Vulcan made an oral agreement to sell its concrete products plant to Forman, and the sale was completed shortly thereafter.

After the existing agreement covering the concrete plant employees expired, the unions and Forman operated under a temporary agreement until a new agreement could be reached. In February, 1968, this temporary arrangement broke down and the Forman employees went on strike. A picket line was placed across an access road leading to both the Forman and Vulcan sites even though separate gates along the access road had been designated for each plant. The picket line effectively shut down the Vulcan slag plant as well as the Forman concrete plant. The question considered on appeal was whether Vulcan was a neutral secondary employer entitled to the protection of 8(b)(4)(ii)(B).

⁸ See *Brownfield Elec., Inc.*, 145 N.L.R.B. No. 113, 55 L.R.R.M. 1113 (1964), cited in 434 F.2d at 1226 (dissenting opinion).

⁹ 430 F.2d 446, 74 L.R.R.M. 2818 (5th Cir. 1970).

The unions contended that Vulcan could not be considered a neutral employer, separate from Forman, because of the restrictions entered into between Vulcan and Forman as part of the sale transaction. In part payment, Vulcan had received an installment note with a provision requiring Vulcan's written consent before Forman could make certain changes in its business operation, alter its structure, make loans, pay dividends or increase certain salaries. The court rejected the argument that these conditions destroyed Vulcan's neutrality. The financial restrictions were held to be no more than commonplace safeguards to protect the interest of a lender. Such potential control, which might be exercised to protect Vulcan's investment, fell short of the actual control that must be shown to destroy neutrality.

The union argued that in addition to the incidents of financial control by Vulcan, Vulcan and Forman were interrelated operationally and economically. Before the sale, the two operations were carried on by employees in a single bargaining unit under the same collective bargaining agreement. After the sale, operations were carried on in virtually the same manner as before the sale, utilizing the same employees, equipment and material as before the sale. There was no sign or other indication that the concrete plant no longer was owned by Vulcan, Forman's delivery truck carried Vulcan symbols, both groups of employees utilized the same time-card racks and other facilities, and Vulcan salesmen continued to take orders for both companies.

The court rejected this evidence as falling short of destroying Vulcan's neutrality. The operational similarities were dismissed as incidental trappings rather than essential controls of Forman by Vulcan. The two employers were held to be independent since the basic operations were carried out in different plants, a different product was sold to different customers, neither employer was a customer of the other's products, and capital and management were separately maintained. For these reasons, the court held that Vulcan was a neutral employer within the protection of 8(b)(4)(ii)(b), and upheld the recovery of damages occasioned by the strike and picketing of the unions representing Forman employees.

The Board was presented with a similar question of determining the status of a neutral secondary employer in *Los Angeles Newspaper Guild*.¹⁰ The respondent unions were engaged in an economic strike against a Los Angeles newspaper which was a division of the Hearst Corporation. In furtherance of this strike, the premises of a San Francisco newspaper, which was another separate division of Hearst, were picketed by the unions. The picket line was honored by other

¹⁰ 185 N.L.R.B. No. 25, 75 L.R.R.M. 1014 (1970).

employees and resulted in a suspension of publication of the San Francisco newspaper.

The issue presented for Board determination was whether the San Francisco division of Hearst was a separate "person" under the terms of section 8(b)(4)(ii)(B). The Board admitted that corporate divisions are not mentioned in the applicable statutory definition which provides:

The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.¹¹

However, the Board noted that prior decisions have held that separate corporate subsidiaries are separate persons under 8(b)(4)(ii)(B) if neither the parent corporation nor the subsidiary exercises actual control over the day-to-day operations of the other. To deprive corporate divisions of the protection of 8(b)(4)(ii)(B) while including subsidiaries would be to exalt form over substance. Therefore, it was held that where a virtually autonomous division has all the qualities of a person except separate incorporation, logic requires that the division also be considered a person.

The Board examined the relationship between divisions within Hearst in light of the actual control standards previously used to determine the neutrality of corporation subsidiaries. It was found that each Hearst division manager supervises staff salaries, promotions and discharges. There is no transfer of employees among divisions. Each division manager has full control over publication policies, advertising and circulation programs. A manager may refuse to use any of the Hearst-owned news services, and each division maintains its own financial system. It was also found that although corporate approval is required for expenditures over \$10,000, such approval has never been denied.

Upon these facts, the Board held that the corporation's authority amounted to only potential control over the financial operations of each division. This authority falls short of the active, actual control standard previously applied to corporate subsidiaries. By this test, each Hearst division is a separate and autonomous enterprise. The San Francisco newspaper, therefore was held to be a "person" protected by section 8(b)(4)(ii)(B), and the unions' picketing of that newspaper was unlawful secondary activity.

Member Brown, dissenting in part, viewed the picketing of the San Francisco division as part of a lawful program of direct economic

¹¹ 29 U.S.C. § 152(1) (1964).

pressure upon a single corporate enterprise. The picketing of the San Francisco paper was designed to impose economic sanctions upon the Hearst Corporation in support of economic demands being negotiated with another operating division of the same corporation. To extend the scope of section 8(b)(4)(ii)(B) to prohibit this activity would insulate the corporate employer from the effects of its own dispute.¹² In Member Brown's opinion, this result would be contrary to the established policy against extending section 8(b)(4)(ii)(B) in a manner which would restrict direct economic pressure in primary labor disputes.

3. *Work Preservation Agreements and Their Enforcement*

The Board has consistently applied a "right to control" test in determining whether enforcement of a work preservation agreement constitutes prohibited secondary activity. Under this test, if, while seeking to preserve job opportunities, a union stops or threatens to stop working for an employer, and that employer has no legal power to comply with the demands of the union, the union violates the section 8(b)(4)(ii)(B) prohibition against secondary boycotts.¹³ This situation often arises when a contractor is bound to follow a builder's specifications requiring materials which have been assembled by non-union labor.

The Board has consistently adhered to this test despite language in *National Woodwork Manufacturers Ass'n v. NLRB*¹⁴ that the distinction between primary and secondary activity

cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for . . . [the unit's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case . . . the boycotting employer would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees.¹⁵

Use of the "right to control" test after *National Woodwork* has been

¹² 185 N.L.R.B. No. 25, 75 L.R.R.M. at 1017 (dissenting opinion).

¹³ See Local 1066, Longshoremen, 137 N.L.R.B. No. 117, 50 L.R.R.M. 1333 (1962), enforced, 331 F.2d 712, 56 L.R.R.M. 2200 (3d Cir. 1964). See also 1968-1969 Annual Survey of Labor Relations Law, 10 B.C. Ind. & Com. L. Rev. 882-85 (1969).

¹⁴ 386 U.S. 612 (1967).

¹⁵ 386 U.S. at 644-45.

criticized both by commentators¹⁶ and by those courts which have directly considered the validity of the test.¹⁷

In *Local 636, Plumbers v. NLRB*,¹⁸ decided during the Survey year, the Court of Appeals for the District of Columbia Circuit rejected the validity of the Board's "right to control" test. Local 636 had a collective bargaining agreement, covering the employees of Page Plumbing and Heating Co., which contained a work preservation provision requiring that certain pipe must be installed on the job. This clause had in substance appeared in agreements between the union and area contractors since 1941. In 1966, Page entered into a contract to build a hospital under specifications which required factory installation of pipes in the heating and air conditioning systems. The Board found that Page, along with all other bidders for the contract, had been advised of the factory pipe-fitting specification. Shortly after work began on the project, the union insisted that the employees of Page were entitled to install the pipe at the job site in accordance with the collective bargaining agreement. The hospital, however, refused to accede to this demand, and insisted that Page adhere to the contract specifications requiring factory installation. The union then induced the employees of Page to cease handling the units with factory-installed pipe.

The Board applied its "right to control" test and found that the union activity violated section 8(b)(4)(B).¹⁹ The Board reasoned that Page was a neutral party caught between the demands of the union and the hospital, since Page had sought to comply with the union demand but could not because the hospital insisted upon the contract specifications. On these facts, the Board held that the object of the union's conduct was to cause Page to break its contract with the hospital. This objective was held to be unlawful secondary activity.

The court of appeals reversed the Board and found that its analysis of the dispute was "completely wide of the mark."²⁰ The Board's finding that Page had no right to control was seen as based upon an artificial structuring of the facts since Page was aware of the conflict between the collective bargaining agreement and the specifications for the hospital before the contract was signed. Page, rather than having no control over the situation, had in fact created its own predicament. The court reasoned that to allow an employer in this situation to claim that he had no control over the conflict would encourage the solicita-

¹⁶ Note, Secondary Boycotts and Work Preservation, 77 Yale L.J. 1401, 1416-17 (1968).

¹⁷ *American Boiler Mfg. Ass'n v. NLRB*, 404 F.2d 556, 69 L.R.R.M. 2858 (8th Cir. 1968).

¹⁸ 430 F.2d 906, 74 L.R.R.M. 2851 (D.C. Cir. 1970).

¹⁹ 177 N.L.R.B. No. 14, 71 L.R.R.M. 1499 (1969).

²⁰ 430 F.2d at 908, 74 L.R.R.M. at 2853.

tion of contracts whose terms would defeat legitimate work preservation demands.

The court held that such an application of the "right to control test" completely ignores the holding of the Supreme Court in *National Woodwork*,²¹ and noted that a proper application of the *National Woodwork* test should focus upon whether the employees have a dispute with their own employer. In the present case, there was no evidence that the union's objective was to influence the labor relations of the hospital. The court recognized that the union activity will necessarily have a "domino-like" effect by forcing employers not to contract with builders who insist upon using pre-fabricated materials.²² However, the court held that this effect was ancillary to the union objective of enforcing a work preservation agreement made with its own employer. Under the *National Woodwork* test such union activity is primary and lawful despite the fact that the union's immediate employer may, as a result, cease doing business with a builder who requires the use of pre-fabricated materials. Therefore, the court concluded that the Board's "right to control" test must be abandoned because it conflicts with the Supreme Court's holding in *National Woodwork*.²³

4. "Ceasing to do Business" under Section 8(b)(4)(B)

In *NLRB v. Local 825, Operating Engineers (Burns and Roe, Inc.)*,²⁴ the Supreme Court considered the question of whether union pressure upon neutral employers, with the objective of forcing a change in work assignment by the primary employer, amounted to coercion to "cease doing business" with the primary employer under section 8(b)-(4)(B). The general contractor for the construction site in controversy (Burns and Roe, Inc.) subcontracted all of the construction work to three other contractors (White, Chicago Bridge & Iron, and Poirier & McClare). All three subcontractors had employees who were members of Local 185, and all except White had collective bargaining agreements with Local 185.

Local 185 protested the assignment by White of the job of pushing the buttons on a welding machine to the Ironworkers Union. When White refused to change this assignment, Local 185 informed the general contractor, Burns, that members of Local 185 would strike unless Burns entered into a contract with all three subcontractors giving Local 185 jurisdiction over all power machines, including the welding machine. After Burns rejected this demand, the operating engineers walked off the construction site and remained out for four days.

²¹ Id. at 909, 74 L.R.R.M. at 2853.

²² Id.

²³ Id. at 910, 74 L.R.R.M. at 2854.

²⁴ 400 U.S. 297 (1971).

Shortly after their return, efforts at voluntary reconciliation failed, and members of Local 185 physically encircled the welding machine to prevent its operation. The Board found that this conduct was unlawful secondary activity under section 8(b)(4)(B), and a violation of the jurisdictional provisions of section 8(b)(4)(D).²⁵ The Court of Appeals for the Third Circuit upheld the Board's finding of a violation of section 8(b)(4)(D), but reversed the Board's finding of unlawful secondary activity.²⁶

The Supreme Court reversed the holding of the court of appeals that the union's conduct did not violate section 8(b)(4)(B), and upheld the Board's finding that the union's conduct was unlawful secondary activity.²⁷ It was clear that Local 185's coercive activity was directed toward Burns and the other subcontractors not involved in the work assignment dispute with White. The Court viewed this conduct as "unmistakably and flagrantly secondary"²⁸ in its objective of forcing the neutral contractors to induce White to change the disputed work assignment.

However, the Court recognized that it was not as clear that this secondary activity amounted to coercion to "cease doing business" with White as provided in section 8(b)(4)(B). As the dissent pointed out, the union did not directly seek either the termination of White as a subcontractor or White's replacement for another contractor.²⁹ The union demands that the neutral employers contractually agree to assign the disputed work to Local 185 fell short of a specific request that the neutral contractor cease doing business with White. The dissent viewed this activity as failing to meet the "cease doing business" requirement of section 8(b)(4)(B).

The majority of the Court rejected this reading of section 8(b)(4)(B) as overly narrow. While some secondary activity could have effects so slight as to fall short of the "cease doing business" requirement, the implications in the present case was to coerce the neutral contractors to force a change in White's assignment or break off their contractual relations with White. Thus, the Court held that the fact that the union demands did not directly seek the termination of White's contract by neutral contractors did not remove the disruptive activity from the sanctions of section 8(b)(4)(B).

²⁵ 162 N.L.R.B. No. 155, 64 L.R.R.M. 1248 (1967).

²⁶ 410 F.2d 5, 71 L.R.R.M. 2079 (3d Cir. 1969).

²⁷ 400 U.S. at 306. The majority upheld the finding of the Board and the court of appeals that the union conduct also violated the limitations upon jurisdictional disputes provided in section 8(b)(4)(D). However, the Court held that the finding of an 8(b)(4)(D) violation did not exclude a concurrent finding of unlawful secondary activity under section 8(b)(4)(B).

²⁸ *Id.* at 304.

²⁹ *Id.* at 308 (dissenting opinion).

F. Remedies

1. Parties to Section 10(k) Proceedings

Under section 8(b)(4)(D) it is an unfair labor practice for unions to engage in strikes or work stoppages designed to force employers to assign particular work to members of one union rather than to members of another union. This prohibition is the basis of section 10(k) which provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), 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, or 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.¹

In applying section 10(k), the Board has consistently held that the term "parties" within that section includes employers as well as the unions involved in a work assignment dispute. It is the Board's position that the employer who has assigned the disputed work must be a party to any voluntary settlement of the parties if the settlement is to be accepted within the terms of section 10(k). Thus, the Board has refused to accept voluntary settlement of a jurisdictional dispute by the involved unions alone as a basis for quashing notice of a section 10(k) hearing.

In *Plasterers Local 79 v. NLRB (Southwestern Construction Co.)*² the Court of Appeals for the District of Columbia Circuit rejected the Board's view that employers are necessary parties to voluntary settlements under section 10(k). The dispute arose when the Plasterers union claimed that work being performed by members of the Tile Setters union in preparing wall surfaces for tiling should be done by members of Plasterers. When the Tile Setters rejected this demand, the dispute was submitted to the National Joint Board for the Settlement of Jurisdictional Disputes.³ The Joint Board rendered a decision which the Tile Setters interpreted as awarding the disputed

¹ 29 U.S.C. § 160(k) (1964).

² 440 F.2d 174, 74 L.R.R.M. 2575 (D.C. Cir. 1970).

³ The Joint Board is an arbitration panel established by the AFL-CIO, and is comprised of both employer and union representatives. Both unions involved in *Southwestern Construction Co.* were AFL-CIO affiliates. For a more complete description of

work to them. The Plasterers disagreed with this interpretation and picketed the job site in support of their claim to the disputed work. The picketing resulted in a work stoppage and the employer, Southwestern Construction Co., filed a charge of a section 8(b)(4)(D) violation against the Plasterers. The Board obtained a district court injunction and the pickets were removed. The Plasterers then requested that the Joint Board clarify its earlier award. The clarification of the award held that the disputed work was to be performed by the Plasterers and not the Tile Setters.

After this award to the Plasterers was issued, the Board held a section 10(k) hearing to determine the dispute. The Board rejected the argument of the Plasterers that the notice of section 10(k) hearings should be quashed because the unions had agreed to voluntary settlement through Joint Board arbitration. The Board held that this method of settlement was not a basis for quashing notice of the section 10(k) hearing because the employer who had assigned the work involved was not a party to the settlement. The Board then held a hearing on the merits and awarded the disputed work to the Tile Setters. When the Plasterers refused to abide by this award, the Board held an unfair labor practice hearing and found that the Plasterers had violated section 8(b)(4)(D). The court of appeals refused to uphold the Board's finding of a section 8(b)(4)(D) violation on the grounds that it was based upon an invalid section 10(k) hearing.

The court held that the Board had erred by invoking section 10(k) proceedings to determine the jurisdictional dispute when the two unions involved had agreed upon a method for voluntary settlement. This finding was based upon the court's interpretation of legislative history indicating that the purpose of section 8(b)(4)(D) and section 10(k) together is to protect neutral employers from becoming involved in work disputes between unions. The court held that a neutral employer caught up in such a jurisdictional dispute is interested only in settlement of the dispute, and not in the terms of the agreement between the unions. It follows from this reasoning that the purpose of protecting a neutral employer is fully served by any binding settlement between the disputing employee groups.

However, the court recognized that there are many instances where the employer is not truly neutral but is in fact dissatisfied with the settlement reached by the rival unions. In these cases, the court agreed with the Board's determination that the dispute is no longer jurisdictional.⁴ The court stressed that section 10(k) proceedings are

the makeup and operation of the Joint Board, see 440 F.2d at 180 n.10, 74 L.R.R.M. at 2579 n.10.

⁴ See *Safeway Stores, Inc.*, 134 N.L.R.B. No. 130, 49 L.R.R.M. 1343 (1961), cited in 440 F.2d at 187, 74 L.R.R.M. at 2584.

inapplicable to such disputes, even though the employer is not satisfied with the union's agreement and there was an initial 8(b)(4)(D) violation. Thus, the court held that the economic interests of an employer not truly "neutral" are beyond the scope of protection intended by Congress in enacting section 8(b)(4)(D) and section 10(k).

In a dissenting opinion, Judge MacKinnon objected to the majority's holding as being an unwarranted reversal of the Board's interpretation of twenty years standing that agreements under section 10(k) require that the employer be a party. He argued that the majority overemphasized jurisdictional aspects of the dispute and did not give sufficient weight to the fact that the dispute had gone beyond a quarrel between the unions and had developed into a strike against the employer. It is this dispute, a jurisdictional strike which directly involves the employer, that typifies what is meant by the term "such dispute" in section 10(k). Judge MacKinnon contends that since section 10(k) is thus designed to remedy strikes that necessarily involve the employer as a party, the employer must be a party to any settlement under section 10(k).

The majority's reasoning in *Southwestern Construction* relies heavily upon the interpretation of section 10(k) as being designed to apply only to cases where the employer is "neutral," and the only dispute to be remedied is limited to an inter-union quarrel. However, this reasoning is unpersuasive in that it is clear that in reality there are very few cases of truly "neutral" employers who are not directly concerned with the eventual outcome of the dispute. It is unlikely that Congress in enacting section 10(k) intended to preclude the application of that section to the majority of work assignment disputes by limiting its scope to those relatively rare cases where the employer's interest is not involved. This interpretation of section 10(k) thus appears to be overly strained and does not, as Judge MacKinnon pointed out, give sufficient consideration to the fact that the section is not even invoked until there has been a strike which directly involves the employer.

Moreover, the majority opinion itself does not clearly remove consideration of the employer's interest in a union settlement under section 10(k). The court states in a footnote:

Thus, we need not consider the efficacy for purposes of § 10(k) of an inter-union proceeding that made no realistic provision for meaningful attention to the interest of the employer and to questions of efficiency. In the case before us we have a joint board of employers and employees . . . that takes into account factors of economy and efficiency of operation.⁵

⁵ 440 F.2d at 188 n.27, 74 L.R.R.M. at 2585 n.27.

Thus, it appears that the majority recognized that some agreements would be insufficient under section 10(k) because they fail to consider the employer's interest. Yet, the court held that employers should not be considered "parties" under section 10(k). This reasoning does appear to be rather "finespun theory"⁸ and should not displace the well-founded Board practice of including employers as parties under section 10(k).

2. *Make Whole Orders for Refusal to Bargain*

Section 10(c) of the National Labor Relations Act⁷ empowers the Board to take affirmative action to remedy the effects of unfair labor practices. The Board possesses wide discretion in this regard, and its orders may range from requiring an employer to reinstate wrongfully discharged workers, with or without back pay, to the simple publication by the employer of a notice indicating that he promises to refrain from committing the cited unfair practices in the future. The discretionary grant of power in section 10(c) is not, however, unlimited. The Board is specifically restricted to formulating remedial orders that "effectuate the policies" of the Act.⁸ Accordingly, the Supreme Court has held that Board orders must not be punitive in nature.⁹

The actual limits of the Board's remedial power remain far from clear. Recently, the line between remedies which are permissible—or even required—under section 10(c), and those which exceed the Board's power, has been the subject of controversy between the NLRB and the District of Columbia Court of Appeals. The disagreement has centered upon the nature and scope of Board orders directed at employers who refuse to bargain with unions when obligated to do so under the Act. The court of appeals has taken the position that the Board's traditional remedy, which has been limited to ordering the wrongdoer to "cease and desist" from his illegal conduct, is not sufficient to offset the harm caused, and thus fails to effectuate the policies of the Act. The NLRB, on the other hand, has maintained that the cease and desist order represents the limits of its remedial authority in this area.

The initial conflict arose in *H.K. Porter Co. v. NLRB*,¹⁰ where the court of appeals directed the Board to compel an employer who had been engaging in bad faith bargaining to agree to the union contract demand on which the unjustified impasse was based. The Board

⁸ 440 F.2d at 193, 74 L.R.R.M. at 2589 (dissenting opinion).

⁷ 29 U.S.C. § 160(c) (1964).

⁸ *Id.*

⁹ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1949).

¹⁰ *H.K. Porter Co. v. NLRB*, 414 F.2d 1123, 71 L.R.R.M. 2207 (D.C. Cir. 1969).

had contended that section 10(c) did not grant it authority to so act. On appeal, the Supreme Court affirmed the Board's position,¹¹ and held that it was improper to remedy bad faith bargaining by requiring agreement to substantive contract provisions.¹² According to the Court, the fundamental principle of the Act is the preservation of the parties' freedom to contract. Section 8(d) of the Act,¹³ the Court noted, reflects this concern by stipulating that the duty to bargain imposed by the Act requires neither an employer nor a union to agree to any proposal or to make any concession. Thus, the Court concluded that the function of the Board is "to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strength of the parties."¹⁴

Although the Supreme Court's decision in *H.K. Porter* to some extent clarified the scope of the NLRB's remedial powers, a number of cases decided during the Survey year reflect the continuing disagreement between the Board and the District of Columbia Circuit on this matter. In *I.U.E. v. NLRB (Tiidee)*,¹⁵ the District of Columbia Court of Appeals held that when an employer clearly and flagrantly violates its duty to bargain with a newly certified union, the appropriate remedy for the Board to apply should include a "make whole" order. This order would require that the employer compensate the employees for any monetary benefits lost as a result of his wrongful refusal to bargain.

In *Tiidee*, the employer agreed to a Board-conducted consent election. When the ballots were tallied the employees had selected the union by a vote of nineteen to six. The company, however, protested to the Board that a leaflet distributed by the union prior to the election had influenced the outcome. The employer also claimed that three employees not entitled to vote had cast ballots. The regional director rejected the employer's first contention on the merits. The second objection he found to be mooted as a result of the clear plurality the union achieved. Accordingly, the company was directed to commence bargaining with the union on request.

The company persisted in its attempt to have the election set aside. It alleged that the regional director had acted arbitrarily, and announced that it would refuse to meet with the union pending judicial review. The case came before the court of appeals on a petition by the Board for enforcement of its bargaining order. The union joined in

¹¹ 397 U.S. 99 (1969).

¹² For a more detailed discussion of the *H.K. Porter* decision, see 1969-1970 Annual Survey of Labor Relations Law, 11 B.C. Ind. & Com. L. Rev. 916 (1970).

¹³ 29 U.S.C. § 158(d) (1964).

¹⁴ 397 U.S. at 108.

¹⁵ 426 F.2d 1243, 73 L.R.R.M. 2870 (D.C. Cir. 1970).

the action and sought modification of the Board's order to include a "make whole" provision.

The court of appeals unanimously agreed that the company's objections were unwarranted and enforced the Board's order. The majority of the court modified the Board's order to include the "make whole" relief. The court reasoned that the employer's "objections to the election were patently frivolous, and violated the express terms of the Agreement for Consent Election entered into . . . before the election, to abide by the decision of the regional director."¹⁶ The court was of the opinion that limiting the remedy for such a flagrant refusal to bargain to a cease and desist order permitted the employer to reap economic benefit from his violation of the law. The proper remedy, the court asserted, would "both compensate the party wronged and withhold from the wrongdoer the 'fruits of its violation'."¹⁷ Therefore, the court concluded that the employees should be reimbursed for any losses that might be attributed to the employer's wrongful delay.¹⁸ The court also found that under the circumstances the Board's refusal, without satisfactory justification to include a make whole provision in its remedial order, constituted a failure to adhere to the obligation imposed by Section 10(c), "to take such affirmative action . . . as will effectuate the policies of [the Act]."¹⁹

Essentially, two arguments were advanced in opposition to the position adopted by the majority. First, it was asserted that the degree of speculation involved in assessing the damage incurred by the employees was such as to make the remedy punitive in nature, and thus beyond the scope of the Board's authority. Second, and more fundamental, was the argument that, in order to arrive at any damage figure, it would be necessary to presuppose a contractual concession by the employer. Such an assumption, it was asserted, would violate the *H.K. Porter* rationale. The court of appeals considered both of these objections and found them untenable.

Initially, the court considered the speculative nature of the proposed make whole order. The majority conceded that the Board would have to base any remedy on what the employer would *probably* have agreed to had he bargained in good faith, and, therefore, a degree of

¹⁶ Id. at 1248, 73 L.R.R.M. at 2873.

¹⁷ Id. at 1249, 73 L.R.R.M. at 2874.

¹⁸ The court noted that employee support dissipates rapidly when unionism brings no apparent improvements in their working conditions. Therefore, in addition to the economic benefits derived from postponing meaningful negotiations, the employer may also benefit at the bargaining table from the union's weakened condition. Still another reason cited for requiring employers to "make whole" employees when only frivolous arguments are advanced in justification of a refusal to bargain, is that it would clear the court dockets of nonmeritorious litigants. Id. at 1249-50, 73 L.R.R.M. 2874.

¹⁹ 29 U.S.C. § 160(c) (1964).

speculation was involved. However, the court did not consider this problem to be determinative because of prior case law in which comparable probabilities were properly considered when formulating remedies for wrongful conduct. For instance, the court noted that in *NLRB v. Mooney Aircraft, Inc.*,²⁰ the Board computed the wages due under a back pay order at a rate higher than that which the employee was receiving at the time of his discharge because it determined that the employee probably would have been promoted. The *Tiidee* court also referred to *Bigelow v. RKO Radio Pictures*²¹ to rebut the assertion that the speculative nature of the remedy should bar its implementation. In *Bigelow*, the Supreme Court stated that:

where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of the victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

*That principle is an ancient one, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application.*²² (Emphasis added.)

Also, the court reasoned that the propriety of make whole orders in the enforcement of the national labor policy is enhanced further by the Supreme Court's decision in *NLRB v. Rutter-Rex Mfg. Co.*²³ There, the Supreme Court held that the Board may properly require an employer to bear the full burden of compensating employees for losses suffered as a result of the employer's wrongdoing, even when the amount of the losses is magnified by an unusual and unforeseen Board delay.

A major argument made by the employer in opposition to the

²⁰ 375 F.2d 402, 64 L.R.R.M. 2837 (5th Cir.), cert. denied, 289 U.S. 859 (1967).

²¹ 327 U.S. 251 (1946).

²² Id. at 264-65.

²³ 396 U.S. 258 (1969).

make whole order hinged upon Section 8(d) of the Act, which stipulates that neither an employer nor a union is required by its obligation to bargain to agree to any proposal or make any concession.²⁴ In *H.K. Porter*, the Supreme Court indicated that this section reflected the fundamental principle of the Act that preservation of the parties' freedom to contract is of paramount importance.

The court of appeals did not consider the restrictions of section 8(d) applicable. It noted that the *Tiidee* case did not feature a refusal to bargain based upon an unjustified impasse. In fact, no bargaining had ever taken place. The singular issue, in the court's opinion, was whether an employer who wrongfully withheld from employees a right that is secured by law may be required by the Board to compensate the employees for any injury thereby sustained. Answering this question in the affirmative, the court stated that the distinction it was drawing between the legality of imposing substantive contract provisions, as opposed to make whole remedial orders, was not illusory, but real. To illustrate this point, the court cited the widely accepted practice of awarding damages to parties injured by antitrust violations. In determining such awards, the court noted, consideration is necessarily given to agreements that *probably* would have been realized if the law had not been violated. Yet, antitrust damage awards are not thought of as imposing contractual obligations upon the parties.

A second example offered by the court to justify the distinction being drawn made reference to the general rule of tort damages that permits a court which is determining loss of earning power to look beyond the plaintiff's current earnings and consider evidence pertaining to what his earnings might have been were it not for the defendant's wrongful conduct. According to the court, a make whole order serves a similar purpose because, unlike the imposition of a contract term, a make whole order vests no lasting future benefit. Indeed, once the employer engages in good faith collective bargaining he may extract whatever agreement from the union his economic position permits. The only effect of the make whole order is to compensate employees for the damages sustained as a result of the employees prior refusal to bargain.

In assessing the amount of this damage, the court stressed that the Board should not attempt to determine what the parties *should* have agreed to, but instead should consider all relevant data indicating what they likely *would* have agreed to if good faith bargaining had occurred. If it appeared from the facts of a given case that, in all probability, no agreement would have been reached even if collective bargaining had taken place, a make whole order would be inappropriate. By limiting

²⁴ 29 U.S.C. § 158(d) (1964).

the scope of the Board's fact finding in this manner, the court indicated, the admonition in *H.K. Porter* against the imposition of contractual terms could be heeded.

Judge MacKinnon, dissenting from the portion of the majority opinion dealing with the legality of the make whole order, stated that "[t]he fundamental error of the majority opinion is thus that it would authorize damages on the likelihood that certain results would be reached that the Act provides are not required to be reached."²⁵ Judge MacKinnon reasoned that a make whole order cannot be premised upon a mere refusal to bargain because there is no legal duty incumbent upon the company to agree to any union demand. Thus, there exists no basis for assessing damages. Judge MacKinnon concluded that the make whole remedy runs not to the refusal to bargain, but to the refusal to agree, which under *H.K. Porter* is not in itself illegal.

Shortly after *Tiidee* was decided by the court of appeals, the NLRB announced its decision in *Ex-Cell-O Corp.*²⁶ *Ex-Cell-O* involved a union request for "make whole" relief in addition to the traditional bargaining order remedy. The Board unanimously agreed that a bargaining order was appropriate. However, a majority of the Board decided against the propriety of a make whole order. The Board, with two members dissenting, reasoned that the requested relief was beyond the statutory authority of the Board. The dissenters were of the opinion that a make whole order was a permissible remedy and should issue if the employees suffered any measurable losses as a result of the employer's wrongful conduct.

In arriving at its decision in *Ex-Cell-O*, the Board was cognizant of the arguments advanced by the court of appeals in *Tiidee*, and agreed that the traditional bargaining order is insufficient to eradicate the effects of an unlawful delay of two or more years. However, the majority noted that a make whole order may not necessarily further the purposes of the Act. For instance, it was noted that the only way an employer unquestionably can obtain judicial review of a Board determination in a representational dispute is by refusing to bargain. The Board suggested that the imposition on the employer of potentially large monetary awards in representational challenges would have an undesirable "tempering" effect on this procedural right.

The fact that make whole remedies issue in cases such as those involving the wrongful discharge of an employee was thought to be distinguishable because

[t]here are wrongdoers and wrongdoers. Where the wrong in refusing to bargain is, at most, a debatable question, though

²⁵ 426 F.2d at 1257, 73 L.R.R.M. at 2880 (dissenting opinion).

²⁶ 185 N.L.R.B. No. 20, 74 L.R.R.M. 1740 (1970).

ultimately found a wrong, the imposition of a large financial obligation on such a respondent may come close to a form of punishment for having elected to pursue a representation question beyond the Board and to the courts.²⁷

The majority found untenable any suggestions that a subjective determination regarding the "debatability" of an employer's position could be made in order to justify a make whole order. Any such attempt was thought by the Board to be futile because the Board and courts might differ as to what was debatable and what was frivolous, and thus create yet one more subject for litigation.

The primary objection of the majority rested upon their belief that the imposition of a make whole order would conflict with the principles of *H.K. Porter*. According to the Board, the distinction drawn in *Tiidee* by the court of appeals was more illusory than real and was inconsistent with the principles expressed in section 8(d). In their dissent, Members McCulloch and Brown raised arguments similar to those advanced by the court of appeals in *Tiidee*. That is, they asserted that in certain cases involving a refusal to bargain, make whole relief is necessary to effectuate the policies of the Act, and that such a remedy is permissible under Section 10(c).

The questions raised in *Tiidee* and *Ex-Cell-O* are more complex than those resolved by the Supreme Court in *H.K. Porter*. For instance, there is a substantial amount of case law both at the Board level and from the courts that seems to support the *Tiidee* rationale. The persuasive comparison the *Tiidee* court made between the proposed make whole orders and the practice of allowing compensatory damages in civil antitrust cases also complicates the issues involved. Because neither the Board nor the District of Columbia Court of Appeals show any signs of altering their respective positions, it appears that once again the Supreme Court will be required to comment upon the Board's power under section 10(c).

VIII. LABOR UNIONS AND THE ANTITRUST LAWS

When Congress enacted the Sherman Act,¹ it did not specifically provide an exemption for the activities of organized labor. Consequently, in *Loewe v. Lawlor (Danbury Hatters)*,² the Supreme Court held that concerted labor activities were subject to the antitrust laws. In 1914, with the passage of the Clayton Act,³ Congress clarified the

²⁷ Id., 74 L.R.R.M. at 1742.

¹ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

² 208 U.S. 274 (1908).

³ 38 Stat. 731 (1914), as amended, 15 U.S.C. § 17, 29 U.S.C. § 52 (1964).

status of labor unions under the antitrust laws. Section 6 of the Clayton Act states that "the labor of a human being is not a commodity or article of commerce," and Section 20 provides that union activities such as striking and picketing "shall . . . [not] be considered violations of any law of the United States." Nevertheless, the Supreme Court still found the antitrust laws to be applicable to unions.⁴ Congress responded with the enactment of the Norris-La Guardia Act⁵ and the National Labor Relations Act.⁶ In these statutes Congress emphasized a national policy of encouragement of union activity and further clarified the union antitrust immunity.

Subsequent to the enactment of these laws, the Supreme Court looked with deference upon concerted activities that conflicted with antitrust principles.⁷ Even after their enactment, the Court continued to hold that organized labor's congressionally authorized immunity from the antitrust laws was not absolute. According to the Court, the antitrust exemption applied only when the union acted in its own interests, and not in combination with non-labor groups.⁸ Thus, in *Allen Bradley Co. v. Local 3, IBEW*,⁹ the Court held that the Sherman Act was violated when a union conspired with a group of employers to create a monopoly, even though the ultimate union objective was job security and higher wages.

In *United Mine Workers v. Pennington*,¹⁰ the Supreme Court once again attempted to balance the conflicting interests of the nation's labor and antitrust policies. The *Pennington* case involved a contract between the United Mine Workers and a group of large coal companies. Under the terms of the agreement the union was to cease its opposition to mechanization in the mines, and, as worker productivity increased, the employers were to pay higher wages and additional fringe benefits. The Phillips Coal Company, one of the smaller mine operators, alleged that the union also had agreed to impose the higher wage demands on all producers, regardless of their ability to pay. The purpose of this plan, Phillips asserted, was to destroy the small producers in order to give the larger operators control of the coal industry. The Supreme Court held that a union would forfeit its exemption from the provisions of the Sherman Act if it acted as the Phillips Coal Company alleged.

When the Supreme Court decided *Pennington*, it did not consider

⁴ See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1920).

⁵ 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1964).

⁶ 49 Stat. (1935), as amended, 29 U.S.C. §§ 151-66 (1964).

⁷ See *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *United States v. Hutcheson*, 312 U.S. 219 (1941).

⁸ 312 U.S. at 232.

⁹ 325 U.S. 797 (1945).

¹⁰ 381 U.S. 657 (1965).

the elements of proof required to prove an antitrust violation by a labor union. Civil antitrust actions require a plaintiff to establish a violation and injury only by a preponderance of the evidence. Section 6 of the Norris-La Guardia Act, however provides that:

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

In *Ramsey v. United Mine Workers*,¹¹ an antitrust suit brought in the wake of *Pennington*, the union asserted that section 6 required a plaintiff to show by "clear proof" that the alleged acts occurred, that they amounted to a conspiracy, and that the plaintiff was injured thereby.

The trial judge accepted this interpretation of section 6 and dismissed the case for want of proof.¹² On appeal, a panel of the Court of Appeals for the Sixth Circuit reversed.¹³ Upon a rehearing en banc, however, the court split four-four and thus affirmed the district court decision.¹⁴ The Supreme Court granted certiorari to resolve the issue.¹⁵ In a five-four decision, the Court reversed the Sixth Circuit and held that section 6 "requires clear and convincing evidence only as to the Union's authorization, participation in, or ratification of the acts," and does not provide "any basis for . . . fashioning a new standard of proof applicable in antitrust actions against labor unions."¹⁶ The Court indicated that there was nothing in the language of section 6 or in its legislative history that warranted any other interpretation.¹⁷ The intent of Congress in enacting the section, the Court noted, was to protect labor unions from being held responsible for everything that might occur during a strike. The Court found nothing in the legislative history supporting the contention that Congress intended to modify the standard of proof in civil actions for damages against labor unions.¹⁸

Justice Douglas, with whom Justices Black, Harlan and Marshall concurred, dissented. Justice Douglas argued that a proper inter-

¹¹ 265 F. Supp. 388, 64 L.R.R.M. 2498 (1967).

¹² *Id.* at 432, 64 L.R.R.M. at 2534.

¹³ 416 F.2d 655, 70 L.R.R.M. 3281 (6th Cir. 1969).

¹⁴ *Id.*, 72 L.R.R.M. 2321 (6th Cir. 1969).

¹⁵ 397 U.S. 1006 (1970).

¹⁶ *Ramsey v. United Mine Workers*, 401 U.S. 302, 311 (1971).

¹⁷ *Id.* at 309-10.

¹⁸ *Id.*

pretation of section 6 requires clear proof that the union had "full complicity in the scheme."¹⁹ Therefore, he reasoned that a union which authorizes its agents to seek an industry-wide pay scale, which in itself is not illegal, cannot be found liable unless there is clear proof of an illegal purpose.²⁰ Because there was no clear proof of such an intent in *Ramsey*, Justice Douglas concluded that the opinion of the district court should be affirmed.

There can be no doubt that the effect of the majority's holding in *Ramsey* is to make labor unions considerably more vulnerable to liability under the antitrust laws for conduct that is beyond the scope of their statutory immunity. Whether the Court has properly ascertained the congressional intent of section 6 is not clear. The ambiguity of the "clear proof" issue is amply evidenced by the fact that the eighteen judges and justices who considered the case divided evenly in their interpretation of section 6.

As *Pennington* aptly illustrates, labor costs may have a significant effect upon a company's competitive position. Thus, it is understandable that employers should be concerned about agreements between a union and the employer's competitors. During the Survey year, the NLRB ruled in *Dolly Madison Industries*²¹ that employers might protect themselves from injury as a result of discriminatory collective bargaining agreements by means of a "Most Favored Nation" clause. The Board also ruled that such a clause constitutes a mandatory subject for bargaining; that is, an employer may insist upon such a contract provision to the point of impasse.

A "Most Favored Nation" clause is often found in international trade agreements. These clauses provide that the participating countries will grant to one another tariff and quota restrictions as preferential as those accorded to any other country. In the labor context, such a clause would assure the contracting employer that no competitor will acquire an economic advantage as a result of a more favorable collective bargaining contract, because the employer would be able to assimilate the preferential conditions into his own bargaining agreement.

In *Dolly Madison*, the Board distinguished the "Most Favored Nation" provision from the agreement condemned in *Pennington* on two grounds. First, the clause was not considered a restraining factor on the union's freedom to negotiate. In the course of subsequent bargaining a union, if it so chose, could reduce its demands or insist upon greater employer concessions. The only obligation incumbent upon

¹⁹ *Id.* at 315.

²⁰ *Id.* at 318-19.

²¹ 182 N.L.R.B. No. 147, 74 L.R.R.M. 1230 (1970).

the union was to extend to the first employer any arrangements more favorable than those previously negotiated. Second, the Board noted that there was no evidence of any predatory intent. In accordance with this reasoning, the Board suggested that no "tribunal of competent jurisdiction would find [the clause] to be violative of any Federal antitrust laws."²²

The reasoning offered by the Board in support of the *Dolly Madison* ruling is legally and logically persuasive. However, closer analysis suggests that permitting the use of "Most Favored Nation" clauses in labor contracts may lead to the same evil condemned by *Pennington*. For instance, it is likely that unions will attempt to obtain the most economically advantageous agreements from the large, efficient producers. Also, large producers will surely insist on, and have the bargaining power to secure, a "Most Favored Nation" clause. It is conceivable then, that a union which negotiates such a contract will make those terms the floor in future bargaining. Indeed, if the terms are more than small producers can match, it is possible that the union will choose to sacrifice the marginal operator rather than forfeit any benefits secured from industry leaders. Thus, the "Most Favored Nation" clause may constitute a de facto surrender by a union of its right to bargain and, more importantly, a means of legally effectuating the predatory destruction of small competitors.

Although unions enjoy a special deference under the antitrust laws, the decisions of the Supreme Court in *Pennington* and *Ramsey* indicated that agreements between unions and employers that have predatory overtones are subject to special scrutiny. The "Most Favored Nation" clause approved by the Board in *Dolly Madison* certainly has the potential for such abuse. Therefore, any assumption that the clause is per se legal may be premature.

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²² Id., 74 L.R.R.M. at 1231.