

THE NATIONAL LABOR RELATIONS BOARD: REFLECTIONS, FOOTNOTES AND PERSPECTIVES

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I. Union Representation Cases	807
A. <i>Increased Flexibility of Unit Determinations</i>	807
B. <i>Unit Clarification Procedures</i>	810
C. <i>The Excelsior Rule</i>	812
II. Unfair Labor Practices	813
A. <i>Section 8(a)(3)</i>	813
B. <i>Section 8(a)(5)</i>	818
1. The Establishment of the Bargaining Relationship	818
2. Subjects of Bargaining	820
3. Length of the Bargaining Relationship	823
C. <i>Section 8(b)(1)(A)</i>	824
1. Union Discipline	825
2. Duty of Fair Representation	827
III. Board Jurisdiction	828
IV. Remedies	829
V. Administration	830
Conclusion	831

The viability of democratic institutions depends on their ability to respond to the changing needs and the changing environment of the society in which they function. The National Labor Relations Board (NLRB) is no exception to this basic precept. Innovations in technology and merchandising techniques, the effects of new social legislation, and the shifting attitudes of labor and management toward each other have produced change. The decisions of the NLRB during the 1960s reflect a recognition of these developments. The Board has eschewed mechanistic and formalistic analysis and has attempted instead to reach decisions on a case-by-case basis.

The Labor-Management Relations Act¹ is a complex statute based on what is essentially a simple concept—that recognition of the right of employees to organize for the purpose of bargaining collectively with their employer is essential to industrial peace. Implicit in this right to organize is the parallel right to refrain from organizing or engaging in organizational activities. Section 7,² the heart of the Act, guarantees both rights. Section 8³ prohibits certain defined unfair labor practices by either employers or unions which could prevent the exercise of these

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This article does not necessarily reflect the official position of the National Labor Relations Board.

¹ 29 U.S.C. §§ 141-87 (1964) [hereinafter cited as the Act].

² 29 U.S.C. § 157 (1964).

³ 29 U.S.C. § 158 (1964).

rights. Section 9⁴ establishes the procedures for the choice of a bargaining representative.

The Board's paramount purpose is to insure that the rights guaranteed in section 7 and implemented by sections 8 and 9 are fully realized—that employees are in fact free to join or not to join a union guided solely by their own reasoned judgement. The Board's activities to that end may be divided into three categories: (1) those directed toward guaranteeing employee rights in the organizational or pre-collective bargaining period, when it is being determined whether employees desire to be represented by a union for purposes of collective bargaining; (2) those directed toward facilitating the collective bargaining process itself; and (3) those directed to the post-agreement period and intended to promote the stability of the bargaining relationship.

In the 1960s there were significant developments in each of these areas. In the representation cases the Board became more flexible in the determination of units by removing arbitrary impediments to organization. It made the election process more effective by improving channels of communication between unions, employers and employees. It provided unit clarification procedures for units that had arisen through voluntary actions of the parties. In unfair labor practice cases, the Board broadened and clarified the areas in which bargaining may be required. It tried to cushion the impact on employees of changes in the ownership of a business, and it increased the job retention rights of strikers. Correlatively, the Board recognized the right of an employer, under certain circumstances, to lock out his employees in order to enhance his bargaining position. The Board also instituted significant changes in the union's duty to represent fairly all employees in a unit and clarified the rights of unions, in certain circumstances, to discipline and fine their members. And since it is important not only to decide cases in conformity with the statute, but also to provide prompt, effective remedies, the Board devised new remedies to meet new situations, and more effective procedures to expedite the disposition of the many cases which came to the Board during the decade.

The purpose of this article is to examine the significant Board and Supreme Court labor law decisions during the 1960s. This article is not intended to provide an exhaustive survey of the field of labor law during the past decade, but, rather, to highlight a number of issues which arose during the 1960s and which will be of increasing importance in the 1970s. After discussing representation cases, the article will concentrate upon some of the more significant develop-

⁴ 29 U.S.C. § 159 (1964).

ments in unfair labor practice cases. Attention will then be focused upon a few cases dealing with the Board's jurisdiction and with the Board's formulation of appropriate, effective remedies. Finally, two solutions for alleviating the enormous caseload which the Board has been required to handle during recent years will be proposed.

I. UNION REPRESENTATION CASES

Section 9⁵ of the Act establishes the conditions under which the Board conducts an election, and the standards to be utilized in the determination of the appropriate units in which such elections are held. There have been three major substantive developments regarding representation cases during the 1960s: (1) the increasing flexibility of unit determinations; (2) the development of the unit clarification procedure; and (3) the *Excelsior* rule.

A. Increased Flexibility of Unit Determinations

The statute, aside from providing a few general guidelines, does not offer specific rules for the determination of appropriate bargaining units. The basic criterion is whether the unit designated is one which assures the employees the fullest freedom in exercising the rights guaranteed by the Act.⁶ There is also the negative criterion of Section 9(c)(5) of the Act,⁷ which provides that the extent of the union's organization shall not be controlling. Because of the statute's lack of specificity, the Board, through the years, has created a body of decisional law interpreting these general criteria.⁸

It has been recognized that bargaining can proceed in many units in any given organization—that while one unit may indeed be more effective than another, there may be several possible units which could conduct collective bargaining successfully. In the 1960s the Board stopped seeking perfection in its choice of appropriate units and sought instead to encourage collective bargaining by permitting the establishment of units that might not, perhaps, be the best possible, but which nonetheless held out the possibility that collective bargaining could be effectively conducted. The Board sought to establish units comprised of groups of employees with separate and identifiable interests.

⁵ 29 U.S.C. § 159 (1964).

⁶ 29 U.S.C. § 159(b) (1964).

⁷ 29 U.S.C. § 159(c)(5) (1964).

⁸ The Board's unit determinations are judicially reviewable only in an unfair labor practice proceeding arising from the employer's refusal to bargain with the chosen unit. On review, the Board's determinations are given great weight, subject to the requirement that it has articulated clearly the reasons for its decision. For a case in which the Supreme Court rejected a Board determination because the Board had failed to articulate the reasons behind its choice of a unit, see *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

In deciding this question, the NLRB has considered such factors as the structure of the industry, the content of the jobs, and the impact of changing technology. This flexible, case-by-case approach is exemplified by the Board's treatment of truckdrivers,⁹ driver salesmen,¹⁰ and technical employees.¹¹ The Board also utilized this approach in the establishment of new and smaller units in cases involving insurance companies,¹² department stores,¹³ and retail chains.¹⁴

In the insurance industry, the Board for 17 years had applied a rule that required unions to organize insurance agents on a state-wide basis.¹⁵ In 1961 the Board concluded that its policy in this area was hampering rather than assisting employees in the exercise of their statutory right to bargain through a union. The Board therefore changed its rule and recognized a unit of agents at one district office of the Quaker City Life Insurance Company.¹⁶ The Board's position now is that such a local unit, although appropriate, need not be the only appropriate unit, and that organization is possible on several different bases so long as the union's extent of organization is not the controlling factor.¹⁷

In retail store cases the Board no longer insists that the appropriate unit must conform to the employer's administrative or geographic divisions.¹⁸ In *Sav-On Drugs*¹⁹ the Board abandoned this policy and found that a separate retail outlet was an appropriate unit for collective bargaining. The Board announced that it would henceforth apply to retail chain operations the same unit considerations applied to multi-plant operations in general.²⁰ In *Frisch's Big Boy Ill-Mar, Inc.* the Board interpreted *Sav-On* as establishing a presumption that single store units are appropriate.²¹

In department store cases the Board scrutinized the disparate interests between selling and non-selling employees. For many years the Board had consistently held that store-wide units were the most

⁹ See, e.g., *E. H. Koester Bakery Co.*, 136 N.L.R.B. 1006, 49 L.R.R.M. 1925 (1962).

¹⁰ See, e.g., *Plaza Provision Co.*, 134 N.L.R.B. 910, 49 L.R.R.M. 1295 (1961).

¹¹ See, e.g., *Sheffield Corp.*, 134 N.L.R.B. 1101, 49 L.R.R.M. 1265 (1961).

¹² See, e.g., *Quaker City Life Ins. Co.*, 134 N.L.R.B. 960, 49 L.R.R.M. 1281 (1961).

¹³ See, e.g., *Allied Stores, Inc.*, 150 N.L.R.B. 799, 58 L.R.R.M. 1081 (1965).

¹⁴ See, e.g., *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032, 51 L.R.R.M. 1152 (1962); *Purity Food Stores, Inc.*, 160 N.L.R.B. No. 53, 63 L.R.R.M. 1007 (1966).

¹⁵ See *Metropolitan Life Ins. Co.*, 56 N.L.R.B. 1635, 14 L.R.R.M. 187 (1944).

¹⁶ See note 12 *supra*.

¹⁷ See, e.g., *Metropolitan Life Ins. Co.*, 156 N.L.R.B. 1408, 61 L.R.R.M. 1249, 1251 (1966).

¹⁸ See, e.g., *Daw Drug Co.*, 127 N.L.R.B. 1316, 46 L.R.R.M. 1218 (1960); *Robert Hall Clothes, Inc.*, 118 N.L.R.B. 1096, 40 L.R.R.M. 1322 (1957); *Father & Son Shoe Stores, Inc.*, 117 N.L.R.B. 1479, 40 L.R.R.M. 1032 (1957).

¹⁹ See note 14 *supra*.

²⁰ 138 N.L.R.B. at 1033, 51 L.R.R.M. at 1153.

²¹ 147 N.L.R.B. 551 n.1, 56 L.R.R.M. 1246, 1247 n.1 (1964).

appropriate in this industry, and had carved out from such units only homogeneous groups of employees possessing a community of interest because of their distinctive skills.²² But in three companion cases decided in 1965 the Board majority approved separate units of selling,²³ non-selling,²⁴ restaurant,²⁵ and clerical employees²⁶ in retail department stores. In reaching this result, the Board noted that less-than-storewide units were part of the current industrial bargaining pattern in department stores, and that even those store-wide units that did exist were often the culmination of a history of organization of smaller units.²⁷ The Board concluded that

[t]he specific facts of these cases, the current bargaining pattern in the industry, the history of bargaining in the area, and a close examination of the composition of the work force in the industry require a recognition of the existing differences in work tasks and interests between selling and non-selling employees in department stores.²⁸

It may seem somewhat anomalous to discuss the Board's *Mallinckrodt*²⁹ decision as another example of flexibility, particularly in view of my dissents in *Mallinckrodt*³⁰ and in numerous cases applying the doctrine.³¹ Yet a case can be made for the position that *Mallinckrodt* is such an example.

In *Mallinckrodt*, the Board undertook a re-examination of the *American Potash*³² doctrine under which, since 1954, it had been deciding craft severance cases. *American Potash* was a rejection of what had come to be known as the *National Tube*³³ doctrine, which was an interpretation of a provision of Section 9(b)(2) of the Taft-Hartley Act,³⁴ passed in response to the Board's *American Can*³⁵ decision.

These changes in Board policy demonstrate that the issue of

²² See, e.g., *Maas Bros., Inc.*, 116 N.L.R.B. 1886, 39 L.R.R.M. 1120 (1956).

²³ *Allied Stores, Inc.*, 150 N.L.R.B. 799, 58 L.R.R.M. 1081 (1965); *Arnold Constable Corp.*, 150 N.L.R.B. 788, 58 L.R.R.M. 1086 (1965).

²⁴ *Id.* See also *Lord & Taylor*, 150 N.L.R.B. 812, 58 L.R.R.M. 1088 (1965).

²⁵ *Allied Stores, Inc.*, 150 N.L.R.B. 799, 58 L.R.R.M. 1081 (1965); *Arnold Constable Corp.*, 150 N.L.R.B. 788, 58 L.R.R.M. 1086 (1965).

²⁶ *Arnold Constable Corp.*, 150 N.L.R.B. 788, 58 L.R.R.M. 1086 (1965).

²⁷ *Allied Stores, Inc.*, 150 N.L.R.B. 799, 803-04, 58 L.R.R.M. 1081, 1082-83.

²⁸ *Id.* at 806, 58 L.R.R.M. at 1084.

²⁹ *Mallinckrodt Chem. Works*, 162 N.L.R.B. 387, 64 L.R.R.M. 1011 (1966).

³⁰ *Id.* at 400-07, 64 L.R.R.M. at 1017-21.

³¹ See, e.g., *Lear-Siegler, Inc.*, 170 N.L.R.B. No. 114, 67 L.R.R.M. 1522 (1968); *Mobil Oil Corp.*, 169 N.L.R.B. No. 35, 67 L.R.R.M. 1154 (1968); *Holmberb, Inc.*, 162 N.L.R.B. 407, 64 L.R.R.M. 1025 (1966).

³² *American Potash & Chem. Corp.*, 107 N.L.R.B. 1418, 33 L.R.R.M. 1380 (1954).

³³ *National Tube Co.*, 76 N.L.R.B. 1199, 21 L.R.R.M. 1292 (1948).

³⁴ 29 U.S.C. § 159(b)(2) (1964).

³⁵ *American Can Co.*, 13 N.L.R.B. 1252, 4 L.R.R.M. 392 (1939).

separate representation of assertedly distinctive groups, as opposed to their inclusion in a larger unit, is not amenable to simple solution. It can be argued that larger groupings are per se more effective, that the plant-wide or company-wide unit is an optimum one that tends more to equalize bargaining power, and therefore ought to be encouraged rather than destroyed. It can with equal validity be argued that there are, within any large organization, certain groups so different in their skills, interests, and needs that they ought to be afforded, at the least, the opportunity to select a separate representative able to represent their particular interests.

Mallinckrodt established a test which considered arguments both for and against craft severance,³⁶ and thus the decision can be considered a flexible response to the problem. The Board concluded that *American Potash* shackled the Board and compelled the granting of severance whenever it was shown that the unit sought consisted of craftsmen and that the union seeking to represent them was one that traditionally represented that group.³⁷ In *American Potash* consideration was not given to the bargaining history at the particular plant, the distinctive functions of the proposed craft, the extent to which the craft had established or sought a separate identity, and the extent of integration of the production process. *Mallinckrodt* made all of these criteria relevant, and, to that extent, encouraged a case-by-case approach in which *all* relevant factors are discriminatingly appraised.³⁸

It is thus clear that the trend in these Board decisions is toward the establishment of a greater variety of units to accomplish the statutory objective. It is essential, however, that the Board continue to rethink this problem and make changes in its policies when experience shows that prior decisions are obstructing bargaining in specific areas, particularly in view of the primary responsibility that Congress has given it—to determine units which provide employees the fullest freedom in collective bargaining.

B. Unit Clarification Procedures

A necessary concomitant of the Board's statutory power to certify appropriate bargaining units is its power to clarify the status of certain disputed classifications of employees. In *Brotherhood of Locomotive Firemen and Enginemen*,³⁹ the Board overruled *The Bell Tel.*

³⁶ 162 N.L.R.B. at 397, 64 L.R.R.M. at 1016.

³⁷ *Id.* at 396, 64 L.R.R.M. at 1015-16.

³⁸ As my dissents in *Mallinckrodt* and later cases make clear, I do not subscribe either to the doctrine or the way in which it has been applied.

For another critique of the Board's application of *Mallinckrodt*, see Abodeely, NLRB Craft Severance Policies: Preeminence of the Bargaining History Factor After *Mallinckrodt*, 11 B.C. Ind. & Com. L. Rev. 411 (1970).

³⁹ 145 N.L.R.B. 1521, 55 L.R.R.M. 1177 (1964).

Co.,⁴⁰ case and decided that it would thereafter clarify units that had arisen through voluntary actions of the parties as well as units it had originally certified.⁴¹ The Board's rules and regulations were subsequently amended to formalize these procedures, providing that petitions could be filed for amendment and clarification of units, whether originally certified or voluntarily recognized.⁴² This procedure is applicable only when there is no question concerning the representation of the employees whose placement is in doubt. If the Board decides that there is such a question, the clarification or amendment petition will be dismissed and an election will be ordered to ascertain the wishes of the employees.

Most of the cases which arise under this clarification procedure involve accretions, that is, new classifications of employees arising after the establishment of the collective bargaining relationship which have not, therefore, been specifically placed. If they share a community of interests with an existing unit, the Board will place them in that unit without an election. However, if the classification of employees existed at the time the bargaining relationship began, such employees would generally be entitled to an election and would not be placed by means of a clarification procedure.

A possibly unforeseen result of clarification procedures, and one which will have significance in the future, is the *Libbey-Owens-Ford Glass Co.*⁴³ case. There, the union, representing multi-location units, wished to merge them into one employer-wide unit. Since the employer would not acquiesce, the union filed a clarification petition seeking the merger. The employer argued that the appropriate procedure would require the union to file a representation petition, not a clarification petition.⁴⁴ The Board majority decided to conduct self-determination elections in which the employees could decide whether they wished to be represented separately or by a multi-plant employer wide unit.⁴⁵ Thus, this decision was the first one in which the Board sanctioned an election in spite of the fact that there were no representational issues. One recent case decided by the Board suggests that very difficult problems will arise as unions test how far this principle can be extended.⁴⁶

⁴⁰ 118 N.L.R.B. 371, 40 L.R.R.M. 1179 (1957).

⁴¹ 145 N.L.R.B. at 1524, 55 L.R.R.M. at 1178.

⁴² 29 C.F.R. § 101.17 (1969).

⁴³ 169 N.L.R.B. No. 2, 67 L.R.R.M. 1096 (1968). See also *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 68 L.R.R.M. 2447 (D.C. Cir. 1968). But see *PPG Indus., Inc.*, 180 N.L.R.B. No. 58, 73 L.R.R.M. 1001 (1969).

⁴⁴ 169 N.L.R.B. No. 2, at 5, 67 L.R.R.M. at 1097.

⁴⁵ *Id.* at 9, 67 L.R.R.M. at 1098.

⁴⁶ *Cities Serv. Oil Co.*, 182 N.L.R.B. No. 6, 73 L.R.R.M. 1598 (1970).

C. *The Excelsior*⁴⁷ Rule

The determination of units is only the first step in the process of choosing a representative. The Board also regulates the tactics and arguments which can be used by the employer and union during the days preceding the election. Section 8(c) of the Act provides:

The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.⁴⁸

This section guarantees the employer's right to campaign vigorously against union representation of his employees.⁴⁹ The Supreme Court has decided, however, that this right is not without limits and that it must never override the basic right of employees to a free election.⁵⁰ The Board, considering this fundamental right, decided that an employee who has had an effective opportunity to hear the arguments of the employer and the union concerning representation is in a better position to make a more fully informed and reasonable choice.⁵¹ The *Excelsior* rule was intended to accomplish this result by removing an obstacle to communication between a petitioning union and employees.

The rule states that within seven days of either entry into a consent election agreement or the ordering of an election by the Board, the employer shall file with the regional director a list containing the names and addresses of all eligible voters. The regional director in turn shall make this information available to all parties in the case. Failure to comply with this requirement constitutes a basis for setting aside the election.⁵²

The rule engendered much litigation, but for the most part was sustained in the courts of appeals.⁵³ However, the First Circuit Court of Appeals, although indicating its approval of the rule as a matter of substance, decided that it was invalid because it was not adopted in

⁴⁷ *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 61 L.R.R.M. 1217 (1966).

⁴⁸ 29 U.S.C. § 158(c) (1964).

⁴⁹ See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

⁵⁰ *Id.* at 617.

⁵¹ 156 N.L.R.B. at 1240, 61 L.R.R.M. at 1218.

⁵² *Id.* at 1239, 61 L.R.R.M. at 1218.

⁵³ See, e.g., *NLRB v. Hanes Hosiery Div.*, 384 F.2d 188, 66 L.R.R.M. 2264 (4th Cir. 1967), cert. denied, 390 U.S. 950 (1968); *NLRB v. Rohlen*, 385 F.2d 52, 66 L.R.R.M. 2481 (7th Cir. 1967); *Howell Ref. Co. v. NLRB*, 400 F.2d 213, 69 L.R.R.M. 2032 (5th Cir. 1968).

conformity with the requirements of the Administrative Procedure Act.⁵⁴ The Supreme Court agreed with the First Circuit that the rule was adopted by an improper procedure but nevertheless sustained the application of the rule.⁵⁵

II. UNFAIR LABOR PRACTICES

A major part of the Board's work is the adjudication and remedy of unfair labor practices. Under the Wagner Act, only unfair labor practices by employers were proscribed. The 1947 Taft-Hartley amendments proscribed certain unfair labor practices by unions.⁵⁶ The 1959 Landrum-Griffin Amendments added further detail to those latter practices.⁵⁷

This article will not discuss, or even attempt to summarize, all that has transpired in the unfair labor practice cases. Rather, it will concentrate upon significant events which have developed with respect to two employer unfair practices—section 8(a)(3), which forbids encouragement or discouragement of union membership by discrimination in hire or tenure of employment or any term or condition of employment,⁵⁸ and section 8(a)(5), which makes it an unfair labor practice to refuse to bargain collectively with the representative of the employees.⁵⁹ Consideration will also be given to one union unfair practice, section 8(b)(1)(A) which forbids coercion of employees in the exercise of their section 7 rights.⁶⁰

A. Section 8(a)(3)

The simplest case of a section 8(a)(3) violation is the discharge of a union adherent because of his union activity.⁶¹ It would seem to follow from this simple case that if an employer were to shut down his business completely, thus discharging all his employees because they had chosen a union to represent them, a fortiori there would be a violation of section 8(a)(3). That precise issue was presented to the

⁵⁴ *Wyman-Gordon Co. v. NLRB*, 397 F.2d 394, 397, 67 L.R.R.M. 2483, 2485 (1st Cir. 1968).

⁵⁵ *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 (1969). For an excellent discussion of this case, see Comment, Rule-Making and Adjudication in Administrative Policy Making: *NLRB v. Wyman-Gordon Co.*, 11 B.C. Ind. & Com. L. Rev. 64 (1969).

⁵⁶ Labor-Management Relations Act, 1947, 61 Stat. 136, 141-42 (1947), amending 29 U.S.C. § 158 (1964).

⁵⁷ Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 542-44 (1959), amending 29 U.S.C. §§ 153, 158, 159 (1964).

⁵⁸ 29 U.S.C. § 158(a)(3) (1964).

⁵⁹ 29 U.S.C. § 158(a)(5) (1964).

⁶⁰ 29 U.S.C. § 158(b)(1) (1964).

⁶¹ This type of case constitutes the bulk of the unfair labor practice cases before the Board. In the period from 1960-1969, back pay awards to remedy such discharges exceeded \$32,000,000.

Supreme Court in the *Darlington*⁶² case. There, the Court held that an employer has the right to terminate his business for any reason whatsoever, including anti-union animus.⁶³ The Court asserted however that when an employer with such motivation closes only a part of his business, this action may be violative of section 8(a)(3) if the employer may reasonably have foreseen that such a closing would likely have a "chilling effect" upon organizational activities at the remaining plants.⁶⁴ The Court remanded the case to the Board so that it could make a finding with respect to the purpose and effect of the closing.⁶⁵

The Board upon remand conducted a further hearing, and upon review of the Trial Examiner's Supplemental Decision, held that the closed Darlington plant was part of a larger enterprise, and that the closing was under circumstances which established the purpose and effect of chilling unionism in other plants of the employer.⁶⁶ It therefore held that this closing was in violation of section 8(a)(3).⁶⁷ The Board has, however, strictly interpreted the *Darlington* standard, and in subsequent cases has stressed the importance of establishing a specific discriminatory motivation before finding that a partial closing of an employer's business is an unfair labor practice.⁶⁸

The *Darlington* requirement of a specific anti-union animus contrasts with the holdings in other Supreme Court cases. In 1954 the Court held that specific proof of motivation is not required but will be presumed, where the type of discrimination inherently discourages or encourages union membership.⁶⁹ Then, in 1961 in the *Local 357* case the Court held that while there were circumstances from which the Board could infer a discriminatory motivation, the inference was not permissible because the hiring hall agreement under consideration contained specific language to the contrary.⁷⁰

In *NLRB v. Erie Resistor Corp.*,⁷¹ the Court again found that the circumstances of the case were sufficiently clear to eliminate the need for specific evidence of an intent to discriminate. There, the employer granted super-seniority to replacements for strikers and to strikers

⁶² *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

⁶³ *Id.* at 273-74.

⁶⁴ *Id.* at 275.

⁶⁵ *Id.* at 277.

⁶⁶ *Darlington Mfg. Co.*, 165 N.L.R.B. 1074, 65 L.R.R.M. 1391, 1405 (1969).

⁶⁷ *Id.* at 1086, 65 L.R.R.M. at 1404, *aff'd*, *Darlington Mfg. Co. v. NLRB*, 397 F.2d 760, 68 L.R.R.M. 2356 (4th Cir. 1968).

⁶⁸ See, e.g., *Morrison Cafeterias Consol., Inc.*, 177 N.L.R.B. No. 113, 71 L.R.R.M. 1449 (1969); *Motor Repair, Inc.*, 168 N.L.R.B. No. 148, 67 L.R.R.M. 1051 (1967); *A.C. Rochat Co.*, 163 N.L.R.B. 421, 64 L.R.R.M. 1321 (1967).

⁶⁹ *Radio Officers' Union v. NLRB*, 347 U.S. 17, 52 (1954).

⁷⁰ *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 676-77 (1961).

⁷¹ 373 U.S. 221 (1963).

who returned to work before the strike ended. Although the right to strike must be protected, it is not entirely without limits. For example, the *Mackay*⁷² rule permits an employer permanently to replace economic strikers. In *Erie Resistor*, however, the Court found the employer's plan inherently discriminatory.⁷³ Its consequences were such that the employer must have both foreseen and intended them, and its effect upon the right to strike was so devastating, that the Court found a violation of section 8(a)(3) without proof of specific intent to discriminate.⁷⁴

In *American Ship Bldg. Co. v. NLRB*, the Supreme Court held that, absent a showing of discriminatory intent, an employer may temporarily lock out his employees in support of his bargaining position during a bargaining impasse.⁷⁵ Assuming no motivation to discourage union activity or to evade bargaining, the test is whether the lockout is so inherently prejudicial to union interest and so devoid of significant economic justification that no evidence of intent is necessary.⁷⁶ The Court found that the purpose and effect of the lockout were to bring pressure to bear on the union to cause it to modify its economic demands and to accept the employer's legitimate demands.⁷⁷ Thus, the Court held that the employer had not committed an unfair labor practice.⁷⁸

Since the Board's view prior to *American Ship* had been that only a defensive lockout under special circumstances was permissible,⁷⁹ *American Ship* compelled a rethinking and reassessment of the problem. One of the first cases to reconsider the question was *The Evening News Ass'n*,⁸⁰ where two newspapers, The Free Press and The News were involved in negotiations with the same union. Although there was not a two-company unit, the crucial demands on each paper were almost identical. When the union struck The Free Press, The News locked out its employees. Because of the similarity in demands being pressed upon both newspapers, the deadlock on significant is-

⁷² NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

⁷³ 373 U.S. at 335-36.

⁷⁴ Id. at 231-32.

⁷⁵ 380 U.S. 300, 318 (1965); accord, NLRB v. Brown, 380 U.S. 278, 282-83 (1965).

⁷⁶ 380 U.S. at 311-12 (by implication).

⁷⁷ 380 U.S. at 312.

⁷⁸ Id. The Supreme Court, at the same time it decided *American Ship*, which involved only one employer, also decided NLRB v. Brown, 380 U.S. 278 (1965). *Brown* involved multi-employer bargaining. After a whipsaw strike was called against one employer, the other employers in the unit locked out their employees, and then, following the struck employer's lead, they resumed operations with temporary replacements. The Court found this conduct part of an acceptable defensive measure to preserve the integrity of the multi-employer unit against the whipsaw. Id. at 284.

⁷⁹ See, e.g., *International Shoe Co.*, 93 N.L.R.B. 907, 27 L.R.R.M. 1504 (1951); *Duluth Bottling Ass'n*, 46 N.L.R.B. 1335, 12 L.R.R.M. 151 (1943).

⁸⁰ 166 N.L.R.B. 219, 65 L.R.R.M. 1425 (1967).

sues, and the threat of a strike at The News, the Board held that The News was justified in locking out its employees.⁸¹ The Board clearly indicated, however, that it was not establishing any hard and fast rules as to the general legality or illegality of various types of lockouts, but rather intended to judge each of them on a case-by-case basis.⁸²

In *Darlington & Co.*⁸³ the Board further extended the scope of permitted lockouts. While *American Ship* involved a lockout after a bargaining impasse, in *Darlington* the lockout occurred before the impasse. Because of this distinction, the Trial Examiner held *American Ship* inapplicable and the lockout illegal. Reviewing the underlying principles of *American Ship*, the Board held that the presence or absence of an impasse in negotiations does not automatically determine the legality of a lockout, but is merely one factor to be considered.⁸⁴ The Board then found that the employer had locked out its employees in support of its bargaining position and to avoid a strike that might have occurred during the busy shipping season.⁸⁵ The Board dismissed the complaint, and after noting that the Supreme Court had said in *American Ship* that the right to strike does not include the right exclusively to determine the timing and duration of all work stoppages, the Board concluded that the lockout was neither inherently prejudicial to union interests nor devoid of significant economic justification.⁸⁶

*NLRB v. Great Dane Trailers, Inc.*⁸⁷ represents further development of the motivation concept in employer discrimination cases. The unfair labor practice, as the majority of the Court saw it,⁸⁸ was based on the employer's payment under the terms of an expired contract of accrued vacation benefits to some employees who met the contractual requirements, but not to others.⁸⁹ The employer had refused to pay the vacation benefits to those strikers who had not returned to work by a company-determined date during the strike. The Court stated that paying "accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity."⁹⁰ But, the Court noted,

⁸¹ Id. at 222, 65 L.R.R.M. at 1427.

⁸² Id.

⁸³ 171 N.L.R.B. No. 95, 68 L.R.R.M. 1133 (1968).

⁸⁴ Id. at 6, 68 L.R.R.M. at 1135.

⁸⁵ Id.

⁸⁶ Id. at 7, 68 L.R.R.M. at 1135.

⁸⁷ 388 U.S. 26 (1967).

⁸⁸ Justices Harlan and Stewart, in dissent, thought the Court had decided an issue not properly before it. Id. at 35-36.

⁸⁹ Id. at 27.

⁹⁰ Id. at 32.

under *American Ship* and *Erie Resistor* the question of employer motivation for the discriminatory conduct must still be examined before finding a violation of section 8(a)(3).⁹¹ There are cases where motivation can be inferred from the very nature of the conduct, and some where the employer may be able to establish legitimate and substantial business justification for the conduct.⁹² In *Great Dane* the employer offered no evidence as to its motivation, and therefore the violation was established without deciding to which class this case belonged.⁹³

In *NLRB v. Fleetwood Trailer Co.*,⁹⁴ the Supreme Court applied *Great Dane* to the re-employment of economic strikers. When the six strikers involved in the case applied for reinstatement there were no jobs available. However, after their applications had been made, the employer hired six new employees to fill jobs the striker-applicants were qualified to fill. The complaint alleged, and the Trial Examiner found, violations of sections 8(a)(3) and 8(a)(1) in the hiring of the six new employees instead of the strikers.⁹⁵ After the Board affirmed,⁹⁶ the Court of Appeals for the Ninth Circuit reversed, holding that the rights of the strikers were to be judged as of the day they applied for reinstatement.⁹⁷ Since there were no jobs then available, there was no violation.⁹⁸ The Supreme Court reversed,⁹⁹ referring to *Great Dane* and stating that the denial of reinstatement to strikers here was no less destructive of employee rights than the refusal to make vacation payments in *Great Dane*.¹⁰⁰ As the employer had not shown any justification, there was an unfair labor practice without reference to intent.¹⁰¹ The Court also made clear that the right of a striker to reinstatement does not expire when there is no job at the moment he applies.¹⁰² He remains an employee until he obtains other substantially equivalent regular employment, and his right to an offer of reinstatement until then is defeated only by a showing of legitimate and substantial business justification.¹⁰³

Before *Fleetwood* the Board had applied *Mackay* rather literally, determining the economic striker's rights as of the date of his ap-

⁹¹ Id. at 33.

⁹² Id. at 33-34.

⁹³ Id. at 34-35.

⁹⁴ 389 U.S. 375 (1967).

⁹⁵ *Fleetwood Trailer Co.*, 153 N.L.R.B. 425, 428, 59 L.R.R.M. 1492 (1965).

⁹⁶ Id. at 425, 59 L.R.R.M. at 1492 (1965).

⁹⁷ *NLRB v. Fleetwood Trailer Co.*, 366 F.2d 126, 129, 63 L.R.R.M. 2155, 2157 (9th Cir. 1966).

⁹⁸ Id. at 130, 63 L.R.R.M. at 2158.

⁹⁹ 389 U.S. at 381.

¹⁰⁰ Id. at 380.

¹⁰¹ Id.

¹⁰² Id. at 380-81.

¹⁰³ Id. at 381.

plication.¹⁰⁴ But after *Fleetwood* and *Great Dane*, the Board was compelled to reassess its position. In the *Laidlow Corp.* case the Board therefore held that, regardless of intent, an employer cannot lawfully ignore outstanding applications for reinstatement from strikers, and hire new applicants, absent legitimate and substantial business reasons.¹⁰⁵ The Board further noted that when vacancies occur, a refusal to consider or reinstate strikers who have been replaced is in effect a delayed discrimination which does not become lawful simply because there was the intervening lawful hiring of a permanent replacement.¹⁰⁶

B. Section 8(a)(5)

Although Section 8(a)(3) of the Act has usually been considered the most important unfair labor practice provision, section 8(a)(5) (dealing with the employer's refusal to bargain collectively with representatives of his employees) has, during the 1960s, become equally significant. In fact, during the past decade there have been major developments in all aspects of the law affecting the bargaining relationship—its establishment, its duration, and the mandatory subjects of bargaining.

1. The Establishment of the Bargaining Relationship

In *Bernel Foam Prods. Co.*¹⁰⁷ the Board, reversing the *Aiello Dairy Farms* case,¹⁰⁸ held that a majority union which participates in an election with knowledge of the employer's unlawful refusal to extend recognition and bargain, and loses that election, is not precluded from filing a section 8(a)(5) unfair labor practice charge based on the employer's pre-election misconduct, provided that it can present meritorious objections to the election.¹⁰⁹ The effect of *Bernel* was to precipitate a number of cases in which the Board was called upon to determine whether the union could in fact demonstrate majority status, usually by authorization cards it had obtained during its organizational campaign, and whether the employer's motivation in refusing recognition was based upon a good faith doubt as to the majority status of the union.¹¹⁰

¹⁰⁴ See, e.g., *Brown & Root, Inc.*, 132 N.L.R.B. 486, 48 L.R.R.M. 1391 (1961); *Atlas Storage Div., P&V Atlas Indus. Center, Inc.*, 112 N.L.R.B. 1175, 36 L.R.R.M. 1171 (1955); *Bartlett-Collins Co.*, 110 N.L.R.B. 395, 35 L.R.R.M. (1954).

¹⁰⁵ 171 N.L.R.B. No. 175, at 10, 68 L.R.R.M. 1252, 1257 (1968).

¹⁰⁶ *Id.* at 10 n.16, 68 L.R.R.M. at 1258 n.16.

¹⁰⁷ 146 N.L.R.B. 1277, 56 L.R.R.M. 1039 (1964).

¹⁰⁸ 110 N.L.R.B. 1365, 35 L.R.R.M. 1235 (1954).

¹⁰⁹ 146 N.L.R.B. at 1282-83, 56 L.R.R.M. at 1042. See also *Irving Air Chute Co.*, 149 N.L.R.B. 627, 629-30, 57 L.R.R.M. 1330, 1332 (1964).

¹¹⁰ See, e.g., *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268, 54 L.R.R.M. 1233 (1963).

In *NLRB v. Gissel Packing Co.*,¹¹¹ the Supreme Court resolved some of the problems which were created by the *Bernel Foam* decision. The Court held that union authorization cards, if obtained from a majority of the employees without misrepresentation or coercion, generally are reliable enough to provide a valid method of determining majority status.¹¹² The Court also determined that a bargaining order is an appropriate remedy where the employer rejects the union's card majority while at the same time committing unfair labor practices which tend to undermine the union's majority and to impede the election process.¹¹³ In reaching this conclusion, the Court distinguished three types of situations:

1. It noted those cases in which the employer's violations are so serious that even in the absence of a section 8(a)(5) violation, a bargaining order is the only effective remedy. Regarding this category of cases the Court left undecided the question of whether it is necessary to establish a union majority prior to issuance of the order.¹¹⁴

2. In cases in which the employer's unfair practices are less damaging to the union but still have the tendency to undermine majority strength and impede the election process, the Court noted that it is necessary to establish that at one time the union in fact had a majority, because the Board has the dual goals of effectuating the employees' free choice and deterring the employer's misbehavior. In choosing a remedy the Board must therefore

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 effects 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 sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.¹¹⁵

3. In other cases the unfair labor practices have such a minimal

¹¹¹ 395 U.S. 575 (1969).

¹¹² Id. at 603. The Court approved the Board's statement of its position on the validity of cards as set out in *Levi Strauss & Co.*, 172 N.L.R.B. No. 57, 68 L.R.R.M. 1338 (1968). It is to be noted that none of the cases included in *Gissel* involved ambiguous, dual-purpose cards, and the Court therefore expressed no opinion on how such cards are to be handled.

¹¹³ 395 U.S. at 610.

¹¹⁴ Id. at 613-14. In *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 570, 66 L.R.R.M. 2596, 2603 (4th Cir. 1967), the court stated that in a case marked by sufficiently outrageous unfair labor practices, a bargaining order would be appropriate even if the union had never attained a majority.

¹¹⁵ 395 U.S. at 614-15.

effect on the election process that they will not justify a bargaining order.¹¹⁶

While *Gissel* did not, of course, solve all the problems in determining majority status, it made clear that the basic test the Board is to use is not the subjective test of the employer's motivation in refusing to bargain with a union, but rather the objective test of the extent to which the employer's conduct made it impossible to conduct an election.

The problem of determining who may actually engage in bargaining has become significant in view of the increase in what has been described as "coordinated bargaining," that is, bargaining by several unions which represent employees of one company. In *General Elec. Co.* the Board held that the company need only bargain with the union with which it was scheduled to bargain at that time, although that union could bring in representatives of other unions as advisors in its negotiations.¹¹⁷ The Second Circuit enforced the Board's order and upheld the Board's ruling that a mixed-union negotiating committee is not per se improper, and that, absent a showing of substantial evidence of ulterior motive or bad faith on the part of the union, an employer commits an unfair labor practice in refusing to deal with such a group.¹¹⁸ Such evidence may be difficult to obtain, but the court noted¹¹⁹ that such a determination can be made, and in fact had been made in the *Kennecott Copper* case.¹²⁰ The court's decision indicates that the Board will be faced with difficult problems if and when there are attempts to extend this union bargaining technique beyond established limits.

2. Subjects of Bargaining

Section 8(d) of the Act states that the basic bargainable matters are wages, hours, and conditions of employment.¹²¹ In *NLRB v. Wooster Div. of Borg-Warner*,¹²² the Supreme Court made the fundamental distinction between mandatory subjects of bargaining, as to which a party may insist on its position to the point of impasse, and non-mandatory subjects on which the agreement to a contract may not be conditioned. The Court further indicated that refusal to agree

¹¹⁶ Id. at 615.

¹¹⁷ *General Elec. Co.*, 173 N.L.R.B. No. 46, at 8-9, 69 L.R.R.M. 1305, 1308 (1968). See also *Minnesota Mining & Mfg. Co.*, 173 N.L.R.B. No. 47, 69 L.R.R.M. 1313 (1968).

¹¹⁸ *General Elec. Co. v. NLRB*, 412 F.2d 512, 519-20, 71 L.R.R.M. 2418, 2423 (2d Cir. 1969).

¹¹⁹ 412 F.2d at 519, 71 L.R.R.M. at 2423-24.

¹²⁰ *Kennecott Copper Co.*, No. 27-CB-453, 70 L.R.R. 427 (April 4, 1969).

¹²¹ 29 U.S.C. § 158(d) (1964).

¹²² 356 U.S. 342 (1958).

to a contract because it does not contain a non-mandatory subject is an unfair labor practice within the meaning of section 8(a)(5).¹²³

During the 1960s the Board has had many opportunities to distinguish between mandatory and non-mandatory subjects of bargaining. In making these distinctions, the Board has recognized that the label attached to a subject of bargaining is not immutable. For example, in 1948 the Board decided that pension plans had then become a mandatory subject.¹²⁴ In 1969 society and the economy had changed to such an extent that the Board decided that retired employees are "employees" within the meaning of the statute for the purpose of bargaining about changes in their retirement benefits, and that bargaining about such changes is in any event within the contemplation of the statute because of the interest that active employees have in retirement benefits. The Board thus concluded that this subject was also a bargainable matter.¹²⁵

The most significant development in classifying subjects of bargaining was clearly the *Fibreboard*¹²⁶ decision. There, the Supreme Court held that the contracting out of unit work was well within the literal meaning of "terms and conditions of employment," and that therefore contracting out is a mandatory subject of collective bargaining.¹²⁷ The Court did not purport to cover all forms of subcontracting, a term which has, as it noted, many meanings. However, in *Fibreboard* it did require bargaining not only about the decision to subcontract, but also about the effect of the decision on unit employees. The doctrine is limited, however, to those situations in which the subcontracting involves a change in prior practice, or will result in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for unit employees.¹²⁸

¹²³ Id. at 349.

¹²⁴ *Inland Steel Co.*, 77 N.L.R.B. 1, 21 L.R.R.M. 1310 (1948), enforced, 170 F.2d 247, 22 L.R.R.M. 2506 (7th Cir. 1948).

¹²⁵ *Pittsburgh Plate Glass Co.*, 177 N.L.R.B. No. 114, 71 L.R.R.M. 1433 (1969).

¹²⁶ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

¹²⁷ Id. at 203.

¹²⁸ The *Fibreboard* decision has also had an impact on § 8(e) of the Act, 29 U.S.C. § 158(e) (1964), generally called the "hot cargo" provision. In *District Council of Carpenters*, 149 N.L.R.B. 646, 57 L.R.R.M. 1341 (1964), the Board considered the validity of a clause which provided that no member of the union would handle any doors which had been fitted prior to being furnished on the job, and held it valid because it was designed to preserve for the employees work which they had customarily performed. After the court of appeals reversed the Board, *National Woodwork Mfrs. Ass'n v. NLRB*, 354 F.2d 594, 60 L.R.R.M. 2458 (7th Cir. 1965), the Supreme Court upheld the Board, 386 U.S. 612 (1967). The Court noted that under its *Fibreboard* decision, subcontracting is a mandatory subject of bargaining and that it would therefore be incongruous to invalidate clauses over which the parties may be mandated to bargain. Id. at 642-43.

The *Fibreboard* case has led to employer demands for broad and detailed manage-

The duty to bargain is not satisfied by the mere execution of a contract. Collective bargaining is not a single act but a continuous process. Thus, a union is entitled to information which will enable it to perform its statutory duty of representing the employees. An employer is often required to furnish the union with financial data in order to sustain its plea of inability to increase wages.¹²⁹ The Board has even required the employer to submit to union investigations of its production methods. For example, in *Fafnir Bearing Co.*,¹³⁰ the union wanted to make its own time-and-motion study of production rates, intending to use the results in deciding whether or not grievances then in process should be taken to arbitration.¹³¹ The employer refused permission and the union charged the employer with an unfair labor practice. The Board held that the information sought was necessary to allow the union to police and administer the agreement, and that compliance with the requirement of good faith bargaining necessitated

ment rights or prerogative clauses. Through these clauses some employers have tried to obtain contractual waivers of statutory rights of the *Fibreboard* character as well as other management prerogatives in the management of their plants. The Board has found that an employer's insistence on a clause of this character, together with other actions, is inconsistent with his duty to bargain in good faith and thus is a § 8(a)(5) violation. See, e.g., *Stuart Radiator Core Mfg. Co.*, 173 N.L.R.B. No. 27, 69 L.R.R.M. 1243 (1968); *East Texas Steel Castings Co.*, 154 N.L.R.B. 1080, 60 L.R.R.M. 1097 (1965). It has also dismissed some § 8(a)(5) complaints of this character. See, e.g., *Procter & Gamble Mfg. Co.*, 160 N.L.R.B. 334, 62 L.R.R.M. 1617 (1966). But clauses of this character are not invalid per se, and it is entirely proper for an employer to try to spell out in the contract the restrictions and the privileges of the bargaining relationship in this regard, within the limitations of the statute. The leading decision in this area is *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952), where the Supreme Court stated:

The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.

Id. at 409. This area of the law probably will require further clarification in the years ahead.

¹²⁹ See, e.g., *NLRB v. Truitt Mfg. Co.*, 149 U.S. (1956); *Stanley Bldg. Specialties Co.*, 166 N.L.R.B. No. 110, 65 L.R.R.M. 1684 (1967). In *NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 64 L.R.R.M. 2320 (8th Cir. 1967), the court sustained a Board order requiring the employer to supply the union with price lists.

¹³⁰ 146 N.L.R.B. 1582, 56 L.R.R.M. 1108 (1964).

¹³¹ Arbitration as a means of settling labor disputes has become increasingly important. In 1955 the Board had decided that it would recognize arbitrators' awards if certain safeguards were met. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955). In 1960 the Supreme Court decided the *Steelworkers' Trilogy*, in which it indicated the great value which it attached to arbitration. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). Since then numerous and complicated problems have come to the Board involving the relationship between its processes and arbitration, and the extent to which the Board should accept arbitration awards or remit cases to arbitration. See, e.g., *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). For a discussion of this problem, see Lev & Fishman, *Suggestions to Management: Arbitration v. the Labor Board*, 10 B.C. Ind. & Com. L. Rev. 963 (1969).

the company's cooperation, unless the union's request was improper for another reason or imposed an unreasonable burden on the company.¹³² Finding neither of these, the Board issued a bargaining order which was enforced.¹³³

An employer must also inform a union of his intention to close or sell all or part of his operations. This requirement gives the union an opportunity to bargain about both the decision to close the operation and its effect upon the employees. Although the Board has not yet determined if there is a duty to bargain about the decision to close an operation completely, it has established that there is a duty to bargain about a partial closing and its effect on the unit employees.¹³⁴ This does not mean that the employer is forbidden to take action the union opposes. It means only that he must discuss the matter before acting. Thus, in *Guardian Glass Co.*,¹³⁵ an employer who had purchased a plant that had been incurring large losses, immediately recognized the incumbent union and began bargaining in good faith for modifications in the contract. The union was intransigent, and an impasse ensued. The Board held that the employer had fulfilled its duty to bargain about the decision to close, and that there had been no violation of the Act.¹³⁶

3. Length of the Bargaining Relationship

When a purchaser takes over a business where the employing industry remains essentially unchanged and there is a collective bargaining representative, the new employer must recognize and bargain with that representative.¹³⁷ Because this proposition has been established for a long time, the problems which presently arise under it are largely factual, as exemplified by such recent cases as *Thomas Cadillac, Inc.*¹³⁸ and *Tallaksen Ford, Inc.*¹³⁹ The major question in this area arises from the Supreme Court's decision in *John Wiley & Sons, Inc.*

¹³² 146 N.L.R.B. at 1585, 56 L.R.R.M. at 1110.

¹³³ 362 F.2d 716, 62 L.R.R.M. 2414 (2d Cir. 1966). See also *Univis, Inc.*, 169 N.L.R.B. No. 18, 67 L.R.R.M. 1090 (1968).

¹³⁴ See, e.g., *Morrison Cafeterias Consol., Inc.*, 177 N.L.R.B. No. 113, 71 L.R.R.M. 1449 (1969); *Drapery Mfr. Co.*, 170 N.L.R.B. No. 119, 68 L.R.R.M. 1027 (1968); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966). It has also been established that an employer must bargain with a union about the effects on employees of a management decision to go out of business completely. *Interstate Tool Co.*, 177 N.L.R.B. No. 107, 71 L.R.R.M. 1487 (1969).

¹³⁵ *Guardian Glass Co.*, 172 N.L.R.B. No. 49, 68 L.R.R.M. 1323 (1968).

¹³⁶ *Id.* at 4, 5, 68 L.R.R.M. at 1325.

¹³⁷ *Ideal Laundry Corp.*, 172 N.L.R.B. No. 138, 69 L.R.R.M. 1349 (1968).

¹³⁸ 170 N.L.R.B. No. 92, 67 L.R.R.M. 1504 (1968) (no violation of the Act), enforced sub nom. *Lodge 94, IAM v. NLRB*, 414 F.2d 1135, 71 L.R.R.M. 2150 (D.C. Cir. 1969).

¹³⁹ 171 N.L.R.B. No. 67, 68 L.R.R.M. 1136 (1968) (no violation of the Act).

v. Livingston,¹⁴⁰ where the Court held that where a successor took over a business whose employees had been covered by a contract which included an arbitration clause, the obligation to arbitrate survived the termination of the contract and devolved upon the successor, even though it had not signed the contract.¹⁴¹ The Court was concerned with protecting the rights of the employees, who would not normally be considered in the sale of a business, and attempted to provide some stability for them. For that reason, the question has arisen whether, despite what could be considered a narrow holding based upon the Court's view of the value of arbitration, the entire contract should be held binding upon the successor.¹⁴² Although the Board has not yet decided this question, it has used the *Wiley* rationale to hold that a purchaser who acquires and operates, in basically unchanged form, the business of an employer found guilty of unfair labor practices, in circumstances which charge the purchaser with notice of the unfair labor practice charges against the predecessor, should be held responsible, jointly and severally, with the predecessor for remedying the unlawful conduct.¹⁴³

C. Section 8(b)(1)(A)

Since the Taft-Hartley amendments became law, the Act has prohibited certain unfair labor practices by unions. All of the unfair labor practices specified in the Act will not be discussed here; rather the emphasis will be upon section 8(b)(1)(A),¹⁴⁴ which makes it an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7.¹⁴⁵ The Board at first narrowly interpreted this section as inhibiting *only* union tactics involving violence, intimidation, reprisals, and threats of reprisal.¹⁴⁶ That interpretation was expanded when the Board's ruling in *Bernhard-Altmann Tex. Corp.*¹⁴⁷ was affirmed in the Supreme Court, which held that the intent of Congress was to

¹⁴⁰ 376 U.S. 543 (1964).

¹⁴¹ *Id.* at 549-51.

¹⁴² Although there is a split of authority in the courts of appeals, the Supreme Court has yet to decide this issue. Compare *United Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891, 56 L.R.R.M. 2721 (3rd Cir. 1964) (contract *not* unqualifiedly binding upon successor employer) with *Wackenhut Corp. v. Local 151, United Plant Guard Workers*, 332 F.2d 954, 56 L.R.R.M. 2466 (9th Cir. 1964) (contract unqualifiedly binding upon successor employer). This issue is currently before the Board in several cases.

¹⁴³ *Perma Vinyl Corp.*, 164 N.L.R.B. 968, 65 L.R.R.M. 1168, 1169 (1967), enforced sub nom. *United States Pipe & Foundry Co. v. N.L.R.B.*, 398 F.2d 544, 68 L.R.R.M. 2913 (5th Cir. 1968).

¹⁴⁴ 29 U.S.C. § 158(b)(1)(A) (1964).

¹⁴⁵ 29 U.S.C. § 157 (1964).

¹⁴⁶ See, e.g., *Painters' Dist. Council 6*, 97 N.L.R.B. 654, 29 L.R.R.M. 1151 (1951); *National Maritime Union*, 78 N.L.R.B. 971, 22 L.R.R.M. 1289 (1948).

¹⁴⁷ 122 N.L.R.B. 1289, 43 L.R.R.M. 1283 (1959).

impose upon unions the same restrictions that the Wagner Act had imposed upon employers as to violations of employee rights.¹⁴⁸

1. Union Discipline

A proviso to section 8(b)(1)(A) states that a union still has the right to prescribe its own rules with respect to the acquisition or retention of membership therein. In *NLRB v. Allis-Chalmers Mfg. Co.*¹⁴⁹ the Supreme Court, affirming the Board¹⁵⁰ and reversing the Court of Appeals for the Seventh Circuit,¹⁵¹ held that a union was not barred under section 8(b)(1)(A) from fining members who crossed a union picket line during an authorized strike.¹⁵² The Court stressed the importance of the strike as a union weapon; the power to fine or expel strikebreakers is essential if the union is to be able to function as an effective bargaining agent.¹⁵³

*Scofield v. NLRB*¹⁵⁴ represents another situation in which it was held that a union may fine its members without violating section 8(b)(1)(A). There, the union had a rule, enforceable by fines and expulsion, that employees could produce as much as they wished on any day, but could be paid only up to a ceiling rate. Any excess earnings were retained by the company and paid to the employee for days on which he did not reach the production ceiling. Those who demanded immediate payment of the excess would be paid at once, but the union would fine them on a sliding scale. Failure to pay the fine could lead to expulsion from the union. Although it was not contained in a contract provision, the company and the union had discussed what the daily ceiling should be, and the company had agreed to withhold the excess earnings. Members of the union brought an unfair labor practice charge against the union after it had fined the members for demanding immediate payment of the excess earnings. The Board dismissed the case,¹⁵⁵ and the Seventh Circuit Court of Appeals¹⁵⁶ and the Supreme Court affirmed, holding that a union can generally enforce its rules internally against its members, but it cannot enforce them externally by causing the employer to change the member's employee status or rights.¹⁵⁷ Since the union only enforced the rule internally, the major issue was whether the internal rule

¹⁴⁸ *Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738 (1961).

¹⁴⁹ *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

¹⁵⁰ Local 248, UAW, 149 N.L.R.B. 67, 57 L.R.R.M. 1242 (1964).

¹⁵¹ *Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656, 61 L.R.R.M. 2498 (7th Cir. 1966).

¹⁵² 388 U.S. at 195.

¹⁵³ *Id.* at 181.

¹⁵⁴ 394 U.S. 421 (1969).

¹⁵⁵ Local 1283, UAW, 145 N.L.R.B. 1097, 55 L.R.R.M. 1085 (1964).

¹⁵⁶ 393 F.2d 49, 67 L.R.R.M. 2673 (7th Cir. 1968).

¹⁵⁷ 394 U.S. at 428.

vindicated a legitimate union interest, and whether any policy of the Act is violated by a union-imposed production ceiling.¹⁵⁸ The Court noted the historic union opposition to unlimited piecework pay systems,¹⁵⁹ the failure of the employer to achieve a removal of production ceilings, and its cooperation in administering the system.¹⁶⁰ The Court also noted that the union's rule did not violate the contract,¹⁶¹ that the employer did not pay for unperformed services,¹⁶² that the union had not induced employer discrimination against any class of employees,¹⁶³ and the acceptable manner in which the rule was enforced.¹⁶⁴ It consequently held that the rule was valid, and that its enforcement by reasonable fines was not a "restraint or coercion" proscribed by section 8(b)(1)(A).¹⁶⁵

In deciding whether a fine or expulsion by the union is legal, the object of the penalty must be scrutinized to insure that the union is not impeding a member's access to the Board's processes.¹⁶⁶ The Board has concluded that a union does impede access to the Board's processes when it expels a member only because the member has filed charges with the Board.¹⁶⁷ The Supreme Court recently sustained the Board's position. In *NLRB v. Indus. Union of Marine Workers*,¹⁶⁸ the union had expelled a member for filing an unfair labor practice charge against it without having first exhausted his intra-union remedies. The Court stressed the right of an employee to ask the Board for relief, and held that any coercion used to discourage exercise of that right is beyond the legitimate interests of a labor organization.¹⁶⁹

Another recent case in which the Board was faced with the validity of union disciplinary action was *Local 125, Int'l Molders*,¹⁷⁰ where the union fined one of its employees for circulating a petition seeking to have the Board decertify the union. The employee filed an unfair labor practice charge against the union. The Board relied upon *Marine Workers*, and found that the union had committed an unfair

¹⁵⁸ Id. at 431.

¹⁵⁹ Id.

¹⁶⁰ Id. at 432-33.

¹⁶¹ Id. at 433.

¹⁶² Id. at 434.

¹⁶³ Id. at 435.

¹⁶⁴ Id. at 436.

¹⁶⁵ Id. The Board is currently considering a case which involves the definition of a "reasonable fine."

¹⁶⁶ See, e.g., *Operating Engineers Local 138*, 148 N.L.R.B. 679, 57 L.R.R.M. 1009 (1964) (imposition of fine on union member for filing unfair labor practice charge held to be a violation of § 8(b)(A)); *H.B. Roberts*, 148 N.L.R.B. 674, 57 L.R.R.M. 1012 (1964) (imposition of fine held to be in violation of § 8(b)(1)(A)).

¹⁶⁷ See, e.g., *Cannery Workers Union*, 159 N.L.R.B. 843, 62 L.R.R.M. 1298 (1966).

¹⁶⁸ *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418 (1968).

¹⁶⁹ Id. at 424.

¹⁷⁰ 178 N.L.R.B. No. 25, 72 L.R.R.M. 1049 (1969).

labor practice by hindering the employee's access to the Board.¹⁷¹ In its decision the Board noted that a union may consider the filing of a decertification petition an attack upon its very existence, against which it may defend by expulsion or suspension of the member who initiates it.¹⁷² On the other hand, the Board reasoned that a fine, unlike a suspension or expulsion, was coercive and thus illegal:

[W]here the union member is seeking to decertify the union, the Board has said that the public policy against permitting a union to penalize a member because he seeks the aid of the Board should give way to the union's right to self-defense. But when a union only fines a member because he has filed a decertification petition, the effect is not defensive and can only be punitive—to discourage members from seeking such access to the Board's processes; the union is not one whit better able to defend itself against decertification as a result of the fine. The dissident member could still campaign against the union while remaining a member and therefore be privy to its strategy and tactics.¹⁷³

Member Jenkins and I dissented by noting that there is no meaningful distinction between fines and expulsion.¹⁷⁴ We also asserted that *Marine Workers* was distinguishable from the *Local 125* decision in that in the former case the employee was expelled after filing an unfair labor practice charge while in the latter case the employee sought to decertify the union.¹⁷⁵ We further argued that to forbid fines for decertification petitions was to read the proviso out of section 8(b)(1)(A).¹⁷⁶

2. Duty of Fair Representation

In *Vaca v. Sipes*¹⁷⁷ the Supreme Court stated that a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.¹⁷⁸ The Court did not decide whether such action would in fact be a violation of section 8(b)(1)(A), but it did intimate that it might so hold. In *Miranda Fuel Co.*,¹⁷⁹ the

¹⁷¹ Id. at 1, 72 L.R.R.M. at 1049.

¹⁷² Id. at 3, 72 L.R.R.M. at 1050. See also *Tawas Tube Prods., Inc.*, 151 N.L.R.B. 46, 58 L.R.R.M. 1330 (1965).

¹⁷³ 178 N.L.R.B. No. 25, at 3-4, 72 L.R.R.M. at 1050.

¹⁷⁴ Id. at 6, 72 L.R.R.M. at 1051.

¹⁷⁵ Id. at 8, 72 L.R.R.M. at 1051.

¹⁷⁶ Id. at 10, 72 L.R.R.M. at 1052.

¹⁷⁷ 386 U.S. 171 (1967).

¹⁷⁸ Id. at 190.

¹⁷⁹ 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962), enforcement denied, 326 F.2d 172, 54 L.R.R.M. 2715 (2d Cir. 1963).

Board in fact held that section 8(b)(1)(A) prevented a labor organization acting as a statutory representative from taking action against any employee on the basis of considerations or classifications which are irrelevant, invidious, or unfair.¹⁸⁰ The Board therefore concluded that the union's action in causing the reduction of an employee's seniority in response to unjustified pressures from some unit employees was unlawful.¹⁸¹

In *Metal Workers Local 1*¹⁸² the same issue of fair representation arose in the much more sensitive area of racial discrimination, and the Board followed *Miranda*. The racial issue again arose in *Rubber Workers Local 12*,¹⁸³ and the Board adhered to its position. The Court of Appeals for the Fifth Circuit, in enforcing the Board's order, rejected a narrow view of section 8(b)(1)(A) and agreed with the Board that by refusing, for racially discriminatory reasons, to process grievances concerning a racially discriminatory seniority system and segregated plant facilities, the union had violated section 8(b)(1)(A).¹⁸⁴

III. BOARD JURISDICTION

During the 1960s the Board asserted jurisdiction over private hospitals¹⁸⁵ and nursing homes,¹⁸⁶ whose gross annual income exceeded \$250,000 and \$100,000 respectively. The present size and expected future growth of such institutions indicate that their impact on commerce is already substantial and will increase in the future.

The Board recently entered another previously unprotected field with its assertion of jurisdiction over major league baseball.¹⁸⁷ It rejected the argument that even though there was constitutional and statutory power to do so, the exercise of jurisdiction would not effectuate the policies of the Act. The Board concluded that should future labor disputes arise in baseball, they would radiate far beyond individual state boundaries, and that an employer conducting such an operation ought not to have its labor relations problems subject to diverse state labor laws.¹⁸⁸

¹⁸⁰ 140 N.L.R.B. at 185, 51 L.R.R.M. at 1587.

¹⁸¹ Id. at 190, 51 L.R.R.M. at 1589.

¹⁸² 147 N.L.R.B. 1573, 56 L.R.R.M. 1289 (1964).

¹⁸³ 150 N.L.R.B. 312, 57 L.R.R.M. 1535 (1964).

¹⁸⁴ *Rubber Workers Local 12*, 368 F.2d 12, 17, 63 L.R.R.M. 2395, 2398 (5th Cir. 1966). See also *Local 568, Truck Drivers & Helpers v. NLRB*, 379 F.2d 137, 65 L.R.R.M. 2309 (D.C. Cir. 1967).

¹⁸⁵ *Butte Medical Props.*, 168 N.L.R.B. No. 52, 66 L.R.R.M. 1259 (1967).

¹⁸⁶ *University Nursing Home, Inc.*, 168 N.L.R.B. No. 53, 66 L.R.R.M. 1263 (1967).

¹⁸⁷ *American League of Professional Baseball Clubs*, 180 N.L.R.B. No. 30, 72 L.R.R.M. 1545 (1969).

¹⁸⁸ Id. at 8, 72 L.R.R.M. at 1548.

IV. REMEDIES

The most common unfair labor practice is still the discriminatory discharge in violation of section 8(a)(3). From the earliest days of the Board, the remedy for this has been reinstatement with back pay,¹⁸⁹ and in recent years the Board has attempted to reimburse employees more fully. The most important changes in this respect during the 1960s are the addition of interest to back pay awards,¹⁹⁰ and the reversal of the earlier holding that back pay is tolled for the period between a Trial Examiner's ruling that no unfair labor practice has been committed and its later reversal by the Board.¹⁹¹

The Board also confronted during the 1960s the problem of the repeat violator, the notable example being *J.P. Stevens & Co.*¹⁹² Being of the view that the traditional back pay, reinstatement, and posting of notice requirements were not sufficient, the Board added new requirements. Stevens was ordered by the Board to (1) mail copies of the notice to each employee at the affected plants; (2) upon request of the union, grant it and its representatives reasonable access at the affected plants, for one year, to its bulletin boards and all places where notices to employees are customarily posted; (3) give to the union, upon its request made within one year of the Board's decision, a list of names and addresses of all employees at the affected plants; (4) convene during working hours, by departments and by shifts, all of its employees at the affected plants, and to have a responsible official of the corporation at a specified organizational level or above, or a representative of the Board, read the notice to them.¹⁹³

The opinion of the Fifth Circuit Court of Appeals enforcing the last Board decision involving J.P. Stevens expressed in strong language the need for Board remedies which would be effective in keeping the employer's intransigence within the bounds of vigorous but lawful opposition to union efforts to organize.¹⁹⁴ Rejecting Stevens' argument that the Board's order made the lot of the union easier, the Court

¹⁸⁹ See, e.g., *Pennsylvania Greyhound Lines, Inc.*, 1 N.L.R.B. 1, 1 L.R.R.M. 303 (1935).

¹⁹⁰ See, e.g., *Isis Plumbing & Heating Co.*, 138 N.L.R.B. 716, 51 L.R.R.M. 1122 (1962).

¹⁹¹ See, e.g., *A.P.W. Prods. Co.*, 137 N.L.R.B. 25, 50 L.R.R.M. 1042 (1962).

¹⁹² See *J.P. Stevens & Co.*, 157 N.L.R.B. 869, 61 L.R.R.M. 1437 (1966), enforced in substantial part, 380 F.2d 292, 65 L.R.R.M. 2829 (2d Cir. 1967); 163 N.L.R.B. 217, 64 L.R.R.M. 1289 (1967), enforced as modified, 388 F.2d 896, 67 L.R.R.M. 2055 (2d Cir. 1967); 167 N.L.R.B. No. 37, 66 L.R.R.M. 1024 (1967), enforced as modified, 406 F.2d 1017, 70 L.R.R.M. 2104 (4th Cir. 1968); 167 N.L.R.B. No. 38, 66 L.R.R.M. 1030, (1967), enforced as modified, 406 F.2d 1017, 70 L.R.R.M. 2104 (4th Cir. 1968); 171 N.L.R.B. No. 163, 69 L.R.R.M. 1088 (1968), enforced, 417 F.2d 533, 72 L.R.R.M. 2433 (5th Cir. 1969).

¹⁹³ See, e.g., 157 N.L.R.B. at 878-79, 61 L.R.R.M. at 1438.

¹⁹⁴ 417 F.2d at 535, 72 L.R.R.M. at 2434.

answered that this was only because Stevens had made the union's lot harder than the law tolerates.¹⁹⁵

There are many further proposals for providing more effective remedies. Of these, perhaps the most significant is the proposal to grant monetary compensation as a remedy for refusal by an employer to bargain, a suggestion now before the Board in a series of cases.¹⁹⁶ Where a union has been certified by the Board, and the employer, challenging the election, refuses to bargain, the result allegedly has been that employees often are denied the benefits of union representation, especially of a contract providing for higher pay and fringe benefits, during the period of the litigation. The unions in the cases now before the Board are seeking reimbursement for the loss of such wages and benefits they claim they could have obtained through collective bargaining. This proposal raises many complex problems the Board will ultimately have to resolve: Does the Board have the legal authority to effectuate such a remedy? Is the remedy invalid because it is punitive or speculative? If reimbursement is ordered, how can it be computed? Should there be a distinction between flagrant refusals to bargain and the technical violation that is necessary if a representation case is to be reviewed in court?

V. ADMINISTRATION

During the 1960s the Board has experienced an enormous increase in its caseload. In fiscal 1960, total case intake was somewhat over 21,000 cases. In fiscal 1969, the total had risen to over 31,000 cases. This large amount of litigation imposes a responsibility to decide cases rapidly. Remedies are of little use unless they can be applied promptly. In recognition of this need, which was already apparent in 1959, the Landrum-Griffin amendments gave the Board the authority to delegate to its regional directors its powers under section 9 in connection with representation cases, subject to review by the Board upon the request of any interested person.¹⁹⁷ The Board has taken advantage of that authority, and has found that the processing of representation cases has been much expedited by its use, the time between the filing of a petition and the direction of an election having been reduced to an average of 45 days.

A similar type of delegation to Trial Examiners, with the Board retaining discretionary authority for appellate review, might well have comparably beneficial effects in the disposition of unfair labor practice cases. This would not eliminate the present judicial review of Board

¹⁹⁵ 417 F.2d at 541, 72 L.R.R.M. at 2438.

¹⁹⁶ See, e.g., *Ex-Cell-O Corp.*, 25-CA-2377; *Herman Wilson Lumber Co.*, 26-CA-2536; *Zinke Foods*, 30-CA-372.

¹⁹⁷ 29 U.S.C. § 159(c)(1) (1964).

decisions. The Board has estimated that between 100 and 140 days in the handling of a case before it would be saved under this kind of processing, depending upon whether a request for review was granted or denied. This would also simplify the problem of providing prompt remedies which, as noted above, is a continuing one. In 1961 this concept was presented to Congress as a reorganization plan,¹⁹⁸ but it was not approved. It is submitted that the need is still present for this type of plan.

Another proposal which could eliminate procedural delays is to make Board orders self-enforcing after a given time, perhaps 45 days, during which a respondent is given the opportunity to seek court review. Under such a procedure, the lengthy span between the issuance of Board and court orders would be shortened substantially, thereby reducing the present attractiveness of continuing litigation in those cases in which the legal issue may not warrant full judicial review. Some courts are in fact experimenting with expedited procedures designed to weed out those cases in which the full panoply of argument is not required.¹⁹⁹

CONCLUSION

The decade which lies ahead, of course, is not predictable in detail. But the future grows from and perhaps is implicit in the past. Experience teaches that the social, economic, industrial, and cultural changes which are now taking place will be reflected in the issues presented to the Board for decision. Population growth, the need for more jobs, inflation, automation, product and process changes, foreign competition, the human rights upsurge, new corporate management concepts, new union bargaining techniques, the problems of poverty for many of our citizens, the increasing youth and improved education and training of our work force, will all create labor-management relations problems which ultimately will be reflected in Board decisions.

Over the years it has been widely accepted that the National Labor Relations Act, as amended, embodies a policy geared to meet changing economic conditions and to confine labor-management disputes to the peaceful arena of collective bargaining. The Board can be justifiably proud to have played a major part in the effectuation of this policy.

¹⁹⁸ Reorganization Plan No. 5, proposed in accordance with the Reorganization Act of 1949, 63 Stat. 203, as amended.

¹⁹⁹ See, e.g., the discussion of Chief Judge Brown in *Huth v. Southern Pac. Co.*, 417 F.2d 526 (5th Cir. 1969).