

1968-1969 ANNUAL SURVEY OF LABOR RELATIONS LAW

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I. INTRODUCTION

This Survey is the eighth in a series of annual efforts by the *Law Review* to present in a concise manner the important developments in the field of labor relations.¹ The goal of the Survey is to report those decisions which consolidate, add substance to, or depart from prior policy in the application of the Labor-Management Relations Act,² the Norris-LaGuardia Act,³ and other relevant federal statutes. The subject matter comprises decisions of the National Labor Relations Board and the state and federal courts reported during the Survey year ending March 1, 1969. In addition, some cases decided before or after the Survey year are discussed at length because of their relevance to developments during the year.

Any attempt to isolate a single trend or theme characteristic of the developments during the Survey year would be futile. Several of the cases discussed below, however, are of unusual significance. While several circuit courts attacked the reliance of the NLRB on certain evidence in representation questions,⁴ and the rule-making procedures which the Board favors,⁵ the Supreme Court approved a more liberal use of the Board's remedial powers.⁶ In addition, one circuit has attempted to limit the proscription of the Norris-LaGuardia Act against federal court injunctions,⁷ and another circuit has maintained that the Board has jurisdiction to remedy an employer's discrimination based on race.⁸

II. BOARD AND COURT JURISDICTION

A. NLRB Refusal to Assert Jurisdiction: Non-Profit Nursing Homes

In *University Nursing Home, Inc.*,¹ the Board asserted jurisdiction over "proprietary" or profit-making nursing homes. The Board based its holding on a conclusion that the industry had a substantial impact on interstate commerce. Asserting what it believed to be its discretionary authority, however, the Board declined to extend this jurisdiction to non-profit nursing homes. The facts of *University* merely indicate that non-profit nursing homes comprise a relatively small portion of the entire industry. Otherwise, the opinion does not explicitly detail the reasons for the Board's refusal to extend its jurisdiction.

¹ The previous comments are: Labor Law—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); 1965-1966 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 pp. 808-15 *infra*.

⁵ See pp. 802-07 *infra*.

⁶ See pp. 887-88 *infra*.

⁷ See pp. 820-27 *infra*.

⁸ See pp. 863-64 *infra*.

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

During the Survey year, the employees of the Drexel Home, a non-profit nursing home in Illinois, petitioned the Regional Director for a representation election. In accordance with *University*, the petition was dismissed on the ground that the Board had declined jurisdiction over non-profit nursing homes. The Regional Director's action was sustained by the Board for the same reason. Frustrated in their efforts to be certified as the exclusive bargaining agent of the nursing home employees, as well as in their efforts to have the Board entertain certain unfair labor practice charges, the union filed a complaint in the federal district court. The union contended that the Board's action was discriminatory and arbitrary, and sought to compel the Board to assert jurisdiction. The district court, in *AFSCME, Council 19 v. NLRB*,² denied the Board's motions to dismiss. It held that it had jurisdiction of the suit under the theory of *Fay v. Douds*,³ since the Board had allegedly deprived the union of its constitutional rights. The court reasoned that in renouncing jurisdiction over non-profit nursing homes, the Board had deprived the union of a statutory right to represent the Drexel employees and had made an arbitrary distinction, violative of due process, between non-profit and proprietary nursing homes.

The case thus presents issues relating not only to the jurisdiction of the district court, but also, and perhaps of more ultimate significance, to the Board's assertion of jurisdiction over a class of employees which excludes those involved in non-profit activities. The practical impact of the decision, however, may be limited, since the nursing home industry is perhaps unusual in its inclusion of non-profit employers as well as those operating for profit.

The court recognized three grounds upon which the Board might decline to assert jurisdiction. These included instances where, in the opinion of the Board, it would not effectuate the purposes of the Act to assert jurisdiction in an individual case, or where refusal was on an ad hoc basis for religious, eleemosynary or educational reasons. Third, under Section 14(c)(1) of the LMRA,⁴ the Board is empowered to decline jurisdiction over any class or category of employer which in the opinion of the Board does not have a substantial impact on commerce. The district court in *AFSCME, Council 19* interpreted the Board's opinion in *University* as holding that non-profit nursing homes are intrinsically exempt from the purview of the Act. The court found such a holding to be lacking in authority.

As noted above, the Board in *University* did not elaborate upon its grounds for declining jurisdiction over non-profit nursing homes. It did refer, however, to the Supreme Court's opinion in *Office Employees Union v. NLRB*.⁵ In that case, the Court placed a construction upon the LMRA which would exclude non-profit employees from the provisions of the Act except in exceptional circumstances or in situations where such employees were involved in commercial activities. The district court in *AFSCME, Council 19*, relying upon the same Supreme Court decision, reasoned that it precludes

² 296 F. Supp. 1100, 69 L.R.R.M. 2275 (N.D. Ill. 1968).

³ 172 F.2d 720, 23 L.R.R.M. 2356 (2d Cir. 1949).

⁴ 29 U.S.C. § 164(c)(1) (1964).

⁵ 353 U.S. 313 (1957).

the Board, once it has asserted jurisdiction over a class of employees (nursing homes, for example), from declining jurisdiction over a category of that class (non-profit nursing home employees).

In *Office Employees* the Board had announced that it would decline jurisdiction over labor unions which were themselves engaged as employers. The Board concluded that labor unions were similar to non-profit employers and, therefore, should be excluded from the scope of the Act. Although the Supreme Court construed the LMRA as not generally applicable to non-profit employees, it did not agree with the Board's view that labor unions could be characterized as non-profit employers. Furthermore, the Court noted that under section 2(2),⁶ the provisions of the LMRA expressly apply to labor unions when engaged as employers, and for these reasons held the action of the Board to be in error. The Supreme Court, then, was not concerned with the same issue presented in *AFSCME, Council 19*, that is, the Board's discretionary authority to decline jurisdiction over employers engaged in non-profit activities, when it had asserted jurisdiction over employers similarly engaged, but for profit.

The Supreme Court in *Office Employees* did indicate, however, that under exceptional circumstances, or in situations where a non-profit employer is engaged in purely commercial activities, the provisions of the LMRA would apply. It was the judgment of the district court in *AFSMCE, Council 19* that non-profit nursing homes were engaged in essentially commercial activities. Furthermore, the court concluded that the Board's assertion of jurisdiction over proprietary nursing homes did present circumstances sufficiently exceptional to warrant the inclusion of non-profit homes, because no reasonable distinction could be made between the two. The court's conclusion that the non-profit nursing homes were engaged in commercial activities was drawn from the Board's own conclusions in *University*, upon which jurisdiction over proprietary homes was predicated. The Board, however, appeared to be referring only to proprietary homes, and it had made no specific finding regarding non-profit homes.

B. Preemption: State Court Jurisdiction Over Charges of Unfair Representation

When Congress enacted the National Labor Relations Act, it not only formulated a body of substantive law but, further, assigned primary responsibility for the interpretation and application of that law to the National Labor Relations Board.¹ Since the passage of the Act, however, the scope of permissible state action has constituted a recurrent issue. Section 14(c) of the Act² expressly grants to the state courts jurisdiction over any labor dispute in which the Board has, either by rule of decision or by published rule, declined jurisdiction. However, where the Board has not so acted, the state court must, in each case, consider for itself whether the federal law preempts its jurisdiction. The principal guidelines for this determination are set

⁶ 29 U.S.C. § 152(2) (1964).

¹ Labor-Management Relations Act § 10, 29 U.S.C. § 160 (1964).

² 29 U.S.C. § 164(c) (1964).

forth in the decision of the United States Supreme Court in *San Diego Bldg. Trades Council v. Garmon*:³

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.⁴

Underlying the policy of federal preemption is a concern with latent conflict between enforcement by both state and federal authorities, with the procedural disharmonies which would result, and with the inconsistency between the federal and state substantive law and remedies.⁵ As foreseen by the Court, this potential conflict would arise not only in the enforcement of public interests but in the protection of private interests as well. Therefore, as earlier stated in *Garner v. Teamsters Local 776*,⁶ "when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right."⁷

Although the *Garmon* doctrine thus reaches to any activity arguably protected or prohibited by the Act, state action has not been entirely foreclosed. Despite the seemingly broad scope of the doctrine, the Court in *Garmon*, with due regard for the federal system, did recognize certain activities over which state court jurisdiction must be respected. These included activities which were only of peripheral concern to the Act,⁸ "[o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."⁹ Nor under *Garmon* were state courts to be deprived of jurisdiction to award damages in traditional tort actions for violent conduct or threats to public order. Under such circumstances, the Court recognized, the maintenance of domestic peace is a compelling state interest.¹⁰

Generally, then, in recognition of only these limited areas of state jurisdiction, *Garmon* seemed to settle the vexing problem of the delineation of permissible state action.

The Supreme Court's subsequent decision in *Smith v. Evening News Ass'n*¹¹ carved out an additional area of permissible state jurisdiction but did not alter the basic precepts of *Garmon*. In *Smith* the Court held that state courts could assert jurisdiction of suits under Section 301 of the Act

³ 359 U.S. 236 (1959).

⁴ *Id.* at 244.

⁵ *Id.* at 242.

⁶ 346 U.S. 485 (1953).

⁷ *Id.* at 500-01.

⁸ 359 U.S. at 243.

⁹ *Id.* at 244.

¹⁰ *Id.* at 247.

¹¹ 371 U.S. 195 (1962).

for breaches of collective bargaining agreements. Although, in a section 301 suit, the contract breach might also involve an unfair labor practice, the Court, nevertheless, concluded that under these circumstances Congress did not intend that the Board have exclusive jurisdiction.¹² A more recent decision of the Supreme Court, *Vaca v. Sipes*,¹³ has created even further inroads on the area proscribed by *Garmon*. Unlike *Smith*, however, *Vaca* does not set clearly defined limits on the areas exempted from the *Garmon* rule. In light of several recent conflicting decisions as to the implications of *Vaca* for federal preemption, that case warrants further examination.

At issue in *Vaca* was a breach of a union's duty of fair representation. The Court held that a state court could assert jurisdiction of a suit by a union member against his union where it was alleged that the member had been discharged in violation of the collective bargaining agreement and that the union had arbitrarily, capriciously and without just or reasonable cause refused to take the member's grievance to the final step, arbitration.¹⁴ The complaint was initiated by one Benjamin Owens who, because of poor health, had been discharged from his job at Swift & Company's Kansas City Meat Packing Plant. Owens, who had suffered from high blood pressure, had earlier been granted sick leave, but upon return was denied reinstatement despite a bill of good health from his own physician. The union subsequently agreed to process Owens' claim of wrongful discharge, and carried it through the fourth step of the grievance procedure, but without success. Prior to deciding whether to continue to the last step, arbitration, the union requested Owens to submit to another physical examination. Upon receipt of an adverse report from the examining physician, the union board voted against further action. Owens' suit resulted from this refusal.

In answer to Owens' complaint, brought in a Missouri State Circuit Court, the union contended that the court lacked jurisdiction because the alleged conduct was arguably and basically an unfair labor practice under Section 8(b) of the Act, and therefore within the exclusive jurisdiction of the Board. Although the trial was permitted to proceed, and Owens was awarded both compensatory and punitive damages by the jury, the judge set aside the verdict and entered judgment for the union on the grounds that the court lacked jurisdiction for the reasons set forth by the union. Ultimately the Missouri Supreme Court reversed the trial court and directed reinstatement of the verdict.

The union's appeal to the Supreme Court of the United States rested upon the contention that the Board, in *Miranda Fuel Co.*,¹⁵ had adopted the theory that a breach of the union's duty of fair representation constituted an unfair labor practice, and that, accordingly, the broad preemption doctrine defined in *Garmon* precluded state court jurisdiction. The Court, noting that the Board's decision in *Miranda Fuel* had been denied enforcement by

¹² Id. at 197.

¹³ 386 U.S. 171 (1967).

¹⁴ Id. at 173.

¹⁵ 140 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).

the Second Circuit¹⁶ even though the doctrine had been accepted by the Fifth Circuit,¹⁷ left open the question whether unfair representation constituted an unfair labor practice. It reasoned, however, that even if unfair representation were an unfair labor practice, the *Garmon* principle would not apply unless it could also be inferred that Congress intended that the Board have exclusive jurisdiction. The court found no such inference. Working to this conclusion, the Court observed that the duty had been developed and long recognized by the Courts, and, further, that the Board itself had, in *Miranda*, adopted the judicially developed doctrine. The Court noted, in addition, that in an unfair representation suit a review of the substantive positions taken in collective bargaining agreements will be required. It questioned whether the Board had substantially greater expertise in this regard than the courts. Moreover, the Court underscored the fact that the duty of fair representation is a valuable right, enforcement of which should not be left solely to the unreviewable discretion of the General Counsel of the Board.

The opening language of *Vaca* is thus broad in its sweep, and has precluded the Board from exercising exclusive jurisdiction over activity involving unfair representation. However, the balance and emphasis of the Court's discussion in *Vaca* centers upon the intricate relationship of the duty of fair representation to collective bargaining agreements, and in turn to suits brought under Section 301 of the Act. In this latter respect, the Court stressed certain practical considerations warranting judicial cognizance of allegations involving unfair representation, and pointed to the situation, like that in *Vaca*, where the employee is seeking enforcement of contractual rights, that is, arbitration, which only the union may invoke in his behalf. The Court noted that under such circumstances it is the employer who commits a breach, notwithstanding the fact that it was the union's wrongful refusal to process the grievance that contributed to the breach. In order to establish the employer's breach, however, it will also be necessary to establish the union's failure to prosecute the claim. The Court thus suggests that in the context of a section 301 suit, where the employer's breach of contract results from the union's breach of its duty of fair representation, a state court should be able to assert jurisdiction over suits alleging unfair representation. In this setting, then, *Vaca* appears to have at least its primary significance.

The Court in *Vaca* does, however, suggest that state courts may also assert jurisdiction of suits alleging unfair representation absent a breach of any collective bargaining agreement. This unrestricted interpretation of *Vaca* creates a doubt as to the ultimate scope of the decision, and in turn as to the effect of the decision on the *Garmon* doctrine.

During the Survey year, issues involving the scope of *Vaca* have been presented in several decisions.¹⁸ Relying upon an interpretation giving an

¹⁶ *NLRB v. Miranda Fuel Co.*, 326 F.2d 172, 54 L.R.R.M. 2715 (2d Cir. 1963).

¹⁷ *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12, 63 L.R.R.M. 2395 (5th Cir. 1966).

¹⁸ *Phalen v. Theatrical Protective Union No. 1*, 22 N.Y.2d 34, 238 N.E.2d 295, 290 N.Y.S.2d 881, 68 L.R.R.M. 2427, cert. denied, 393 U.S. 1000 (1968); *Alaska v. Operating Eng'rs*, 68 L.R.R.M. 2434 (Alas. Super. Ct. 1968); *Tyree v. Edwards*, 287 F. Supp. 589, 69 L.R.R.M. 2137 (D. Alas. 1968), aff'd mem., 393 U.S. 405 (1969).

unrestricted meaning to *Vaca*, the New York Court of Appeals, in *Phalen v. Theatrical Protective Union No. 1*,¹⁹ asserted jurisdiction over a suit brought against the respondent union by two non-union stage workers. It was alleged that the petitioners had been refused admission to membership and that, because of their non-membership, the union had caused them to be subject to discriminatory practices. Allegedly, they had been refused employment and summarily dismissed from jobs, and replaced by union members, all at the instance of the respondent. In their initial complaint the petitioners sought a writ of mandamus compelling the union to admit them to membership. The lower court had in part dismissed the petitioners' suit on the ground that their complaint was arguably within the purview of the Act and, therefore, under the federal preemption doctrine expressed in *Garmon*, within the exclusive jurisdiction of the Board. The New York Court of Appeals disagreed. Although it recognized that the petitioners charged the respondent union with a violation of a federal statutory obligation to represent the members of its bargaining unit fairly, the court, nevertheless, relied upon *Vaca* to assert jurisdiction. Unlike the charge in *Vaca*, it was not alleged that the breach of duty of fair representation had contributed to a violation of any contractual right. Rather, the petitioners were seeking to enforce an equitable right to non-discriminatory treatment, and the appropriate remedy envisaged by the court was an injunction against the union's conduct, as well as incidental damages.

While the petitioner's complaint in *Phalen* was thus framed as a breach of the duty of fair representation, the union's alleged conduct was also, arguably, a violation of section 8(b)(2),²⁰ in that it caused employers to discriminate against employees with respect to whom membership in the union had been denied on some grounds other than failure to pay dues. An 8(b)(2) charge would clearly have been within the jurisdiction of the Board. Because of this factor, Chief Judge Fuld, in a concurring opinion, expressed misgivings about the majority's reliance upon *Vaca* in their conclusion that state jurisdiction over the union activity had not been preempted.²¹ In agreement with one commentator's view of *Vaca*,²² he maintained that the ruling in the case was restricted to breaches of the duty of fair representation arising within the context of section 301 actions. Judge Fuld, however, nevertheless concluded that no federal preemption obtained because the Board did not have the power to fashion what he felt was the only effective remedy, that is, to order a labor union to admit the petitioners to membership.

Two other related actions decided during the Survey year further highlight the disagreement among the courts as to the implications of *Vaca*. In *Alaska v. Operating Eng'rs*,²³ the Superior Court of Alaska placed an interpretation upon *Vaca* similar to that of the New York Court of Appeals in *Phalen*. The *Operating Engineers* case stemmed from a violation of the Alaska

¹⁹ 22 N.Y.2d 34, 238 N.E.2d 295, 290 N.Y.S.2d 881, 68 L.R.R.M. 2427.

²⁰ 29 U.S.C. § 158(b)(2) (1964).

²¹ 22 N.Y.2d at 46, 238 N.E.2d at 302, 290 N.Y.S.2d at 891, 68 L.R.R.M. at 2433.

²² Lewis, Fair Representation in Grievance Administration: *Vaca v. Sipes*, 1967 S. Ct. Rev. 81, 99.

²³ 68 L.R.R.M. 2434 (Alas. Super. Ct. 1968).

Local Autonomy Act. Under the provisions of that Act, a labor union representing 100 or more members residing in Alaska was required to establish a local within the state. The union, however, was exempted from this provision if it maintained a local-hire preference in its collective bargaining agreements within the state. The defendant union local, based in Seattle, and representing members residing in Alaska, was charged with giving preference in job opportunities in Alaska to union members living outside the state. Therefore, the union's failure to establish a local in Alaska constituted a violation of the Local Autonomy Act.

The court, considering whether to grant a preliminary injunction against the union forbidding it to do business within the state, faced the initial issue whether jurisdiction of the matters had been preempted by federal law. It reviewed the principal decisions regarding preemption, and, emphasizing the discriminatory conduct of the union in the case, relied primarily upon the Supreme Court's decision in *Vaca* for its assertion of jurisdiction. The court observed that the LMRA did not expressly proscribe such discriminatory conduct, and further that, since the General Counsel was not compelled to act upon any unfair labor practice charge, the administrative remedy was not sufficient. In this regard, the Alaska court seems to have drawn heavily upon the Supreme Court's analysis in *Vaca* of the judicial development of the concept of unfair representation and of the responsibility of the courts to entertain such claims.

Unlike the question in *Vaca*, however, the issue of unfair representation in *Operating Engineers* had arisen, as in *Phalen*, outside the context of a section 301 action. Absent this condition, a doubt persists, similar to that expressed by Judge Fuld in *Phalen*, as to whether *Vaca* should be given the unrestricted meaning attached to it by the Alaska court.

The doubtfulness of the Alaska court's conclusions regarding the scope of *Vaca* is underscored in a subsequent and related action involving the same parties in the federal district court in Alaska, *Tyree v. Edwards*.²⁴ In that decision, not only was the Local Autonomy Act declared unconstitutional, but enforcement of the injunction against the union was barred. Determinative in the opinion of the federal court was its conclusion that *Vaca* applied only where it could not be inferred that Congress intended exclusive jurisdiction to lie with the Board. In this instance, the alleged discriminatory conduct—job referral discrimination to strengthen union authority—was held by the court to be within the exclusive jurisdiction of the NLRB, because it would constitute a violation of Section 8(b)(1)(A) of the Act.²⁵ The federal court thus seemed to conclude that, while the union activity is tainted with charges of unfair representation, it does nevertheless constitute a recognized unfair labor practice and, therefore, it falls within the Board's responsibility to prosecute.

If *Vaca*, *Phalen*, *Operating Engineers* and *Tyree* are taken together, the cases demonstrate that issues involving unfair representation may arise in three ways: alone, in the context of a section 301 suit, or in conjunction with a charge of a recognized unfair labor practice under section 8(b). Therefore,

²⁴ 287 F. Supp. 589, 69 L.R.R.M. 2137 (1968).

²⁵ 29 U.S.C. 158(b)(1)(A) (1964).

it is submitted that the Supreme Court in *Vaca* purposely avoided characterization of unfair representation as an unfair labor practice in itself, and thereby removed it from the ambit of the *Garmon* rule when it arises in a section 301 action. However, the Court in *Vaca* did not preclude the possibility that the issue of unfair representation would arise in a situation where the Board would have exclusive jurisdiction, that is, in the accompaniment of a charge of violation of section 8(b). The court in *Tyree* apparently felt the latter instance to be the case before it. An opposite conclusion, that reached by the majority in *Phalen* and by the Alaska state court, would permit state courts to assert jurisdiction over any case where unfair representation has been alleged, regardless of the fact that the conduct may also be arguably protected or prohibited activity under the Act. Such a result would invite the conflict between state and federal authorities which the Court in *Garmon* sought to avert. For these reasons, the reservations as to an unrestricted meaning of *Vaca* expressed by Judge Fuld in *Phalen* and the conclusions reached by the federal court in *Tyree* appear to be a sounder interpretation of the holding in *Vaca*.

III. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. *Appropriate Bargaining Unit*

1. *Single-Store Units*.—Section 9(b) of the LMRA¹ entrusts to the Board the responsibility for determination of the appropriate employee unit for the purpose of collective bargaining. The basic statutory guideline is the direction that the Board "assure to employees the fullest freedom in exercising the rights guaranteed by this Act . . ."² Thus, where the interests of a group of employees seeking representation can be clearly identified, it becomes incumbent upon the Board to give maximum consideration to their interests and desires, unless a unit of such employees would prove disruptive to the employer's operation.³ In executing this legislative mandate the Board ruled in *Haag Drug Co.*,⁴ decided during the Survey year, that, absent a bargaining history in a larger unit and absent a significant degree of integration in the employer's operation, such employee "freedom" is maximized by the treatment of a unit composed of employees of a single outlet of a retail or restaurant chain as presumptively appropriate.⁵

The Board's decision in *Haag Drug* expanded the conclusion previously reached in *Sav-On Drugs, Inc.*,⁶ that a separate retail outlet unit might be appropriate. In *Sav-On Drugs*, the Board had overruled an earlier policy which emphasized the administrative grouping of retail chains over such other factors as geographic separation, substantial local managerial authority, and minimal employee interchange.⁷ This earlier policy, it was felt, impeded the

¹ 29 U.S.C. § 159(b) (1964).

² *Id.*

³ *Dixie Belle Mills, Inc.*, 139 N.L.R.B. 629, 631, 51 L.R.R.M. 1344, 1345 (1962).

⁴ 169 N.L.R.B. No. 111, 67 L.R.R.M. 1289 (1968).

⁵ *Id.*, 67 L.R.R.M. at 1291.

⁶ 138 N.L.R.B. 1032, 51 L.R.R.M. 1152 (1962).

⁷ *Id.* at 1033, 51 L.R.R.M. at 1153.

employees' rights of self-organization guaranteed by Section 7 of the Act⁸ in that it ignored organizational efforts at the single-outlet level. The conclusion reached in *Haag Drug*, that such units should be regarded as *presumptively* appropriate, was prompted by the Board's experience since *Sav-On Drugs*. A review of the cases following that decision showed that single-outlet bargaining units had consistently been found to have been appropriate.⁹ The Board's opinion in *Haag Drug*, grounded on this experience, clarifies that policy.

As expressed by the Board,

[t]he employees in a single retail outlet form a homogeneous, identifiable, and distinct group, physically separated from the employees in the other outlets of the chain; they generally perform related functions under immediate supervision apart from employees at other locations; and their work functions, though parallel to, are nonetheless separate from, the functions of employees in the other outlets, and thus *their problems and grievances are peculiarly their own and not necessarily shared with employees in the other outlets*.¹⁰ (Emphasis added.)

Thus, paramount to the determination that separate outlets are suitable units for collective bargaining purposes is the requirement that they form distinct, separate and homogeneous groups, possessing a clear community of interest arising from their own problems and grievances. The centralized controls which mark chain operations are considered by the Board as largely record keeping or administrative functions having little relation to the daily routine of the employees or their interests in employment conditions. Therefore, while it might be disadvantageous to the employer, who would, no doubt prefer to set uniform policies regarding wages, hours and conditions of employment, bargaining on less than a chain-wide basis would not, in the opinion of the Board, prove disruptive to the employer, and would provide maximum recognition to the interests of the employees.¹¹

⁸ 29 U.S.C. § 157 (1964).

⁹ 169 N.L.R.B. No. 111, 67 L.R.R.M. at 1290 n.3. See cases cited therein.

¹⁰ *Id.*, 67 L.R.R.M. at 1291.

¹¹ *Id.*

The Board did not elaborate under which circumstances bargaining on less than chainwide units would prove disruptive. It merely stated that "[i]t does not necessarily follow that organization of only a portion of the chain would likely result in a lack of uniformity of working conditions through the chain or, if it would, that this necessitates rejecting a unit such as here sought." 169 N.L.R.B. No. 111, 67 L.R.R.M. at 1291. Therefore, the fact that each outlet might have different wage and benefit programs and different work rules would not militate against single store units. Previously, in *Purity Food Stores, Inc.*, 160 N.L.R.B. 651, 63 L.R.R.M. 1007 (1966), enforcement denied, 376 F.2d 497, 65 L.R.R.M. 2261 (1st Cir. 1967), the Board had stated that bargaining by individual units "is not only entirely feasible, but would not unduly encroach on the Employer's various administrative controls." 160 N.L.R.B. at 659-60, 63 L.R.R.M. at 1012.

Where such factors as geographic proximity and significant employee interchange existed, bargaining on a less than chain-wide basis might prove disruptive. Temporarily transferred employees might be working at wages and under work rules different from those applied to personnel regularly employed at the outlet. See *NLRB v. Purity Food Stores, Inc.*, 376 F.2d 497, 500-01, 65 L.R.R.M. 2261, 2264. Similarly, if the outlets were

The organization of the Haag Drug Company is illustrative of the degree of centralized control which a chain headquarters might maintain over its individual outlets without achieving the degree of centralization necessary to overcome the presumption that a single-store unit is appropriate. In the Haag operation, the central headquarters set pay scales and established personnel policies for the entire chain, and retained the personnel and pay records. Further, the central office maintained control over fiscal matters. It established budgets and maintained profit and loss statements for each outlet. It negotiated and contracted with vendors, paid bills, and kept all financial records. A company vice president and assistant were in charge of and supervised the operations of each outlet. Nevertheless, the responsibilities of the central office were characterized as essentially record keeping or administrative, and not directly related to the employee's daily routine.

The local manager, on the other hand, did approximately 60 percent of the hiring, fixed wages within prescribed ranges, trained his own personnel, had authority to discharge, and could make recommendations regarding employee promotions. In addition, the manager ordered his own supplies, albeit from assigned vendors, and contracted for major repairs. This extent of functional independence and local managerial supervision, coupled with minimal employee interchange among stores and geographic separation of the outlet, was deemed sufficient to promote a "community of interest" among the employees of each store, and to create the degree of autonomy and identity necessary to constitute a separate unit.¹²

The Board acknowledged that where the outlets are not self-contained economic units, where the central office maintains close supervision, and where there is substantial employee interchange, such units would not be appropriate bargaining units, because the identity of the outlets would be obscured. Therefore, the policy expressed in *Haag Drug* reflects that of critical importance are those factors which help to define the separate and distinct identity of the unit. The fact that the central office retained administrative control and made policy determinations would not, in the opinion of the Board, obscure the identity of the single-store unit.¹³

not economically self-contained and frequent exchange and redistribution of inventory occurred, a labor dispute at one outlet might disrupt operations at other outlets. See *Star Market Co.*, 172 N.L.R.B. No. 130, 68 L.R.R.M. 1497 (1968). These, of course, would all be factors militating against single-store units.

¹² In adhering to the policy announced in *Haag Drug*, the Board, during the Survey year, found other single stores appropriate units. In *Kostel Corp.*, 172 N.L.R.B. No. 167, 68 L.R.R.M. 1561 (1968), the Board emphasized such factors as geographic separation, lack of employee interchange, extent of local control over employees' daily activities and the absence of a bargaining history in a more comprehensive unit. *Id.*, 68 L.R.R.M. at 1563. In *Warehouse Markets, Inc.*, 174 N.L.R.B. No. 70, 70 L.R.R.M. 1192 (1969), the Board faced the issue whether a new store of a chain operation should be granted separate recognition or become, by accretion, part of an existing multi-store unit. Despite the fact that the older stores in the chain were included in one unit, the Board emphasized the rights of the employees at the new store. Finding that, in addition to being newly opened, the store had separate, immediate supervision, that minimal employee interchange occurred, and that the store was separately rated on its performance, the Board concluded that the store was a separate economic unit and appropriate for collective bargaining purposes. *Id.*, 70 L.R.R.M. at 1194.

¹³ During the Survey year the Board has in several instances found single store units

The Board has previously noted that certain types of bargaining units, such as plant units or district offices of insurance companies, are presumptively appropriate,¹⁴ and in *Haag Drug* the Board has adopted similar criteria in reaching the same conclusion regarding retail chain outlets. In a multi-plant operation, where central control constitutes largely planning and coordinating functions, and the operational control and direct day-to-day supervision remains with the plant manager, a plant is an appropriate unit for bargaining purposes.¹⁵ Likewise, with respect to district offices of insurance companies, the Board has emphasized the community of interest among employees of each office, the homogeneous and separate identity of the unit, the geographic separation, and local supervision over daily operations.¹⁶ Nevertheless, the policy regarding the appropriateness of single-store units has not met complete acceptance.¹⁷

Disagreement with the single-store unit policy centers principally on the degree of autonomy which must exist within the outlet. The Seventh Circuit, in *NLRB v. Frisch's Big Boy Ill-Mar, Inc.*,¹⁸ concluded that local managers must have extensive authority affecting subjects of collective bargaining, such as wages, hours and conditions of employment, before the Board is justified in finding sufficient autonomy to declare a single outlet an appropriate unit.¹⁹ In the Frisch chain, local managers supervised day-to-day matters. They also had authority to hire, discipline and discharge. In addition, they could set wages, albeit within prescribed minimums, and could make recommendations regarding promotions. The court, however, emphasized that the central office formulated wage and labor policies and that this central control would seriously hinder separate bargaining units among the outlets. The

inappropriate. In *Pep Boys*, 172 N.L.R.B. No. 23, 68 L.R.R.M. 1308 (1968), the Board found a high degree of central control in the chain. In addition, frequent employee interchange occurred, and the stores were geographically close and drew from the same general labor market. The Board emphasized also that the local manager had limited authority and the district manager maintained close supervision over the operations at each outlet. *Id.*, 68 L.R.R.M. at 1309. Very similar factors militated against a single store unit in *Star Market Co.*, 172 N.L.R.B. No. 130, 68 L.R.R.M. 1497 (1968). See also *Horn & Hardart Co.*, 170 N.L.R.B. No. 110, 67 L.R.R.M. 1512 (1968), and *Frankel Shops, Inc.*, 70 L.R.R.M. 1194 (Dec. of Reg. Dir., 29th Reg., Jan. 31, 1969).

¹⁴ See *Temco Aircraft Corp.*, 121 N.L.R.B. 1085, 42 L.R.R.M. 1538 (1958), and *Dixie Belle Mills, Inc.*, 139 N.L.R.B. 629, 51 L.R.R.M. 1344 (1962) (single-plant unit appropriate); *Metropolitan Life Ins. Co.*, 156 N.L.R.B. 1408, 61 L.R.R.M. 1249 (1966) (district insurance office appropriate unit).

¹⁵ *Dixie Belle Mills, Inc.*, 139 N.L.R.B. at 630, 51 L.R.R.M. at 1344.

¹⁶ *Metropolitan Life Ins. Co.*, 156 N.L.R.B. at 1412, 61 L.R.R.M. at 1252.

¹⁷ See *NLRB v. Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895, 61 L.R.R.M. 2362 (7th Cir. 1966); *NLRB v. Purity Food Stores, Inc.*, 376 F.2d 497, 65 L.R.R.M. 2261 (1st Cir. 1967); *NLRB v. Davis Cafeteria, Inc.*, 396 F.2d 18, 68 L.R.R.M. 2426 (5th Cir. 1968); and *NLRB v. Solis Theatre Corp.*, 403 F.2d 381, 69 L.R.R.M. 2664 (2d Cir. 1968).

During the Survey year, several courts have supported the Board's determination regarding the appropriateness of single store units. See *NLRB v. Dee's of N.J., Inc.*, 395 F.2d 112, 68 L.R.R.M. 2302 (3d Cir. 1968); *NLRB v. Lou De Young's Market Basket, Inc.*, 406 F.2d 17, 70 L.R.R.M. 2262 (6th Cir. 1969); and *NLRB v. Spartans Industries, Inc.*, 406 F.2d 1002, 70 L.R.R.M. 2475 (5th Cir. 1969).

¹⁸ 356 F.2d 895, 61 L.R.R.M. 2362.

¹⁹ *Id.* at 897, 61 L.R.R.M. at 2363.

First Circuit, in *NLRB v. Purity Food Stores, Inc.*,²⁰ also placed great emphasis on the central control and administration within a chain operation in concluding that a single-store unit was inappropriate, despite the Board's earlier finding of significant autonomy in the outlet.

During the Survey year, the view that local managers must be able to decide questions affecting subjects of collective bargaining has been emphasized by two circuits. In *NLRB v. Davis Cafeteria, Inc.*,²¹ the Fifth Circuit denied enforcement of a bargaining order where the Board had determined that two closely located cafeterias in a group of eight were appropriate as a bargaining unit. The court emphasized that the central office determined the labor policies, wages and hours for all the units, notwithstanding the Board's finding that the local manager had authority to hire and discharge, to recommend pay increases, and to order food and supplies.

The Second Circuit, in *NLRB v. Solis Theatre Corp.*,²² also refused to sanction, as an appropriate bargaining unit, a single theatre which was part of a chain in the greater New York City area. The local manager was responsible for supervision of the daily activities of the employees, had authority to discipline them, and conducted initial job interviews. The Board concluded that sufficient local authority existed to warrant a separate unit. The court disagreed, noting the geographic proximity of the theatres in the chain. Further, the court underscored the fact that "the 'manager' has little or no authority on labor policy but is subject to detailed instructions from the central office."²³

Thus, the critical issue, upon which ultimate determination by the Supreme Court may be required, is the degree of managerial authority which must reside in the single outlet. The position of the Board is that the local manager need only be responsible for day-to-day supervision and be involved in matters concerning the employees' grievances and routine problems. This degree of local supervision, according to the Board, establishes a sufficient identity in the outlet to have it designated as an appropriate bargaining unit. As stated in *Haag Drug*:

It is in this framework that the community of interest of the employees in a single store takes on significance, for the handling of

²⁰ 376 F.2d 497, 65 L.R.R.M. 2261 (1st Cir. 1967). Compare the First Circuit's more recent decision in *Banco Credito v. NLRB*, 390 F.2d 110, 67 L.R.R.M. 2718 (1st Cir. 1968), in which the court approved as an appropriate bargaining unit a single branch of a bank. The bank operation was marked by an appreciable degree of centralization and uniform policies and standards. The branch manager's authority, on the other hand, involved daily supervision of employees. He could also make recommendations for promotions, pay increases, transfers, discipline, and discharge. The court, in spite of the central control, concluded that the branch manager's authority, albeit limited, in addition to the geographic separation and minimal employee interchange, supported the determination of an independent unit. In that case, the court disavowed that its decision in *Purity Food Stores* stood "for the proposition that central policy-making in a chain precludes a single unit determination." *Id.* at 112, 67 L.R.R.M. at 2719.

²¹ 396 F.2d 18, 68 L.R.R.M. 2426 (5th Cir. 1968).

²² 403 F.2d 381, 69 L.R.R.M. 2664 (2d Cir. 1968).

²³ *Id.* at 383, 69 L.R.R.M. at 2665.

the day-to-day problems has relevance for all the employees in the store, but not necessarily for employees of the other stores.²⁴

The view espoused by some courts, that the local manager must have extensive authority over wages, hours and conditions of employment, reflects a policy of greater deference to the interests of the employer. Under those circumstances where an employer retains the authority to determine wage and labor policies, it may be advantageous to be able to maintain uniform conditions of employment throughout the chain. The Board, however, has previously concluded that less than chain-wide bargaining is feasible and the employer can bargain individually with each outlet if the interests of these employees can be clearly identified.²⁵ The courts' requirement that a manager have extensive authority to decide questions affecting wages, hours and conditions of employment appears to exceed the mere identification of an outlet as an autonomous unit. However, since the LMRA requires that emphasis be given to the freedom of the employees, the policy reflected in *Haag Drug* more properly effectuates the purposes of the Act.

2. *Redesignation of Appropriate Bargaining Unit.*—The United Glass and Ceramic Workers represented the employees at ten plants belonging to Libbey-Owens-Ford Glass Company. The employees at eight of the plants were organized as a multi-plant unit, while the employees at each of the remaining two plants were organized as single plant units. The employer is engaged in the production and fabrication of glass and glass products. The operations at all ten plants are similar and there is no greater degree of operational or administrative intergration among the eight plants in the multi-plant unit than exists among all ten. The existence of three separate units is attributable to historical factors in the organization of the employees. Initially, in 1939, the union was certified as the bargaining representative of the eight plants in the multi-plant unit. Later, in 1943 and 1962, the other two plants were respectively acquired and constructed, and each was separately organized. Since then the union has sought in bargaining sessions to merge the separate units into the multi-plant unit, but the employer has not acceded to the union's request. Frustrated by the employer's opposition, the union filed a petition with the Board for unit clarification in order to effect the inclusion of the two plants. In *Libbey-Owens-Ford Glass Co.*²⁶ the Board, in an unprecedented ruling, and with two members dissenting, ordered an election among the employees at the two separate plants to determine whether they desired to remain as separate units or to merge with the multi-plant unit.

In the past, "Globe" or self-determination elections have been held only where a question of representation has existed.²⁷ Accordingly, it was the position of Libbey-Owens-Ford that any question involving unit determination

²⁴ 169 N.L.R.B. No. 111, 67 L.R.R.M. at 1291-92.

²⁵ See note 11 *supra*, and Purity Food Stores, Inc., 160 N.L.R.B. 651, 659, 63 L.R.R.M. 1007, 1012 (1966), enforcement denied, 376 F.2d 497, 63 L.R.R.M. 2261 (1st Cir. 1967).

²⁶ 169 N.L.R.B. No. 2, 67 L.R.R.M. 1096 (1968).

²⁷ The term "Globe" election is derived from the Board's decision in *Globe Mach. & Stamping Co.*, 3 N.L.R.B. 294, 1A L.R.R.M. 122 (1937), in which the Board first prescribed this type of election.

necessarily presents a question of representation. Therefore, the employer argued, the appropriate procedure would require the union to file a representation petition under Section 9(c) of the Act.²⁸ The Board could then decide questions regarding the appropriateness of the unit and arrange for a self-determination election. The "catch" to the employer's position, and the obvious reason why the argument was advanced, was that the existing contracts would bar any elections at this time. Therefore, the majority avoided the characterization of the question as one of representation. Furthermore, the Board was careful to note that no question of representation existed. It was undisputed that the union represented the employees at all ten plants and, therefore, that the redetermination of the unit would be for purposes of *future* bargaining only. Thus the failure of the employer to agree to a merger compelled the Board to resort to a self-determination election.

Libbey-Owens-Ford presents the principal issue whether the Board has power to make a unit determination absent a question of representation.²⁹ The use of an election appears to be the only practical means to aid the Board in this determination and, therefore, it becomes an integral part of the issue. The Board held that its statutory duty required it to determine the appropriate bargaining unit wherever the issue should arise. It did not present any express statutory authorization to make this determination where a question of representation was not also presented. Nevertheless, the majority maintained that the need to resolve a long-standing dispute justified its action. Moreover, the Board reasoned that a failure to decide the question would constitute a breach of the Board's statutory duty.

We are unable to perceive any reason why a further delay should be required where, as here, no question of the presumptive propriety of the employer-wide unit exists and only the technical problems of bargaining history and employer opposition have prevented its establishment.³⁰

The absence of such express statutory authority led Members Fanning and Jenkins to dissent. They could not agree that only "technical problems" had prevented resolution of the dispute regarding the appropriate bargaining unit. These Board members believed that the question of merger of units must be left to voluntary bargaining. The dissenters emphasized that the statutory provisions for an election are very explicit. Section 9(c)(1) of the Act³¹ authorizes an election where a "question of representation" exists. Members Fanning and Jenkins pointed to the fact that "only by reason of the selection of a particular representative rather than another representative

²⁸ 29 U.S.C. § 159(c) (1964).

²⁹ The Federal District Court for the District of Columbia asserted jurisdiction of a suit by the employer to enjoin the Board from conducting the election on the theory that the Board had acted in excess of its statutory duty. *Libbey-Owens-Ford Glass Co. v. McCulloch*, 67 L.R.R.M. 2712 (D.D.C. 1968). The district court, however, was later reversed and the case ordered dismissed. *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 68 L.R.R.M. 2447 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969).

³⁰ 169 N.L.R.B. No. 111, 67 L.R.R.M. at 1098.

³¹ 29 U.S.C. § 159(c)(1) (1964).

does the employee register a preference as to unit."³² They stressed other express provisions for elections, such as votes by professional employees regarding inclusion in units with non-professional employees and votes for craft severance, and concluded that "these provisions are actually limitations imposed by Congress on the Board's authority to define units—limitations within the overall pattern of Section 9 of the Act specifying the circumstances in which elections shall be held."³³ The dissenters posed questions regarding the effect to be accorded such elections, specifically whether the rule barring elections for one year following a previous election was applicable, and whether a union which desired to challenge the incumbent union's status as employee representative should be allowed to participate in such an election. The recalcitrance of the employer in the instant case toward a merger perhaps explains the Board's use of the extraordinary remedy of a self-determination election in order to resolve the dispute over the proper unit for future bargaining purposes. The position of the dissenters, however, is well taken; the express provisions of the Act limit the circumstances under which an election can be held to those involving representational issues. Therefore, the question whether the Board had authority to take extraordinary action in this case will no doubt prove a significant one for judicial resolution.

B. Union Communication With Employees: "Names and Addresses" Rule

In *Excelsior Underwear, Inc.*,¹ the Board first announced a rule which requires an employer, within seven days following the scheduling of a representation election, to furnish the Regional Director with a list containing the names and addresses of all employees eligible to vote. In turn, the list is to be made available to the union. The failure of the employer to comply will be ground for setting aside the election.²

The *Excelsior* rule was prompted by the contentions of two unions, following elections in which each had been defeated, that the employers' refusal to furnish the unions with the names and addresses of the employees interfered with the elections. The unions argued that this refusal precluded them from answering the employers' letters and campaign propaganda mate-

³² 169 N.L.R.B. No. 111, 67 L.R.R.M. at 1099.

³³ *Id.*

¹ 156 N.L.R.B. 1236, 61 L.R.R.M. 1217 (1966).

² *Id.* at 1240, 61 L.R.R.M. at 1218. The Board made one exception to the rule's application. It will not apply to an expedited election conducted pursuant to § 8(b)(7)(c) of the LMRA, 29 U.S.C. § 158(b)(7)(c) (1964). 156 N.L.R.B. at 1242 n.14, 61 L.R.R.M. at 1219 n.14. The Board has also since held that the rule is not to be applied mechanically where there has been substantial compliance. See *Fuchs Baking Co.*, 174 N.L.R.B. No. 108, 70 L.R.R.M. 1294 (1969), and *Telonic Instruments*, 173 N.L.R.B. No. 87, 69 L.R.R.M. 1398 (1968). In *Telonic* the Board ruled that the omission of four names from the eligibility list, even though the union lost the election by one vote, was not reason enough to set aside the election. Upon discovery of the omissions the employer immediately advised the Regional Director. Also, there was no evidence that the omissions were due to gross negligence or unwillingness by the employer to afford the union access to all the employees. *Id.*, 69 L.R.R.M. at 1399. In *Fuchs* there had not been substantial compliance and the election was set aside. 174 N.L.R.B. No. 108, 70 L.R.R.M. at 1294.

rial. In spite of these objections, the Board certified the results of the election. The Board did announce, however, that in the future an employer's refusal to furnish such information would constitute grounds for setting aside an election. Thus the ruling was prospective only, and not applied to the parties in the *Excelsior* case itself.

Both the validity of the *Excelsior* rule and the Board's power to promulgate it were quickly challenged. The Board countered by stressing that the importance of full information to employees concerning both the union's and the employer's views on election issues dictates that the names and addresses be furnished to the union. Many of the specific objections to the rule had been anticipated and rebutted by the Board in the *Excelsior* opinion itself. The courts generally upheld the Board's conclusions that the rule did not infringe upon the employees' section 7 right to refrain from concerted activity, and that the rule would not expose employees to harassment or tempt the unions to abuse the information.³

The method relied upon by the Board for the enforcement of the rule has also been challenged. Under Section 11(1) of the Act, the Board "shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question."⁴ The Board has, in effect, considered the eligibility list as "evidence" that relates to a matter under investigation, and has relied upon the subpoena power of section 11(1) and the jurisdiction of the federal district courts under section 11(2)⁵ to enforce by court order the subpoena issued by the Board. It has been contended that the list is not "evidence," but this objection has been overruled and the Board's method of enforcement upheld.⁶

³ See *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) (the rule does not infringe on the § 7 rights of employees and will not expose them to additional harassment); *NLRB v. Rohlen*, 385 F.2d 52, 66 L.R.R.M. 2481 (7th Cir. 1967) (the rebuttal of the Board in *Excelsior Underwear* was fully adopted); *NLRB v. Cone Mills Corp.*, 68 L.R.R.M. 2980 (D.S.C. 1968) (the rule does not invade the privacy of employees and expose them to harassment); *Howell Ref. Co. v. NLRB*, 400 F.2d 213, 69 L.R.R.M. 2032 (5th Cir. 1968) (the possibility that the union abused the opportunity to communicate with employees was insufficient to invalidate the rule; the Board's order was denied on other grounds); *NLRB v. J.P. Stevens & Co.*, 69 L.R.R.M. 2756 (W.D.N.C. Nov. 14, 1968) (in spite of the fact that 219 employees demanded their names not be divulged, the court sustained the validity of the rule and enforced the Board's subpoena of the names and addresses); *NLRB v. Piper Aircraft Corp.*, 70 L.R.R.M. 2241 (S.D. Fla. Dec. 30, 1968) (enforcement of rule does not constitute an unlawful invasion and interference of employee privacy).

⁴ 29 U.S.C. § 161(1) (1964).

⁵ 29 U.S.C. § 161(2) (1964).

⁶ *NLRB v. Hanes Hosiery Div.*, 384 F.2d 188, 66 L.R.R.M. 2264 (4th Cir. 1967); *NLRB v. Rohlen*, 385 F.2d 52, 66 L.R.R.M. 2481 (7th Cir. 1967). During the Survey year the Board's use of the § 11(1) subpoena power to enforce the rule has received continued endorsement. See *NLRB v. Cone Mills Corp.*, 68 L.R.R.M. 2980 (D.S.C. 1968); *NLRB v. Daniel Constr. Co.*, 69 L.R.R.M. 2206 (D.S.C. Sept. 6, 1968) (enforced on the specific condition that the employer furnish the names and addresses with the express restriction that the union could only communicate by mail with those employees who had not been on the payroll within 30 days of the order); *NLRB v. J.P. Stevens & Co.*, 69 L.R.R.M. 2756 (W.D.N.C. Nov. 14, 1968); *NLRB v. Beech-Nut Life Savers, Inc.*, 406

During the Survey year, however, the First Circuit, in *Wyman-Gordon Co. v. NLRB*,⁷ upheld a novel attack on the *Excelsior* rule. The court held that the rule was promulgated in disregard of the notice and publication requirements of Sections 552 and 553 of the Administrative Procedure Act (APA).⁸ In addition to the formal rule creating procedures prescribed by the APA, the court recognized that as an administrative body the Board might also promulgate rules through decisions in adjudicative proceedings, where the case is decided between parties and the result "stands as a guide for the future and may be spoken of as a rule."⁹ In *Excelsior*, however, the rule announced was not applied to the parties before the Board, but rather was to take effect 30 days from the date of the order. The fact that the *Excelsior* rule was to have only prospective effect was fatal, in the opinion of the First Circuit in *Wyman-Gordon*, since it could not be regarded as having been properly formulated in an adjudicative proceeding. Therefore, "to the extent the Board was not deciding a case, this is precisely where Congress has instructed it as to the procedure it should adopt."¹⁰ These procedures, which are set forth in the APA, would require the Board to have first published notice of and conducted a hearing on the proposed rule, and then

F.2d 253, 69 L.R.R.M. 2846 (2d Cir. 1968), cert. denied, 89 S. Ct. 1624 (1969); *British Auto Parts, Inc. v. NLRB*, 405 F.2d 1182, 70 L.R.R.M. 2065 (9th Cir. 1968).

⁷ 397 F.2d 394, 68 L.R.R.M. 2483 (1st Cir.), cert. granted, 393 U.S. 932 (1968). See note 21 *infra*.

⁸ 5 U.S.C. §§ 552, 553 (1964). Section 552 provides in part:

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

...
(C) rules of procedure . . . ;

(D) substantive rules of general applicability adopted as authorized by law . . . ; and

(E) Each amendment, revision or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

Section 533 provides in part:

...
(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. . . .

...
Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice

...
(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.

⁹ 397 F.2d at 397, 68 L.R.R.M. at 2485.

¹⁰ *Id.*

published the rule as finally adopted in the *Federal Register*.¹¹ This, of course, the Board had not done.

Judge Coffin, dissenting, contended that the *Excelsior* rule should be characterized as merely procedural, because it establishes a positive requirement that the employer furnish names and addresses; it has no proscriptive effect. Therefore, according to the dissent, the rule was valid with respect to parties who had knowledge of it, despite the absence of the formal notice required by the APA.¹² The Federal District Court for South Carolina, faced in *NLRB v. Cone Mills Corp.*¹³ with the same question as was presented in *Wyman-Gordon*, adopted this view. The majority in *Wyman-Gordon*, however, found the rule to be substantive, because it requires the employer to furnish the interested unions with affirmative assistance in the conduct of their election campaigns. In the majority's opinion, such a rule could not be characterized as merely procedural. The majority, however, deemphasized the importance of this distinction, feeling that it was advanced only for avoidance of the effect of the APA. As the majority opinion stresses, the basic issue is whether the *Excelsior* rule was properly formulated through an adjudicative proceeding of the Board. In the opinion of the *Wyman-Gordon* court, it was not. Therefore, it must fall because neither was it promulgated in accordance with the formal rule-making procedures of the APA.¹⁴

At this writing, the *Wyman-Gordon* case itself is before the Supreme

¹¹ See note 8 *supra*.

¹² Under § 553(b) of the APA, 5 U.S.C. § 553(b) (1964), the notice and hearing requirements are waived with respect to a proposed procedural rule. Therefore, if the *Excelsior* rule were characterized as procedural it would fall within this exception, and under § 552(a), 5 U.S.C. § 552(a) (1964), it could be applied to any person with actual and timely notice of it.

¹³ 68 L.R.R.M. 2980 (D.S.C. 1968).

¹⁴ Since the possibility that the rule failed to comply with the APA was not an issue in *Excelsior Underwear*, the Board did not address itself to the question whether the rule was procedural or substantive. The reasons offered by the Board in formulating the rule, however, may provide some hint as to the precise character of the rule. The Board first reasoned that, being entrusted by Congress to control the election proceeding and to determine the steps necessary for a fair election, it regarded it as its function to conduct elections where employees have the opportunity to cast their ballots free not only from interference, restraint and coercion, but as well from other elements which may impede or prevent a free choice. The Board concluded that lack of information with respect to the available choices is such an impediment to communication, and the rule was directed to this poor communication. This conclusion suggests at first blush the requirement of an act which would interfere with the election process and, therefore, would be substantive in nature. The Board, however, was careful to avoid characterizing the failure to comply as an unfair labor practice, and merely rested on its view that the rule was to provide a necessary safeguard. This treatment suggests that the rule is procedural and could be likened to any other procedural rule controlling the election proceeding. 156 N.L.R.B. at 1245, 61 L.R.R.M. at 1221.

Secondly, the Board believed that the prompt disclosure of names and addresses would eliminate post-election challenges based upon the union's lack of knowledge as to the voters' identity, and that it would facilitate early and informal settlement of such disputes. 156 N.L.R.B. at 1242-43, 61 L.R.R.M. at 1219-20. Judge Coffin, in *Wyman-Gordon*, felt that this secondary purpose, to expedite the handling of election challenges, was "uncontrovertedly procedural." 397 F.2d at 399 n.1, 68 L.R.R.M. at 2486 n.1.

Court on this precise issue.¹⁵ It is significant that several circuits have rejected contentions based upon the holding in *Wyman-Gordon*.¹⁶ The Second Circuit, in *NLRB v. Beech-Nut Life Savers, Inc.*,¹⁷ perhaps best articulated the view that the *Excelsior* rule was properly formulated in the course of an adjudicative proceeding. The employer in *Beech-Nut* first contended that rules of general applicability and future effect, even if applied to the parties in a quasi-judicial proceeding, could not be promulgated by decision; rather only "orders" with special applicability could be formulated in such proceedings. The court answered that this was too narrow an interpretation of the powers given to the Board and of the manner in which they could be exercised. The court concluded that it remained within the discretion of the Board as to how it should resolve problems encountered in the administration of the federal labor laws. The Board could facilitate its administration of the Act by the promulgation of general rules in quasi-legislative proceedings, with general notice as to the proposed rule making and with hearings on the rule, as prescribed by the APA. Alternatively, if a problem should arise as an issue before the Board in an adjudicative proceeding, the Board could resolve it by decision, even though that decision might give rise to a "rule" to be applied in the future.

It was further contended in *Beech-Nut* that, even if rules of general and future applicability could be formulated in an adjudicative proceeding, they must result from an adjudication of the rights of the parties before the Board. This argument follows the decision of the First Circuit in *Wyman-Gordon*. Answering this contention, the Second Circuit maintained that the mere fact that the rule was not applied to the parties in *Excelsior* did not in any way militate against the conclusion that the rule was properly formulated in a quasi-judicial agency proceeding. Critical to this holding is the fact that the *Excelsior* rule, although not applied to the parties in the case, was nevertheless substantially related to the facts and issues before the Board.¹⁸ The Second Circuit noted that the rule evolved directly from the arguments of

¹⁵ Cert. granted, 393 U.S. 932 (1968). The Board has itself rejected the contention that the promulgation of the *Excelsior* rule violated the APA but does not offer any reasons in rebuttal. See *Laars Eng'rs, Inc.* 173 N.L.R.B. No. 90, 69 L.R.R.M. 1376 (1968). In argument before the Supreme Court, the government, represented by the Solicitor General, contended that the election rule was the result of adjudication. 70 Lab. Rel. Rep. 284 (1969). Pending the resolution of the issue by the Supreme Court, the Board has modified its election procedure within the First Circuit regarding an employer's refusal to furnish eligibility lists. Accordingly, it has deferred seeking court enforcement of subpoenas to force compliance with the rule, but still has permitted the filing of timely objections to elections conducted without a list, and will pass on these if the Supreme Court holds in favor of the rule. See *Endicott Johnson De Puerto Rico, Inc.*, 172 N.L.R.B. No. 194, 69 L.R.R.M. 1002 (1968).

¹⁶ *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 70 L.R.R.M. 2268 (5th Cir.), cert. denied, 89 S. Ct. 1628 (1969); *NLRB v. Beech-Nut Life Savers, Inc.*, 406 F.2d 253, 69 L.R.R.M. 2846 (2d Cir. 1968), cert. denied, 89 S. Ct. 1624 (1969); *Howell Ref. Co. v. NLRB*, 400 F.2d 213, 69 L.R.R.M. 2032 (5th Cir. 1968); *British Auto Parts, Inc. v. NLRB*, 405 F.2d 1182, 70 L.R.R.M. 2065 (9th Cir. 1968); *NLRB v. Piper Aircraft Corp.*, 70 L.R.R.M. 2241 (S.D. Fla. Dec. 30, 1968).

¹⁷ 406 F.2d 253, 69 L.R.R.M. 2846 (2d Cir. 1968), cert. denied, 89 S. Ct. 1624 (1969).

¹⁸ 406 F.2d at 258, 69 L.R.R.M. at 2849. See also *British Auto Parts, Inc. v. NLRB*, 405 F.2d 1182, 1183, 70 L.R.R.M. 2065, 2066 (9th Cir. 1968).

the union in *Excelsior* that the election should not have been certified because of the employer's failure to furnish the names and addresses of the employees. Although the rule extended beyond the immediate facts presented in *Excelsior*, this factor was not fatal, in the opinion of the court in *Beech-Nut*, because "the Board in devising a rule is not limited to the particular facts of the case presented to it for adjudication."¹⁹ Furthermore, the Second Circuit felt that "[t]here is nothing anomalous about a prospective change in a legal rule occurring in an adjudicative setting. In all fairness sufficient time may be required to permit persons to change systems and modes of dealing with one another."²⁰

The argument as to the validity of the *Excelsior* rule, then, appears to center upon the question whether the rule was properly formulated in an adjudicative proceeding. If the Supreme Court should sustain the rule on these grounds, the Court would appear to have sanctioned the Board's continued use of adjudicative proceedings to formulate rules of general and purely future applicability. On the other hand, if the Court should invalidate the *Excelsior* rule, or if it should sustain the rule by characterizing it as merely procedural, and thus not subject to APA notice requirements, as did Judge Coffin in *Wyman-Gordon*, far-reaching implications would arise with respect to the discretion exercised by the Board. It would seriously limit the use of quasi-judicial proceedings to formulate rules and would force the Board to utilize the formal rule-making procedures prescribed by the APA.²¹

¹⁹ 406 F.2d at 258, 69 L.R.R.M. at 2849.

²⁰ *Id.*

²¹ The actual tack taken by the Court, in its opinion of April 23, 1969, 89 S. Ct. 1426, was apparently toward some middle ground between these extremes. The Court, in a 7-2 decision, reversed the First Circuit and upheld the Board's order directing the employer to furnish the names and addresses. Yet the majority opinion, delivered by Mr. Justice Fortas, expressed its *agreement* with the circuit court's conclusion that the *Excelsior* rule, in itself, had been improperly promulgated because of the Board's failure to comply with the requirements of the APA. The majority acknowledged that the Board could decide, in an adjudicatory hearing, whether a particular employer should be required to furnish a list. But, the Court noted, the Board had not done this in *Excelsior*; the rule of that case was not applied to the parties in the proceeding. As stated by Mr. Justice Fortas, "Instead, the Board purported to make a rule: *i.e.*, to exercise its quasi-legislative power." *Id.* at 1429. Nevertheless, the majority concluded that because the Board had, in an adjudicatory hearing, directed *Wyman-Gordon*, the respondent in the instant case, to furnish the list, that *particular* order was valid, even though the order was based on the infirm *Excelsior* rule. The Court sustained the Board's authority to make the order upon the Board's "wide discretion to ensure the fair and free choice of bargaining representatives." *Id.* at 1430. The order in *Wyman-Gordon* is, in substance, the same as the *Excelsior* rule and, as an order resulting from an adjudicatory proceeding, will serve as precedent for future Board action. Thus, the Court has come full circle to save the rule.

Mr. Justice Black, concurring, contended that the majority was inconsistent in finding on the one hand that the Board had not complied with the APA, yet upholding enforcement of what he termed the *Excelsior* "practice." His characterization is significant, because by it he avoids the conclusion that, if it was a "rule," the Board should have followed the APA procedures. He was "convinced that the *Excelsior* practice was adopted by the Board as a legitimate incident to the adjudication of a specific case before it, and for that reason I would hold that the Board properly followed the procedures applicable to 'adjudication' rather than 'rule making.'" *Id.* at 1432.

Mr. Justice Douglas and Mr. Justice Harlan, in separate dissents, maintained that,

C. *Recognition Without Election: Authorization Cards*

In the course of a typical organizational campaign, a labor union will distribute to the employees cards to be signed and returned, which, according to the usual language on the face of the cards, designate the union as the employees' exclusive bargaining agent. If at least 30 percent of the employees sign these so-called "authorization cards," the union may petition the Board for a representation election.¹ If a *majority* of the employees return the cards, the union may even make a direct demand for recognition upon the employer, offering the cards as evidence of its majority support. In the latter instance the employer may, if he entertains a good faith doubt as to the union's majority, nonetheless decline to bargain, and insist upon an election. Accordingly, much of the union organizer's discussion with the employees regarding the purpose of the cards will lay emphasis upon a petition for an election.

Authorization cards thus serve a two-fold purpose—to obtain an election and to support a demand for recognition. The question of representation will generally be reviewed in a carefully supervised Board election. Such a procedure is preferable because the conditions under which authorization cards are normally solicited are in sharp contrast to the "laboratory conditions" of an election. In an election, an employee may cast his ballot in the quiet and secrecy of a ballot booth or his own home. When asked to sign an authorization card, on the other hand, the employee may be exposed to pressure and hard selling. Even then he may sign in the belief that he is asking only for an election. Nevertheless, the Board may still order the employee to bargain on the basis of a card majority if it is found that the employer lacked a good faith doubt as to the union majority, despite the fact that the union may have, after the unlawful refusal to bargain, proceeded to an election and lost. As stated by the Supreme Court in *Franks Bros. Co. v. NLRB.*²

Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions. The Board's study of this problem has led it to conclude that, for these reasons, a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain.³

The assumption underlying the use of this remedy is, therefore, that the union enjoyed majority support at the time it demanded recognition

because the Board had not complied with the APA in promulgating the *Excelsior* rule, it was invalid and unenforceable against the respondent, Wyman-Gordon.

¹ From the Board's administrative experience it has determined that "in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner [for an election] has been designated by at least 30 percent of the employees." 29 C.F.R. § 101.18 (1969).

² 321 U.S. 702 (1944).

³ *Id.* at 704.

from the employer. The cards will be the only evidence of the union's support, and in this context their validity, and more specifically the possibility of misrepresentation resulting from their twofold use, will be in issue.

The Board, in its determination of the validity of authorization cards looks to the rule, first set forth in its *Cumberland Shoe Corp.*⁴ decision, that a card will be considered valid unless the solicitor represented to the employee that the *sole* and *only* purpose of the card was to seek an election. The rationale of the rule, as reflected in the Board's recent decision, *Levi Strauss & Co.*,⁵ is that if the wording of the card is unambiguous it must be assumed that the employee will act intelligently and responsibly, and that "if he can read he is at least aware that by his act of signing he is effectuating the authorization the card declares."⁶ In *Levi Strauss* the Board ascribed to the card and its signing the same solemnity and binding effect ascribed to the signing of a will, deed, contract or note, and found no basis in law for the denial of face value to the card, in the absence of affirmative proof of misrepresentation. The Board thus dismissed consideration of the possibility that discussion of a contemplated election might mislead employees as to the purpose of the cards. It pointed to the fact that authorization cards serve a twofold purpose, and, therefore, any declarations to the effect that the union is seeking an election are "no more than truthful statements of a concurrent purpose for which the cards are sought . . . entirely consistent with the authorization purpose expressed in the cards, as well as with the use of the cards to establish majority support."⁷ This belief is grounded also in what the Board viewed as the realities of union organizational practices. The Board theorized that authorization cards are used primarily for the showing of the requisite interest in an election and, consequently, discussion regarding an election is to be expected. Therefore, little reason exists to mention that the union may also seek immediate recognition on the basis of such cards, because the opportunity for such a demand will arise infrequently.

Increasingly, the courts have demonstrated a hesitancy to adopt the Board's apparent faith in the reliability of authorization cards, reflected by its continued adherence to the *Cumberland Shoe* rule. The inquiry of the courts is now being directed toward the subjective intent of the employees signing the cards. One court's reason for this closer scrutiny is succinctly expressed by Judge Medina of the Second Circuit, in *Schwarzenbach-Huber Co. v. NLRB*:⁸

This "representation" card business is an abomination. As presently administered it is a pro-Union device that serves no other purpose than to afford a method by which elections can be bypassed and the Unions ushered in without giving the employees individually or collectively any voice in the matter.⁹

⁴ 144 N.L.R.B. 1268, 54 L.R.R.M. 1233 (1963), enforced 351 F.2d 917, 60 L.R.R.M. 2305 (6th Cir. 1965).

⁵ 172 N.L.R.B. No. 57, 68 L.R.R.M. 1338 (1968).

⁶ *Id.*, 68 L.R.R.M. at 1341.

⁷ *Id.*

⁸ 408 F.2d 236, 70 L.R.R.M. 2805 (2d Cir. 1969).

⁹ *Id.* at 249, 70 L.R.R.M. at 2815.

Judge Medina was referring to the danger inherent in the twofold use of authorization cards, of misleading employees who signed the cards into the belief that they are only supporting an election when in fact they are unintentionally designating the union as their exclusive bargaining agent.

The facts in *Schwarzenbach* followed the typical organizational pattern. The union had both made a demand for recognition and filed a petition for an election. When the union lost the election, it sought to have the result set aside, to establish that the employer had committed various unfair labor practices, and to have the employer bargain without a new election. The Board sustained the claims of the union, held that the employer's earlier refusal to bargain had not been based upon a good faith doubt, and concluded that a new election would be impractical. The Board, therefore, ordered the employer to bargain with the union. Contrary to the Board, the Second Circuit concluded that a number of cards, sufficient to reduce the union's support below a majority, were invalid. Therefore, the employer's refusal to bargain was justified, and under the circumstances a bargaining order was inappropriate.¹⁰

What had sparked Judge Medina's remarks and led to the court's denial of enforcement to the Board's order was the court's conclusion that numerous cards had been obtained through misrepresentation by the union. The attention of the court had focused on whether the employees signing the cards had realized that they were designating the union as their bargaining representative in addition to merely lending their support to a petition for an election. In reviewing this question, the Board had relied upon its *Cumberland Shoe* rule. The circuit court, however, questioned whether certain employees really intended to designate the union as bargaining representative, despite the overt act of signing the cards. The court noted that at a meeting where a number of cards had been signed, the union solicitor, although he had read the card aloud, had nevertheless emphasized that the union sought an election, and had stated that if the union lost the election the cards would be returned. He had failed to mention that the union might also use the cards to support a demand for immediate recognition. The court concluded that such an omission must have led the employees to believe that they were not accepting union membership unconditionally. The statement was, therefore, deceitful, and a flagrant misrepresentation.¹¹

During the Survey year, the Fifth Circuit, in *NLRB v. Lake Butler Apparel Co.*,¹² and *NLRB v. Southland Paint Co.*,¹³ has concurred with the

¹⁰ As stated by the court,

[t]he propriety of enforcing an order to bargain after a union has lost a representation election depends on the resolution of three questions: (1) whether the Union in fact had a majority; (2) whether the employer refused to bargain because of a good faith doubt of such majority, if the Union had a majority; (3) whether on all the facts of the election situation a bargaining order is an appropriate remedy for enforcing the policy of the National Labor Relations Act.

Id. at 240, 70 L.R.R.M. at 2807.

¹¹ *Id.* at 242, 70 L.R.R.M. at 2809.

¹² 392 F.2d 76, 67 L.R.R.M. 2883 (5th Cir. 1968).

¹³ 394 F.2d 717, 68 L.R.R.M. 2169 (5th Cir. 1968).

Second Circuit in its criticism of authorization card procedure. In *Lake Butler Apparel*, the court placed the burden upon the "General Counsel, once representation cards are challenged as here because of misrepresentation in their procurement and proof is offered which substantiates the challenge, to show that the subjective intent to authorize union representation was not vitiated by the misrepresentation."¹⁴

The circumstances in *Lake Butler Apparel* were similar to those in *Schwarzenbach*. The union had obtained signed cards from a majority of the employees and first made a demand for recognition, but without waiting for a reply had also filed a petition for an election. When the union subsequently lost the election it charged the employer with unfair labor practices, and contended that these practices had frustrated the election by dissipating the union's majority support. The Board concluded that the union had obtained valid authorization cards from a majority of the employees, and that under the circumstances the employer should be ordered to recognize the union.

There had been testimony that some employees had been advised that the purpose in signing the cards was to obtain an election. Adhering to the *Cumberland Shoe* rule the Board held that such statements did not invalidate the cards, because the trial examiner's findings disclosed that the employees had not been told that this was the *only* purpose. The court, while it noted that the language of the cards was unambiguous, emphasized that the employees were not affirmatively advised that the union would also claim to represent the employees on the basis of the cards alone. Furthermore, the employees had failed to read the back of the card containing the conditions to which they subscribed, and they were not furnished with a copy of the card. Generally, the union solicitor had emphasized the election as the purpose of the cards. The notion that the solicitors were seeking only an election received support from the fact that they had not waited for the employer to respond to their demand before petitioning for an election. The court thus concluded that the challenged cards had been executed upon the misrepresentation that they sought an election, and therefore declared them invalid. The union then lacked the necessary majority support at the time of their demand.

In *Southland Paint* the union had made a demand for recognition, but the employer had refused to bargain. The Board found that he had lacked a good faith doubt as to the union's majority and therefore ordered him to bargain. Again, the question centered on the validity of the cards, upon which the Board had based its finding of the union majority. The cards were unambiguous, but the court indicated that, if they were to be relied upon in lieu of an election, the card should so state. The omission of such a statement, in light of the solicitor's representation that the card signing sought an election, constituted misrepresentation. The card also omitted any reference to union membership, something which the court felt the employee would readily understand. It was also the belief of the court that the statement in the card to the effect that it would be kept confidential

¹⁴ 392 F.2d at 80, 67 L.R.R.M. at 2885.

created the impression that the act of signing was only preliminary, and that the cards would form the basis for a secret election.

Ultimately, the criticism of the Second Circuit in *Schwarzenbach*, and the Fifth Circuit in *Lake Butler Apparel* and *Southland Paint*, is directed at the *Cumberland Shoe* rule, through which the Board, in effect, sanctions the existing practices in the solicitation of authorization cards. As indicated by the Second Circuit in *Schwarzenbach*, that court will not enforce a bargaining order, despite the long-standing recognition of such an order in situations where an employer's unfair labor practices have dissipated a union's majority, and where the evidence of the majority support upon which the order is predicated "is accomplished by the invention of new *per se* rules of evidence and new standards by which the proofs are to be evaluated, that fly in the face of common sense and elementary concepts of justice and fair play."¹⁵ At stake in the opinion of both circuit courts were the section 7 rights of the employees—the rights to engage in or to refrain from engaging in concerted activity.¹⁶ A scheme whereby employees could be misled into the belief that they were merely seeking a free election, when in fact they were unknowingly designating the union as their bargaining representative, was considered a clear violation of these rights. As the Second Circuit concluded, the bargaining order under those circumstances "nullifies the beneficent purposes of the Act and in no possible way can be said to effectuate the purposes of the Act."¹⁷

The principal objection to the *Cumberland Shoe* rule is that the Board's inquiry fails to reveal whether the employee has been afforded the opportunity freely to choose a bargaining representative or to decline representation. The Board assumes that the employee is sophisticated, but the Fifth Circuit in *Southland Paint* made particular mention of the low educational level of most employees, inferring that they are more susceptible to the misleading statements of solicitors and less likely to appreciate the full significance of signing the card, notwithstanding the declaration printed on the cards.¹⁸

The circumstances or conditions under which authorization cards are solicited do not duplicate the laboratory conditions of which the courts make repeated mention. But an election may not always be feasible, particularly where the employer has dissipated the union strength through unfair labor practices. Here, the *only* remaining remedy is to order the employer to bargain on the basis of the earlier demand for recognition. Outright rejection

¹⁵ 408 F.2d at 249, 70 L.R.R.M. at 2815.

¹⁶ 29 U.S.C. § 157 (1964).

¹⁷ 408 F.2d at 250, 70 L.R.R.M. at 2815.

¹⁸ 394 F.2d at 729-30, 68 L.R.R.M. at 2178. See also the statement of Judge Friendly in *NLRB v. S.E. Nichols Co.*, 380 F.2d 438, 65 L.R.R.M. 2655 (2d Cir. 1967):

It is all too easy for the Board or a reviewing court to fall into the error of thinking that language clear to them was equally clear to employees previously unexposed to labor relations matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality.

Id. at 442-43, 65 L.R.R.M. at 2658.

of the authorization cards as evidence would, therefore, deny the Board the only practicable basis for a determination whether the union had obtained the requisite support. This consideration may have restrained the courts from condemning their use altogether.¹⁹ Nonetheless, this prospect did not restrain the District of Columbia Circuit, in *Amalgamated Clothing Workers v. NLRB*,²⁰ from remanding that case to the Board for a determination of some alternative method of ascertaining the union strength at the time of the demand for recognition.²¹

Clothing Workers concerned the organization of a textile plant which had been erected in a poverty-stricken town, Eloy, Arizona. The employer had been encouraged to locate in the area through the efforts of the local development corporation, established to attract industry to the town. The employees of the new plant were in a large part drawn from the Spanish-speaking residents of the town, and had formerly been employed as agricultural workers. A short time after the opening of the plant, the petitioner union commenced an organizational campaign and solicited signatures on bilingual cards, the printed language of which signified a designation of the union as bargaining representative. Of 182 employees, the union obtained 113 signatures, but, nevertheless, requested an election rather than directly demand recognition. The presence of the union, however, sparked strong opposition, not only from the employer, but from the community as well, and in particular from the development corporation which had initially sponsored the construction of the plant and attracted the textile manufacturer to lease it. A vigorous anti-union campaign was begun by this group. The local newspaper ran a strong editorial against the organizing effort, and even the local parish priest contributed with an anti-union sermon. The company itself urged voting against the union, apparently with overtones of possible dismantlement of the factory and bankruptcy. As a result of this activity, the union lost the election, 48 to 124, a complete reversal of the majority which it had earlier enjoyed, at least insofar as it was reflected by the number of signed authorization cards. A hearing was held and the Board adopted

¹⁹ The criticism of the *Cumberland Shoe* rule should not be misconstrued as a collateral attack on the Board's use of the bargaining order remedy. Referring to the oft cited decision of the District of Columbia Circuit, *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 27 L.R.R.M. 2012 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951), which held that an employer could not refuse to bargain where he lacked a good faith doubt or where he desired only to gain time in order to dissipate the union's strength, the Fifth Circuit in *Southland Paint* emphasized that no issue had been raised in *Joy Silk* regarding the validity of the cards. The Fifth Circuit noted, however, that the Board has relied on *Joy Silk* "to make the act of signing an authorization card decisive—regardless of the employee's understanding of what he was signing and what he was told about the purpose of the card. . . . [T]he *Joy Silk* rationale is sound only if the employees understand that if a majority sign cards designating the union as their bargaining agent an election will be unnecessary." 394 F.2d at 725, 68 L.R.R.M. at 2174.

²⁰ — F.2d —, 70 L.R.R.M. 2207 (D.C. Cir. Jan. 9, 1969).

²¹ It is interesting to note that the District of Columbia Circuit had only recently adhered to the *Cumberland Shoe* rule in *UAW v. NLRB* (*Preston Products*), 392 F.2d 801, 66 L.R.R.M. 2548 (D.C. Cir. 1967), cert. denied, 392 U.S. 906 (1968). The court distinguished its decision in *Clothing Workers* on the ground that *Cumberland Shoe* "does not articulate an absolute rule, but rather a useful and well founded rule of thumb." — F.2d at —, 70 L.R.R.M. at 2209.

the trial examiner's finding that the employer had committed unfair labor practices, and his recommendation that the employer be ordered to recognize the union because no means existed for conducting a fair election. Therefore, it was necessary to accept the conclusion evidenced by the authorization cards. Under *Cumberland Shoe*, the trial examiner's findings disclosed that the campaign had not been conducted as though an election were the union's *only* goal, and, therefore, the card signers were not victims of misrepresentation.

Despite the impracticability of a second election, the circuit court denied enforcement to the Board's order because it could not accept the cards as reliable evidence of the employees' true desires. The court found that the card majority was the result of hard campaigning; that the union solicitors had given the employees a one-sided view of the nature of the union, and of the benefits of representation; that the declarations of the solicitors, while they did not state that an election was the *sole* purpose, were nevertheless permeated with the idea that the signing of the card would lead to an election. The court even raised a question whether the employees were presented with any choice in the election itself.

The court emphasized, as had the Second and Fifth Circuits, the right of the employees to a free choice whether to have a bargaining agent. Confronted with evidence not only of employer interference, and of the possibility of union pressure and influence as well, the court viewed as the proper considerations for decision not such "off target inquiries" as what might have been said to the employees concerning an election, but, rather, inquiries "directed precisely at the prime question in the case: What was the real choice of these employees in respect to a collective agent?"²² The D.C. Circuit, therefore, even dismissed inquiry into the employee's subjective intent in signing the card. It was the conclusion of the court that, where the Board admitted that it did not really know the employees' choice, where the results of the election and the authorization cards are in flat contradiction, the Board must inquire further to ascertain what that choice might be. In the opinion of the court, authorization cards amount to no more than "an unsupervised poll taken individually in private by agents of one of the interested parties . . ."²³

The court, in remanding the case to the Board, provided little guidance for the ascertainment of employees' choice. In response to this absence of standards, the dissenter, Judge Robinson, stressed the very practical observation that if there existed "a method superior to card counting for ascertaining employee desires in the circumstances here, I would assume that the Board would not need judicial prompting to resort to it."²⁴ He concluded that the evidence of the authorization cards was the Board's nearest approach to the actual wishes of the employees, and that the court "must defer to the Board's broad discretionary powers to devise remedies suitable to rectify violations of the Act."²⁵ Judge Robinson also pointed to the judicial support for the use

²² Id. at —, 70 L.R.R.M. at 2210.

²³ Id. at —, 70 L.R.R.M. at 2211.

²⁴ Id. at —, 70 L.R.R.M. at 2215.

²⁵ Id. at —, 70 L.R.R.M. at 2212.

of authorization cards. In doing so, he reaffirmed the *Cumberland Shoe* rule and, applying it to the facts of the case, he did not find that under the circumstances the purpose of the cards had been misrepresented.

The extreme result reached in *Clothing Workers* may possibly be explained by the unusual circumstances—very unsophisticated employees, whose background of poverty, language, and industrial inexperience made them particularly susceptible to misunderstanding not only about an election, but generally about the purposes of labor organizations. Therefore, *Clothing Workers* may not foreshadow the ultimate rejection by the courts of the use of authorization cards. The holding of the court for the moment seems confined to the facts. However, if it is assumed that the cards are not considered totally reliable, Judge Robinson raises the practical question: What superior method of ascertaining employee wishes might be utilized?

The use of authorization cards as evidence of employee support for recognition thus remains, at the conclusion of the Survey year, in a very unsettled state. The Board, on the one hand, continues to take the position that they are a reliable indication of employee wishes and, therefore, limits its inquiry to the narrow question whether they were solicited under any overt misrepresentation. The probability that the cards may not be so reliable, however, has stimulated closer judicial scrutiny of the practice, which in turn has led to the imposition of more stringent limitations on the manner in which the cards may be solicited. The limitations, particularly those proposed by the Fifth Circuit, do not seem impractical or burdensome to implement. Particularly in light of the fact that the employees' freedom of choice will be more adequately insured, it is submitted that other circuits will follow and adopt the position of the Fifth Circuit, and that the Board will be obliged to modify the *Cumberland Shoe* rule. It seems unlikely, however, that reliance on authorization cards would be altogether rejected. The very practical reason for their continued use is that they do furnish an alternative method by which the Board might ascertain employee wishes when a fair election would not be feasible. Past judicial acceptance of the practice would seem to support this thesis.²⁶

IV. ARBITRATION

A. *New-Contract Arbitration*

There have been few significant arbitration cases during the current Survey year. The courts appear to have heeded the Supreme Court's teachings in the field of arbitration. Current decisions consistently reflect the view

²⁶ In *NLRB v. Gissel Packing Co.*, 37 U.S.L.W. 4536 (U.S. June 16, 1969) (Nos. 573, 691, 585), the Supreme Court upheld the Board's application of the *Cumberland Shoe* rule. The opinion of the Court referred to the criticism by several circuits of the "sole purpose" test of *Cumberland Shoe*, but conceded that the issue was not presented clearly in three of the four cases consolidated before it. *Id.* at 4544. The fourth case, however, where the trial examiner refused to find misrepresentation in the union's statements that the cards were secret and were to be shown only to the Board (*id.* at 4538 n.5), was held to "represent the limits of the *Cumberland* rule's application." *Id.* at 4545. Thus, while the Board's rule was approved in general, the circuit courts appear to have been left some latitude in defining the "limits" of the rule.

that arbitration is the favored means of settling labor disputes;¹ that the role of the court in suits to compel arbitration is merely to decide whether the collective bargaining agreement forecloses such arbitration;² and that the arbitrator may use his expertise and knowledge of the industry to make any award consistent with the powers granted by the union-management agreement.³ With the exception of the cases noted below, the writers have not discovered any arbitration cases constituting sufficient deviation from prior law to merit discussion here.

The federal courts have been in conflict in recent years over whether a court could enforce a union-management agreement to submit unresolved differences in new contract terms to arbitration.⁴ During the current Survey year, the Court of Appeals for the Fourth Circuit held that a collective bargaining agreement envisioning arbitration of the terms of a new contract was judicially enforceable.⁵ In *Winston-Salem Printing Pressmen Union v. Piedmont Publishing Co.*,⁶ the court affirmed a lower court order obligating the employer to submit to arbitration.

Piedmont Publishing Company and the Printing Pressmen Union entered into a contract effective April 13, 1964, containing a detailed arbitration procedure,⁷ and providing:

This agreement shall continue to and including the 31st day of October, 1965, except that either party on thirty days notice prior

¹ See, e.g., *Winston-Salem Printing Pressmen Union v. Piedmont Publishing Co.*, 393 F.2d 221, 67 L.R.R.M. 2939 (4th Cir. 1968).

² See, e.g., *District 50, Mine Workers v. Matthiessen & Hegeler Zinc Co.*, 291 F. Supp. 578, 69 L.R.R.M. 2403 (N.D. W. Va. 1968); *Local 73, Meat Cutters v. Fred Rueping Leather Co.*, 67 L.R.R.M. 3045 (E.D. Wis. 1968); *International Organization of Masters, Mates & Pilots v. American Oceanic Corp.*, 67 L.R.R.M. 2951 (S.D.N.Y. 1968).

³ See, e.g., *Local 135, Rubber Workers v. Dunlop Tire & Rubber Corp.*, 391 F.2d 897, 67 L.R.R.M. 2887 (2d Cir. 1968); *Textile Workers Union v. Textile Paper Prods., Inc.*, 405 F.2d 397, 69 L.R.R.M. 2578 (5th Cir. 1968); *Local 342, UAW v. T.R.W., Inc.*, 402 F.2d 727, L.R.R.M. 2524 (6th Cir. 1968), cert. denied, 89 S. Ct. 1742 (1969); *Anaconda Co. v. Smeltermen's Union*, 402 F.2d 749, 69 L.R.R.M. 2597 (9th Cir. 1968).

⁴ Succeeding text and notes will indicate the directions taken on this issue by various courts.

⁵ *Winston-Salem Printing Pressmen Union v. Piedmont Publishing Co.*, 393 F.2d 221, 67 L.R.R.M. 2939 (4th Cir. 1968).

⁶ 393 F.2d 221, 67 L.R.R.M. 2939 (4th Cir. 1968).

⁷ The parties hereto will settle any and all differences affecting wages, hours, working conditions, and shop practices that may arise between them, by conciliation; and if conciliation fails, then by arbitration, as provided below: "A standing committee of . . . representatives selected by the Publisher . . . and the Union . . . shall be appointed. . . . To this committee shall be referred all disputes which may arise as to the scale of wages hereto attached, the construction to be placed upon any clause of this agreement, or alleged violations thereof, which cannot be settled otherwise. . . . Should the joint committee be unable to agree, then it shall refer the matter to a Board of Arbitration"

Both parties recognize that their respective rights under this agreement will have been accorded by the performance and the fulfillment of the terms and conditions of said agreement, and that the complete obligation of each to the other is expressed herein. Under all circumstances the terms of this agreement are paramount.

Id. at 222-23 n.1, 67 L.R.R.M. at 2939-40 n.1.

to November 1, 1964, may reopen the agreement for the consideration of wage adjustment only.

Should either party desire to negotiate for changes in any or all of the provisions of this contract as of November 1, 1965, written notice to the effect must be given to the other party on or before September 1, 1965, together with a written statement in detail of the changes desired. Otherwise this agreement shall continue from November 1 through October 31 from year to year and can be changed only by mutual consent or through negotiations started by written notice of one of the parties to the other, on or before September 1st of any succeeding year. Should either party propose such amendments or a new contract, and an agreement proves impossible, the difference or differences shall be arbitrated as herein provided.⁸

By letter dated August 30, 1965, the union gave notice of its desire to make changes and add new provisions to the contract. Collective bargaining sessions were conducted on September 29, December 2 and December 3 but no final agreement was reached. Concluding that an impasse had been reached, the union informed the company on December 7, 1965, of its intention to submit the issue to arbitration. The company refused, advising the union that it considered the contract to have expired as of October 31, 1965, and that it was therefore no longer obligated to arbitrate. The union instituted suit to compel the company to arbitrate the unresolved differences as provided in the agreement.⁹ The company defended against the union's action on two theories. First, it contended that the court lacked jurisdiction to compel arbitration under a contract which, by its own terms, had terminated. Second, it maintained that courts were precluded from commanding what has come to be known as "prospective" or "quasi-legislative" arbitration.

The distinction between so called "prospective" or "quasi-legislative" arbitration and "retrospective" or "quasi-judicial" arbitration was developed in 1956 in the case of *Boston Printing Pressmen's Union v. Potter Press*.¹⁰ An arbitrator with "quasi-legislative" power could formulate or "legislate" terms over which the parties had not previously agreed. The arbitrator having only "quasi-judicial" power would be restricted to interpretation or enforcement of terms already agreed upon by the parties.¹¹ The situation in *Potter Press* was identical to that in *Piedmont Press*. The *Potter Press* court, however, concluded that it could not enforce the parties' agreement to submit unresolved differences in the new contract to arbitration. The court's conclusion rested on the following line of reasoning. At the time when *Potter Press* arose for consideration, the Supreme Court had decided that "[t]he aim [of

⁸ 393 F.2d at 222-23, 67 L.R.R.M. at 2940.

⁹ The union also sought damages, but damages were not awarded by the lower court order. 263 F. Supp. 952, 64 L.R.R.M. 2337 (M.D.N.C. 1967).

¹⁰ 141 F. Supp. 553, 556, 38 L.R.R.M. 2211, 2213 (D. Mass. 1956), aff'd, 241 F.2d 787, 39 L.R.R.M. 2524 (1st Cir.), cert. denied, 355 U.S. 817 (1957).

¹¹ See Fleming, *Reflections on the Nature of Labor Arbitration*, 61 Mich. L. Rev. 1245, 1254-58 (1963); Note, *Quasi-Legislative Arbitration Agreements*, 64 Colum. L. Rev. 109 (1964).

section 301]¹² was to open the federal courts to suits on agreements solely because they were between labor organizations and employers *without providing federal law for such suits.*"¹³ (Footnote and emphasis added.) The *Potter Press* court, therefore, concluded that section 301 was merely jurisdictional, and it declined to hold an arbitration clause enforceable under that section. Finding the controlling substantive law to be in the United States Arbitration Act,¹⁴ the court decided that the Act would permit only enforcement of "quasi-judicial" arbitration. Thus, it refused to enforce the "quasi-legislative" arbitration agreement before it.¹⁵

After *Potter Press*, the Supreme Court's conception of section 301 evolved to the point where the court was able to conclude

that § 301(a) is more than jurisdictional—that it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements. . . .¹⁶ We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws.¹⁷ (Footnote omitted.)

Subsequently the Supreme Court itself developed the federal law applicable to arbitration agreements in labor-management contracts. Arbitration was seen not only as an acceptable means of resolving labor disputes. The Court actively encouraged it.¹⁸ The function of the courts was "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."¹⁹ "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."²⁰

¹² 29 U.S.C. § 185 (1964), which provides in part:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, 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.

¹³ *Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 447 (1955).

¹⁴ 9 U.S.C. §§ 1-14 (1964).

¹⁵ 141 F. Supp. at 558, 38 L.R.R.M. at 2214.

¹⁶ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957).

¹⁷ *Id.* at 456.

¹⁸ Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.

... An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

¹⁹ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-83 (1960).

²⁰ *United Steelworkers v. American Mfg. Co.* 363 U.S. 564, 568 (1960).

²⁰ 363 U.S. at 582-83.

In basing its decision on the substantial background policy in favor of arbitration, the *Piedmont Press* court clearly achieved the right result. The parties had unequivocally agreed to arbitrate unresolved differences in any new contract. The court should have and did do no more than determine that the contract did not foreclose arbitration of such issues. It properly concluded that an express contract provision making such issues arbitrable required court enforcement. "Nothing would be more out of step with our national labor policies than for courts to refuse to enforce a voluntary agreement to arbitrate differences."²¹

The court recognized that a substantial number of recent decisions had affirmed the holding in *Potter Press*,²² but it concluded that "these cases are entitled only to the remaining force and validity underlying the rationale of [*Potter Press*]."²³ The court embraced other recent opinions challenging the statutory predicate of *Potter Press* in the light of more recent Supreme Court decisions.²⁴

The second issue raised by the company's defense was whether the court could compel arbitration in view of the union's failure to request arbitration until more than a month after the contract expiration date. Pointing out that the contract provided that the arbitration panel should decide any disputes involving construction of contract terms, the court concluded that the arbitrators must decide whether the union's arbitration request was timely.²⁵ Again, its conclusion on this issue is consistent with the Supreme Court's views on the relative powers of courts and arbitrators.²⁶

The persistent question in *Piedmont Press* is not whether a court could enforce the clause submitting new contract terms to arbitration. The court could do no less if it was to remain consistent with the national labor policy favoring arbitration. Rather, the question is whether management and union negotiators were well advised to agree on such a provision. Although the parties have created a stable relationship, one wonders whether either party should surrender its traditional economic power to enforce its demands in

²¹ 393 F.2d at 227, 67 L.R.R.M. at 2943.

²² *International Typographical Union v. San Francisco Newspaper Printing Co.*, 247 F. Supp. 963 (N.D. Cal. 1965); *Austin Mailers Union v. Newspapers, Inc.*, 226 F. Supp. 600 (W.D. Tex. 1963), aff'd, 329 F.2d 312, 55 L.R.R.M. 2693 (5th Cir.), cert. denied, 377 U.S. 985 (1964); *In re Valencia Baxt Express Co.*, 199 F. Supp. 103, 49 L.R.R.M. 2126 (D.P.R. 1961); *Couch v. Prescolite Mfg. Corp.*, 191 F. Supp. 737, 49 L.R.R.M. 2080 (W.D. Ark. 1961).

²³ 393 F.2d at 227, 67 L.R.R.M. at 2943.

²⁴ *Division No. 892, Street Ry. Employees v. M.K. & O. Transit Lines, Inc.*, 210 F. Supp. 351, 51 L.R.R.M. 2470 (N.D. Okla. 1962), rev'd on other grounds, 319 F.2d 488, 53 L.R.R.M. 2662 (10th Cir.), cert. denied, 375 U.S. 944 (1963); *Builders Ass'n v. Greater Kansas City Laborers*, 326 F.2d 867, 55 L.R.R.M. 2199 (8th Cir.), cert. denied, 377 U.S. 917 (1964); *Seltzer & Co. v. Livingston*, 253 F. Supp. 509, 61 L.R.R.M. 2581 (S.D.N.Y.), aff'd, 361 F.2d 218, 62 L.R.R.M. 2079 (2d Cir. 1966).

²⁵ 393 F.2d at 228, 67 L.R.R.M. at 2944.

²⁶ See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The *Enterprise Wheel* case presented a question similar to that in *Piedmont Press*. The Court decided that the arbitrator must determine whether the parties intended the arbitration clause to cover disputes arising before, but not submitted to arbitration until after, the termination date.

order to achieve such stability.²⁷ Moreover, management and unions usually seek to minimize the risk of unwanted working relationships by means of a tightly drawn collective bargaining agreement specifying the limits of third-party interference. Usually this interference is limited to grievance arbitration. The Printing Pressmen-Piedmont Press Company contract not only permitted resolution of differences in the existing contract, but also allowed third-party participation in the *formulation* of the next contract. The curious result is that, so long as one party refuses to terminate the existing contract (which would have the effect of removing the arbitration clause), the parties must sit at the bargaining table with a third party. Instead of the parties' specification of the limits of third-party interference, the third party may well specify the limits of union's and management's powers to affect each other's interests.²⁸

The decision in *Piedmont Press*, considered in the light of the recent history of section 301 suits to compel arbitration, is simply a restatement of the general rule that a court will compel arbitration when it cannot be said with "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." The court gave the parties exactly what they had bargained for, and it did so consistently with the national labor policy to foster stable labor-management relations through the use of the arbitration process. While the result of the decision may be somewhat startling—the prospect of an unending contract or a third party sitting between union and management at the bargaining table—the moral is clear: the parties should not agree to arbitration of unresolved differences in new contracts unless they are prepared to abide by that agreement.

B. *Arbitration Awards: Enforcement by Injunction*

1. *Power of Federal Courts to Enforce Injunctive Arbitration Award.*—In *Sinclair Ref. Co. v. Atkinson*,¹ the Supreme Court considered whether a federal court had jurisdiction to enjoin union strikes in breach of a no-strike agreement. Alleging that it had no adequate remedy at law, the employer had brought an action under Section 301 of the Labor-Management Relations Act² seeking an injunction against strikes over grievances which could, under the existing contract, be submitted to arbitration.³ Mr. Justice Black, writing for the majority stated:

The question this case presents is whether § 301 of the Taft-Hartley Act, in giving federal courts jurisdiction of suits between employers and unions for breach of collective bargaining agreements,

²⁷ The failure of either party to submit to arbitration would put that party in breach of the existing contract, as the principal case holds.

²⁸ There is no indication in the Printing Pressmen-Piedmont agreement that the arbitrator's function would be confined to compromising the difference between the parties' positions. Rather, the arbitrator could give effect to the entire demand of the party without regard for the asserted interest of the other party.

¹ 370 U.S. 195 (1962).

² 29 U.S.C. § 185 (1964).

³ The collective bargaining agreement contained a clause declaring that "any difference regarding wages, hours or working conditions between the parties hereto or be-

impliedly repealed § 4 of the pre-existing Norris-LaGuardia Act, which, with certain exceptions not here material, barred federal courts from issuing injunctions "in any case involving or growing out of any labor dispute."⁴ (Footnote omitted.)

Having cast the legal issue in these terms, the Court was required to make two essential decisions. First, was the altercation between union and management a "labor dispute" within the meaning of Section 13 of the Norris-LaGuardia Act?⁵ Second, if this was a "labor dispute," did the anti-injunction mandate of Norris-LaGuardia⁶ preclude an injunctive remedy in a suit for breach of contract?

Justice Black disposed of the first issue by concluding that the case did involve a "labor dispute" which is defined in Norris-LaGuardia as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, charging, 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."⁷ Each of the work stoppages, said the Court, came well within the definition. The Court was unimpressed by the possibility that the strikes may have constituted a breach of contract. This possibility did not "alter the plain fact that a 'labor dispute' within the meaning of the Norris-LaGuardia Act is involved."⁸

The second issue—whether Norris-LaGuardia retained its vitality in a suit for breach of contract—was not so easily resolved. The Court reasoned as follows: The controversy between union and management was clearly a "labor dispute," and therefore the Norris-LaGuardia Act would deprive a federal court of jurisdiction to enjoin union strikes growing out of that dispute. Norris-LaGuardia must control unless Section 301 of the Labor-Management Relations Act—authorizing suits in federal courts for breach of collective bargaining agreements—could be found to repeal or modify the operation of Norris-LaGuardia under the circumstances of the case. The legislative history of section 301 and the omission of any provision within it

tween the Employer and an employee covered by this working agreement which might arise within any plant or within any region of operations" should be submitted to compulsory, final and binding arbitration. 370 U.S. at 197. Apparently the union had engaged in work stoppages or strikes repeatedly over a 19-month period and had refused to submit to arbitration of its grievances. In another proceeding arising out of this same activity, the Supreme Court ruled that the employer could recover damages from the union because of union strikes in violation of the no-strike contract. *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962).

⁴ 370 U.S. at 196.

⁵ 29 U.S.C. § 113 (1964).

⁶ No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment

⁷ 29 U.S.C. § 104 (1964).

⁸ 29 U.S.C. § 113 (1964).

⁹ 370 U.S. at 200.

specifically repealing Norris-LaGuardia indicated that Congress intended the vitality of Norris to be unimpaired by section 301. Because Norris-LaGuardia is the controlling law in the case, the lower court properly ruled that a federal court is without jurisdiction to enjoin a "labor dispute" strike which is also a breach of a no-strike contract.⁹

Two Justices joined in Justice Brennan's dissenting opinion. Section 301 of the Labor-Management Relations Act did not "repeal" the anti-injunction provisions of Norris-LaGuardia, the dissent conceded,

[b]ut the two provisions do coexist, and it is clear beyond dispute that they apply to the case before us in apparently conflicting senses. Our duty, therefore, is to seek out that accommodation of the two which will give the fullest possible effect to the central purposes of both. Since such accommodation is possible, the Court's failure to follow that path leads it to a result—not justified by either the language or history of § 301—which is wholly at odds with our earlier handling of directly analogous situations and which cannot be woven intelligibly into the broader fabric of related decisions. . . .¹⁰

Justice Brennan's reference to the "broader fabric of related decisions" brings into consideration the substantial body of law developed under section 301. Beginning with *Textile Workers Union v. Lincoln Mills*¹¹ and continuing with the *Steelworkers Trilogy*,¹² the Supreme Court had consistently emphasized the power of the federal courts to "fashion a body of federal law for the enforcement of . . . collective bargaining agreements . . ."¹³ In the *Lincoln Mills* opinion, the Court had quoted substantial portions of the Senate report indicating the purpose of section 301:

If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. *The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement.* Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities in the Federal courts in disputes affecting commerce. (Emphasis added.)¹⁴

⁹ Id. at 203.

¹⁰ Id. at 216 (dissenting opinion).

¹¹ 353 U.S. 448 (1957).

¹² *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

¹³ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

¹⁴ Id. at 454.

The Court also included the following passage from House debate on its version of section 301:

It is my understanding that section [301] the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings in district courts contemplates *not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances*; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract.¹⁵ (Emphasis added.)

The *Textile Workers* case and the *Steelworkers Trilogy* essentially decided (1) that federal courts have the power under section 301 to fashion a body of law to provide both legal and equitable relief to parties in suits for breach of collective bargaining agreements; (2) that arbitration is the favored means of settling differences; and (3) that the courts' power under (1) should be used to effectuate the policy of (2).

Mr. Justice Brennan's dissent in *Sinclair* points up the difficulty encountered by both courts¹⁶ and commentators¹⁷ in attributing full effect either to the Norris-LaGuardia anti-injunction statute or to the concept of full legal and equitable relief apparently available under section 301. The fact is that the two concepts are mutually exclusive—a court does not have full power to grant equitable relief if it does not have the power to issue an injunction. Unless one is to assume—as did Justice Black in *Sinclair*—that, absent an express repeal of its effectiveness, Norris-LaGuardia overrides section 301, then Justice Brennan is correct in calling for an accommodation of the two concepts.¹⁸

¹⁵ Id. at 455-56.

¹⁶ See, e.g., *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967), in which the Court set aside a lower court order "specifically enforcing" an arbitration award which had the effect of enjoining a strike. It appears that the district court sought to achieve the effect of an injunction without specifically denominating the order an "injunction." In view of the facts in the case, it can only be assumed that the district court was seeking to enjoin union activity but that it declined to characterize its order as an injunction for fear of reversal under the doctrine of *Sinclair*. The Supreme Court set aside the order on the theory that it was too vague to be enforced.

¹⁷ See, Gregory, the Law of the Collective Agreement, 57 Mich. L. Rev. 635 (1959); Stewart, No-Strike Clauses In The Federal Courts, 59 Mich. L. Rev. 673 (1961); Rice, A Paradox of Our National Labor Law, 34 Marq. L. Rev. 233 (1951).

¹⁸ It should be noted that the dissenting justices in *Sinclair* apparently have not given up hope of overturning that decision. In *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967), Justice Douglas, concurring in part and dissenting in part, stated, ". . . I feel strongly that [*Sinclair*] caused a severe dislocation in the federal scheme of arbitration of labor disputes[;] I think we should not set our feet on a path that may well lead to the eventual reaffirmation of the principles of that case. . . . [T]here must be an accommodation between the Norris-LaGuardia Act and all other legislation on the books dealing with labor relations." Id. at 78. In the same case, Justice Brennan concurred in the result but wrote a separate opinion em-

Recently, a significant decision was rendered by the Fifth Circuit Court of Appeals which brings into play the alternative forces of Norris-LaGuardia and section 301. In *New Orleans S.S. Ass'n v. General Longshore Workers Local 1418 (Steamship)*,¹⁹ a unanimous bench held that a federal court has jurisdiction to enforce an arbitration award directing the union to desist from further work stoppages. In so doing, the court reversed the district court which had concluded that *Sinclair*, as it interpreted the Norris-LaGuardia Act, prohibited enforcement of an arbitration award where the effect of enforcement would be to enjoin striking.

The contract between the parties contained a no-strike clause, an arbitration clause and a clause empowering the arbitrator to issue a desist order.²⁰ After work stoppages by the union at the port of New Orleans, the employer submitted the matter to arbitration. After a hearing, the arbitrator found that the stoppages had occurred in violation of the contract. He directed the union, its officers, agents and members to "cease and desist from work stoppages in violation of their contract."²¹ Alleging that work stoppages had occurred subsequent to the award, the employer sought an order from the district court enforcing the arbitrator's award. Thus the *Steamship* case came before the Fifth Circuit.

Rather than meet *Sinclair Ref. Co. v. Atkinson* head-on by simply enjoining further striking violative of the arbitrator's award, the court chose

phasizing that the case did not imply that *Sinclair* would determine the applicability of the Norris-LaGuardia Act under the circumstances. *Id.* at 76-77. In *Avco Corp. v. Machinists Aero Lodge 735*, 390 U.S. 557 (1968), Justices Harlan and Brennan joined in the concurring opinion of Justice Stewart, which emphasized that the Court's opinion reserved decision on the effects of *Sinclair* in the circumstances of the case. "The Court will, no doubt, have an opportunity to reconsider the scope and continuing validity of *Sinclair* upon an appropriate future occasion." *Id.* at 562. It appears therefore that at least four Justices are waiting for the opportunity to reconsider *Sinclair*.

¹⁹ 389 F.2d 369, 67 L.R.R.M. 2430 (5th Cir.), cert. denied, 393 U.S. 828 (1968). See Comment, Labor Arbitration and Anti-Injunction: The Case for Accommodation, 10 B.C. Ind. & Com. L. Rev. 898 (1969).

²⁰ The contract provided:

(a) No Strikes—No Lockouts

There shall be no strikes, work stoppages, nor shall there be any lockouts.

(b) Disputes Procedure and Arbitration

The parties accept the principle that any dispute involving the interpretation or application of the terms of this agreement shall be resolved in an orderly and expeditious manner. They commit themselves to the procedure outlined below. Failure by either party to staff and maintain the permanent disputes committee provided for herein and failure to deal with disputes under the disputes procedure shall constitute a violation of this agreement.

....

(d) Either party to a dispute may bypass the procedure leading up to arbitration and obtain arbitration forthwith whenever a violation of sections (a) and/or (b) of this Article shall be alleged. In this event, a notice of such allegation shall be made by telegram to the other party and to the arbitrator. The arbitrator shall hold a prompt hearing within seventy-two (72) hours after receipt of the notice and shall render an award within twelve (12) hours after the hearing. In such case the arbitrator shall make findings of fact concerning the alleged violation and shall prescribe appropriate relief, including an order to desist therefrom."

389 F.2d at 370, 67 L.R.R.M. at 2431.

²¹ *Id.*

to distinguish *Sinclair*. It did so on two grounds. First, *Sinclair* did not involve an arbitration award. "It involved an effort to obtain an injunction to enforce a no-strike clause where strikes were ensuing but where there had been no arbitration. The Supreme Court has not considered the precise question with which we are now concerned."²² Second, the court concluded that it could distinguish *Sinclair* "on the more than semantical ground that there is a real difference between an ordinary injunction and an order enforcing the award of an arbitrator although the end result is the same."²³ Because the parties had agreed to the remedy of a desist order, the "court in enforcing such order or award, although injunctive in nature, would be doing no more than enforcing the agreement of the parties."²⁴

Summing up its conclusions, the court decided that the case did not present a "labor dispute" within the meaning of the Norris-LaGuardia Act. The parties' contractual agreement to submit their differences to an arbitrator having power to issue a desist order removed their remedy of self-help in labor disputes. "Once the arbitration was completed, the matter became ripe for specific performance and fell outside the scope of Norris-LaGuardia."²⁵ Moreover, the court concluded, the logic of the arbitration policy compels this result. Otherwise, a party may successfully bargain for an arbitration clause giving the arbitrator power to issue a desist award, and it may compel the other party to submit to arbitration.

[The court does] not believe in light of the body of law which has grown from § 301 that the law will now say to this party that, having done these things, there is no remedy in the event the opposite party decides to ignore the award of the arbitrator to desist the stoppage. No such result should be imputed to Congress; the Supreme Court did not go so far in *Sinclair*.²⁶

The *Steamship* case accomplishes a division between those cases that come to a court before submission to arbitration and those cases that come to the court after issuance of an arbitral award. The court admits that *Sinclair* precludes an injunction in the former, but finds that the latter situation is more nearly contractual in nature and therefore that an award may be enforced by an order having the effect of an injunction. It may well be asked

²² Id. at 371, 67 L.R.R.M. at 2432.

²³ Id. at 372, 67 L.R.R.M. at 2432-33.

²⁴ Id. The court was also compelled to distinguish its decision in *Gulf & South American Steamship Co. v. National Maritime Union*, 360 F.2d 63, 62 L.R.R.M. 2083 (5th Cir. 1966), which the district court had held to be precedent for dismissal of the employer's suit for enforcement of the arbitration award in *Steamship*. The circuit court explained that *Gulf & South American Steamship* held only that a court could not order enforcement of a cease and desist arbitration award when the arbitrator had exceeded his authority in making the award. Absent contractual authority in the arbitrator to issue a cease and desist award, "the case was nothing more than an effort to obtain a federal injunction to enjoin a work stoppage arising out of a labor dispute." 389 F.2d at 371, 67 L.R.R.M. at 2432. *Sinclair* was seen as direct authority on that issue, and it would prevent the enforcement of the award. The court emphasized that *Steamship* was distinguishable since it was clear that the parties had expressly conferred upon the arbitrator the power to issue a desist award.

²⁵ 389 F.2d at 372, 67 L.R.R.M. at 2433.

²⁶ Id.

whether any substantial difference exists between the two situations. Both actions would be brought on breach of contract theory under section 301. Both actions would seek equitable relief in view of the inadequacy of legal relief and the speculative nature of the damage remedy. In both cases the parties have contractually agreed to arbitrate disputes rather than resort to strikes or lockouts. In short, the dispute seems no less *contractual* in nature where arbitration has taken place than it does where the parties have agreed to arbitrate disputes but where arbitration has not yet occurred.

The *Steamship* court gave added weight to its conclusion that the dispute was purely contractual in nature by reference to the express contractual authority given the arbitrator to issue a desist award. While this circumstance may make the court's enforcement of the desist award somewhat easier in view of the *Sinclair* case, it would seem that the court need not have relied on the existence of such power in the arbitrator. The broader limits of the arbitrator's power in *Steamship* included the power to "prescribe appropriate relief."²⁷ It is submitted that, if the court had power to enforce the award at all, it could have enforced a desist award based solely on this power to prescribe appropriate relief. The inclusion of a clause giving the arbitrator such broad power implies an agreement to settle disputes by awards in the nature of equitable decrees. At least, such a clause implies contractual agreement to enlarge, rather than restrict, the arbitrator's power to make an appropriate award. Since the purpose of arbitration is to avoid the limited forms of relief available in a court of law, it is fair to infer that broad arbitration clause would include the power to issue a desist order.

Whether or not one considers the differences between the *Sinclair* and *Steamship* situations to be substantial, it is apparent that the Fifth Circuit was careful to point out all the distinguishing factors in order to avoid reversal on the basis of a renewed application of *Sinclair* reasoning. The Supreme Court has denied the Longshore Workers' petition for a writ of certiorari,²⁸ and therefore the case stands as settled law within the Fifth Circuit. The circumstances of the case and the convincing opinion of the lower court would not have presented an optimal occasion for the Supreme Court to accomplish a tacit reversal of *Sinclair*. An affirmation of the court of appeals' decision might have resulted in the rubric that a federal court's injunctive power might be employed only after arbitration had occurred. If this result were coupled with the power of the federal courts to compel arbitration already extant under section 301, the net effect would be to overrule *Sinclair*, since an employer would be required merely to bring two court actions—the first to compel arbitration, the other to enforce a desist award—instead of one in order to accomplish the objective unachievable under *Sinclair*. Had the Supreme Court granted the certiorari and reversed on the basis of *Norris-LaGuardia*, it could be assumed that under no circumstances would a federal court be able to enjoin union striking where that union is involved in a "labor dispute." The Court's denial of certiorari avoids both the creation of a cumbersome two-step process of court enforcement implicit in affirmation of *Steamship* and the Draconic exclusion of all federal court jurisdiction in the

²⁷ See note 20 supra.

²⁸ 393 U.S. 828 (1968).

"labor dispute" area implicit in reversal. As Mr. Justice Stewart suggested in *Avco Corp. v. Machinists Aero Lodge 735*,²⁹ "[t]he Court will, no doubt, have an opportunity to reconsider the scope and continuing validity of *Sinclair* upon an appropriate future occasion."³⁰ Unfortunately, *Steamship* did not present that precise opportunity.

2. *The Relationship of State and Federal Court Power to Enforce: Removal to Federal Court.*—Shortly after the Fifth Circuit decided, in *New Orleans S.S. Ass'n v. General Longshore Workers*,³¹ that a federal court had jurisdiction to enforce an injunctive arbitration award, the Supreme Court in a related development decided whether a federal court possessed the power to remove a case originally brought in a state court and resulting there in an injunctive order against a strike. In *Avco Corp. v. Machinists Aero Lodge 735*,³² the Court held that federal courts do possess the power to remove from state courts actions to enjoin breach of collective bargaining agreements.³³ In *Avco* the employer had obtained a state court injunction against union striking which was held to be a breach of the no-strike provision in the contract. The defendant union removed the action to a federal court, whereupon the injunction was dissolved.

The *Avco* decision removed a conflict which had existed between the lower court's holding in the case³⁴ and an opposite conclusion reached three years earlier by the Third Circuit in *American Dredging Co. v. Local 25, Operating Eng'rs*.³⁵ *American Dredging* decided that federal courts did not have power to remove cases from state courts. It did so on the somewhat technical ground that because Section 4 of the Norris-LaGuardia Act³⁶

²⁹ 390 U.S. 557 (1968).

³⁰ *Id.* at 562 (concurring opinion).

³¹ 389 F.2d 369, 67 L.R.R.M. 2430 (5th Cir.), cert. denied, 393 U.S. 828 (1968). See discussion at pp. 820-27 *supra*, and Comment, Labor Arbitration and Anti-Injunction: The Case for Accommodation, 10 B.C. Ind. & Com. L. Rev. 898 (1969).

³² 390 U.S. 557 (1968).

³³ The power of federal courts to remove cases from state courts is governed by 28 U.S.C. § 1441 (1964), which provides in relevant part:

Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties

³⁴ *Avco Corp. v. Machinists Aero Lodge 735*, 376 F.2d 337, 65 L.R.R.M. 2193 (6th Cir. 1967).

³⁵ 338 F.2d 837, 57 L.R.R.M. 2407 (3d Cir. 1964), cert. denied, 380 U.S. 935 (1965).

³⁶ Section 4 of the Norris-LaGuardia Act provides in part:

No court of the United States shall have *jurisdiction* to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

deprived federal courts of *jurisdiction* to issue strike injunctions, a federal court could not have the *original jurisdiction* over the case required by the removal statute.³⁷ Stated otherwise, the removal of a case requires that it appear to a federal court that it had original jurisdiction over the subject matter of the suit. But federal courts have no jurisdiction to enjoin union striking. Therefore the federal court has no original jurisdiction over actions to enjoin striking allegedly in breach of a no-strike contract.³⁸

In opposition to the line of reasoning in *American Dredging*, the Supreme Court in *Avco* concluded that section 301 provided the required basis of *original jurisdiction* over suits for breach of collective bargaining agreements. The injunction prohibition in Norris-LaGuardia is relevant only in the determination of the "nature of the relief available after jurisdiction attaches."³⁹

The importance of *Avco* cannot be overestimated. The anti-injunction provisions of Norris-LaGuardia are not directly applicable to state courts.⁴⁰ State courts may therefore enjoin union striking which federal courts could not enjoin. *Avco* obviates this situation by permitting union defendants to remove cases from state courts in which the strike might be enjoined to federal courts lacking jurisdiction to enjoin such activity.⁴¹

Avco, of course, is not an arbitration case. It is useful to consider it here, however, because it illustrates and partially resolves questions concerning the relative powers of state and federal courts to grant relief in actions for breach of collective bargaining agreements. *Avco* holds that state court

(a) Ceasing or refusing to perform any work or to remain in any relation of employment

29 U.S.C. § 104 (1964) (emphasis added).

³⁷ See note 3 *supra*.

³⁸ A more complete statement of the machinations in this line of reasoning is set out in Janofsky & Vaughn, *The Affirmative Role of State Courts to Enjoin Strikes in Breach of Collective Bargaining Agreements*, 7 B.C. Ind. & Com. L. Rev. 869, 877-81 (1966).

³⁹ 390 U.S. at 561.

⁴⁰ See *McCarroll v. District Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958).

⁴¹ The *Avco* case is perhaps as significant for what it does not hold as for what it does hold. First, because the district court decision did not specify the reasons for ordering dissolution of the strike injunction, the Supreme Court refused to assume that the lower court had considered itself compelled by *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962), to order such dissolution. After removal, a federal court has broad power to dissolve a state court injunction. 28 U.S.C. § 1450 (1964). Such power exists independently of any national labor policy expressed in *Sinclair*. Because of the ambiguity of the original dissolution order, the Supreme Court expressly stated that its affirmance of the removal power in this case could not also be taken as an indication that the district court's dissolution order was required by *Sinclair*. 390 U.S. at 561 n.4. The concurring opinion of Mr. Justice Stewart also states that the Court's decision cannot be taken as a reaffirmation of *Sinclair*. *Id.* at 562.

Second, the Court found it unnecessary to rule on the court of appeals' holding that "the remedies available in State Courts are limited to the remedies available under Federal law." 376 F.2d at 343, 65 L.R.R.M. at 2193. Such a conclusion would suggest that state courts are precluded by Section 4 of the Norris-LaGuardia Act from issuing injunctions in labor disputes, even though the defendant did not exercise his right to remove the case to a federal court. Because the defendant did elect to remove in *Avco*, the Court did not consider the applicability to state courts of remedy limitations imposed on federal courts in breach of contract actions. 390 U.S. at 560 n.2.

actions for breach of contract are removable to federal courts even where the action is brought to enjoin union striking. It appears that this holding would be equally applicable to removal of state court actions to enforce arbitration awards where the effect of the award is to enjoin striking.

Whether a federal court has the power to enforce an arbitral award, the effect of which is to enjoin striking, was considered earlier here in the discussion of *New Orleans S.S. Ass'n v. General Longshore Workers (Steamship)*.⁴² Under the circumstances of that case the Fifth Circuit Court of Appeals concluded that a federal court has jurisdiction to enforce such an award. The case cannot be taken as settling the question, since the Supreme Court merely denied certiorari. If the *Steamship* case does not settle the matter, it may still be important in terms of the court's enforcement power whether an action to enforce an injunctive arbitral award is originally commenced in a state court or in a federal court. A state court would not be constrained by *Norris-LaGuardia* to deny enforcement of such an award,⁴³ whereas a federal court might consider Supreme Court decisions construing *Norris*⁴⁴ to militate against enforcement.

During the current Survey year, the District of Columbia Circuit Court considered a case relating both to the potential disparity in the enforcement powers of state and federal courts vis-à-vis injunctive arbitral awards and to the federal court removal power. In *United Electrical Workers v. NLRB*,⁴⁵ the union charged, among other violations, that the employer had committed an unfair labor practice under Section 8(a)(5) of the Labor-Management Relations Act⁴⁶ in that it refused to bargain in good faith. The basis of the charge consisted of the employer's bargaining to an impasse over a proposed arbitration clause. In particular, the union objected to that part of the provision giving the arbitrator the power to bring an action in the state courts of New York to enforce an order by him against violations of the contractual ban on strikes and lockouts. Under the employer's proposal, in the event that the arbitrator brought such an enforcement action, both union and employer promised not to seek removal to a federal court.

The employer's purpose in making this proposal is readily apparent. It recognized that New York state courts could enforce an injunction arbitral award⁴⁷ and suspected that federal courts could not. It therefore sought to limit enforcement actions to the New York courts. Moreover, the employer may have anticipated the *Avco* ruling,⁴⁸ and hoped to avoid its impact by

⁴² 389 F.2d 369, 67 L.R.R.M. 2430 (5th Cir.), cert. denied, 393 U.S. 828 (1968). *Steamship* is discussed herein beginning at p. 820 supra.

⁴³ See *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958).

⁴⁴ See *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962).

⁴⁵ 409 F.2d 150, 170 L.R.R.M. 2529 (D.C. Cir. 1969).

⁴⁶ 29 U.S.C. § 158(a)(5) (1964). Section 8(a)(5) provides as follows:

It shall be an unfair labor practice for an employer

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this title.

⁴⁷ *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958).

⁴⁸ Collective bargaining between the Electrical Workers and the employer (Star Expansion Industries Corp.) began more than three years before the Supreme Court

gaining the union's contractual agreement not to seek removal of the enforcement action to a federal court.

The unfair labor practice aspects of *Electrical Workers* have received detailed discussion elsewhere in this Survey.⁴⁹ One facet of the court's opinion deserves attention here, however, for it appears to be a significant development in the law concerning collective bargaining for arbitration clauses. The basic question facing the court was whether the employer's refusal to sign a contract not containing its proposed arbitration clause amounted to a refusal to bargain in good faith. The union urged that under the doctrine of *NLRB v. Wooster Div. of Borg-Warner Corp.*,⁵⁰ the employer had violated its duty to bargain in good faith by conditioning its agreement to a contract on acceptance of a company proposal not within the mandatory subjects of collective bargaining under section 8(d)—"wages, hours, and other terms and conditions of employment."⁵¹ The court rejected the union's argument that grievance arbitration procedure was not a mandatory bargaining subject. It cited several opinions indicating that arbitration and no-strike clauses were considered mandatory bargaining subjects.⁵² Furthermore, in view of the "federal policy of promoting industrial peace through a combination of no-strike clauses and effective arbitration provisions, *there can be no question but that such proposals are mandatory subjects of bargaining.*"⁵³ (Emphasis added.)

It is significant to note that none of the cases cited by the court on the question whether an arbitration proposal constitutes a mandatory subject of collective bargaining had been directly concerned with whether an employer could refuse a contract not containing the proposed clause.⁵⁴ The *Electrical Workers* case appears to establish new law in this regard.

The court went further to conclude that the employer had bargained in good faith and thus had not committed a section 8(a)(5) violation. In opposition to the union's contention that the employer's proposed arbitration-removal clause collided with national labor policy, the court could not find that the proposal was so at odds with the national policy as to make the

decision in *Avco*. The employer could therefore have done no more than anticipate the *Avco* ruling.

⁴⁹ See pp. 854-55 *infra*.

⁵⁰ 356 U.S. 342 (1958).

⁵¹ 29 U.S.C. § 158(d) (1964), which, in part, provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .

⁵² 409 F.2d at 156 nn. 9, 10, 70 L.R.R.M. at 2533.

⁵³ *Id.* at 156, 70 L.R.R.M. at 2533.

⁵⁴ *NLRB v. United Nuclear Corp.*, 381 F.2d 972, 66 L.R.R.M. 2101 (10th Cir. 1967); *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 53 L.R.R.M. 2878 (3rd Cir.), cert. denied, 375 U.S. 984 (1963); *NLRB v. Celotex Corp.*, 364 F.2d 552, 62 L.R.R.M. 2475 (5th Cir.), cert. denied, 385 U.S. 987 (1966); *Hughes Tool Co. v. NLRB*, 147 F.2d 69, 15 L.R.R.M. 852 (5th Cir. 1945).

company's motives "patently meretricious."⁵⁵ "The issue is one of the Company's good faith, not its infallibility as a legal prophet."⁵⁶ Finding that the company had demonstrated a willingness to bargain over its proposals, the court was led to the conclusion that the company did not make its arbitration proposals as a means to avoid agreement with the union.

Whether a court would uphold the legality of and enforce a contract provision barring a removal action was not settled in *Electrical Workers*. The decision goes only to the question whether at the time of bargaining the employer could in good faith insist upon such a provision. The *Electrical Workers* bargaining occurred long before the *Avco* decision. Possibly, then, the next court to consider this type of employer proposal will find that it does collide with the national labor policy. In such case, the court may find an absence of good faith bargaining. The proposed arbitration-removal clause surely does conflict with federal labor policy after *Avco*. It seems very unlikely that the next court to consider such a contract proposal would hold that an employer might bargain in "good faith" and yet refuse to reach agreement solely because the union would not embrace the proposal.

The value in discussion of *Electrical Workers* lies not in the hard conclusions available from the decision, but rather in two other respects. First, it is a useful vehicle for examination of the unsettled delineation of the relative powers of state and federal courts to enforce injunctive arbitral awards. Second, it vividly illustrates one means by which an employer sought to avoid the impact of the Norris-LaGuardia anti-injunction rule.

C. NLRB Jurisdiction Concurrent with Arbitration

The case of *Dock Loaders Local 854 v. W. L. Richeson & Sons, Inc.*,¹ decided during the Survey year, has raised a substantial problem regarding the effect of arbitral awards in work-assignment disputes where the NLRB has asserted jurisdiction. W. L. Richeson & Sons, Inc. had maintained a collective bargaining relationship with both the Teamsters Union (Teamsters) and the International Longshoremen's Association (ILA) for over ten years. A loading operation in Richeson's plant had traditionally been performed by members of the Teamsters. After a change in the operation, the ILA informed Richeson that it claimed the loading job. When its claim was rejected, the ILA filed a grievance pursuant to its collective bargaining agreement with Richeson. The result was a determination by the grievance committee awarding the loading job to the ILA. Richeson still refused to assign the work to the ILA. Certain members of the ILA then brought suit under Section 301 of the Labor-Management Relations Act,² alleging that defendant Richeson had breached its collective bargaining agreement with the ILA by its refusal to remove Teamsters members from the disputed jobs and to replace them with ILA members pursuant to the grievance committee decision. Richeson there-

⁵⁵ 409 F.2d at 157, 70 L.R.R.M. at 2534.

⁵⁶ *Id.*

¹ 280 F. Supp. 402, 67 L.R.R.M. 2560 (E.D. La. 1968).

² 29 U.S.C. § 185(a) (1964).

after advised the Teamsters that, in order to protect itself from any liability arising out of the ILA suit, it would not employ Teamsters to perform the disputed work. The Teamsters threatened to strike if they were not permitted to continue performance of the work. The NLRB regional counsel then sought an injunction under section 10(l)³ which resulted in a stipulation by the parties not to engage in acts of picketing pending the outcome of litigation.

In the meantime, Richeson filed an unfair labor practice charge with the NLRB alleging that a jurisdictional dispute existed within the meaning of section 8(b)(4)(ii)(D).⁴ A section 10(k)⁵ hearing was held, and six months later the NLRB issued its decision awarding the work to the Teamsters. The ILA did not thereafter challenge assignment of the work to the Teamsters, but it maintained its section 301 damage action because of Richeson's failure to honor the grievance committee decision.

The federal district court hearing the section 301 suit had to consider whether the NLRB award required the court to deny damages accruing prior to the NLRB decision to ILA members not assigned the disputed jobs despite a grievance committee award requiring such assignment. In short, would the subsequent NLRB award save the employer from answering in damages for his deliberate refusal, in violation of the contract, to honor a grievance committee decision? Finding no specific authority on the question, the court ruled that the employer would not be liable under the circumstances. It relied on dicta in *Carey v. Westinghouse Elec. Corp.*,⁶ in which the Supreme Court stated:

Should the [NLRB] disagree with the arbiter by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's actions had been in accord with that ruling, it would not be liable for damages under § 301.⁷

³ 29 U.S.C. § 160(l) (1964). Section 10(l) provides federal district courts with power to issue injunctions upon application of the regional counsel of the NLRB. Section 10(e) proceedings are limited to those cases in which a party has allegedly engaged in an unfair labor practice under §§ 8(b)(4)(ii)(A), (B), (C) or (D), § 8(e), or § 8(b)(7). Work assignment disputes are covered under § 8(b)(4)(ii)(D) which provides as follows:

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:

. . .
(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

29 U.S.C. § 158(b)(4)(ii)(D) (1964).

⁴ 29 U.S.C. § 158(b)(4)(ii)(D) (1964), quoted in note 3 supra.

⁵ 29 U.S.C. § 160(k) (1964). Section 10(k) empowers the NLRB to award the disputed work to one of the contending unions. See *NLRB v. Radio & Television Broadcast Eng'rs Union*, 364 U.S. 573 (1961).

⁶ 375 U.S. 261 (1964).

⁷ *Id.* at 272.

This statement constituted only dicta because in *Carey* the Court was deciding only whether one of the competing unions could compel arbitration of the work assignment dispute.

The *Carey* case in essence reaffirmed *Smith v. Evening News Ass'n*,⁸ in which the Court had ruled that a party to a collective bargaining agreement might sue for breach of contract under section 301 even though the activity complained of also constituted an unfair labor practice. Having decided in *Smith* that a party could sue for damages, the next logical step was to permit suit to compel arbitration under the same circumstances. The *Carey* decision made this step.

The question left unanswered in *Carey* was the disposition of the arbitral award should the NLRB decision conflict with it. The dicta quoted above comprised the Court's nearest foreshadowing of an answer to that question. The dicta, however, answered only the question of which union would finally perform the work.⁹ It did not decide whether the "precedence" of the NLRB award would excuse the employer from paying damages accrued under an arbitration award which it had refused to honor. The latter question had not been decided prior to the *Dock Loaders* decision.

The *Dock Loaders* rationale concluded that underlying congressional policy required that NLRB decisions take precedence over contractual arbitration:

If the parties were free to race to the forum, one to the arbitrator and the other to NLRB, there is the counter risk that the party who successfully reached arbitration first would imperil the effectiveness of the statutory remedy by making an employer liable in damages even when his position had been correct under the standards considered appropriate by the NLRB pursuant to its statutory mandate.¹⁰

The court found that a conflict existed between a national labor policy encouraging arbitration and a policy requiring resolution of jurisdictional disputes by the NLRB. When these policies conflict, one must yield. The court properly concluded that it would be inconsistent to subject the party whose cause has prevailed in a final judgment under a statutory procedure to liability for damages occasioned while it was seeking its statutory remedy.

The *Dock Loaders* decision seriously undermines the practical effect

⁸ 713 U.S. 195 (1962).

⁹ See *New Orleans Typographical Union*, 147 N.L.R.B. 191, 56 L.R.R.M. 1169 (1964), aff'd, 368 F.2d 755, 63 L.R.R.M. 2467 (5th Cir. 1966). See also *Smith Steel Workers*, 174 N.L.R.B. No. 41, 70 L.R.R.M. 1145 (1969). In *Smith* the majority of the Board found that the dicta in *Carey v. Westinghouse Elec. Corp.* confirmed the power of the Board to make a final determination in a unit clarification decision. Upon petition by the employer, the Board had redefined bargaining units at the employer's plant. One union that lost membership as a result of the regrouping requested the employer to bargain over matters pertaining to the lost employees. Meeting resistance from the employer, the union brought a § 301 suit to compel arbitration of the matters. The trial examiner found, and the Board confirmed, that the union had committed a § 8(b)(3) violation in its insistence that the employer bargain with the union over employees who were no longer part of its bargaining unit.

¹⁰ 280 F. Supp. at 405, 67 L.R.R.M. at 2562.

of the Supreme Court's holding in *Carey* that the employer may be required to arbitrate a work assignment dispute. No value lies in the union's ability to compel the employer to arbitrate the disputed work assignment if the union cannot recover damages for the employer's refusal to honor the arbitral award. To protect itself from liability to one of the two competing unions, the employer may now seek the cover of the statutory procedure by obtaining an NLRB award.

The question is raised, therefore, whether arbitration will continue to be a useful method for settlement of work assignment disputes. The answer would seem to be that bilateral arbitration between the employer and one of the competing unions can no longer be useful. In the *Dock Loaders* situation, for instance, the arbitration took place between the employer and the ILA. The Teamsters were not even represented. It is unlikely that the ILA-Employer grievance committee would award the disputed work to the unrepresented Teamsters. The NLRB will "voluntarily withhold its . . . authority to adjudicate alleged unfair labor practice charges involving [arbitrable matters], unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act."¹¹ The NLRB surely would not defer to an arbitral award where one of the unions had not been represented.

If arbitration is to continue to be useful in this area, a process of tri-lateral arbitration will be necessary.¹² Under this procedure the employer and both competing unions may submit the work-assignment dispute to a single arbitral body. Its decision should settle the matter. Because all interested parties would have been represented in the arbitration proceedings, the NLRB might be persuaded to withhold its authority to adjudicate the jurisdictional dispute.

V. SECTION 301 SUITS

A. *Right of an Individual Employee to Sue*

During the current Survey year few significant cases were decided with regard to the right of an individual to bring suits against his employer, his collective-bargaining representative, or both. For the most part, the significance of those recent cases considered here lies in their interpretation and application of principles set out by the Supreme Court in *Humphrey v. Moore*¹ and *Vaca v. Sipes*.² This discussion will consider first, individual suits against employers, and second, individual suits against unions. The following material will indicate that the law governing the individual employee's right to sue his employer has developed to the point

¹¹ International Harvester Co., 138 N.L.R.B. 923, 927, 51 L.R.R.M. 1155, 1157 (1962).

¹² See Jones, An Arbitral Answer to a Judicial Dilemma: The *Carey* Decision and Trilateral Arbitration of Jurisdictional Disputes, 11 U.C.L.A.L. Rev. 327 (1964).

¹ 375 U.S. 335 (1964).

² 386 U.S. 171 (1967).

where some definite guidelines can be relied upon. Among these are the inherent power of the individual to sue for breach of contract³ under Section 301 of the Labor-Management Relations Act,⁴ tempered by the requirements that he attempt to obtain available remedies under the contract grievance procedure,⁵ and that he be fairly represented by his union in the grievance proceeding.⁶

A lesser degree of certainty prevails in the area of individual suits against collective-bargaining representatives. The representative clearly has a duty to represent each member of the bargaining group fairly⁷ and a group member may obtain relief for his representative's failure to fulfill that duty.⁸ Still in doubt, however, are the nature of the relief available and the basis upon which it is predicated. Three different bases have been evident: (1) an unfair labor practice charge for which the NLRB may make an appropriate corrective order;⁹ (2) a suit for damages based on an alleged breach of the judicially developed duty of fair representation;¹⁰ (3) a suit for damages brought under section 301 either directly against the union¹¹ or as an ad-

³ *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

⁴ 29 U.S.C. § 185 (1964), of which part (a) reads as follows:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, 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.

⁵ *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). See also *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 62 L.R.R.M. 2389 (5th Cir. 1966), in which the court decided that a final determination by union and management under the grievance procedure may operate to deprive the employee of his right to sue in court.

⁶ *Vaca v. Sipes*, 386 U.S. 171 (1967); 1966-1967 Annual Survey of Labor Relations Law, 8 B.C. Ind. & Com. L. Rev. 771, 835 (1967).

⁷ *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

⁸ *Humphrey v. Moore*, 375 U.S. 335 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

⁹ See *Miranda Fuel Co.*, 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). But see *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12, 63 L.R.R.M. 2395 (5th Cir. 1966); *Vaca v. Sipes*, 386 U.S. 171, 198 (1967) (concurring opinion).

¹⁰ See the concurring opinion of Mr. Justice Goldberg in *Humphrey v. Moore*, 375 U.S. 335, 351 (1964), in which he wrote:

I concur in the judgment and in the holding of the Court that since "Moore has not . . . proved his case . . .," the decision below must be reversed. . . . I do not, however, agree that Moore stated a cause of action arising under § 301(a). . . . It is my view rather that Moore's claim must be treated as an individual employee's action for a union's breach of its duty of fair representation—a duty derived not from the collective bargaining contract but from the National Labor Relations Act. . . .

¹¹ See *Humphrey v. Moore*, 375 U.S. 335 (1964), in which a union member brought an action to enjoin implementation of a decision of a management-bargaining representative committee to dovetail seniority lists. The court stated that

[T]his action is one arising under § 301 . . . and is a case controlled by federal law. . . . [T]he complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts

junct to a 301 suit against the employer.¹² The cases to be considered below are illustrative of current judicial thought as to the appropriate causes of action and types of relief available to the individual employee.

Vaca v. Sipes,¹³ decided by the Supreme Court in 1967, has become the touchstone for judicial consideration of individual suits against the employer as well as individual suits against the union. In *Vaca* an employee was discharged by the employer on the ground that he was medically unfit to continue working. The employee sought to use the union grievance procedure, and the union processed the grievance up to the point of submission to arbitration. The union refused to proceed further because its doctor concurred in the opinion of the company doctor that the employee was medically unfit to continue working. At this point the employee brought two suits in state court—one against the union, and one against the employer—for damages for wrongful discharge.

The suit against the union eventually found its way to the Supreme Court. The union had defended on the ground that the courts had no jurisdiction because the charge was arguably an unfair labor practice subject to the exclusive jurisdiction of the NLRB. The lower court overturned a jury verdict for the plaintiff-employee on that ground, but the Supreme Court of Missouri reversed and reinstated the jury verdict. Although the Supreme Court reversed the latter state court decision because it had applied the wrong standard of union conduct,¹⁴ the Court upheld the Missouri court's ruling that the cause of action was within the jurisdiction of both state and federal courts.

The issue whether the courts are precluded from consideration of suits by employees against their collective bargaining representatives by the *Garmon*¹⁵ preemption doctrine has received treatment elsewhere in this Survey.¹⁶ It will suffice to mention here that the Court concluded that state and federal courts are not precluded from deciding cases involving such employee suits. In support of this conclusion the Court stated:

A primary justification for the preemption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not

Id. at 343-44.

¹² See *Vaca v. Sipes*, 386 U.S. 171 (1967).

¹³ 386 U.S. 171 (1967).

¹⁴ The state court had ruled, in effect, that the union's failure to proceed to arbitration was wrong if the evidence showed that the plaintiff-employee was wrongfully discharged. The Supreme Court disagreed with this standard since it would make the union liable if, after the union's decision not to proceed to arbitration, a judge or jury decided that the employee's grievance was meritorious. The proper standard of union conduct, concluded the Court, was whether the union had been "arbitrary, discriminatory, or in bad faith" in processing the employee's grievance. 386 U.S. at 190.

¹⁵ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). The Court stated there: "When an activity is arguably subject to § 7 or § 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." Id. at 245.

¹⁶ See pp. 789-95 *supra*.

applicable to cases involving alleged breaches of the union duty of fair representation.¹⁷

The decision on this issue left the Court uncommitted as to whether an action by an employee against his union for breach of the duty of fair representation is an unfair labor practice as the NLRB¹⁸ and two circuit courts¹⁹ have held. The Court decided only that courts had jurisdiction over such causes of action whether or not the NLRB may also have unfair labor practice jurisdiction.

Having decided that courts are competent to hear the employee's suit against his union, the Court approached what must be considered the central issue in the case: "The problem . . . is to determine under what circumstances the individual may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures."²⁰ The emphasis of Mr. Justice White's majority opinion thus shifted from the employee's suit against his union—the only one of the plaintiff's two suits that reached the Court—to a general discussion of the conditions under which the employee might obtain judicial review of his claims against the employer.²¹ From this discussion most of the recent cases in this area draw their conclusions.

Under the doctrine of *Republic Steel Corp. v. Maddox*,²² the Court pointed out, an employee could not seek judicial review of his grievance unless he had at least attempted to exhaust exclusive grievance and arbitration procedures established in the bargaining contract. Because these contractual remedies are devised and controlled by the union and the employer, they could prove unworkable for the individual employee. The question arises as to when the employee could have his case heard by a court even though denied relief by the contract grievance machinery. The most obvious situation is that where the employer repudiates those procedures.²³ In addition, said the Court, "we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon

¹⁷ 386 U.S. at 180-81.

¹⁸ *Miranda Fuel Co.*, 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).

¹⁹ *Truck Drivers Local 568 v. NLRB*, 379 F.2d 137, 65 L.R.R.M. 2309 (D.C. Cir. 1967); *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12, 63 L.R.R.M. 2395 (5th Cir. 1966).

²⁰ 386 U.S. at 185.

²¹ In a concurring opinion joined by Chief Justice Warren and Justice Harlan, Justice Fortas stated: "I regret the elaborate discussion in the Court's opinion of problems which are irrelevant. This is not an action by the employee against the employer, and the discussion of the requisites of such an action is, in my judgment, unnecessary." *Id.* at 199-200. The majority opinion itself commenced by stating: "We granted certiorari to consider whether exclusive jurisdiction lies with the NLRB and, if not, whether the finding of Union liability and the relief afforded . . . [the plaintiff-employee] are consistent with governing principles of federal labor law." *Id.* at 174. It would seem that the Court had already decided this much by the time it came to consider the employee's rights against the employer.

²² 379 U.S. 650 (1965).

²³ 386 U.S. at 185, citing *Drake Bakeries, Inc. v. Local 50, Bakery Workers*, 370 U.S. 254, 260-63 (1962).

the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance."²⁴ An employee's suit against his employer is no less a section 301 action because the employee must prove a breach of duty by the union in order to have standing. "The court is free to determine whether the employee is barred by the actions of his union representative, and, if not, to proceed with the case."²⁵ The employee might join both the employer and the union. "The action is still a § 301 suit. . . ."²⁶

The Court had thus come to the point of permitting an employee suit against the employer if the union had breached its duty of fair representation by its failure to invoke the higher stages of the grievance procedure. Many situations would arise in which a court would be required to pass upon whether a breach of the union's duty had occurred in the context of a section 301 action against the employer, and in such cases the court would have to fashion appropriate remedies.²⁷ "The governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each."²⁸

Insofar as the theory of union liability is concerned, *Vaca v. Sipes* apparently retreats from the *Humphrey v. Moore* decision that a suit for breach of the duty of fair representation is a section 301 action.²⁹ *Vaca* would require at least a concurrent 301 action against the employer in order to adjudicate the union's breach of duty.³⁰ No indication exists that the Court would entertain an employee action solely against his union grounded on a section 301 breach of contract theory.

1. *Individual Suit Against Employer*.—The district court considering *Rivera v. NMU Pension Plan*³¹ was required to interpret and apply the principles of *Vaca v. Sipes*. Plaintiff-employee brought suit under section 301 against her former employer seeking reinstatement, back pay and damages. According to plaintiff's complaint, the employer had violated the collective bargaining agreement by dismissal of plaintiff without sufficient warning or the required two-week notice.³² Plaintiff further alleged that, although the contract provided for a grievance procedure and arbitration, she was advised not to press her claim and was not given an opportunity to appear at a hearing as provided in the contract. Plaintiff's poorly drafted complaint concluded "that said [union?] acts constitute unfair representa-

²⁴ 386 U.S. at 186.

²⁵ *Id.* at 187.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 197.

²⁹ See note 12 *supra*.

³⁰ 386 U.S. at 186.

³¹ 288 F. Supp. 874, 69 L.R.R.M. 2249 (E.D. La. 1968).

³² Article VII B of the contract provided:

The employer agrees not to dismiss any worker except for just and sufficient cause. Employees shall receive two (2) weeks notice before being discharged. No employee shall be dismissed for cause unless he has received sufficient warning of such dismissal within a reasonable period prior to receiving notice of discharge, except in cases of an extremely serious or flagrant nature.

tion, and entitles [*sic*] her to redress against the defendant herein [*i.e.*, the employer]."³³ Plaintiff did not join her union as a defendant nor did she even mention it by name. The employer submitted uncontroverted affidavits showing that a meeting was held between representatives of the employer and of the union, and that these representatives agreed that plaintiff's discharge was for just cause. Defendant employer moved to dismiss the complaint for failure to state a cause of action and, alternatively, for a summary judgment.

The court was faced with a difficult problem. It had, on the one hand, a claim lodged against the employer for wrongful discharge violative of the collective bargaining agreement. On the other hand, there was uncontroverted evidence that management and union had conferred and agreed that plaintiff-employee's discharge was for just cause. Moreover, even though plaintiff's complaint contained a vague statement about "unfair representation," it did not join the union as a defendant, nor did it even mention the union by name. The issue was whether, under the doctrine of *Vaca v. Sipes*, the plaintiff had stated a cause of action against the employer (as opposed to the union), and, if so, whether the management-union agreement that the discharge was proper amounted to the sort of grievance procedure finality³⁴ entitling the employer to summary judgment.

First, the court considered whether plaintiff had stated a cause of action against the employer. It noted that the Supreme Court in *Vaca* had "endorsed the right of an employee in certain situations to sue his employer without joining the union on a claim based on the collective bargaining agreement. . . ."³⁵ In order to gain relief against the employer under *Vaca*, the *Rivera* court thought that plaintiff must allege and prove "a breach of the collective bargaining agreement by the employer and a breach of the statutory duty of fair representation by the union."³⁶ The complaint had alleged a breach of contract by the employer and, if the most liberal construction possible were adopted,³⁷ it had alleged a breach of duty by the union since it had mentioned "unfair representation" which could result only through union conduct.³⁸ Therefore, though technically deficient, the complaint had put the defendant employer on notice of plaintiff's claim, and it would not be dismissed for failure to state a cause of action.

As to whether plaintiff's claim should have been directed toward her union rather than the employer, the court noted that "[u]ndoubtedly, the employee does have a remedy against the union."³⁹ It was obvious, however,

³³ 288 F. Supp. at 876, 69 L.R.R.M. at 2250.

³⁴ See *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 62 L.R.R.M. 2389 (5th Cir. 1966).

³⁵ 288 F. Supp. at 876, 69 L.R.R.M. at 2250.

³⁶ *Id.* at 877, 69 L.R.R.M. at 2251.

³⁷ On the question whether plaintiff's complaint sufficiently alleged a breach of duty by the union, the court stated: "[W]e feel that the complaint can be construed to fall within the outermost bounds of Federal Rule of Civil Procedure 8(a)(2). The complaint does allege unfair representation, and unfair representation can result only through union conduct." *Id.* at 878, 69 L.R.R.M. at 2252.

³⁸ See note 37 *supra*.

³⁹ 288 F. Supp. at 878, 69 L.R.R.M. at 2251.

that plaintiff was not seeking redress against her union. She was seeking relief which the union could not give her, namely, reinstatement by the employer.

Further, it would be unrealistic to suppose that an order compelling the union to fairly represent the employee in the grievance procedures would suffice. It smacks against common sense to believe that a judicial declaration is capable of erasing the acrimony, bias, prejudice or other feeling that may have infected the union-employee relationship.⁴⁰

Regarding the second aspect of defendant's motion—that for summary judgment—the court pointed out that a controversy still existed as to whether the union representatives acted unfairly in their representation of the plaintiff. If such unfairness had occurred, then the grievance proceeding which affirmed plaintiff's discharge would not be binding on the court. Because this important issue of fact was yet to be decided, the court refused to grant summary judgment.

It is useful to consider here some of the points which the *Rivera* court adopted from *Vaca*. First, it pointed out that absent unfair representation by the union, the contract grievance procedure determination would be binding on the individual employee. Second, there is no requirement that the plaintiff-employee join the union as a defendant. However, in order to gain relief against the employer, the employee must allege and prove both a breach of contract by the employer and a breach of the duty of fair representation by the union. Finally, the court touched upon one of the difficult problems only partially resolved in *Vaca*: the overall question of the form of relief sought, the relative liability of union and management, and the apportionment of damages. The *Rivera* court disposed of this aspect of the case with relative ease, since it was called upon only to decide whether plaintiff had stated a cause of action against the employer. The court recognized, however, that the union, as well as the employer, might be liable to the employee and that the employee could seek different forms of relief from each party. Correlatively, neither union nor management would be liable for damages caused by the other.

While the *Rivera* court was combing the plaintiff-employee's complaint to see whether the requisite claim of unfair union representation was present, the Third Circuit, in a similar case, appears to have gone one step farther. In *Rothlein v. Armour & Co.*⁴¹ the court reversed the lower court's summary judgment for the employer on the ground that, although the plaintiff-employees had not alleged unfair representation in their complaint, the facts adduced at a trial on the merits *might* show that the union had breached its duty.

Plaintiff-employees brought a class action on behalf of 86 members of the bargaining unit against the employer under section 301. They sought an accounting and payment of amounts allegedly owed them under a pension plan. The "Armour" plan had been initiated as part of a collective bargain-

⁴⁰ Id. at 877-78, 69 L.R.R.M. at 2251.

⁴¹ 391 F.2d 574, 68 L.R.R.M. 2109 (3d Cir. 1968).

ing agreement signed in 1952. In 1964 the union obtained the employer's agreement to make payments to a different pension plan maintained solely by the union. The 1964 agreement said nothing about the amounts contributed by the employer to the Armour plan. The company submitted affidavits showing that during negotiations for the 1964 plan the union agreed that all employees would withdraw from and cease to have any interest in the Armour plan.

The company defended on the ground that the binding grievance procedure had been exhausted and that the management-union grievance committee had concluded that the employees had no interest in the Armour plan. While the district court held that the grievance committee determination was final and binding on the court,⁴² the circuit court found that substantial issues of fact remained for court consideration. Most important was the question whether the grievance concerning the Armour plan should have been decided under the 1964 contract grievance procedure or whether the original 1952 contract procedure was appropriate. The court further instructed the district court:

[B]efore a district court should accept a contractual "merits" determination as a basis for granting summary judgment under Section 301, the judge should be satisfied that the quality of the contractual grievance procedures, in actual practice and "legally," is commensurate with the substantiality of the claim or dispute presented by the employee. If the procedures suffer because a union is in breach of its duty of fair representation, clearly the individual should have recourse to the courts.⁴³

The circuit court pointed out the possibility that a unity of interest may have existed between the company and the union in negotiations for the 1964 pension plan agreement. For instance, the company might have demanded lower payments to the new plan if it were not permitted to contribute amounts accumulated under the Armour plan. The union might side with the company in an attempt to keep payments to its pension plan as high as possible. If in fact this unity of interest existed, the plaintiff-employees might have a basis for proving a breach of the duty of fair representation and thus for overturning the otherwise "final" grievance committee determination.⁴⁴

As was indicated at the outset of this discussion, the significance of *Rivera* and *Rothlein* does not lie in deviation from prior law in the area of individual suits against the employer. Rather, they represent a consolidation of prior law. *Rivera* concentrated on the allegations by a plaintiff necessary in order to come within the terms of *Vaca v. Sipes*. It found that the employee would not suffer a summary judgment so long as there remained

⁴² The district court relied on *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 62 L.R.R.M. 2389 (5th Cir. 1966). The *Haynes* case is discussed at length in 1966-1967 Annual Survey of Labor Relations Law, 8 B.C. Ind. & Com. L. Rev. 771, 830-34 (1967).

⁴³ 391 F.2d at 580, 68 L.R.R.M. at 2113.

⁴⁴ *Id.*

sufficient allegation and question of unfair representation by his union. *Rothlein* elaborated upon essentially the same question but took a somewhat bolder approach in that it did not require an allegation of unfair representation where the available evidence indicated the possibility of its existence. Both cases reveal the tendency of the judiciary to scrutinize carefully those grievance proceedings which under the contract would result in a "final" determination of the employee's rights.

2. *Individual Suit Against Union*.—The tendency of recent decisions to interpret and refine cases in the area of private suits against employers is paralleled by the past year's developments in the individual's right to sue his collective bargaining agent. The two cases to be considered below are directed toward an answer to questions raised in the Supreme Court's decisions in *Vaca v. Sipes* and *Humphrey v. Moore*.

The employee claim in *Humphrey v. Moore*⁴⁵ arose from a situation in which one employer was forced to absorb another. A joint management-union committee was assigned the task of dovetailing employee lists of the two former employers. As a result of the committee's decision, Moore was discharged. Moore brought an action claiming that his exclusive bargaining agent had deceived him concerning his rights to a job and to seniority and had combined with the employees of the other employer and the International union to deprive him of his employment rights. The Supreme Court held that the allegations were sufficient to charge a "breach of duty by the union,"⁴⁶ and that "this action is one arising under § 301 of the Labor Management Relations Act."⁴⁷

There was—and still is—considerable doubt whether Moore's action against the union actually arose under section 301. Mr. Justice Goldberg's concurring opinion stated his belief that the claim should be treated as an individual employee's action for breach of the union's duty of fair representation, not as a 301 suit.⁴⁸ One commentator suggested that *Humphrey* meant either (1) that when a valid 301 cause of action is alleged, the fair representation issue may be litigated in the nature of ancillary jurisdiction, or (2) that 301 "includes the fair representation claim when it is alleged that such unfair representation has resulted in a breach of contract."⁴⁹ *Humphrey* has also been viewed as a rather hastily fashioned pronouncement by the Court to insure that the judiciary would retain jurisdiction over an employee's claims against his union in the face of NLRB decisions to the effect that such claims were in the nature of unfair labor practice charges.⁵⁰ Whatever may have been the Court's underlying rationale in *Humphrey*, the case still contained inescapably clear language declaring that an individual employee's suit against his bargaining representative for breach of the duty of fair representation stated a cause of action under section 301.

⁴⁵ 375 U.S. 335 (1964).

⁴⁶ *Id.* at 343.

⁴⁷ *Id.*

⁴⁸ *Id.* at 351. See note 10 *supra*.

⁴⁹ Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 Mo. L. Rev. 373, 387 (1965).

⁵⁰ 8 B.C. Ind. & Com. L. Rev. 771, 839 (1967).

Earlier discussion noted that in *Vaca v. Sipes* the Court appeared to retreat from its position in *Humphrey*. *Vaca* affirms the employee's right of recovery against the union for breach of the duty of fair representation in a 301 suit. But *Vaca* limits the employee's right to bring a claim against his union to those situations in which the union has unfairly represented the employee in the assertion of contractual rights against the employer—a party against whom the employee clearly has a 301 cause of action. To reach the union under this 301 jurisdiction, the employee must at least bring a concurrent 301 suit against the employer. The claim against the union is cognizable under 301 simply because the employee must explain to the court why, after he has exhausted his contractual grievance remedies, he must seek the court's assistance. That reason, of course, is the union's breach of duty. Under *Vaca* the court may then apportion damage liability between the employer and the union.

During the current Survey year, the District Court for the Northern District of California had an opportunity to consider the implications of *Humphrey* and *Vaca*. In *Hall v. Pacific Maritime Ass'n*⁵¹ the plaintiff-employee alleged that a joint management-union committee decision depriving plaintiff of his job was the result of a conspiracy between management and union. The committee's decision proceeded from a complaint brought to it after plaintiff fought with two other union members over work procedures to be used in unloading a ship. The other union members complained to the committee that plaintiff had assaulted them with a deadly weapon. Plaintiff theorized that the committee decision was unfavorable to him because of union pressure to expel him, since one of the two persons with whom he had fought was the brother of a high union official.

Though the action was brought against both union and employer, the emphasis lay in the claims against the union. Thus, the case was very similar to the situation in *Humphrey v. Moore*. In deciding the nature of the claim presented, however, the court did not come to the conclusion reached in *Humphrey*, that the claim against the union was a section 301 "violation of contract" action. Rather, the court concluded that

[t]he allegation that management joined in an unfair and discriminatory plot to deregister plaintiffs alleges a breach of the collective bargaining agreement ⁵²

while

[p]laintiffs' allegation that the union initiated the complaint and joined in the action of the Joint Port Committee with unfair and arbitrary intent states a cause of action against the union which is the breach of its statutory duty to fairly represent its members in any such proceeding.⁵³

What the court appears to conclude is that even where management-union complicity is alleged, the statutory basis giving rise to those claims is dif-

⁵¹ 281 F. Supp. 54, 67 L.R.R.M. 2756 (N.D. Cal. 1968).

⁵² Id. at 59, 67 L.R.R.M. at 2759.

⁵³ Id.

ferent vis-à-vis each of the defendants. A section 301 breach of contract action will lie against the employer, while a right of recovery against the union must be predicated upon breach of its statutory duty of fair representation.

It is submitted that the *Hall* court's decision is correct. Although the majority opinion in *Humphrey v. Moore* indicated that claims against the union were 301 actions, the Court in *Vaca v. Sipes* implicitly rejected this possibility. The court in *Hall* has drawn upon *Vaca* to bifurcate the bases of relief against union and management. This bifurcation gives recognition to the contractual relationship existing between employer and employee on the one hand, and the representational relationship between union and employee on the other. If *Hall* represents current judicial thinking in the wake of *Vaca*, it would appear that the courts have achieved a proper formulation of the relationships which employer and union bear to the individual employee.

In a similar decision during the past year, the Third Circuit Court of Appeals further diminished the vitality of *Humphrey v. Moore*. In *Nedd v. United Mine Workers*,⁵⁴ retired coal miners brought an action, which they claimed was based on section 301, solely against the union. The plaintiffs alleged that the union had failed to require mine operators to contribute "royalty" payments to trustees of the United Mine Workers Health and Welfare Fund as required by the collective bargaining contract between the operators and the union. Alleging that the mine operators' contributions were more than ten million dollars in arrears, plaintiffs sought a judgment against the union for the amount of the arrearages. The lower court had denied defendant union's motion for summary judgment, and defendant brought the case to the circuit court on interlocutory appeal.

Plaintiffs had invoked federal jurisdiction under section 301 on the theory that theirs was a suit for violation of a contract between an employer and a labor organization. The circuit court rejected section 301 as a basis of federal jurisdiction over an individual employee's suit against his union representatives. The court recognized that the conduct attributed to the union "may well constitute a breach of the union's equitable duty as a fiduciary representative of employees to act in their interest, fairly and in good faith . . ."⁵⁵

But this responsibility arises out of the union-employee relationship and pervades it. It is not created by any contract between union and employer although the bargaining for and the administration of such a contract may supply the context in which the obligation inherent in representative status controls the representative's conduct. Accordingly, though the administration of a labor contract provided an occasion upon which the union's preexisting obligation to serve the plaintiffs came into play, we think that the union's failure to act, wrongful though it may have been, was not "a violation of [a] contract between an employer and labor organization,"

⁵⁴ 400 F.2d 103, 68 L.R.R.M. 3012 (3d Cir. 1968).

⁵⁵ *Id.* at 105, 68 L.R.R.M. at 3014.

the only type of wrong which section 301(a) brings within federal jurisdiction.⁵⁶

Because plaintiffs had not asserted a viable basis upon which to rest federal court jurisdiction, the court vacated the lower court order denying summary judgment. The court preserved the right of the plaintiffs to amend their complaint to state a claim based on the union's breach of its duty of fair representation.

The *Nedd* court cited *Vaca v. Sipes* as support for the conclusion that plaintiffs had not stated a claim cognizable under section 301. It found in *Vaca* reasoning that "though the employer might be guilty of a breach of the labor contract, the wrong charged to the union was not a violation of the contract but rather a breach of its duty [of fair representation]. . . ."⁵⁷ Drawing upon this line of reasoning, the court in *Nedd* decided that section 301 would not support an individual employee's action brought solely against his union. In turn, the decision in *Nedd* lends support to the conclusion reached here that *Vaca* must be interpreted as permitting relief against the union under 301 only where that 301 suit is brought against the employer.⁵⁸

B. Injunctive Remedial Powers Under Section 301

1. *State Court Power to Enjoin Union Strikes.*—State courts continue to operate outside the ambit of the Norris-LaGuardia Act and may, therefore, enjoin union striking in breach of a no-strike collective bargaining agreement. As discussed earlier, federal courts are precluded from enjoining such strikes by the Supreme Court's application of Norris-LaGuardia to this situation in *Sinclair Ref. Co. v. Atkinson*.¹ The Supreme Court has not had occasion to decide whether, in the context of a section 301 breach of contract suit, the remedial power limitations imposed on federal courts are also imposed on state courts. Cases and commentators have arrived at different conclusions in their efforts to determine in advance of a Supreme Court decision whether the state courts' power is so restricted.² Because there has been extensive discussion of this topic elsewhere, it is sufficient to note here that in each of three state court decisions during the past year, the court has reaffirmed its power to enjoin union striking.³

⁵⁶ Id. at 106.

⁵⁷ Id.

⁵⁸ See p. 838 *supra*.

¹ 370 U.S. 195 (1962). Discussion of *Sinclair* and related decisions commences at p. 820 *supra*.

² See cases and commentary cited in 1965-1966 Annual Survey of Labor Relations Law, 7 B.C. Ind. & Com. L. Rev. 909, 928 (1966). In addition, compare the Sixth Circuit's blanket pronouncement in *Avco Corp. v. Machinists Aero Lodge 735*, 376 F.2d 337, 65 L.R.R.M. 2193 (6th Cir. 1967), that state courts were prohibited by Norris from enjoining union striking, with the Supreme Court's decision in the same case in which the court expressly reserved decision on that question, 390 U.S. 557, 560 n.2 (1968).

³ *International Longshoremen's Ass'n v. Producers Grain Corp.*, 437 S.W.2d 33, 70 L.R.R.M. 2375 (Tex. Civ. App. 1969); *Rust Eng'r Co. v. United Bhd. of Carpenters & Joiners*, 210 So. 2d 154, 69 L.R.R.M. 2115 (La. 1968); *Millwrights Local 2484 v. Rust Eng'r Co.*, 424 S.W.2d 283, 68 L.R.R.M. 2340 (Tex. Civ. App. 1967).

The Supreme Court's decision in *Avco Corp. v. Machinists Aero Lodge 735*⁴ during the current Survey year appears to have rendered academic the entire question whether state courts may enjoin strikes in breach of a no-strike contract. *Avco* has been discussed at length earlier in this Survey.⁵ The Court held in *Avco* that federal courts may remove from state courts actions to enjoin breaches of collective bargaining agreements. More specifically, the Court affirmed a lower court decision in which an employer's action to enjoin striking was removed to the federal court whereupon the state-issued injunction was dissolved. The law is, then, that state courts may enjoin striking in breach of the bargaining agreement; however, state courts may be deprived of this power when the union elects to remove the action to a federal court.

2. *Power to Enjoin Plant Removal.*—Two cases arising during the current Survey year considered the novel question whether a court may enjoin an employer from closing his plant when the union alleges that such closing would constitute a breach of the collective bargaining agreement. Both decisions affirm the view that courts possess the power to enjoin plant closings in such circumstances.

In *UAW v. Hamilton Beach Mfg. Co.*,⁶ the union brought a section 301 action in a state court alleging that the employer breached the collective bargaining agreement between the parties by a threatened plant removal to another state. The basis of the alleged breach was a clause in the agreement authorizing the union's members to perform certain jobs in the production operation and conferring seniority ratings on union members. The union contended that the plant removal would deprive union members of job and seniority rights and thus would constitute a breach of contract. The union sought damages and an injunction restraining the company from moving. The trial court sustained defendant-employer's demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

On appeal, the Wisconsin Supreme Court decided, first, that, as to the union's action for an injunction, "it is our opinion that the courts, both federal and state, do have jurisdiction by virtue of sec. 301(a)."⁷ The court considered itself competent to enjoin the plant closing if the shutdown would violate the contract.

On the issue whether the closing would constitute a breach of contract, the court reviewed the basis upon which the trial court had found the complaint deficient. Unlike the trial court, the supreme court did not consider it necessary for the union to allege that the threatened shutdown would be an unfair labor practice.⁸ Citing *Smith v. Evening News Ass'n*,⁹ the court pointed out that actions founded in breach of the collective bargaining agree-

⁴ 390 U.S. 557 (1968).

⁵ See pp. 827-29 *supra*.

⁶ 40 Wis. 2d 270, 162 N.W.2d 16, 69 L.R.R.M. 2563 (1968).

⁷ *Id.* at 277, 162 N.W.2d at 20, 69 L.R.R.M. at 2565.

⁸ *Id.* at 278, 162 N.W.2d at 20, 69 L.R.R.M. at 2565.

⁹ 371 U.S. 195 (1962).

ment may be brought independently of any unfair labor practice charges. The court agreed with the trial court, however, that in the absence of an explicit contract provision limiting the employer's right to close the plant, no such provision would be inferred. The contractual provisions relied upon by the union—those relating to job specification and seniority rights—were considered insufficient to show that the company had bargained away its right to decide the location of production facilities.¹⁰ Consequently, the lower court's order sustaining defendant's demurrer was affirmed.

An injunction was issued prohibiting an employer from closing a distribution facility in the case of *Local 328, Teamsters v. Armour and Co.*¹¹ In *Armour* the employer announced to the union on October 17, 1968, that it would close its distribution outlet in Marquette, Michigan, on November 2, 1968. Affidavits presented to the court showed that the outlet had been losing money for over a year, with heaviest losses sustained in September and October, 1968. Three Armour employees who were members of plaintiff union would have been affected by the closing.

The union's 301 action sought an injunction against the closing, alleging that the threatened shutdown would violate the contract. The union relied upon a contract provision guaranteeing that the employer would not permit employees of one bargaining unit to perform work recognized as being in the province of members of another bargaining unit. Also cited was a clause under which the employer agreed to "discuss" with the union any anticipated reduction in the number of employees. The union claimed that there was no such discussion. The contract did not contain an arbitration clause.

The decision of the district court consisted of an oral opinion issued by the judge one day prior to the planned closing. In deciding whether he had jurisdiction to issue an injunction, the judge considered himself faced with a dilemma. On the one hand, he recognized the apparent applicability of the Norris-LaGuardia Act,¹² which deprives federal courts of jurisdiction to issue injunctions in "labor disputes." On the other hand, the court looked to decisions construing section 301 in which the Supreme Court had conferred authority on federal courts to fashion appropriate remedies in breach of contract cases. With some exasperation, the judge pronounced the statutes and cases in this area "in hopeless conflict."¹³ "[F]rankly, it places the Court in what could only be termed a hopeless dilemma; which forces the Court, then, under the circumstances, to resort to the general rules of equity."¹⁴ The court concluded that the question whether the contract precluded a closing of the distribution facility should be decided at a hearing on the merits. Accordingly, it enjoined the closing pending a hearing scheduled for two months later.

At first blush, it may appear that *Hamilton Beach* and *Armour* achieve a result of disparate treatment of the employer, on the one hand, and the union, on the other. While *Sinclair Ref. Co. v. Atkinson* and the Norris-

¹⁰ 40 Wis. 2d at 283, 162 N.W.2d at 23, 69 L.R.R.M. at 2567.

¹¹ 294 F. Supp. 168, 69 L.R.R.M. 2895 (W.D. Mich. 1968).

¹² 29 U.S.C. § 104 (1964).

¹³ 294 F. Supp. at 171, 69 L.R.R.M. at 2896.

¹⁴ *Id.*, 69 L.R.R.M. at 2897.

LaGuardia Act prohibit the injunction of a union strike in breach of contract, *Hamilton Beach* and *Armour* indicate that the employer may be enjoined from refusing to provide work if the contract is thereby breached. Indeed, in *Armour*, it appeared that the issuance of an injunction would cause the distribution outlet to go even further into the red.

It is submitted, however, that these two decisions reach a correct result. The courts were faced with a situation in which the employer may have contractually guaranteed another party—in these cases, the union—that it would not move its production facilities, and in reliance on that promise the other party—in these cases, the union and its members—made arrangements accordingly. Reduced to their basic elements, both *Hamilton Beach* and *Armour* considered a simple contract situation involving mutual promises, reliance and breach. The legal remedy being inadequate, equity would dictate the issuance of an injunction.

An injunction against a breach of contract under these circumstances should be distinguished from an injunction against the employer's use of a *lockout* in a legitimate "labor dispute." Faced with the threat of a non-enjoinable union strike in a labor dispute, the employer should retain his countervailing economic weapon, the lockout. Where union and employer have balanced economic power and the union's exercise of its power could not be enjoined, the employer's use of its economic weapon should not be enjoined. In the case of a threatened plant removal, on the other hand, the countervailing threat of a union strike does not exist. Where the company has clearly bargained away its right to remove its plant during the collective bargaining agreement, it should be subject to appropriate remedial sanctions in the event of breach, including an injunction.

C. Seniority Rights: Plant Removal

During the current Survey year, the Second Circuit, in *Local 1251, UAW v. Robertshaw Controls Co.*,¹ decided that when an employer moves its plant to a distant location the employer has no duty to give priority to its original employees in hiring for the new plant. In so holding, the court expressly overruled its 1961 decision in *Zdanok v. Glidden Co.*² *Robertshaw* thus finally laid to rest the much criticized *Glidden* doctrine.³ The court's reasons for reversing *Glidden* were summarized as follows:

We are persuaded that the reasoning of the majority opinion in the *Glidden* case was erroneous and that that erroneous reasoning led to an incorrect result. For example the basic proposition of the opinion that seniority is a vested right, finds no support in authority, in logic or in the socio-economic setting of labor-management relations. Seniority is wholly a creation of the collective agreement and does not exist apart from that agreement. The incidents of seniority can be freely altered or amended by modification

¹ 68 L.R.R.M. 2671 (2d Cir. 1968).

² 288 F.2d 99, 47 L.R.R.M. 2865 (2d Cir. 1961).

³ The court's majority opinion in *Robertshaw* cites numerous law review articles critical of *Glidden*. Moreover, the court points out that labor arbitrators have refused to follow *Glidden*. 68 L.R.R.M. at 2672-73.

of the collective agreement. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 31 LRRM 2548 (1953). In giving seniority a conceptual status apart from the provisions of the collective agreement and the intentions of the parties the Glidden opinion seriously misconceived the nature of the employment relationship and dealt "a blow to labor-management relations."⁴ (Footnote omitted.)

Absent a contractual provision to the effect that employee seniority rights persist beyond the term of the collective bargaining agreement, the court will, henceforth, imply no duty on the employer to rehire old employees after plant relocation.

D. *Relationship of State-Imposed Time Limitations to Section 301 Suits*

In *UAW v. Hoosier Cardinal Corp.*,¹ the Supreme Court refused to formulate a uniform federal statute of limitations to govern actions under section 301. Finding that variations in state statutes of limitations would not frustrate consensual processes of dispute settlement, the Court held that the appropriate state statute of limitations should apply to an action under section 301. The *Hoosier* Court pointed out that

statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy.²

Recently, in *West Rock Lodge 2120, Machinists v. Geometric Tool Co.*,³ the Second Circuit had occasion to consider the relationship to 301 cases of another form of state-imposed time limitation. In *Geometric* the employer and the union had submitted a union grievance to arbitration. After more than 100 days of deliberation, the arbitrator gave an award in favor of the employer. The union brought an action in the Connecticut state courts to vacate the award because of a Connecticut statute⁴ providing that when an arbitrator's award is not rendered within 60 days of submission, the award should have no legal effect. The employer removed the case to a federal court under section 301. The union's position was that the Connecticut state limitation was controlling in matters of federal law under section 301, in much the same way that the state statute of limitations was found applicable to 301 actions in *Hoosier*. Agreeing with the union, the district court vacated the arbitrator's award.

The Second Circuit reversed. It found that the statute was incompatible with federal labor law policy. The court noted that in the statute of limitations case, private means of dispute settlement had already broken down or the parties would not be before a court. In the *Geometric* situation, however, the state statute intruded into and blocked settlement of the parties'

⁴ *Id.* at 2674.

¹ 383 U.S. 696 (1966).

² *Id.* at 702.

³ 406 F.2d 284, 70 L.R.R.M. 2228 (2d Cir. 1968).

⁴ Conn. Gen. Stat. Ann. § 52-416 (1960).

dispute by the type of consensual proceedings favored by federal labor policy. "Thus, unlike the *Hoosier Cardinal* situation, we have a very strong need for federal uniformity here, and an incorporation of this Connecticut statute into labor-management resolution in that state derogates from that need."⁵ The court chose a flexible standard for determination of the applicability of state-imposed time limits on arbitration:

In adopting a uniform federal standard, we ought not to accept an arbitration rule which encourages post-award technical objections by a losing party as a means of avoiding an adverse arbitration decision . . . Rather we believe it to be a better rule that any limitation upon the time in which an arbitrator can render his award be a directory limitation, not a mandatory one, and that it should always be within a court's discretion to uphold a late award if no objection to the delay has been made prior to the rendition of the award or there is no showing that actual harm to the losing party was caused by the delay.⁶

The court's decision is consistent with the federal labor policy which adopts a uniform set of standards to be applied in section 301 cases. State law will not be permitted to intrude into this federal domain where the objectives of the two systems conflict. Furthermore, *Geometric* represents a correct interpretation of the Supreme Court's opinion in *Hoosier*. It should not be overlooked that the Court's endorsement in *Hoosier* of state statutes of limitations was qualified by the prerequisite that such limitations do not collide with federal labor policy.

VI. UNFAIR LABOR PRACTICES

A. Duty to Bargain

1. *The Requirement of Good Faith.*—Section 8(a)(5)¹ declares that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. Section 8(d)² makes it clear that the employer does not satisfy the Act's requirement of "collective bargaining" merely by meeting with the employees' representatives and performing the empty motions of bargaining. Section 8(d) insists that he bargain in "good faith" with respect to "wages, hours, and other terms and conditions of employment" If the Board is to ferret out the apparent from the real bargaining by means of this test, it must consider to some extent the reasonableness of the employer's position at the bargaining table.³

On the other hand, section 8(d) cautions that "good faith" does not compel the employer "to agree to a proposal or require the making of a

⁵ 406 F.2d at 286, 70 L.R.R.M. at 2229.

⁶ *Id.*

¹ 29 U.S.C. § 158(a)(5) (1964).

² 29 U.S.C. § 158(d) (1964).

³ See *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134, 32 L.R.R.M. 2225, 2228 (1st Cir.), cert. denied, 346 U.S. 887 (1953).

concession. . . ." The Board's duty to consider the reasonableness of the employer's bargaining position to some extent, compelled by the good faith standard of section 8(d), thus appears to contradict directly the "no concession" clause of that same section. Board surveillance of the bargaining process will have the effect of pressuring employer concessions on those issues on which the Board deems the employer to have taken an unreasonable position.

However, if one accepts as a starting point that sections 8(a)(5) and 8(d) minimally require the employer to respect the negotiator on the other side of the bargaining table as the true representative of the employees, and therefore as worthy of the respect due an equal, then, perhaps, some understanding emerges as to the intended harmony between the paradoxical directives of section 8(d).⁴ In a context presenting a range of issues open to negotiation, little harm would result from the Board's examination of the employer's position on relatively minor issues.⁵ If he is not willing to yield in any degree on at least some of these issues, one could fairly infer that the employer is unilaterally seeking to impose terms on the employees and is completely ignoring the representative procedure provided for by the Act. This stance would constitute bad faith bargaining on his part. However, the Board's review of the bargaining results in little harm to the process of "free negotiations" because the employer's stand on major issues is not even open to question. It is submitted that the "no concession" clause of section 8(d) was meant to guarantee that no inference of bad faith would be drawn from an employer's unyielding stance on a major issue.⁶ Section 8(d) signifies a recognition by Congress of the possibility of numerous valid reasons supporting the employer's position on such an issue.

Furthermore, "good faith" would not require employer concession on all minor issues. Such a requirement would be unnecessary for a reasonable resolution of the apparent contradiction within section 8(d). Rather, the employer's mere insertion of himself into the give-and-take process should constitute a sufficient demonstration of his willingness to work within the representative system. This obligation does not require that he concede on all minor demands put forward by the employees' representative. Section 8(d) seeks to effect a compromise between complete freedom of negotiation and the duty to observe the representative system, which is made necessary by the good faith requirement. A requirement of total employer concession on these minor demands would not effect the desired compromise, but rather

⁴ See Cox, *The Duty to Bargain In Good Faith*, 71 Harv. L. Rev. 1401, 1407-09 (1958).

⁵ A "minor" issue may be defined as one that has no proximate effect on the allocation of economic value between workers and employers. For example, a union request for bulletin board space (see *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 32 L.R.R.M. 2225 (1st Cir.), cert. denied, 346 U.S. 887 (1953)), or for financial data upon which a company bases its wage position (see *General Elec. Co., Battery Prod. Cap. Dept. v. NLRB*, 400 F.2d 713, 69 L.R.R.M. 2081 (5th Cir. 1968)) should be considered minor issues. Union requests for a wage increase or for fringe benefits, on the other hand, should be considered "major" issues.

⁶ The duty to bargain and the provisions of § 8(d) apply to the employee representative as well under § 8(b)(3).

would unduly restrict freedom of negotiation. Successful bargaining contemplates the trading of demands by both parties in the belief that their gains exceed their losses. Trading on minor issues can play an important part in the achievement of this result. To the extent that both sides have minor demands, each party to the negotiations will presumably desire to trade them for ends considered more valuable. A requirement of concession on all such issues will dampen the desire to trade and thus chill the bargaining process.⁷ Therefore, while employer concession as to some minor issues may be necessary to demonstrate good faith, total concession is not only unnecessary, but also undesirable.

a. *Impasse on "Minor" Demand.* The line between legitimate, hard bargaining and bad faith bargaining may not lend itself to easy definition in a particular case. In *United Steelworkers v. NLRB*⁸ the Court of Appeals for the District of Columbia Circuit affirmed a Board finding of an 8(a)(5) violation. The Board had found that the employer had bargained in bad faith on a single checkoff issue, even though it had also found the employer's overall bargaining conduct demonstrative of a desire to reach an agreement with the union. In these general terms, the decision appears to conflict with the requirements of collective bargaining described above. Checkoff should be considered a minor issue since it comprises merely a facilitative arrangement in aid of union stability, and does not affect the economic relation of employer and employee. An employer is not required to yield on all minor issues. Employer concession on some minor issues is required only as an indication of the employer's willingness to give real recognition to the union. In this case, the Board's finding that the employer's bargaining conduct demonstrated a desire for ready agreement with the union would seem to satisfy this requirement.

Among the factors considered by the court were (1) the employer's preelection statements indicating a belief that the union's survival depended on the implementation of a checkoff; (2) the granting of a checkoff to a favored local union in its previous collective bargaining contract; (3) the absence of a business purpose to grant the checkoff where the union was willing to assume its full maintenance cost; (4) a blanket refusal by the employer to consider alternatives; and (5) vigorous anti-union animus demonstrated by the employer. In light of these considerations the court regarded the employer's complete rejection of the union's request for a checkoff as motivated by a desire to destroy the union. Such motivation was viewed as inconsistent with good faith bargaining, despite the finding of an overall desire of reaching agreement with the union.

It is submitted that the court's decision in the *Steelworkers* case is a sound one. Sections 8(a)(5) and 8(d) require genuine recognition of the union by the employer. If an employer equates union survival with the granting of dues-collection assistance to the union, he denies this recognition by flat rejection of all union requests for such assistance. What kind of proof is necessary to demonstrate that the employer equates union survival with a partic-

⁷ See 81 Harv. L. Rev. 1874, 1878 (1968).

⁸ 390 F.2d 846, 67 L.R.R.M. 2450 (D.C. Cir. 1967, opinion amended 1968).

ular issue is the difficult question presented by the case. In *Steelworkers*, the employer made inculpatory statements to the effect that he had equated union survival with its success in securing a checkoff provision. The court can hardly be criticized for taking the employer at his own word.

In the absence of such statements, however, would the Board and the courts be justified in inferring such employer equation? As a matter of logic, it would seem they would not be. Good faith does not require total employer concession on minor union demands. An employer may take a firm stand against granting a checkoff purely as a matter of bargaining technique. He *might* have changed his position if the union had offered a sufficient inducement. Nevertheless, even without inculpatory statements, it is conceivable that the Board or the courts would draw the inference of bad faith in the face of all the other considerations present in *Steelworkers*. Evidence short of this, however, would seem clearly insufficient to support such an inference.

b. *Wage-Scale Requirements of Union Bylaws*. In *NLRB v. Insurance Agents' Int'l Union*,⁹ the Supreme Court held that no inherent inconsistency exists between application of economic pressure by a union during negotiations and good faith bargaining on its part. Therefore, union strikes and concerted on-the-job activity designed to harass the employer during negotiations are permissible under section 8(b)(3). The Court reasoned that if the Board could regulate the choice of economic weapons permissible within collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms of the ultimate contract. Section 8(d) was designed to prevent such Board influence on collective bargaining contracts.

On the other hand, the Supreme Court held in *NLRB v. Katz*¹⁰ that an employer's unilateral change on subjects of mandatory bargaining which are, in fact, under discussion at the time does not constitute legitimate economic pressure but rather a per se violation of section 8(a)(5). The Court concluded that the employer had refused to "negotiate in fact—to meet . . . and confer"—about the subjects on which he has initiated unilateral change.¹¹ Again he was failing to recognize the representative system as provided for by the Act.

In *Cutler v. NLRB*,¹² a union, during contract negotiations with an employer, unilaterally amended its bylaws to raise minimum wage scales and to establish a new welfare fund requiring employer contributions. The union threatened its members with fines if they worked for an employer who had not agreed to pay this new minimum wage or to contribute to the new welfare fund. A complaint issued charging an 8(b)(3) violation and alleging that the unilateral union action constituted a per se violation of section 8(b)(3) under *Katz*. The Board dismissed and the Court of Appeals for the Second Circuit affirmed. The court reasoned that, since the employer had complete control over the purse strings, the change in bylaws supported by

⁹ 361 U.S. 477 (1960).

¹⁰ 369 U.S. 736 (1962).

¹¹ *Id.* at 743.

¹² 395 F.2d 287, 68 L.R.R.M. 2317 (2d Cir. 1968).

enforcement of member compliance should be regarded only as union demands and thus as protected economic pressure under the *Insurance Agents'* case. *Katz* was distinguishable because there the employer had power himself actually to effect the unilateral changes in working conditions.

2. *Mandatory Subjects of Bargaining.*—Despite a finding of subjective good faith on the employer's part, his bargaining conduct may still constitute an unfair labor practice under section 8(a)(5). Section 8(d) requires that he bargain in good faith concerning "wages, hours, and other terms and conditions of employment." These are the so-called mandatory subjects of bargaining. In *NLRB v. Wooster Division of Borg-Warner Corp.*,¹³ the Supreme Court held that an employer, despite an overall desire to reach agreement with a union, violates his bargaining duty by conditioning his agreement to a collective bargaining contract on acceptance of a management proposal not within the mandatory subjects of collective bargaining.

In *United Electrical Workers v. NLRB*,¹⁴ a case decided during the Survey year, a union charged an employer with an 8(a)(5) violation on the basis of *Borg-Warner* because the employer had bargained to an impasse over certain provisions related to arbitration. The union objected specifically to the clauses which (1) gave the arbitrator the power to bring an action in the state courts of New York to enforce an order by him against violations of the contractual ban on strikes and lockouts, and (2) provided that if the arbitrator sought enforcement, both union and employer would not seek removal to a federal court.¹⁵

By these provisions the employer was obviously seeking to avoid the directive of the Norris-LaGuardia Act¹⁶ prohibiting a federal court from issuing an injunction in situations involving labor disputes. He was apparently fearful that not all federal courts will follow *New Orleans SS. Ass'n v. General Longshore Workers Local 1418*,¹⁷ which held that a federal court may enforce an arbitrator's cease and desist order. On the other hand, he recognized that Norris does not apply to state courts. The only problem remaining concerns the power of a federal court to remove a case in such situations. He therefore sought to secure himself against this possibility by the contractual promise of the union not to remove.

The Court of Appeals for the District of Columbia Circuit affirmed a Board decision that the employer was not guilty of an unfair labor practice by insistence upon these provisions. The court held that the disputed clauses were integral parts of the arbitration clause, a mandatory subject of bargaining. Furthermore, the arbitration clause taken as a whole was not so at odds with national labor policy as to make the company's motives "patently meretricious."¹⁸ The court recognized that at the time of bargaining the legality of the objective sought by the employer through the disputed provisions was unsettled. Until it is finally settled, the employer can insist on them as a con-

¹³ 356 U.S. 342 (1956).

¹⁴ 409 F.2d 150, 70 L.R.R.M. 2529 (D.C. Cir. 1969).

¹⁵ *Id.* at 154-55, 70 L.R.R.M. at 2530.

¹⁶ 29 U.S.C. §§ 101-15 (1964).

¹⁷ 389 F.2d 369, 67 L.R.R.M. 2430 (5th Cir.), cert. denied, 393 U.S. 828 (1968).

¹⁸ 409 F.2d at 157, 70 L.R.R.M. at 2534.

dition of his agreement with the union under *Borg-Warner*. "The issue is one of the company's good faith, not its infallibility as a legal prophet."¹⁹

It should be emphasized, however, that the bargaining in *Electrical Workers* preceded the decision of *Avco Corp. v. Machinists Acro Lodge 735*,²⁰ which held that the federal courts had the power to remove suits brought under Section 301 of the Act from the state courts. It is possible that the court of appeals of a jurisdiction which does not accept *Steamship* will consider the waiver-of-removal provisions as obviously contrary to sound labor policy after *Avco* and therefore of no effect. It would then probably decide that an employer does violate section 8(a)(5) by bargaining to an impasse on the disputed clauses.

3. *Coordinated Union Bargaining*.—The International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE), experiencing frustration at an efficient centralized bargaining strategy of the General Electric Company geared to secure uniform terms from the many unions with which it dealt, concluded that a program of mutually agreed upon national goals was needed to offset GE's strategy. A Steering Committee, consisting of an IUE representative and representatives from seven other unions, was formed to meet with GE to discuss various contract issues. GE refused to meet with the Committee, regarding it as an attempt to engage in coalition bargaining. In April, 1966, an IUE negotiating committee notified GE that the unions would no longer request joint negotiations. It suggested a meeting with the company to discuss preliminary matters concerning the negotiation of a new contract to replace the one due to expire in October, 1966. GE agreed to meet on May 4. When GE arrived for the talks and discovered that seven men on the Negotiating Committee were affiliated with other unions represented on the Steering Committee, the company refused to commence contract talks and left the conference room.

Acting upon a charge filed by the IUE, the Regional Director issued a complaint that GE was engaging in an unfair labor practice and also, pursuant to Section 10(j) of the Act,²¹ sought an injunction in federal district court restraining GE from refusing to meet with IUE's Negotiating Committee. The district court granted the injunction.²² The Court of Appeals for the Second Circuit set aside the injunction.²³ Mr. Justice Harlan stayed enforcement and execution of the judgment of the court of appeals pending certiorari proceedings.²⁴ Subsequently, the IUE Negotiating Committee and

¹⁹ *Id.*

²⁰ 376 F.2d 337, 65 L.R.R.M. 2193 (6th Cir. 1967).

²¹ Sections 10(l) and 10(j) provide the Board with authority to seek injunctions from the federal district courts. Section 10(l) requires that the regional director seek injunctive relief pending a formal Board decision when the regional director finds that there is good reason to believe that a union is acting, picketing or boycotting in violation of §§ 8(b)(4)(A), (B), or (C), 8(b)(7), or 8(e). Injunctions under § 10(j), however, are discretionary with the Board and are not required by the finding of certain facts as with § 10(e). The only formal prerequisite for seeking an injunction under § 10(j) is that there be before the Board an unfair labor practice charge involving the enjoinee.

²² 257 F. Supp. 690, 62 L.R.R.M. 2809 (S.D.N.Y. 1966).

²³ 366 F.2d 847, 63 L.R.R.M. 2065 (2d Cir. 1966).

²⁴ 87 S. Ct. 5 (1966).

the company, which bargained under protest, agreed upon a new contract. The Supreme Court granted certiorari, dissolved the stay, and set aside the judgment of the court of appeals with directions to enter a new judgment setting aside the order of the district court and remanding to that court for further proceedings appropriate to the changed circumstances.²⁵

In its decision to grant the section 10(j) injunction, the district court assumed, but did not decide, that IUE insistence upon coordinated bargaining through its Negotiating Committee would be illegal. Apparently the court regarded such insistence as arguably illegal under the rule of *NLRB v. Wooster Div. of Borg-Warner Corp.*²⁶ As noted above, *Borg-Warner* held that an employer may not hold up a collective bargaining contract by his insistence on nonmandatory, albeit legal, bargaining subjects.

During the current Survey year, the NLRB held that GE's refusal to confer with the IUE Negotiating Committee constituted an 8(a)(5) violation.²⁷ The Board reasoned that the section 7 right of the employees to select their bargaining agent includes the derivative right of the duly elected bargaining agent to select the bargaining team which will represent it at the negotiating table. The Board did not feel that coordinated bargaining makes good faith bargaining an inherent impossibility. Furthermore, it held that the mere showing of a potential for abuse is not sufficient reason for abrogation of section 7 rights.

Because GE's representatives left the table before any actual bargaining had taken place, the Board found it unnecessary to decide whether a refusal to bargain would be justified after it had become apparent that (1) members of IUE's Negotiating Committee were locked into an understanding that no union would sign an agreement unless all unions did, or (2) members other than the IUE representative were seeking to negotiate for their own unions. The Board's discussion of these situations in the context of potential abuses²⁸ suggests that such conduct will in the future be regarded as actual abuses and, consequently, as justification for an employer's refusal to bargain.

In support of its reasoning that coordinated bargaining was not inherently disruptive of the collective bargaining process, the Board pointed out the absence of evidence of actual disruption of the negotiations conducted pursuant to the injunction issued by the district court. In addition, because GE traditionally made similar offers to all unions represented on the Negotiating Committee and because these unions traditionally made similar agreements with GE, such disruption would hardly be expected. Unions bargaining for many of the same contractual benefits from an employer which has traditionally refused to treat one union more favorably than another will naturally have the common objective of securing the most favorable terms possible for the union currently negotiating.

This argument prompts the question whether the Board should require an employer to confer with a coordinated negotiating committee absent any

²⁵ 385 U.S. 533 (1967).

²⁶ 356 U.S. 342 (1956).

²⁷ 173 N.L.R.B. No. 46, 69 L.R.R.M. 1305 (1968).

²⁸ *Id.*, 69 L.R.R.M. at 1307-08.

real history of parallel offers by the employer to each union or of similar agreements with the member unions. A greater strain is necessarily placed on a committee member's allegiance where there is no such parallelism. If, in fact, it is an abuse for a member other than the one whose contract is subject to discussion to bargain for his own union, perhaps the mere possibility of this abuse is great enough, in the absence of parallel offers and contracts, to free the employer from the necessity of negotiations before the actual occurrence of the abuse. Certainly the need for such a coordinated union effort appears to have lessened, since the employer, unlike GE, lacks or is not exercising the power to exact favorable uniform terms from nearly all the unions with which it bargains.

4. *Union Interest in Employer's Competitor.*—In *Bausch & Lomb Optical Co.*,²⁹ the Board held that an employer could refuse to bargain with a union which had established a competing enterprise in the same vicinity. The Board based its decision on the fact that the union stood in the position of a business competitor which, unlike the employees whom it represented, stood to benefit if the employer could be forced out of business by concessions to inordinate demands. The majority of the Board believed that this threat would cause the employer to suspect the union's motives and objectives and therefore would make successful bargaining virtually impossible.

During the Survey year, the First Circuit had before it for the second time the case of *NLRB v. David Buttrick Co.*³⁰ In *Buttrick* the company refused to bargain with a certified local of the Teamsters on the ground that the local was subject to a disqualifying conflict of interest. The alleged conflict stemmed from the fact that a Teamsters' pension fund had made substantial loans to a competitor of Buttrick. Since the General President of the Teamsters Union was also a trustee of that pension fund, it was alleged that he might, in order to protect the loans, induce the local to act adversely to Buttrick's interests.

In its initial decision the Board found no actual connection between the local and the loans made by the Teamsters to Buttrick's competitor. The Board, therefore, ordered the company to bargain.³¹ The Court of Appeals for the First Circuit set aside the order and remanded the case to the Board with instructions that it assess whether the potential conflict of interest posed a threat sufficient to frustrate the bargaining process.³² It also recommended that the Board lay down guidelines to prevent the kinds of investments in competing enterprises which had the inherent effect of casting suspicion on the collective bargaining relationship.

On remand the Board found that the possibility of the Teamsters' intervention in the local's bargaining was too remote to disqualify the local. It again ordered the employer to bargain with the local.³³ The Board also stated that it lacked sufficient empirical evidence to lay down any meaningful guidelines. This time the First Circuit enforced the order. In order to abro-

²⁹ 108 N.L.R.B. 1555, 34 L.R.R.M. 1222 (1954).

³⁰ 399 F.2d 505, 69 L.R.R.M. 2044 (1st Cir. 1968).

³¹ 154 N.L.R.B. 1468, 60 L.R.R.M. 1181 (1965).

³² 361 F.2d 300, 62 L.R.R.M. 2241 (1st Cir. 1966).

³³ 167 N.L.R.B. No. 58, 66 L.R.R.M. 1057 (1967).

gate the section 7 rights of the employees to choose their representative, the employer must show a *clear and present danger* of a conflict of interest interfering with the collective bargaining process.³⁴ The court deferred to the Board's judgment with regard to the possibility of the Teamsters' intervention in the local's bargaining. Furthermore, even if the NLRB ruling was erroneous as to that issue, the court found no showing that the competitor's financial status made it likely that the Teamsters' Fund had an equity-like interest in it. Therefore, no proximate threat existed that the Teamsters' Fund would influence the operation of the competitor so as to bring suspicion upon the bargaining between Buttrick and the local.

B. Employer Discrimination

1. *The Economic Lockout*.—In *American Ship Bldg. Co. v. NLRB*,¹ the Supreme Court held that, absent a showing of a discriminatory motive, an employer may temporarily lock out his employees in support of his bargaining position during an impasse without violating Sections 8(a)(1) or (3) of the LMRA.²

The Court postulated 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 Court concluded, however, that the lockout under review in *American Ship Bldg.* did "not fall within that category of cases arising under § 8(a)(3) in which the Board may truncate its inquiry into employer motivation."⁴

A problem arising out of *American Ship Bldg.* is whether a bargaining impasse is necessary to justify an employer lockout used solely as a means to bring economic pressure to bear in support of his bargaining position. In *Darling & Co.*,⁵ a case decided during the Survey year, the Board for the first time clearly articulated the view that a bargaining impasse is not necessary to justify such an employer lockout. In *Darling* the employer and union had bargained extensively on all subjects and had reached accord on most issues. They remained at odds, however, over certain key issues. The union was threatening to strike in order to pressure employer concession on these issues, but indicated that the strike would occur at a time of its own choosing.

³⁴ 399 F.2d at 507, 69 L.R.R.M. at 2045.

¹ 380 U.S. 300 (1965).

² Section 8 provides in relevant 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 *Id.* at 312.

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

There had been a history of work stoppages. The employer was engaged in a highly seasonal business and its busy season was fast approaching. Fearful of losing the entire season because of a strike called at that time, the employer forced the issue by locking out his employees beforehand. The trial examiner expressly found that no bargaining impasse had arisen, and the Board adopted this finding.

The Board regarded the test of a lockout's legality in the absence of discriminatory motivation, as set forth in *American Ship Bldg.*, to be whether the lockout is so inherently prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent is required.

In holding that this test is equally applicable to a pre-impasse lockout, the Board stated:

While we recognize that the Court's holding [in *American Ship Bldg.*] was limited to a situation involving a lockout after an impasse in bargaining, we do not find that the absence of an impasse renders the test per se inapplicable. The Court indicated that a careful evaluation of all the surrounding circumstances must be made to determine whether there was unlawful motivation in the lockout. The absence of an impasse is one of the surrounding circumstances, but it does not necessarily require a conclusion that the lockout was unlawful on that ground alone. While the finding of an impasse in negotiation may be a factor supporting a determination that a particular lockout is lawful, the absence of an impasse does not of itself make a lockout unlawful any more than the mere existence of an impasse automatically renders a lockout lawful.⁶

On the particular facts of *Darling* the Board held that the lockout was neither inherently prejudicial to union interests nor devoid of significant economic justification when considered in the context of a possible union strike interrupting the peak business season of the employer.

2. *Lockout to Pressure Multi-Employer Contract Terms.*—The test of a lockout under *American Ship Bldg.* asks whether the lockout is discriminatorily motivated and whether it serves a legitimate business interest of the employer. Ever since *NLRB v. Truck Drivers Local 449 (Buffalo Linen)*,⁷ it has been recognized that a lockout by an employer member of a multi-employer bargaining unit to counter the whipsaw tactics of a union with which the unit must bargain serves a legitimate business interest.⁸

During the Survey year, the Court of Appeals for the District of Columbia, in *News Union v. NLRB*,⁹ passed on the validity of a lockout by a member of a newspaper publishers' multi-employer unit prompted by the refusal of all the members of a printers' union under contract with the unit to cross the picket lines set up in front of another unit member's business by another

⁶ Id., 69 L.R.R.M. at 1135.

⁷ 353 U.S. 87 (1957).

⁸ "Whipsawing" is the process of striking one at a time the employer members of a multi-employer association.

⁹ 393 F.2d 673, 67 L.R.R.M. 2487 (1968).

union which bargained solely with that unit member. In this situation, the court assumed that legitimate business interests for the lockout comparable to that approved in *Buffalo Linen* could be found only if the collective bargaining contract between the multi-employer unit and the printer's union barred the union's refusal to cross the picket lines of another union. The relevant contract language provided:

The language and spirit of this Agreement guarantee the prompt and faithful performance of the Union and the Office of all obligations imposed by the terms of this Agreement. Both parties agree that whenever any differences of opinion as to the rights of either under the Agreement shall arise, or whenever any dispute as to the construction of the contract or any of its provisions takes place, such difference or dispute shall be promptly resolved in the manner provided in this contract without strike [or] lockout . . . to the end that . . . harmonious relations be maintained. . . .¹⁰

Elsewhere in the contract a grievance procedure was provided to handle differences in the interpretation, scope, and enforcement of the contract terms.

The union argued that the strike prohibition in the contract should not be read as also prohibiting the observance of picket lines. The court rejected this contention on the ground the word "strike" is practically understood to include the suspension of plant operations resulting from refusals to report for work across picket lines.

The union further argued that the contract language was clear in its failure to bar observance of the picket lines. Failure to cross picket lines is not related in any way to the terms of the contract and, therefore, it does not involve any differences of opinion as to the right of either party under the agreement. The trial examiner had admitted that this argument was supported by the legal principle that statutorily protected rights to strike and to observe picket lines are not to be regarded as waived in the absence of a clearly evident purpose to do so.¹¹ The court, however, agreed with the Trial Examiner that the contract language was not clear one way or the other but, rather, ambiguous because of the words "'spirit of this agreement' guaranteeing prompt performance by the Union." Presumably the court felt that one might conclude from this language that a union's refusal to cross picket lines was as inconsistent with the union's duty of "prompt performance" of its obligations as a union strike specifically proscribed. Therefore, it permitted the trial examiner to refer to external circumstances to clear up the ambiguity. The trial examiner concluded that the statements and actions of union officers, indicating disapproval of member picket observance in the belief that the members were obligated to honor the contract, dissolved the ambiguity of the contract term. It should be read as prohibiting union picket line observance. The court found this conclusion amply supported by the evidence.

Finally, the union argued that because the Board had not found the union formally responsible for, in the sense of condonation, the breach of the

¹⁰ See *id.* at 676, 67 L.R.R.M. at 2488.

¹¹ See *NLRB v. Lion Oil Co.*, 352 U.S. 282, 293 (1957).

contract ban against refusal to cross picket lines, the lockout should be viewed merely as a device by one employer to aid another, and therefore as unjustifiable. The court rejected this argument also. The expectation of no work stoppages contemplated by the contract was defeated by the printer union members' refusal to cross the picket lines. Each employer in the multi-employer unit had an interest in the protection of the integrity of this expectation which had been commonly bargained for. This expectation is a legitimate business interest under *Buffalo Linen*. The destructive effect of picket line observance is in no way lessened because the union has not formally endorsed it. Therefore, for purposes of passing on the validity of an employer lockout, "union" action can be reasonably equated with the action of all the union members, even though that action is taken in defiance of the union officers.

3. *Partial Plant Closing*.—In *Textile Workers Union v. Darlington Mfg. Co.*,¹² the Supreme Court had before it the question whether an employer has the right to terminate his business for any reason which he chooses. The Court held that an employer can close his entire business for any reason whatsoever, even if the liquidation was motivated by vindictiveness towards a union recently successful in organizing a majority of his employees. If, however, an employer with such anti-union motivation closes only a part of his business, this action may result in an unfair labor practice under section 8(a)(3). Such a partial closing may afford the employer the leverage for discouraging the free exercise of section 7 rights among the employees in the remaining business similar to those in the cases of the runaway shop¹³ and the temporary closing.¹⁴ In such cases there are remedies available to the Board, including reinstatement of the discharged employees in other parts of the business, which would not be available where an entire business is terminated.¹⁵

The Supreme Court listed the necessary findings for an 8(a)(3) violation in a partial plant closing case:

If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed

¹² 380 U.S. 263 (1965).

¹³ The "runaway shop" describes the situation where a company closes its business in one area and relocates in another in order to rid itself of a union.

¹⁴ The "temporary closing" describes the situation where a company conditions the renewal of its shutdown operations on employee renunciation of the union.

¹⁵ See *NLRB v. Norma Mining Corp.*, 206 F.2d 38, 32 L.R.R.M. 2466 (4th Cir. 1953); *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162, 41 L.R.R.M. 1038 (1957), enforced, 272 F.2d 184, 45 L.R.R.M. 2137 (6th Cir. 1959); *Sidele Fashions, Inc.*, 133 N.L.R.B. 547, 48 L.R.R.M. 1679 (1961), enforced, 305 F.2d 825, 50 L.R.R.M. 2637 (3d Cir. 1962).

down if they persist in organizational activities, we think that an unfair labor practice has been made out.¹⁶

In the *Darlington* case itself, members of the Milliken family owned, directly or indirectly through controlled corporations, a majority of the stock in the Darlington Company. They also held controlling interests in many other textile plants in the Darlington, North Carolina area. Roger Milliken exercised a dominant influence over the labor policies of all these plants. One month after the employees of the Darlington plant opted for union representation, the plant was closed at the behest of Roger Milliken, who was president and a member of the board of directors of the Darlington Company. The Board found that the closing was motivated by antiunion animus and this finding was not disturbed on appeal.

The Supreme Court found that the record would support a finding of the requisite holding and interests of the Milliken family in the other textile plants to make discouragement of union organization in those plants worthwhile. However, the Court held that the Board had made insufficient findings as to the "purpose and effect" of the closing with respect to the employees in the other plants comprising the Milliken group. Therefore, the Court ordered that the case be remanded to the Board.

On remand the Board found that the forbidden purpose and effect existed, and made the Milliken interests liable for an 8(a)(3) violation.¹⁷ During the current Survey year, the Court of Appeals for the District of Columbia Circuit enforced the Board's order.¹⁸ In so doing, the court was faced with the Deering Milliken¹⁹ argument that a violation must be predicated upon a finding that an organizing campaign was actually under way in the employer's remaining businesses at the time of closing. There had been no actual organizing at the other Milliken-controlled mills at the time when Darlington was closed. Deering Milliken buttressed its argument by reference to the Supreme Court's opinion: "[It must be] realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities."²⁰ Deering Milliken contended, "'Actions which are being persisted in are actually occurring, not foreseeable,' and there is a 'difference between the realization of an immediate benefit (cooling off a current union campaign) and a future one (discouraging the union from starting a hypothetical campaign at some future and unknown date).'"²¹

The court rejected this argument. It agreed with the Board that contemporaneous organizational activity in the other plants is not a prerequisite to finding an unfair labor practice. It is sufficient if the employer anticipated such activity in the reasonably near future. In the *Darlington* case, Roger Milliken's memorandum which stated, "The unions are going to be making

¹⁶ 380 U.S. at 275-76.

¹⁷ *Darlington Mfg. Co.*, 165 N.L.R.B. No. 100, 65 L.R.R.M. 1391 (1967).

¹⁸ *Darlington Mfg. Co. v. NLRB*, 397 F.2d 760, 68 L.R.R.M. 2356 (4th Cir. 1968).

¹⁹ In 1960, after the closing of Darlington, Deering Milliken, Inc., became the principal corporation through which the Milliken family exercised control over its textile mills.

²⁰ 380 U.S. at 276.

²¹ See 397 F.2d at 771, 68 L.R.R.M. 2363-64.

a tremendous drive all through this area"²² was sufficient proof of such anticipation.

4. *Racial Discrimination*.—In *Packinghouse Workers v. NLRB*,²³ the Court of Appeals for the District of Columbia held for the first time that the practice of discrimination on account of race or national origin by an employer constitutes a violation of section 8(a)(1). *Packinghouse* actually came before the court on review of a Board order to remedy an 8(a)(5) violation by the employer. Among other violations, the union had charged that the employer was guilty of discrimination based on race and national origin and had requested the employer to bargain about these practices. The Board found that the employer had in fact been practicing such discrimination. The company operated a plant in West Texas employing whites, Negroes and Latin Americans. The Board found that the company had filled its highest paying hourly jobs almost exclusively with whites. In one instance, it found that a Latin American employee who actually performed the work of a weigher had been classified as performing the work of a lower-rated job and was accordingly paid the lower rate. Again, all the other weighers, with one exception, were white and were paid the higher wage. The Board found also that the company had guaranteed weekly salaries to a few employees, all of whom were white, and that from 1963 to 1966 the company had given the overtime work of checking sprinklers only to whites, although the Negroes and Latin Americans were qualified to perform and had actively sought the work. Finally, the Board found that the company had practiced discrimination by holding separate picnics for its employees, one for the whites and one for the Negroes and Latin Americans. The whites alone were offered the option to bring their wives to these picnics. The Board concluded that the company had taken evasive action on the union's request to bargain over these various practices. It therefore ordered the company to cease the evasive action and to bargain in good faith with the union.²⁴

Both parties petitioned for review, the union contending that the Board should also have found an 8(a)(1) violation independent of the refusal to bargain. In its opinion the court first observed that the Board has already assessed itself competent to deal with questions relating to racial discrimination. It pointed out that the Board has adopted the principle, first formulated in the federal courts,²⁵ that a union, as the sole bargaining representative of a group of employees, has a duty to represent all the employees fairly.²⁶

²² See *id.* at 767, 68 L.R.R.M. at 2360.

²³ — F.2d —, 70 L.R.R.M. 2489 (D.C. Cir. Feb. 7, 1969).

²⁴ *Farmers' Coop. Compress*, 169 N.L.R.B. No. 70, 67 L.R.R.M. 1266 (1968).

²⁵ See *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

²⁶ *Miranda Fuel Co.*, 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). Accord, *Houston Maritime Ass'n, Inc.*, 168 N.L.R.B. No. 83, 66 L.R.R.M. 1337 (1967), enforced, 379 F.2d 137, 65 L.R.R.M. 2309 (D.C. Cir. 1967); *Local 12, United Rubber Workers*, 150 N.L.R.B. 312, 57 L.R.R.M. 1535 (1964), enforced, 368 F.2d 12, 63 L.R.R.M. 2395 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); *United Auto Workers*, 149 N.L.R.B. 482, 57 L.R.R.M. 1298 (1964); *Local 1367, Longshoremen*, 148 N.L.R.B. 897, 57 L.R.R.M. 1083 (1964), enforced, 368 F.2d 1010, 63 L.R.R.M. 2559 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).

The Board deems it an unfair labor practice for a union to fail in this duty. The majority of the cases decided by the Board involving the breach of this duty arose from charges that the union was practicing racial discrimination in representation of employees.

The court recognized, however, that a holding that racial discrimination by an employer violates section 8(a)(1) requires a demonstration not only that the discrimination is unjustified but that it interferes with or restrains subjected employees in the exercise of their statutory right to act concertedly for their own aid or protection, as guaranteed by Section 7 of the Act. The court maintained that section 7 rights were not to be interpreted narrowly: "That section protects concerted activity by workers to alleviate oppressive working conditions, regardless of whether their activity is channelled through a union, through collective bargaining, or through some other means."²⁷ The court concluded that the crucial question reduces to whether discrimination because of race or national origin inhibits its victims from asserting their rights against the employer. The court held that such discrimination did so. According to the court, the effect of such discrimination is twofold:

(1) [R]acial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act; and (2) racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination.²⁸

The presence of *both* these effects sufficiently deters the exercise of section 7 rights by the employees subject to the discrimination so as to violate section 8(a)(1).²⁹ Although the *Packinghouse* decision is a novel one, it is logically sound and should receive wide endorsement in the near future.

C. *Economic Strikers*

It is established law that, although an employer may not discharge an economic striker, he may temporarily or permanently replace strikers during an economic strike.¹ Prior to the decision in *NLRB v. Fleetwood Trailer Co.*,² it was also fairly well established through Board law that, after an economic strike, the employer must reinstate strikers only if jobs were still available at the time of the application for reinstatement.³ If no jobs were available

²⁷ — F.2d at —, 70 L.R.R.M. at 2495.

²⁸ Id. at —, 70 L.R.R.M. at 2495.

²⁹ The court noted that where a matter is litigated, even though the particular violation has not been specifically charged, the Board can find such a violation. Although the issue of racial discrimination had been litigated in the context of an 8(a)(5) violation in *Packinghouse*, the court nevertheless felt that in the interests of fairness, the employer should have an opportunity to litigate the issue more fully after notice that the question of an 8(a)(1) violation is specifically to be determined.

¹ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

² 389 U.S. 375 (1967).

³ See *Bartlett-Collins Co.*, 110 N.L.R.B. 395, 35 L.R.R.M. 1006 (1954), *aff'd*, 230

at that time, the employer was not required to seek out the employees or put them on a preferential hiring list for future openings.

In *Fleetwood Trailer* the company hired replacements and operated with a skeleton crew during an economic strike. Two days after the strike ended, six employees offered to return to work, but the employer denied them reinstatement on the ground that there were no openings. Nearly two months after termination of the strike, the employer hired six new employees who had not previously worked for the company. The strikers were eventually rehired when the company resumed full operations, but there was substantial evidence that the company had at all times intended to resume normal operations as soon as possible. For failure to give the six striking employees preference in hiring, the Board found violations of section 8(a)(1) and (3) and ordered back pay from the date when the six new employees were hired. The Board adopted the Trial Examiner's view that these strikers had not really been permanently replaced. The Court of Appeals for the Ninth Circuit denied enforcement of the Board's order. Relying on previous Board decisions it held that the right of the strikers to jobs must be judged as of the date when they apply for reinstatement. Since the six strikers had applied for reinstatement on a date when no jobs were available, the court concluded that the company had not committed an unfair labor practice by failing to rehire them.

The Supreme Court vacated the decision of the court of appeals. The Court reasoned that under Section 2(3) of the Act an individual whose work has ceased because of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment elsewhere. If, after termination of the strike, the employer refused to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike as guaranteed by Sections 7 and 13 of the Act. Under *NLRB v. Great Dane Trailers, Inc.*,⁴ such employer interference with employee rights constitutes a prima facie unfair labor practice under sections 8(a)(1) and (3) even in the absence of any employer antiunion motivation.

In some situations, legitimate and substantial business justifications for refusing to reinstate economic strikers have been recognized. One recognized exception arises when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations. Under *Great Dane*, however, the burden of proving such justifications rests with the employer.⁵ In *Fleetwood Trailer* the employer

F.2d 212, 37 L.R.R.M. 2409 (D.C. Cir.), cert. denied, 351 U.S. 988 (1956); *Brown & Root, Inc.*, 132 N.L.R.B. 486, 48 L.R.R.M. 1391 (1961), enforced, 311 F.2d 447, 52 L.R.R.M. 2115 (8th Cir. 1963).

⁴ 388 U.S. 26 (1967).

⁵ In *Great Dane* the Supreme Court enunciated the following standards for reviewing an employer's alleged discriminatory conduct:

First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory con-

could not claim this justification. It was clear that the jobs of the six strikers were available after the strike, as was evidenced by the hiring of the six new employees. The temporary lull in production operations had no effect on the status of the strikers as employees. The Court stated, "The right to reinstatement does not depend upon technicalities relating to application. On the contrary, the status of the striker as an employee continues until he has obtained 'other regular and substantially equivalent employment.'"⁶

In *Laidlaw Corp.*,⁷ decided during the Survey year, the Board was faced with a case in which striking employees were permanently replaced during an economic strike. Despite this fact, these economic strikers applied for reinstatement. They had not obtained regular and equivalent employment elsewhere. While their applications for reinstatement were on file, some of the permanent replacements left their jobs. The company, however, did not recall these prior applicants. It hired new employees instead. The Board, relying on *Fleetwood Trailer* and *Great Dane*, held that the company had violated sections 8(a)(1) and (3) by not first offering reinstatement to the prior applicants. Economic strikers remain employees until they obtain other regular and substantially equivalent employment. Thus, they are entitled to reinstatement absent substantial business justification, and regardless of anti-union motivation. While the hiring of permanent replacements justifies a refusal to take back economic strikers so long as the replacements are occupying their former jobs, it is no justification for refusing to recall them once these replacements have departed. *Fleetwood Trailer* makes it clear that the hiring of replacements by the employer has absolutely no effect on the status of these economic strikers. They continue to be employees until they obtain regular and equivalent employment elsewhere. Since the strikers in *Laidlaw* were unable to gain such employment, they were entitled to reinstatement.

The *Fleetwood Trailer* and *Laidlaw* decisions mark a complete reversal in the law regarding the reinstatement rights of economic strikers. In the past, the economic striker's right to reinstatement was limited to those instances where a job was available at the time of application for reinstatement. Now, unless the employer is able to point to some legitimate and substantial business reason for denying the striker's right to reinstatement, this right continues in force until the employee finds substantially equivalent employment elsewhere.

In *General Elec. Co., Battery Prod. Cap. Dept. v. NLRB*,⁸ two striking employees applied for reinstatement to their jobs immediately after termination of the strike. The strike ended on a Thursday and the employees

duct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

388 U.S. at 34.

⁶ 389 U.S. at 381.

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

⁸ 400 F.2d 713, 69 L.R.R.M. 2081 (5th Cir. 1968), cert. denied, 394 U.S. 904 (1969).

offered to return to work on the night shift that evening. These employees had not been permanently replaced by the employer during the strike. The employer had, however, hired temporary replacements for the duration of the strike. The employer delayed reinstatement of the striking employees for five days, only three of which were work days since Monday and Tuesday were off days. For such delay the employees charged the employer with violations of 8(a)(3) and 8(a)(1). In defense, the company offered two reasons for the delay. First, it wanted to retain the temporary replacements in different capacities, but adjustments in working shifts which had been disrupted by the strike delayed their reassignment. Second, the reassignment of the two replacements was not completed until Wednesday because Saturday and Sunday were "overtime" days and the company wanted to avoid paying time-and-a-half while it was retraining these new employees. The Board, however, found the employer guilty of the charged violations.

The Court of Appeals for the Fifth Circuit reversed the Board. It recognized that a delay in reinstating economic strikers after termination of the strike is discriminatory conduct which could adversely affect employee rights, at least to some extent. The court felt, however, that whatever adverse effect the delay caused on union activities was comparatively slight. Therefore, although such conduct is presumptively illegal under the principles of *Fleetwood Trailer* and *Great Dane*, it may be justified if the employer is able to come forward with legitimate and substantial business reasons to support it.

Contrary to the Board, the court held that the two reasons offered by the employer to explain the delay in reinstatement were legitimate and substantial. Essentially, the court reasoned that it would be inconsistent and unfair to penalize an employer for reopening its strikers' former jobs by reassignment of the temporary replacements to different jobs, causing a few days delay but avoiding excessive costs, when he could have permanently replaced the striking employees without consequence.

D. Employer Anti-Strike Campaign

In *General Elec. Co., Battery Prod. Cap. Dept. v. NLRB*,¹ a company, fearing a strike after reaching a bargaining impasse with the union, instituted an anti-strike campaign in its plant. During the campaign it distributed numerous publications to employees warning them of the loss of business which might result from a strike and asking them to vote against a strike in the union meeting and to continue working even if a strike were called. The anti-strike drive was extensive and proved successful. The campaign, however, contained no threats of retaliation and no special promises of benefits to strikebreakers.

The Board found that such an employer campaign violates section 8(a)(1).² The Board, adopting the trial examiner's opinion, based its decision on *NLRB v. Wooster Div. of Borg-Warner Corp.*³ That case held that an employer could not bargain to an impasse on a matter not a manda-

¹ 400 F.2d 713, 69 L.R.R.M. 2081 (5th Cir. 1968), cert. denied, 394 U.S. 904 (1969).

² 163 N.L.R.B. No. 30, 64 L.R.R.M. 1312 (1967).

³ 356 U.S. 342 (1958).

tory subject of bargaining. The employer in *Borg-Warner* bargained to an impasse on a ballot clause requiring a pre-strike secret vote of both union and nonunion employees as to the employer's last offer. The Supreme Court concluded that the ballot clause was not a mandatory subject of bargaining because it dealt only with relations between the employees and the union. It represented an attempt by the employer to bypass the statutory representative and to deal directly with the employees. The Board, borrowing from the 8(a)(5) context of *Borg-Warner*, reasoned that the employer's anti-strike campaign was an attempt to bypass the statutory representative, and therefore interfered with the section 7 rights of the employees to channel their bargaining through their chosen representative. Thus, the Board held that the campaign violated section 8(a)(1).

The Court of Appeals for the Fifth Circuit reversed. It distinguished *Borg-Warner* on the basis that the company there had been insisting on a contract clause which would automatically have removed all strike decisions from union control. It viewed the instant case as an attempt by the employer to avoid a single strike merely by persuasion. It felt that the Board decision in *Texas Co.*⁴ controlled such a situation. In that case the company had sought to induce striking employees to return to work by sending them a letter similar in content to the publication issued by the company in this case. The Board found no violation by the company. It relied on the fact that the company had never offered any illegal opposition to the union. Furthermore, it did not seem to the Board that the company was seeking to undermine the union's representative status, because the company had published certain self-serving statements indicating a realization on its part that a settlement of the dispute could be resolved only by negotiation with the union. In the case at bar, the court concluded that the company had shown no illegal opposition to the union and that there was insufficient evidence of a company attempt to bypass the employees' representative. The court did recognize that individual solicitation and polling of strikers to determine their wishes had been held violative of the Act. Nevertheless, it felt that vitality remained in the *Texas Co.* case.

The court did admit that the distinction between *Borg-Warner* violations and permissible activity under *Texas Co.* may be rather slim. This admission opens the opinion to criticism. If the question is such a close one, should not the court allow the Board, as the expert body established to administer the Act, to draw the line between the permissible and impermissible? The Supreme Court stated in *Republic Aviation Co. v. NLRB*:⁵

The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, the Act left to the Board the work of applying the Act's prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a "rigid scheme of remedies" is avoided and administrative flexibility within appropriate

⁴ 93 N.L.R.B. 1358, 27 L.R.R.M. 1587 (1951), rev'd on other grounds, 198 F.2d 540, 30 L.R.R.M. 2513 (9th Cir. 1952).

⁵ 324 U.S. 793 (1945).

statutory limitations obtained to accomplish the dominant purpose of the legislation.⁶ (Emphasis added.)

Certainly it is not patently unreasonable for the Board to conclude that such an anti-strike employee campaign has the same effect of bypassing the employees' representative as does employer solicitation of individual strikers aimed at inducing their return.

E. *Per Se* Violations

1. *Contract Bar to Solicitation.*—In *Republic Aviation Corp. v. NLRB*,¹ the Supreme Court held that an employer violated section 8(a)(1) by promulgating and enforcing a broadly defined no-solicitation rule which included within its ban union solicitation by employees in non-working areas and on non-working times. Is, however, such a rule valid if it is included in a collective bargaining agreement? The Board, in the 1963 decision of *Gale Prods.*,² announced the policy, which it has continued to maintain, that such a rule is still invalid despite its inclusion in a bargaining agreement. The Sixth and Seventh Circuits, however, the only two circuits having occasion to consider the Board's rule prior to the Survey year, rejected the Board's position.³ They held that maintenance of the integrity of the collective bargaining agreement took precedence over any interference with employee rights occasioned by the rule.

Recently, in *NLRB v. Mid-States Metal Prods.*,⁴ the Court of Appeals for the Fifth Circuit became the first court to adopt the view of the Board on this issue. The agreement provided that all solicitation was banned and that bulletin boards would be the sole method of communication between employees and the union. The court recognized that it was dealing with an issue concerning the section 7 rights of employees to choose their own bargaining representative. It recognized also that the union can waive some section 7 employee rights in order to effect a collective bargaining agreement with the union. The court concluded, however, that the employee right of solicitation should not be considered one of these. The court reasoned that, because the solicitation rights of employees related to the employees' rights to select and to reevaluate their collective bargaining agent, they were to be distinguished from rights which employees acting in concert, through their collective bargaining agent, may exercise in the effort to gain economic advantage.⁵ On the latter type of issue the union and employee interests are

⁶ Id. at 798.

¹ 324 U.S. 793 (1945).

² 142 N.L.R.B. 1246, 53 L.R.R.M. 1242 (1963).

³ *NLRB v. Gale Prods.*, 337 F.2d 390, 57 L.R.R.M. 2164 (7th Cir. 1964), denying enforcement to 142 N.L.R.B. 1246, 53 L.R.R.M. 1242 (1963); *Armco Steel Corp. v. NLRB*, 344 F.2d 621, 59 L.R.R.M. 2077 (6th Cir. 1965), denying enforcement to 148 N.L.R.B. 1179, 57 L.R.R.M. 1132 (1964); *General Motors Corp. v. NLRB*, 345 F.2d 516, 59 L.R.R.M. 2030 (6th Cir. 1965), denying enforcement to 147 N.L.R.B. 509, 56 L.R.R.M. 1241 (1964).

⁴ 403 F.2d 702, 69 L.R.R.M. 2656 (5th Cir. 1968).

⁵ See *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953), where the Supreme

one and, therefore, it can be fairly assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer which are beneficial to the employees. However, the court felt that the same reasoning would not apply in a situation where the subject matter waived relates directly to the right of the employees to change their bargaining representative, or to have no bargaining representative. In this situation, the interests of the employees and the union may lie in direct conflict. "We cannot presume that the union, in agreeing to bar such activities, does so as a bargain for securing other benefits for the employees and not from the self-interest it has in perpetuating itself as bargaining representative."⁶

The court also indicated that the employee was violating section 8(a)(2)⁷ by agreement to the broad no-solicitation rule. The incumbent union could at least make use of the bulletin boards to communicate with the employees. Outside unions, however, did not have even this channel of communication open to them. Therefore, by adoption of the rule the employer would be favoring or supporting one employee representative (the incumbent) over another, conduct prohibited by Section 8(a)(2) of the Act.

2. *Instructions to Supervisors.*—In *Elder-Beerman Stores Corp.*⁸ the Board held that an employer violates section 8(a)(1) when it instructs a supervisor to engage in surveillance of employees' union activities as part of an integral plan to discover the identity of employees engaged in union activity and to rid himself of union adherents, and discharges the supervisor for failure to carry out his instructions. This conduct is to be regarded as unlawful, whether or not the employees were ever aware of such instructions. In so deciding, the Board stated that it was overruling its previous decision in *General Eng'r, Inc.*⁹ to the extent that it was inconsistent. In that case the Board had held that unexecuted instructions to a supervisor to spy on employees have no impact on the employees and therefore cannot interfere with their organizational rights unless the employees had knowledge of them.

F. *Employer's Duty to Investigate Union Demand for Discharge*

Section 8(a)(3) provides in part that

no employer shall justify any discrimination against an employee for non-membership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.¹

Court held valid a waiver of the employees' protected right to refuse to cross the picket line of another union.

⁶ 403 F.2d at 705, 69 L.R.R.M. at 2658.

⁷ Section 8(b)(2) provides: "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(b)(2) (1964).

⁸ 173 N.L.R.B. No. 68, 69 L.R.R.M. 1460 (1968).

⁹ 131 N.L.R.B. 648, 48 L.R.R.M. 1105 (1961).

¹ 29 U.S.C. § 158(a)(3) (1964).

The difficult task for the Board and the courts is the formulation of standards to be applied in the determination whether information conveyed to an employer must have been sufficient either to create the proscribed belief or at least to prompt a further inquiry by him into a union's discharge demand. This question was before the Court of Appeals for the Second Circuit in *NLRB v. Zoe Chem. Co.*²

In *Zoe* the employees had selected a union as their bargaining representative. This union obtained a three-year contract from the employer which contained a union security clause. The union, however, proved to be very lax in servicing the employees, and as a result the employees became dissatisfied. When the contract had been in force for approximately half its intended term, a rival union interjected itself and sought to win the support of the employees. The employees favored a change but were unable to effectuate it. Some of the employees exhibited their displeasure with the incumbent union's performance by refusal to pay dues or an initiation fee. That union sent representatives several times to remind the employees of their duty to pay and to warn them that they could lose their jobs if they did not. Finally, the union made a written request of the employer to discharge the non-paying employees. The employer balked and refused to comply for a time. After several months, the union submitted to arbitration the question whether the employer was bound to discharge the non-paying employees. The arbitrator found that it was so required. The union sought confirmation of the award in the state courts and received it. The employer then complied with the award. The discharged employees filed charges with the Board, claiming that both the union and the employer were guilty of unfair labor practices. The Board found that the employees had made a tender of dues which was rejected by the union because these employees had failed to sign union membership cards as it required. Although the employees had not tendered the initiation fees, the Board held that they were not required to do so because the tender would have proved fruitless in light of the card-signing requirement.

The Board held that the union had violated sections 8(b)(1)(A) and 8(b)(2) by requiring the card signing and by causing the employer to discharge the employees who had not signed.³ The Board also found that the non-paying employees, on hearing of the union's request that they be discharged, had made to the employer's managers on two occasions statements alleging their offer to pay dues and requesting to continue on the job. On the basis of these statements the Board held that the employer was under a duty to investigate the reasons for the union's discharge requests and that its failure to do so constituted a violation of section 8(a)(3).

Reviewing the Board's decision, the court at the outset made the point that, absent actual knowledge of an alleged illegal union request, an employer has no duty independently to inquire into the circumstances behind the union's demand for an employee's discharge. Therefore, it is incumbent upon the employee to make clear to the employer that he had paid or had tried to pay his dues and fees or that an improper condition was being demanded

² 406 F.2d 574, 70 L.R.R.M. 2276 (2d Cir. 1969).

³ 160 N.L.R.B. 1001, 63 L.R.R.M. 1052 (1966).

by the union as well as the dues and fees. The court further held, in regard to the adequacy of the information available to the employer necessary to give the employer "reasonable grounds for believing," that all the circumstances surrounding the controversy were to be considered. What in isolation may seem to constitute sufficient evidence to hold the employer responsible may seem insignificant amid the totality of circumstances.

On the facts of *Zoe*, the court refused to uphold the Board's finding that the employer "had reasonable grounds for believing" that the union was requesting the employees' discharge for a reason other than failure to pay their dues and initiation fees. The union letter requesting the employees' discharges made no reference to the membership cards. The employer had been aware of the intense hostility shown by the employees toward the incumbent union and, absent a clear enunciation by the employees of their objection to the membership cards, the employer might very reasonably have believed that they still refused to meet such a valid union condition for membership as payment of dues. The two isolated exchanges between the employees and the employer's managers were insufficient notice in this context. The court considered that this conclusion was especially warranted because section 8(a)(3)(B) was directed at the "*prompt and unquestioning acquiescence by the employer in discharging an employee towards whom the union is hostile or arbitrary.*"⁴ (Emphasis added.)

The court felt also that the circumstances of the case did not even impose a duty of further investigation on the employer. It held that even if the employer knew of the card signing requirement the company could not be held to have violated section 8(a)(3). The court stated that "*the Act does not contemplate an exhaustive investigation by the employer into the facts or legal implications of every union discharge request.*"⁵ (Emphasis added.) On the facts of *Zoe*, the court concluded that the burden of inquiry on the employer far outweighed the likelihood that its investigation would lead to a prompt and certain resolution of its doubts. Therefore, the employer was completely absolved even though it had made no inquiry. The court reasoned that the union would probably have denied that the employees had made a tender of dues, since it had done so in the past. Even if the employer could have resolved, from all the conflicting evidence, that a tender had been made, it would still have been faced with the complex legal issues as to whether the employees were required to tender the initiation fees as well as the dues, whether the time for tender had been extended by the arbitration decree, and whether signing membership cards was a permissible requirement of union membership. "To stake an employer's liability on his resolution of such complex legal questions would be to go far beyond the reasonable purpose of the statute to prevent employers from docily acceding to patently illegal discharge demands."⁶

Therefore, according to this case at least, an employer can be held to have violated section 8(a)(3)(B) only if (1) he is clearly notified by his employees that a union has refused a tender of dues or fees or both, or is

⁴ 406 F.2d at 582, 70 L.R.R.M. at 2282.

⁵ Id. at 583, 70 L.R.R.M. at 2282.

⁶ Id. at 584, 70 L.R.R.M. at 2283.

imposing an additional condition of membership which is patently illegal, and if he then discharges the employees without investigation of the charges; or if (2) he discharges the employees when he possesses independent knowledge of the illegal union action. Furthermore, in the absence of independent evidence, if the employer is confronted in the course of his investigation by a union denial of the employees' charges he will not violate section 8(a)(3)(B) if he then proceeds to discharge the allegedly non-paying employees.

G. Union Discipline

Under section 8(b)(1)(A)¹ it is an unfair labor practice for a union to restrain or coerce employees in the exercise of their section 7 rights, including the right to refrain from concerted activity. The proviso to that section, however, preserves to the union the right "to prescribe its own rules with respect to the acquisition or retention of membership" in the union. The following two cases decided during the Survey year considered the extent to which unions may discipline their members, and the means available for that purpose.

1. *Exceeding Union Production Quotas*.—The Board had decided in *Local 283, UAW (Wisconsin Motor Corp.)*² that a union did not violate section 8(b)(1)(A) by imposing fines on members for violating traditional union production quotas. The validity of the Board's position on this issue was placed in doubt by the Ninth Circuit's decision in *Associated Home Builders v. NLRB*.³ A decision whether the fines themselves coerced the employees so as to violate 8(b)(1)(A) was not necessary for a resolution of that case and the court specifically declined to offer one.⁴ The court did, however, note the difficulty of the issue and its own relief at not having to decide it.⁵ On the other hand, the court did decide that the unilateral imposition of production quotas by a union would constitute a refusal to bargain and thereby violate section 8(b)(3) because the quotas were not purely an internal affair, but rather were related to "terms and conditions of employment" about which the union would be required to bargain under section 8(d).⁶ Furthermore, the Ninth Circuit interpreted the proviso to section 8(b)(1)(A) as exempting only internal union affairs from the proscriptions of the body of section 8(b)(1)(A). It held that what constituted an "internal affair" for purposes of section 8(d) also applied to use of that term with respect to the proviso of section 8(b)(1)(A).

Last year, in *NLRB v. Allis-Chalmers Mfg. Co.*,⁷ the Supreme Court decided that union regulation of its members, including the imposition of fines, was free from the proscriptions of section 8(b)(1)(A), even without

¹ Section 8(b)(1)(A) provides: "It shall be 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 . . ." 29 U.S.C. § 158(b)(1)(A) (1964).

² 145 N.L.R.B. 1097, 55 L.R.R.M. 1085 (1964).

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

⁴ Id. at 750, 60 L.R.R.M. at 2349-50.

⁵ Id. at 750-51 n.9, 60 L.R.R.M. at 2350 n.9.

⁶ See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

⁷ 388 U.S. 175 (1967).

application of the proviso to that section, if the regulation concerned a legitimate internal union affair. In *Allis-Chalmers* the Supreme Court held that a union may fine members who cross the union's picket line and go to work during an authorized strike against their employer. The fine related to a legitimate internal union matter. The union regulation in no way affected the member's employment status, nor was it excessive. It was designed to assure the effectiveness of the employees' right to strike. It appears that the formula espoused by the Ninth Circuit in *Associated Home Builders* for determining whether union regulation falls within the proviso to 8(b)(1)(A) corresponds to the formula which the Supreme Court has held in *Allis-Chalmers* to be appropriate for determining whether the body itself of 8(b)(1)(A) has been violated. Therefore, the Ninth Circuit's finding that union enforcement of production quotas was not merely an internal union matter for purposes of section 8(d) might lead it to find that such enforcement violates 8(b)(1)(A).

Recently the Court of Appeals for Seventh Circuit enforced the Board's order in the *Wisconsin Motor Corp.* case in *Scofield v. NLRB*.⁸ The court, attempting to follow *Allis-Chalmers*, concluded that maintenance of production quotas was a legitimate union affair for purposes of section 8(b)(1)(A) and, therefore, that union enforcement of the quotas through fines was beyond the reach of that section. In arriving at its conclusion, the court reasoned that such quotas on piecework production were reasonably designed to protect the well-being of all employees because (1) if the younger and more energetic employees were to receive higher pay for increased production, the older members would be demoralized and even face layoffs; and because (2) quotas prevented employers from reducing liberal pay rates for each piece produced and from using the high earnings of some workers as an argument against a general increase in the pay rates. In addition, the court considered that these quotas were recognized as appropriate subject matter for collective bargaining and felt that if a union could validly establish a quota it must have the concomitant power to enforce it.

The *Scofield* decision seems to be a proper one. The considerations weighed by the Seventh Circuit to demonstrate union interest would seem to compel this result under *Allis-Chalmers*, despite the fact that such quotas constitute "terms and conditions of employment" and are not therefore a purely internal union affair for purposes of section 8(d). *Allis-Chalmers* suggests a broader scope for the term "internal union affair" with respect to section 8(b)(1)(A). It is submitted that under *Allis-Chalmers*, unless a union regulation would affect a member's employment status or would frustrate the general policies which the LMRA was designed to foster, if a union can demonstrate an interest in a particular regulation relating to its representational function, then the union regulation may be classified as strictly an internal matter for purposes of 8(b)(1)(A). The reasonable enforcement of such regulations would therefore be free from proscription.

Most recently, the Supreme Court rendered a decision in the *Scofield* case. The Court upheld the union's right to maintain and enforce the pro-

⁸ 393 F.2d 49, 67 L.R.R.M. 2673 (7th Cir. 1968), aff'd, 394 U.S. 423 (1969).

duction quotas.⁹ In so doing it essentially confirmed the reasoning proposed above.

2. *Access to Board Processes.*—In *NLRB v. Industrial Union of Marine & Shipbuilding Workers*,¹⁰ the Supreme Court, in reversing the Court of Appeals for the Third Circuit,¹¹ held that a union could not fine a member for filing an unfair labor practice charge against it, despite the fact he had not, as required by the union constitution, exhausted the internal union remedies available to him. In so doing the Court was approving the Board's position on this issue, first announced in *Local 138, Int'l Union of Operating Eng'rs (Skura)*.¹² The Third Circuit had declined to follow the Board's *Skura* rule because it felt that requiring members to exhaust internal union remedies before soliciting the outside help of the Board was a reasonable one. It merely gave the union "a fair opportunity to correct its own wrong."¹³ The Supreme Court recognized its decision in *Allis-Chalmers*, but found that case inapplicable to the situation before it. The Court declared that a proceeding by the Board was "not to adjudicate private rights but to effectuate a public policy."¹⁴ It was concerned that the Board machinery to implement this public policy could be brought into action only by the initiative of individual persons who must file a charge within six months of the occurrence of the alleged wrongful conduct. The Court felt that under these operative conditions petitioners should have unrestricted access to Board processes if the LMRA were to function as an organic whole. Any coercion used to discourage that access was beyond the legitimate interests of a labor organization.

The Third Circuit felt that Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act¹⁵ supported its position requiring union members to exhaust their internal union remedies before going to the Board. While that provision prohibits a union from limiting the right of a member "to institute an action before any administrative agency," it provides that a member "may be required to exhaust reasonable hearing procedures . . . not to exceed a four-month lapse of time." The Supreme Court rejected the Third Circuit's reasoning. It did not interpret section 101(a)(4) as buttressing the union's power to police their members but rather as an assuring statement to the agencies that in a given case they may stay their hands for four months, while the aggrieved petitioner seeks relief within the union.

3. *Other Union Regulation of Members.*—In *Steelworkers Local 1070*¹⁶ a union had bargained for and obtained a provision in a collective bargaining agreement governing the seniority rights of supervisors returning to the bargaining unit as regular employees. The provision permitted those supervisors who regularly paid the equivalent of monthly union dues to continue

⁹ 394 U.S. 423 (1969).

¹⁰ 391 U.S. 418 (1968).

¹¹ 379 F.2d 702, 65 L.R.R.M. 2629 (3d Cir. 1967).

¹² 148 N.L.R.B. 679, 57 L.R.R.M. 1009 (1964).

¹³ 379 F.2d at 707, 65 L.R.R.M. at 2632.

¹⁴ 391 U.S. at 424.

¹⁵ 29 U.S.C. § 411(a)(4) (1964).

¹⁶ 171 N.L.R.B. No. 126, 68 L.R.R.M. 1215 (1968).

to accumulate seniority credits while they were outside the unit, but denied this right to those supervisors who failed to make such payments. The Board held that the union violated sections 8(b)(1)(A) and 8(b)(2) by maintaining and enforcing this contract provision.¹⁷

The Board reasoned that an individual who is a supervisor is excluded from the bargaining unit. He is, therefore, under no obligation whatsoever to the union. At the time when a supervisor applies for reemployment in the bargaining unit, however, he is an "employee" as that term is defined by the Act.¹⁸ The Board recognized that seniority is a valuable condition of employment. As such, its grant or denial to a unit employee (the applying supervisor) cannot be conditioned on whether he made payments when he was outside the unit. To hold otherwise would be to approve unlawful discrimination directed at the encouragement of union membership.

On the other hand, in *Metal Workers' Alliance, Inc.*,¹⁹ a union had obtained a collective bargaining contract containing both a union security clause and a clause providing that a supervisor who returned to the bargaining unit would reacquire the seniority accumulated up to the time of his departure from the unit to become a supervisor. The union in its constitution and by-laws, however, had provided that an employee who left the bargaining unit and later returned would have to pay a reinstatement fee ranging from 50 to 150 dollars, depending upon the length of time spent outside the bargaining unit. The union initiation fee for a new employee was five dollars. When supervisors seeking to return to the unit refused to pay the reinstatement fees, the union threatened to have the employer discharge them pursuant to the union security clause. The union was charged with violating sections 8(b)(1)(A) and 8(b)(2) for enforcing the fees. The Board found no violation.

The Board reasoned that the proviso to section 8(b)(1)(A) permits a union "to prescribe its own rules with respect to the acquisition or retention of membership therein." The union's reinstatement fees, therefore, are presumptively lawful under the proviso. The Board recognized the existence of conditions under which such fees lose this protection. Under section 8(b)(5), for example, union membership fees, required by a union security agreement, which are found to be excessive or discriminatory under all the

¹⁷ Section 8(b) provides in relevant part:

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

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .

29 U.S.C. §§ 158(b)(1)(A), (b)(2) (1964).

¹⁸ See *Texas Co.*, 93 NLRB 1358, 27 L.R.R.M. 1587 (1951), enforcement denied on other grounds, 198 F.2d 540, 30 L.R.R.M. 2513 (9th Cir. 1952).

¹⁹ 172 N.L.R.B. No. 34, 68 L.R.R.M. 1351 (1968).

surrounding circumstances are considered unlawful. However, there was no charge here that the fees were excessive. Furthermore, under sections 8(a)(3) and 8(b)(2), where discrimination or attempted discrimination is sought to be justified under a valid union-security agreement because of non-payment of dues or initiation fees, the Board may inquire to determine whether the dues and fees were "uniformly required as a condition of acquiring or retaining membership." The Board recognized that reinstatement fees fall within the statutory intentment of "initiation fees." It further noted that the uniformity requirement does not prohibit unions from charging different fees to different classes of employees so long as there is a reasonable basis for the classification.²⁰ Not only do the returning supervisors regain their accumulated seniority but they also become entitled to immediate employment and other valuable benefits, such as participation in unit overtime, eligibility for paid holidays and vacations, shift preferences, and insurance coverage. New employees, on the other hand, must fulfill certain probationary requirements before they become entitled to these benefits. The Board concluded that the differences in benefits obtaining to these two groups upon admittance to the bargaining unit justifies the difference in fees.

H. *Secondary Boycotts*

1. *Product Picketing: The Tree Fruits Doctrine*.—Section 8(b)(4)(ii)(b)¹ generally represents a congressional attempt to circumscribe union pressure on a neutral employer caught in the cross-fire of a dispute between the union and another employer. One particular practice within the intended proscription of the section is the secondary boycott typically occurring when a retailer (secondary employer) is compelled by a union to stop purchasing from a supplier (primary employer) with whom the union has a labor dispute.

The Supreme Court has found, however, that not all secondary picketing by a union is prohibited. In *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*,² the Court held that union picketing at a supermarket, limited to the request consumers not to purchase Washington State Apples from the store because the apples came from employers against whom the union was striking, did not violate section 8(b)(4)(ii)(B). The Court recognized that such product picketing might result in a diminution of the supermarket's apple purchases, and thus cause the picketing to fall literally within

²⁰ See *Food Mach. & Chem. Corp.*, 99 N.L.R.B. 1430, 30 L.R.R.M. 1171 (1952).

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

(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

² 377 U.S. 58 (1964).

the statutory prohibitions of 8(b)(4)(ii)(B). The Court was convinced, however, that such conduct was not meant to be proscribed by that section and that such a prohibition would be inconsistent with the "spirit" of the Act. The Court reasoned that a basic difference exists between peaceful consumer picketing at a secondary site aimed at persuading the customer of the secondary employer to cease trading with him altogether, and peaceful picketing aimed at persuading the customer of the secondary employer to cease purchasing only the struck product. In the latter case, the union's appeal to the public is closely confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. The Court felt that this kind of picketing does not have the effect of making any essential change in the secondary employer's position as a neutral with regard to the dispute between the union and the primary employer. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer reaches beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute. This kind of picketing, then, destroys the secondary employer's neutrality. The Court noted that this distinction had become established in the state courts by the time of the enactment of section 8(b)(4)(ii)(B). The state courts had held that product picketing was lawful but that picketing for a total boycott of a secondary employer was unlawful.³ Therefore, the Court felt that if Congress had meant by 8(b)(4)(ii)(B) to prohibit product picketing, it would have been more specific in its ban. In holding that such product picketing was legal, the Court stated that it merely practiced fidelity to the principle that peaceful picketing is lawful except where Congress has specifically proscribed a species as unworthy of protection. This policy of the Court presumably reflects a concern over the first amendment implications of peaceful picketing and a deference to the role of peaceful picketing as the traditional economic weapon of the unions.

Does the *Trec Fruits* exception to secondary picketing apply when the struck product has become an integral part of the secondary employer's entire output, and it is therefore impossible for consumers to cease purchasing the primary product without entirely ceasing patronage of the secondary employer? This was the question recently put before the Court of Appeals for the District of Columbia in *Honolulu Typographical Union No. 37 v. NLRB*.⁴ Here, the union had a labor dispute with the Hawaii Press, which published a group of newspapers, one of which is the Waikiki Beach Press. In support of its dispute with Hawaii Press, the union set up pickets outside a shopping center consisting of 50 to 60 shops. Each of the pickets carried a placard identifying one of five shops located in the shopping center which advertised regularly with the Waikiki Beach Press. The placard stated that the named shop advertised in the struck Waikiki Beach Press and requested the public not to buy any of the shop's products advertised in the

³ See *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E.2d 910 (1937); *Newark Ladder & Bracket Sales Co. v. Furniture Workers Local 66*, 125 N.J. Eq. 99, 4 A.2d 49 (1939).

⁴ 401 F.2d 952, 68 L.R.R.M. 3004 (1968).

Press. Four of these five shops were restaurants which advertised their entire business rather than a particular product.

The court agreed with the Board that the *Tree Fruits* exception to secondary picketing did not apply to this situation, and therefore held that the picketing violated section 8(b)(4)(ii)(B). The court was willing to accept the union's argument that "advertising" constituted a product for purposes of the *Tree Fruits* doctrine. It recognized holdings that a union engaged in a dispute with the employer supplying these advertising services has the right under the publicity proviso to section 8(b)(4) to advise the customers of the secondary seller by handbills that such services are provided by an employer with whom the union has a primary dispute.⁵ Since the proviso speaks only in terms of "product or products" of the primary employer, the court in essence held that "advertising" is a product. The court felt that a different holding would, for purposes of the *Tree Fruits* rule, present conceptual difficulties.

The court felt also, however, that the picketing in *Honolulu* represented a union attempt to enlist consumer assistance in a total boycott against the secondary employer. The only realistic meaning of the union's appeal as applied to the restaurants was the traditional "do not patronize this establishment." *Tree Fruits* specifically indicates that this appeal is not excepted from the proscriptions of section 8(b)(4)(ii)(B).

In further support of its decision, the court indicated its belief that first amendment considerations guided the Supreme Court in *Tree Fruits*. It noted that the pickets in that situation made no request of the customers not to cross the picket lines. They merely asked customers to be selective in their purchases once they entered the store. The court of appeals, having assumed that the effect of the *Tree Fruits* picketing would not be very different from the effect of the issuance of handbills making the same request, felt that this kind of request approximates pure speech and that the broad prohibition against it would raise serious constitutional questions. On the other hand, the pickets in *Honolulu* were asking for an entire boycott of the restaurants. This action constituted a request by the union not to cross the picket lines at all. Such a request may constrain consumers not wanting to be considered hostile or indifferent to unions. This constraint destroys any analogy between the picketing and pure speech, and thus makes the former subject to prohibition.

An interpretation of *Tree Fruits* is also central to the decision in *Bedding Workers Local 140 v. NLRB*.⁶ In this case, an agent of Local 140 of the United Furniture Workers of America approached Modern Stoves, Inc., a retail furniture store, and expressed the view that Modern was handling too large a supply from U.S. Mattress Corporation, a bedding manufacturer. Local 140 did not represent the employees of U.S. Mattress, but a Teamsters local did. Modern balked at the union's suggestion that it buy more from suppliers represented by Local 140. The union began to picket Modern. The placards carried by the pickets requested consumers not to buy non-

⁵ See *Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434, 61 L.R.R.M. 2364 (9th Cir. 1966).

⁶ 390 F.2d 495, 67 L.R.R.M. 2392 (2d Cir. 1968).

union furniture, upholstery and bedding and urged them to look for the label of the United Furniture Workers of America when they purchased these articles. Shortly thereafter, the union agent returned to Modern and for the first time told Modern that its merchandise did not have union labels. Modern pointed out that even the bedding supplied by the Local 140 shops had no such label. In the agent's presence Modern called one of these suppliers whose employees were represented by Local 140 to request union labels. This supplier wanted to talk to the agent, but the agent refused. After two weeks of picketing, the president of Local 140, asked again by Modern why it was being picketed, replied that Modern's dealings with suppliers with non-union shops was the cause of the picketing. In fact, all of Modern's suppliers had union shops. U.S. Mattress, however, was the only one not represented by Local 140 or an affiliate of the United Furniture Workers. Finally, Modern ceased buying from U.S. Mattress and the picketing ceased.

The Court of Appeals for the Second Circuit agreed with the Board that Local 140's entire course of conduct demonstrated that its real concern lay with Modern's handling of bedding from suppliers not under contract with it, specifically U.S. Mattress, and that the object of its picketing was to force a cessation of business dealings between the picketed retailer and such "non-union" manufacturer. These findings satisfy the requirements for an 8(b)(4)(ii)(B) violation. In addition, the court found that the picketing did not fall within the *Tree Fruits* exception to secondary picketing. Since U.S. Mattress was the object of the union's picketing, the placards of the pickets should have specified that company and its product in order to fall within the *Tree Fruits* exception. The placards made no mention of U.S. Mattress. Moreover, the appeal to look for the union label was not specific enough in identification of the boycotted product or company. The lack of a union label at Modern did not necessarily indicate non-union merchandise and Local 140 knew as much. Finally, the placards requested the consumer not to buy "non-union furniture, upholstery and bedding," a far broader appeal than was necessary for a boycott of the products of U.S. Mattress, a bedding manufacturer only.

The dissenting opinion reasoned that union label picketing should be considered lawful under *Tree Fruits*,⁷ even though the picketing was not narrowly directed at the specific product of the employer. In essence, the dissenting view postulates that the court should focus on the type of peaceful picketing allowable under *Tree Fruits* and not on the factual context of a boycott directed at a product of an employer with whom the union has a dispute. Focusing on the picketing, the dissenter could find no logical basis for holding that a union may picket to persuade the public not to buy a struck product but not to persuade it to refrain from purchase of non-union made products. The dissent appears correct in its observation; the distinction is illusory. In both situations the union is requesting a limited, as opposed to a total, boycott of the secondary employer. In neither case are they requesting the public to refrain altogether from crossing its picket lines or producing a danger of the restraint discussed above in *Honolulu*. They are

⁷ Id. at 503, 67 L.R.R.M. at 2398.

merely petitioning the consumers to purchase selectively once they have entered the secondary employer's establishment.

The majority opinion embodies the view that the *Tree Fruits* exception to secondary picketing cannot be divorced from the factual context of a boycott directed at the product of a primary employer. By so limiting *Tree Fruits*, and thereby declaring the "union label" picketing in this case unlawful, the majority embraces an artificial distinction. Justice Harlan feared such a consequence from the *Tree Fruits* decision when he questioned the substance of the distinction of limited and total boycott espoused by the majority in a situation where the picketed retailer depends largely or entirely on sales of the struck product.⁸

2. *Reserved-Gate and Common-Situs Picketing*.—In *Local 761, Electrical Workers v. NLRB (General Electric)*,⁹ the Supreme Court held that picketing of a gate reserved for exclusive use of employees of neutral contractors at a struck manufacturing plant violates the secondary boycott prohibitions of the LMRA, unless the work carried out by those employees using the reserved gate is related to the normal operations of the manufacturer. The Board, however, has distinguished reserved-gate picketing in the *General Electric* context from that in a common-situs construction context, where a gate is reserved for neutral subcontractors and their suppliers and where the union has a dispute with the general contractor. In the latter situation the Board has ruled in *Building Trades Council*¹⁰ that the *Moore Dry Dock* standards¹¹ apply. In addition, in *National Woodwork Mfgs. Ass'n v. NLRB*¹² the Supreme Court held that neither did a union violate the secondary boycott prohibitions of the Act by obtaining and enforcing, through a boycott directed at the products of a secondary employer, a contract clause designed to protect or preserve work traditionally performed by its members.

The Board was called on recently to determine the applicability of these three rulings to the facts presented in *Janesville Typographical Union No. 197*.¹³ In *Janesville* a publishing company, in need of more space, decided to construct a new building to house some of its present operations. The company planned to install in the building new machinery and systems affecting composing-room jobs. The union was bargaining with the company concern-

⁸ 377 U.S. at 80.

⁹ 366 U.S. 667 (1961).

¹⁰ 155 N.L.R.B. 319, 60 L.R.R.M. 1296 (1965).

¹¹ *Sailor's Union (Moore Dry Dock)*, 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950). The Board developed the *Moore Dry Dock* criteria to deal with the situation in which the employer with whom the union had a primary dispute did business only on the premises of a secondary employer—as, for example, a subcontractor on a construction project—to determine if picketing the secondary employer's place of business was violative of section 8(b)(4). There will be no violation of section 8(b)(4) where (a) the picketing is strictly limited to times when the situs of 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.

¹² 386 U.S. 612 (1967).

¹³ 173 N.L.R.B. No. 137, 69 L.R.R.M. 1457 (1968).

ing these changes while construction was taking place. Unable to obtain satisfactory terms with regard to job security, the union called a strike. The company hired replacements for the strikers and continued operation. At first the union picketed only the four gates leading into the existing building and the parking lot. Later, however, the union picketed at the gate leading into the construction site. The company had posted a sign reserving this gate for employees of the general contractor, employees of subcontractors, and suppliers. The construction employees honored the picket lines established at the reserved gate, and thus caused construction to be halted. The company charged the union with violation of section 8(b)(4)(ii)(B).

The union argued that the "normal operations" exception of *General Electric* includes future related operations, and thus allows the union to picket the reserved gate to the new building as a measure to protect future jobs when operations begin in the new building. The union maintained that its picketing had the purpose of preserving the jobs of its members within the principles of *National Woodwork*.

The Board rejected the union's argument. It felt that an exception for future related operations would in effect negate the "reserved gate" doctrine of *General Electric*. All work performed on a primary employer's premises would contribute to the efficiency or profitability of the employer's operations, or else he would not authorize it. To create an exception for future related operations would be to accuse the Supreme Court of conducting an exercise in futility in its formulation of the exceptions in *General Electric*.

The Board found also that the picketing did not fall within the principles of *National Woodwork*. It noted that the union, in quest of its demands, had tried to bring primary pressure on the company by striking its premises. When this tactic failed to produce the desired result the union brought pressure against another employer (the general contractor) who was neither an ally nor engaged in the primary work, but who was neutrally engaged in the construction of a building. The Board did not consider this picketing to be direct activity aimed at preservation of work. Rather, it was "activity aimed at a secondary source to prevent it from performing an action which may be followed by actions of other employers with the ultimate (not direct) end of preserving work."¹⁴ This picketing of a neutral is too remote from the end of work preservation to fall within the principle of *National Woodwork*. The Board agreed with the trial examiner that this was a classic secondary boycott.

Finally, though the Board did not consider this case as presenting a true common-situs problem because of the complete separation of the operations of the employees of the primary and secondary employers, it held that the *Moore Dry Dock* standards should apply to the premises. Therefore, since the union could have picketed at gates proximate to the company's operating premises, no legitimate reason existed for it to picket the construction site and the reserved gate.

3. *Work Preservation Agreements and Their Enforcement.*—In *American*

¹⁴ Id., 69 L.R.R.M. at 1459.

Boiler Mfgs. Ass'n v. NLRB, (Minneapolis case),¹⁵ decided during the Survey year, the Court of Appeals for the Eighth Circuit had before it a case in which a union representing the pipefitters in the Minneapolis area had obtained a bargained-for fabrication agreement with a contractors association. This agreement essentially provided that member contractors of the Association would not use on construction sites packaged boilers with trim piping attached, but would secure the items separately and leave their assembly to the pipefitters, as had been the custom. One of the member contractors entered into a contract with a toy company specifying that a packaged boiler with trim piping attached was to be installed in the company's building. When the boiler was delivered at the job site the union demanded that the unit be separated before the boiler was installed, and threatened a work stoppage. The court, contrary to the Board, found that the contractor was bound to the specifications. Despite the employer's lack of control over the boiler specifications, however, the court held that the union's picketing threat was protected activity under the principles of *National Woodwork Mfgs. Ass'n v. NLRB*.¹⁶ This finding is contrary to the Board's position on such situations. The Board has held the view that where a union, seeking to preserve job opportunities, exerts coercive pressure on an employer by calling for a work stoppage or by threatening one, and where such employer has no legal power to take the action requested by the union, the union violates section 8(b)(4)(ii)(B).¹⁷ The Board regards the employer having the control as the primary employer, against whom secondary pressure is being brought to bear. In this case the Board would consider the toy company as the primary employer and the contractor as a neutral because of his lack of control.

The Eighth Circuit recognized that the Supreme Court had specifically stated in *National Woodwork* that the issue concerning the legality of the Board's "right of control" rule was not before it in that case.¹⁸ The court of appeals, however, considered the following language of the *National Woodwork* opinion as determinative:

The determination whether the "will not handle" sentence . . . and its enforcement violated § 8(e) and § 8(b)(4)(B) 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.¹⁹

¹⁵ 404 F.2d 556, 69 L.R.R.M. 2858 (8th Cir. 1968).

¹⁶ 386 U.S. 612 (1967).

¹⁷ See Local 1066, Longshoremen, 137 N.L.R.B. 45, 50 L.R.R.M. 1333 (1962), enforced, 331 F.2d 712, 56 L.R.R.M. 2200 (3d Cir. 1964); Ohio Valley Carpenters Dist. Council, 144 N.L.R.B. 91, 54 L.R.R.M. 1003 (1963), enforced, 339 F.2d 142, 57 L.R.R.M. 2509 (3d Cir. 1964).

¹⁸ 386 U.S. at 616-17 n.3.

¹⁹ Id. at 644-45.

The circuit court interpreted this language as establishing the principle that employees have an absolute right to bring concerted pressure against their employer so long as their objective is the preservation or protection of work traditionally performed by them. The court noted, however, that the "right of control is a factor to be considered in deciding whether concerted activity by unit employees has an illegal objective."²⁰ In the case at bar the court found that work preservation was the sole objective of the union and, therefore, that its activity was lawful. The court's ruling appears sound. It is difficult to regard the contractor as a neutral, as did the Board, since the employees are seeking to affect his working conditions. Certainly if he had not lost his power over the specifications the union's action would be lawful. It should not make a difference that he transfers this control to someone else.²¹

In the companion case of *American Boiler Mjgrs. Ass'n v. NLRB* (St. Paul case),²² a sister union to the one involved in the Minnesota case obtained, in 1963, a fabrication agreement with the Contractors Association similar to the one discussed above. By 1963, however, packaged boilers with trim piping attached were used in 60 to 85 percent of all boiler installations. When the union sought to secure compliance with the fabrication clause on several jobs, it was charged with violation of sections 8(e) and 8(b)(4)(ii)(B). The Association argued that the agreement did not comply with the requirements of *National Woodwork*. That case approved agreements aimed at the preservation of work traditionally performed by the represented employees. The Association argued that "traditional work" was meant to encompass only that work "currently, continuously and exclusively performed by unit employees." Here the union was seeking to reacquire work for the employees which had already been lost. The Eighth Circuit rejected this argument. It agreed with the Board that the Association's reading of *National Woodwork* was too restricted. The record of *National Woodwork* itself supports this conclusion because the trial examiner found in that case that the union was likewise interested in reacquiring as well as preserving work. The term "traditional work" at least includes work which unit employees have performed and are still performing at the time when they negotiated a work preservation clause.

Another aspect of the St. Paul opinion involved the exaction of a 100-dollar fine from one of the contractors for failing to comply with the fabrication agreement. The fine was levied by a fabrication committee composed of union and Association representatives, formed to interpret, apply and enforce the agreement. The issue before the court was whether the union violated section 8(b)(4)(ii)(B) by bringing the contractor's violation to the attention of the fabricating committee and by voting to assess the penalty against him. The court ruled that, in light of its rejection of the Board's

²⁰ 404 F.2d at 561-62, 69 L.R.R.M. at 2861.

²¹ Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. Pa. L. Rev. 1000, 1038 (1965).

²² 404 F.2d 547, 69 L.R.R.M. 2851 (8th Cir. 1968), petition for cert. filed, 37 U.S.L.W. 3460 (U.S. May 29, 1969) (No. 1457).

"right of control" rule,²³ the union's action, even if coercive, did not violate section 8(b)(4)(ii)(B). The union's sole objective in instituting the enforcement proceedings was the preservation of traditional work for its members and was therefore lawful under *National Woodwork*.

I. *Recognitional Picketing by Non-Representative Union*

In *Dallas Bldg. Trades Council v. NLRB*,¹ the Court of Appeals for the District of Columbia considered an instance in which a Building Trades Council, a labor organization including local craft unions in its membership, sought an agreement with an Employer Association having collective bargaining agreements with the local craft unions. The proposed agreement would have restricted subcontracting to employers who had agreements with Council-affiliated locals, and contained clauses disclaiming any intent on the part of the Council to represent any of the employees. When the Association would not consent to such an agreement, the Council struck the member contractors. At the time, the picketed contractors were operating under collective bargaining contracts barring the introduction of representation questions during the contract term. The Board found that the Council's picketing was for recognitional purposes, and therefore violated section 8(b)(7)(A).²

On appeal, the union argued, *inter alia*, that section 8(b)(7)(A) was enacted to eliminate blackmail picketing by one union attempting to wrest the representation of the employees from another weak, but recognized, union. Here, not only did the Council disclaim any such intention, but the local unions themselves did not consider the Council's conduct to interfere with their exclusive representation. Therefore, the union argued, section 8(b)(7)(A) should not apply.

In response to this argument, the court expressed its agreement with the Board that the proscriptions of section 8(b)(7)(A) are not confined to the blackmail-picketing context. Congress outlawed any picketing which sought to compel the employer to recognize and deal with a non-representative labor organization on the subjects which could substantially affect the working conditions of employees. The fact that subcontracting is such a subject is evidenced by the Supreme Court's recognition of it as a mandatory subject of

²³ *American Boiler Mfgs. Ass'n v. NLRB* (Minnesota case), 404 F.2d 556, 69 L.R.R.M. 2858 (8th Cir. 1968).

¹ 396 F.2d 677, 68 L.R.R.M. 2019 (D.C. Cir. 1968).

² Section 8(b)(7)(A) provides:

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

...
to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with the Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act

29 U.S.C. § 158(b)(7)(A) (1964).

bargaining.³ In the case at bar, to the extent that the general contractors might contract out work to cheaper non-unionized subcontractors without the agreement proposed by the Council, subcontracting would affect the number of employees hired by the general contractors. Although it might be argued that the agreement proposed by the Council was meant to enhance the employees' position by making their jobs more secure, it still violates section 8(b)(7)(A) if it is recognitional, since it removes the bargaining leverage of the local bargaining representative on the matter of subcontracting controls. This loss of leverage could substantially weaken the local union's position at the bargaining table, a result that section 8(b)(7)(A) was designed to prevent.

The agreement sought by the union through picketing would in effect have compelled Association recognition of the Council. The proposed contractual obligation included the concomitant obligation to discuss, upon the Council's request, implementation of and compliance with the terms. "A union involved in such inevitable day-to-day dealings could truly be said to have been recognized 'as the representative' of the employees with respect to the subject matter of the agreement."⁴

The Council's principal argument was that "hot cargo" agreements⁵ relating to the construction industry were expressly legalized by section 8(e)⁶ and that, therefore, Congress could not have intended to outlaw the most natural means of achieving such agreements—the strike. The court again agreed with the Board that no inconsistency existed between the Board's interpretation of section 8(b)(7) and the purposes of section 8(e). It does not follow from the fact that the agreement would be lawful if voluntarily adopted that a labor organization can employ illegal means to obtain it. Sections 8(b)(7) and 8(e) were intended to resolve separate problems.

J. Remedies

The National Labor Relations Board is vested with exclusive jurisdiction to prevent unfair labor practices. Section 10(a) provides that the power of the Board in this regard "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement,

³ See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

⁴ 396 F.2d at 683, 68 L.R.R.M. at 2024.

⁵ "Hot cargo" agreements are generally considered agreements not to handle goods which are produced under nonunion standards or not to handle the goods of an employer whom the union for other reasons declares "unfair."

⁶ Section 8(e) provides:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement, shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work

29 U.S.C. § 158(e) (1964).

law, or otherwise."¹ The grant of remedial power to the Board is couched in broad terms, and allows the Board wide discretion in fashioning remedial orders. Section 10(c) provides that the Board may "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act.² The Board adapts its remedy to fit the circumstances of the particular case in order to dissipate the effects of the unfair labor practices. The Supreme Court has held, however, that the Board's discretion is limited to "remedying" unfair labor practices—the Act does not confer "punitive" jurisdiction on the Board.³

1. *NLRB Discretion Under Section 10(c): Fringe Benefits and Implied Seniority Standards.*—In *NLRB v. Strong*⁴ an employer refused to sign a collective bargaining contract negotiated with a union by a multi-employer association to which he belonged. The Board found that the employer's refusal to sign the agreement constituted an unfair labor practice under sections 8(a)(5) and 8(a)(1) and, despite the existence of an arbitration clause in the contract, ordered the employer, among other things, to "pay to the appropriate source any fringe benefits provided for" in the collective bargaining contract.⁵ The Court of Appeals for the Ninth Circuit refused to enforce that part of the Board's order requiring the payment of fringe benefits. The court stated that this was "an order to the [employer] to carry out the provisions of the contract and is beyond the power of the Board."⁶

The Supreme Court reversed the court of appeals and held that the Board is empowered by the broad grant of authority of section 10(c) to order the retroactive payment of fringe benefits to remedy an unfair labor practice. The Court reasoned that such payments complied with the remedial policy of the Act to make the worker whole. Furthermore, it noted that although the Board does not have plenary authority to interpret the collective bargaining agreement, it is empowered under section 10(a) to prevent an unfair labor practice even though the same act constituted a breach of the contract and would provide the basis for a suit under section 301. The Court considered the award of fringe benefits, which would have been paid had the employer signed the contract negotiated on his behalf, to be analogous to the judicially recognized award of back pay in a situation where an employee is discharged for union membership even though such discharge constitutes a violation of a collective bargaining agreement open to arbitration.⁷

In *Buncher v. NLRB*⁸ the Court of Appeals for the Third Circuit enforced a back-pay order of the Board computed on the basis of a seniority

¹ 29 U.S.C. § 160(a) (1964).

² 29 U.S.C. § 160(c) (1964).

³ See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

⁴ 393 U.S. 357 (1969).

⁵ See *id.* at 358.

⁶ *Id.*

⁷ See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

⁸ — F.2d —, 70 L.R.R.M. 2552 (3d Cir. Jan. 20, 1969), petition for cert. filed, 37 U.S.L.W. 3485 (U.S. June 10, 1969) (No. 1508).

standard even though the offending company did not utilize a formal seniority system in its employment practices. The company conducted its business through several facilities, interchanging its employees among them. The company discharged some of the employees working at one of the facilities. The Board found that the discharges were discriminatorily motivated. Subsequent to the discharges, the company was forced to lay off, for economic reasons, a number of employees working at the same facility from which the employees were discharged. The company claimed that it did not utilize a seniority standard, but rather ten different criteria, in order to determine whether it should retain or lay off an employee. The company argued that, according to those criteria, the discriminatees would not have continued in its employment beyond the layoff date. Therefore, its liability for back pay to any of these employees should be limited to the time between the discharges and the layoff date.

The Board rejected the company's argument. It held that the testimony offered by the company to establish the use of the ten criteria in making its employment decisions was so replete with infirmities that it was not a reliable basis for a decision on the back pay issue. The Board instead required an allocation of the available post-layoff jobs among the discriminatees and the other employees on the basis of seniority. The allocation was to be made first with respect to the facility from which the discriminatees were discharged, but if sufficient work were not available at that facility for the discriminatees, an allocation was to be made with respect to the company's other facilities. Presumably, if such an allocation is made, it will yield a finding that at least some of the discharged employees would not have been laid off but for the discrimination practiced by the company. The company would, therefore, be liable for back pay from the time when the employees were discharged until they were reinstated or found substantially equivalent employment.

Enforcing the Board's decision, the court of appeals pointed out that it was established law that where an employer has discharged employees discriminatorily, but asserts in mitigation of back-pay claims that these employees would have been laid off even absent such discrimination, he has the burden of proving that fact.⁹ The court concluded that the company had failed in its burden when its testimony regarding its employment criteria was discredited. In light of the company's failure to sustain its burden and of the broad remedial powers granted to the Board by section 10(c), the court concluded that the Board was acting within its discretion when it computed the back-pay award on the basis of seniority. The record demonstrated to the court that length of service was at least a factor in the company's employment policy. Furthermore, the seniority standard represents "normal industrial practice generally."

The *Strong* and *Buncher* decisions suggest the probable outcome of cases now pending before the Board concerning the validity of a remedy which makes available retroactive compensatory relief in situations where the employer has refused to bargain for an initial contract with his employees'

⁹ See *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 60 L.R.R.M. 2578 (2d Cir. 1965).

certified representative.¹⁰ The proposed remedy, as stated by the trial examiner in *Ex-Cell-O Corp.*, would require the employer to "[c]ompensate . . . its employees for the monetary value of the minimum additional benefits . . . which it is reasonable to conclude that the Union would have been able to obtain through collective bargaining . . . for the period commencing with the date of the Respondent's formal refusal to bargain . . ."¹¹

The Supreme Court's decision in *Strong*, enforcing an award of fringe benefits to remedy the employer's refusal to bargain, leads one to conclude that the Board can make the award recommended by the trial examiner in *Ex-Cell-O* provided that (1) a reliable method exists for determining that the employees would have received the fringe benefits and increment in wages but for the employer's refusal to bargain, and (2) the amount due the employees can be computed with some accuracy. These two related requirements may be stated by the single question: Is there an objective standard by which the Board may determine the losses, if any, suffered by the employees?

It is true that in *Strong* the payment of fringe benefits had already been provided for in the collective bargaining agreement negotiated on behalf of the employer. Furthermore, it was presumably a relatively easy task to compute the amount due the employees by reference to the negotiated agreement. The Supreme Court's emphasis, however, on the plenary authority of the Board to remedy unfair labor practices, and on the broad discretion allowed the Board by section 10(c) in order to effectuate the general policy of the Act to make the offended employees whole, strongly suggests that the Court's reasoning was meant to reach beyond the factual boundaries of *Strong*. This conclusion is supported by the Third Circuit's decision in *Buncher*, even though it was rendered only five days after the Supreme Court's decision in *Strong* and therefore makes no reference to that case. The Third Circuit appeared to take a liberal view of the Board's remedial powers, a view similar to that taken by the Supreme Court in *Strong*. As noted above, the court in *Buncher* held that certain discriminatorily discharged employees were entitled to full back pay from the time of discharge calculated with reference to a seniority system, despite the fact that the employer had not utilized a formal seniority standard to control his past employment decisions.

The charging union in *Ex-Cell-O* suggested in its brief three basic standards for determining what, if any, losses were suffered by the employees as a result of the employer's refusal to bargain: (1) a comparison of the affected employees' wage increases and fringe benefits during the period at issue with those of other employees in the same geographical area; (2) a comparison of the wage and fringe-benefit increases during the same period at *Ex-Cell-O's* other plants;¹² and (3) a comparison of the bargained in-

¹⁰ *Ex-Cell-O Corp.*, NLRB Trial Exam. Dec. 80-67 (Case No. 25-CA-2377, 1967); *Herman Wilson Lumber Co.*, NLRB Trial Exam. Dec. 757-66 (Case No. 26-CA-2536, 1967); *Zinke's Foods, Inc.*, NLRB Trial Exam. Dec. 662-66 (Cases Nos. 30-CA-372, 30-RC-400, 1966); *Rasco Olympia Inc.*, NLRB Trial Exam. Dec. 167-66 (Case No. 19-CA-3187, 1966).

¹¹ *Ex-Cell-O Corp.*, NLRB Trial Exam. Dec. 80-67, at 18 (Case No. 25-CA-2377, 1967).

¹² *Ex-Cell-O* had five other plants all represented by and under contract with, the

creases nationally, tabulated by the Bureau of Labor Statistics for the same period.¹³

The approximation obtained by using a combination of these methods would seem to be no less exacting than the approximation obtained through use of the seniority standard approved in *Buncher*. Reference to the wage and fringe-benefit increases in the employer's other plants seems to be an especially reliable standard. The trial examiner based his award exclusively on this comparison. The employer's argument that the remedy would constitute Board dictation of collective bargaining terms should be rejected because the award would span only the period up to the time when the employer commences to bargain in good faith. It would not, therefore, affect the terms of the contract ultimately negotiated by the parties. The argument that the award is punitive in nature, the contention of the dissenter in *Buncher*, should be rejected here, as it was there. The remedies recommended in *Ex-Cell-O* are tailored for the compensation of the employees for wages and benefits to which they would have been entitled but for the employer's unfair labor practices, just as they were in *Buncher*. The *Strong* case yields the observation that no meaningful difference exists between the two cases merely because the unfair labor practice here is a section 8(a)(5) refusal to bargain, whereas in *Buncher* it was an 8(a)(3) discriminatory discharge. The Supreme Court in *Strong* was affirming an award of fringe benefits to remedy an 8(a)(5) violation. It is therefore submitted that the *Strong* and *Buncher* cases offer the Board more than ample authority for adopting the trial examiner's proposed remedial order in *Ex-Cell-O*.

2. *Section 10(j) Injunctions.*—In 1932, Congress passed the Norris-LaGuardia Act,¹⁴ depriving the federal courts of jurisdiction to grant injunctions in labor disputes except under particular, specified conditions.¹⁵ Certain exceptions to the Norris-LaGuardia Act were carved out by the Taft-Hartley Act in 1947. Section 10(h) of that Act¹⁶ provides that injunctive relief, sought by the NLRB under section 10 generally, shall not be restricted by the Norris-LaGuardia Act. Specifically, sections 10(e)¹⁷ and 10(j)¹⁸ provide the Board with authority to seek injunctions from the federal district courts. Section 10(e) requires that the regional director seek injunctive relief pending a formal Board decision when the regional director finds that there is good reason to believe that a union is acting, picketing or boycotting in violation of sections 8(b)(4)(A), (B), or (C), 8(b)(7), or 8(e).

charging unions. While the products of the plants were different, the employees were all involved in some form of metal work.

¹³ Brief for UAW Before the NLRB, *Ex-Cell-O Corp.*, at 6.

¹⁴ 29 U.S.C. §§ 101-15 (1964).

¹⁵ Before any injunction may be issued in a labor dispute, it must be shown that (1) unlawful acts have been threatened or committed and will be continued unless restrained; (2) substantial and irreparable injury to the complainant's property will result or has resulted; (3) there will be greater injury to complainant if the injunction is denied than there will be to the defendant if the injunction is issued; and (4) the complainant has no adequate remedy at law.

¹⁶ 29 U.S.C. § 160(h) (1964).

¹⁷ 29 U.S.C. § 160(e) (1964).

¹⁸ 29 U.S.C. § 160(j) (1964).

Section 10(j) is dissimilar to section 10(e) in that injunctions under the former are discretionary with the Board and are not required by the finding of certain facts as with the latter. The only formal prerequisite for seeking an injunction under section 10(j) is that there be before the Board an unfair-labor practice charge involving the enjoinee. Beyond that, the court to which the Board petitions is free to grant such temporary relief or restraining order as it "deems just and proper."¹⁹ The courts, however, have not been in agreement as to the standards which govern a "just and proper" application of section 10(j).

In *McLeod v. General Elec. Co.*,²⁰ the Board, as noted above,²¹ successfully petitioned a district court to enjoin the General Electric Company from refusing to bargain with a coordinated bargaining committee representing the electrical workers. In granting the injunction, the court essentially took the position that Congress, in passing section 10(j), had entrusted the NLRB with the discretion to determine the propriety of the injunction. It was, therefore, the duty of the court to determine whether the Board had properly exercised that discretion, which, in effect, left the court to determine no more than "whether the Board has 'reasonable cause to believe' that the accused party has been guilty of unfair labor practices."²²

On appeal the Second Circuit reversed and vacated the injunction.²³ The crux of the court's opinion was its emphasis on the extraordinary nature of the injunction as a remedy in labor disputes. After stating that section 10(j) was but a meager exception to the general prohibition of Norris-La-Guardia against federal court injunctions, the court held that the Board must establish that the injunction is necessary either to preserve the status quo between the parties while the Board resolves the dispute or to prevent "irreparable harm."

After the *McLeod* case, the Tenth and the Eighth Circuits had occasion to pass on the standards governing the issuance of 10(j) injunctions. Both of these courts considered that the inquiry of a court, when petitioned by the Board for a 10(j) injunction, should be whether the Board had reasonable cause to believe that an unfair labor practice had been committed. Both courts, however, felt that the inquiry should not end with a finding of "reasonable cause." They reasoned, as did the Second Circuit in *McLeod*, that in order to justify the granting of injunctive relief in a labor dispute context, the Board must demonstrate something more than reasonable cause. The two circuits' proposed formulations of the further demonstration required of the Board differ somewhat from each other and from that offered by the Second Circuit.

In *Sacks v. Angle*,²⁴ the Tenth Circuit made no mention of the "irreparable harm" consideration proposed by the Second Circuit in *McLeod*, but

¹⁹ *Id.*

²⁰ 257 F. Supp. 690, 62 L.R.R.M. 2809 (S.D.N.Y. 1966).

²¹ See pp. 855-57 *supra*.

²² 257 F. Supp. at 709, 62 L.R.R.M. at 2824, citing *Douds v. International Longshoremen's Ass'n*, 241 F.2d 278, 281, 39 L.R.R.M. 2388, 2390 (2d Cir. 1957).

²³ 366 F.2d 847, 63 L.R.R.M. 2065 (2d Cir. 1966).

²⁴ 382 F.2d 655, 66 L.R.R.M. 2111 (10th Cir. 1967).

focused exclusively on the desirability of the preservation of the status quo. The *Angle* court limited this consideration, however, to situations where there exists "a reasonable apprehension that the efficacy of the Board's final order may be nullified" unless temporary relief is granted.²⁵ In *Minnesota Mining & Mfg. Co. v. Meter (3M)*,²⁶ the Eighth Circuit, while expressing general agreement with the *Angle* case, proposed that section 10(j) relief was warranted (1) "where the unfair labor practices, unless contained, would have an adverse and deleterious effect on the rights of the aggrieved party which could not be remedied through the normal Board channels," and (2) where "the remedial purpose of the Act would be frustrated unless immediate action is taken."²⁷ The first element of the 3M test seems equivalent to the "irreparable harm" elements of the Second Circuit's test. The second element is but a restatement of the *Angle* test.

During the Survey year, two federal district courts gave extensive consideration to the 10(j) problem and to the cases discussed above. In both cases, the courts found that the Board "had reasonable cause to believe" that unfair labor practices had been committed. Furthermore, both courts required something more than this finding to justify the issuance of an injunction.

In *Greene v. Senco, Inc.*,²⁸ the Board petitioned the District Court for Massachusetts for a 10(j) injunction to prevent a certain company from recognizing a minority union as the bargaining representative of its employees. The Board's processes were initiated by a rival union which charged both the company and union with unfair labor practices. Included in the rival's charges was a contention that the company had violated section 8(a)(5) by refusing to bargain with this rival union, which had represented the company employees before the company had moved from its old location and changed its name. However, charges other than the 8(a)(5) contentions prompted the Board to seek the 10(j) injunction.

The claimed minority union offered a three-part argument to support its position in opposition to the majority. First, the union contended that the court should take notice of the 8(a)(5) complaint pending before the Board. Second, if the company had in fact violated 8(a)(5), the Board would order reinstatement of the charging rival union as the bargaining representative of the company's employees. Third, since the Board would order reinstatement of the rival if the 8(a)(5) violation were established, the injunction against the company's recognition of the alleged minority union would not be necessary to insure the efficacy of the Board's final order, as required by *Angle*.

The court rejected the union's argument. It did not, however, propose any new standards for the issuance of 10(j) injunctions, nor did it elect to adopt one from among those already proposed. The court considered the issuance of an injunction as proper, despite the union's argument, no matter which of the tests were applied. Even if it was obliged to consider the pendency

²⁵ Id. at 660, 66 L.R.R.M. at 2114.

²⁶ 385 F.2d 265, 66 L.R.R.M. 2444 (8th Cir. 1967).

²⁷ Id. at 270, 66 L.R.R.M. at 2447.

²⁸ 282 F. Supp. 690, 67 L.R.R.M. 2922 (D. Mass. 1968).

of the 8(a)(5) violation before the Board, the court felt that the union's argument ignored the irreparable harm tests of *General Electric* and *3M*. The court concluded that injunctive relief was necessary to prevent irreparable harm to the rival union arising from its inability to represent the company's employees during the time between the proceeding then before the court and the Board's final order.

The court felt that even if the *Angle* test was the proper one the same result should obtain, but for different reasons. First, the court did not consider itself compelled to recognize the 8(a)(5) violation pending before the Board and reasoned that, absent such a recognition, the union's argument failed, because the injunction would be needed to insure the efficacy of a Board order based on the charged unfair labor practices other than the alleged 8(a)(5) violation. Secondly, even if it were compelled to consider the pendency of the 8(a)(5) charges, the court concluded that it could still properly issue an injunction. The Board, on hearing the 8(a)(5) charge, might not order reinstatement as a final order. It might find the 8(a)(5) charge to be without merit yet at the same time find the other charges to be meritorious. In this case, the Board would order an election. The injunction is necessary to insure the efficacy of such an order.

In *Sachs v. Davis & Hemphill, Inc.*,²⁹ an employer refused to bargain with the certified union representative of its employees. The company's refusal was based on a claim that it had reasonable grounds for doubting the union's majority status. In deciding whether an injunction should properly issue in this situation, the court felt bound to consider "whether there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted."³⁰ The court was satisfied that the Act would be frustrated without the issuance of the injunction. It reasoned that the Act was intended to promote industrial peace through collective bargaining. The public interest in this result weighs in the determination of the propriety of an injunction. Furthermore, if the employer is allowed to continue in its refusal to bargain with the representative chosen by its employees, it will be able to erode employee support for the union. If the temporary injunction is not granted, the delays inherent in the Board processes will enable the employer to continue in its unjustified refusal for so long a time that the normal Board procedures provided by the Act will not afford the employees and the union an adequate remedy. "The public interest requires that the purposes of the Act be not frustrated in this way."³¹

VII. LABOR UNIONS AND THE ANTITRUST LAWS

During the current Survey year the Supreme Court has rendered one major decision seeking to refine the uneasy accommodation between labor and antitrust law.¹ In *American Fed'n of Musicians v. Carroll*² orchestra

²⁹ Id. 70 L.R.R.M. 2399 (D. Md. Jan. 24, 1969).

³⁰ Id. at 2403.

³¹ Id. at 2404.

¹ For a brief history of the development of the law in this area, see 1965-1966 Annual Survey of Labor Relations Law, 7 B.C. Ind. & Com. L. Rev. 909, 954-61 (1966), and

leaders brought an action against the American Federation of Musicians (AFM) alleging violations of Sections 1 and 2 of the Sherman Antitrust Act.³ The AFM had acquired a virtual closed shop in the New York area by means of agreements with booking agents, recording companies and other similar music industry groups. The union's bylaws in effect regulated the musicians' terms of employment. The bylaw challenged by plaintiffs as violative of the antitrust laws was one requiring orchestra leaders to follow a "Price List Booklet" which imposed minimum prices for orchestra "club-date" appearances. A "club-date" is usually a one-time engagement to provide orchestra music for a special occasion. The sponsor of the event may obtain an orchestra by contacting a booking agent or a leader. The leader obtains the sidemen and attends to the business details of the engagement. The four orchestra leaders in this case were fulltime leader-employers, although in many other instances the leader performs as a musician with the orchestra. These leaders maintained offices and employed a staff to solicit engagements. Proceeding on the theory that they constituted a "non-labor" group,⁴ the plaintiffs charged that the union's involvement of orchestra leaders in the setting of price scales for club-date appearances created a combination with a "non-labor" group in violation of the Sherman Act.⁵

The district court dismissed the action, holding that the union's activities were exempt from the antitrust laws as activities affecting a "labor group" which is party to a "labor dispute" under the Norris-LaGuardia Act.⁶ The Court of Appeals for the Second Circuit reversed on the issue of price fixing, stating that

these regulations, in fact, establish price floors because the orchestra leader is required to charge the music purchaser not less than the total of his "leader's fees," the sidemen's wages and other fees.⁷

Otherwise the circuit court affirmed the dismissal.

The Supreme Court vacated the decision of the court of appeals and affirmed the district court decision. The Court essentially adopted the reasoning of the district court. Two significant issues were raised by the facts: first, whether the plaintiff orchestra leaders constituted a "labor group;" second, whether a union may unilaterally impose price scales without violation of the antitrust laws. The Court answered both questions in the affirmative.

1966-1967 Annual Survey of Labor Relations Law, 8 B.C. Ind. & Com. L. Rev. 771, 894-901 (1967).

² 391 U.S. 99 (1968), noted in 10 B.C. Ind. & Com. L. Rev. 480 (1969).

³ 15 U.S.C. §§ 1, 2 (1964).

⁴ The court of appeals held that the leaders did constitute a "non-labor" group. *Carroll v. American Fed'n of Musicians*, 372 F.2d 155, 159, 64 L.R.R.M. 2276 (2d Cir. 1967).

⁵ A union is denied exemption from the antitrust laws if it combines with a non-labor group to restrain trade. *Allen Bradley Co. v. Local 3, Elec. Workers*, 325 U.S. 797 (1945).

⁶ *Carroll v. American Fed'n of Musicians*, 241 F. Supp. 865, 894, 59 L.R.R.M. 2657, 2678 (S.D.N.Y. 1965).

⁷ 372 F.2d at 160, 64 L.R.R.M. at 2280.

Definition of a "Labor Group." On the issue whether club-date orchestra leaders constitute a labor group, the Court agreed with the district court that the applicable criterion was the

presence of a job or wage competition or some other economic inter-relationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a "labor group" and party to a labor dispute under the Norris-LaGuardia Act.⁸

The district court had found that such competition existed because orchestra leaders perform work which actually or potentially affected the hours, wages, job security and working conditions of union members. Because there is intense competition for positions as leaders, the full-time leader "displaces" another union member simply by securing an engagement for himself.⁹

There appears to be a serious question whether the Court properly included plaintiffs, who were full-time orchestra leaders, in a group with those musicians who only occasionally perform as leaders. Such grouping ignores the time and energy which plaintiffs devoted to organizing and managing their businesses. Even when they lead the orchestra, the plaintiffs could be considered supervisory personnel. The Court, however, adopted the district court's conclusion that the plaintiff-leaders' non-business activities had at least a potential effect on union members. Thus, it concluded that plaintiffs comprised a "labor group."¹⁰

Two considerations are raised by the Court's decision on the "labor group" issue. The first is the question of its applicable scope. If the Court's criterion of job or wage competition and its permission to separate the leaders' functions into labor group and non-labor group work is applied to industries other than music performance, the *Carroll* rationale could lead to anomalous results. An employer who occasionally does work normally done by a union member may find himself legally obligated to join the union. Unless the decision is limited to what Mr. Justice White in his dissenting opinion calls the "peculiar role of bandleaders and the peculiar economics of the club-date music industry,"¹¹ *Carroll* does not foreclose such a situation.

The second consideration is the ease with which the Court removes the collective bargaining process from the club-date music industry. The decision held that "in the light of the job and wage competition . . . it was lawful for . . . [the union] to refuse to bargain collectively with the leaders . . ."¹² Since the policy of the National Labor Relations Act is to promote collective

⁸ 241 F. Supp. at 887, 59 L.R.R.M. at 2672.

⁹ 391 U.S. at 111 n.11.

¹⁰ Besides concluding that plaintiff-leaders constituted a "labor group," the Court upheld the district and court of appeals holdings that the AFM could lawfully "pressure the orchestra leaders to become union members . . ." 391 U.S. at 106-07. For a complete analysis of this and other aspects of the *Carroll* case, see 10 B.C. Ind. & Com. L. Rev. 480 (1969).

¹¹ 391 U.S. at 114.

¹² Id. at 106-07.

bargaining,¹³ it seems that the Court should not have denied the bargaining process to an entire industry.¹⁴

The Price-Fixing Issue. Having disposed of the question whether the leaders constituted a labor group, the Court turned its attention to the market price-fixing issue. Because the leaders had been defined by the Court as a "labor group," it was concluded that their acquiescence in union-imposed price floors could not be construed as creating a combination in restraint of trade under the Sherman Act. The union could lose its antitrust exemption only if it combined with a "non-labor group."¹⁵ This determination was not dispositive of the issue, however, since the further question remained whether the union could unilaterally impose price scales which reflected not only the sidemen's wages but also the leader's wages and fees. In short, even though the union might not be acting in combination with a non-labor group, it had unilaterally set prices at which the leader could sell his own services as well as those of the entire orchestra.

The Court considered the "critical inquiry" to be "whether the price floors in actuality operate to protect the wages of the . . . sidemen."¹⁶ The Court agreed with the district court's statement that, "[i]n view of the competition between leaders and sidemen and subleaders which underlies the finding that the leaders are a labor group, the union has a legitimate interest in fixing . . . minimum engagement prices"¹⁷ The engagement price was of immediate and direct concern to the union since the price bore a direct relationship to union members' wages.¹⁸ Because of the potential competition with leaders, the union could set the leaders' minimum fees to prevent them from undercutting the sidemen's established fees.

Even if it is conceded that the union was not acting in combination with a non-labor group, it is submitted that the Court should not have approved the union's unilateral price fixing merely because the market price bears an "immediate and direct" relationship to wages. First, this conclusion overlooks the fact that market price for the product must always reflect some element of wages. Concededly, in the *Carroll* situation, the product itself was labor—the live production of music—and, therefore, an unusually close relationship existed between wages and market price. The Court

¹³ NLRA § 1, 29 U.S.C. § 151 (1964).

¹⁴ Although Mr. Justice White's dissenting comments are directed to the broader issue of antitrust immunity, they are relevant here:

The Court appears to feel that because respondents' work includes some "labor group" tasks, all aspects of respondents' activities are proper subjects of union concern. I see no reason why the law in this area cannot be sufficiently flexible to grant the union antitrust immunity for regulation of those activities of band-leaders which sufficiently affect union members, while denying that immunity where the union has no proper concern.

391 U.S. at 115 (dissenting opinion).

¹⁵ See note 5 *supra*.

¹⁶ 391 U.S. at 108.

¹⁷ 241 F. Supp. at 890, 59 L.R.R.M. at 2674.

¹⁸ The Court could, therefore, conclude that the union's activity met the labor exemption tests set out in *Local 189, Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). First, the union acted in its own self-interest rather than in combination with a non-labor group. Second, the union's unilateral activity intimately concerned a subject of immediate and direct union concern, i.e., wages.

would not, presumably, permit a union specifically to force an employer to raise the market price of the product in order to pay for a wage increase. Such action would constitute the most blatant form of labor group-non-labor group combination in restraint of trade.¹⁹ Despite the Court's discussion of competition between the leaders and union members, it is difficult to see why the restraint of trade should be any less objectionable where, as in *Carroll*, one labor group imposes a market price scale on another labor group.²⁰

Second, the Court's conclusions overlook the fact that the union's requirements could be met by methods consistent with both the antitrust laws and the labor laws. Because the AFM has a virtual closed shop in the New York area, it could simply insist on minimum wage scales for its members. Full-time club-date orchestra leaders could then bargain on an industry-wide basis with the union on sidemen's wages and other terms of employment for club-date appearances. This method would not restrict the freedom of leaders to bargain with purchasers of the musical performances.

Finally, the *Carroll* Court's allowance of unilaterally imposed market prices does not appear consistent with the achievement of an accommodation of the antitrust laws and the labor laws. *Carroll* overbalances the scales in favor of protection of the union's interest in the "mandatory subjects of collective bargaining"—wages, hours and working conditions—at the expense of creating restraints in the market for "club-date" music performances. The Court's method is surely an efficient means of promoting one of the strong national labor policies—the protection of employers' legitimate interest. The problem inherent in the decision is that it does not conform with an equally strong national trade regulation policy—the prevention of market restraints. It may be, as Mr. Justice White suggests, that the music industry has special problems of supply and demand requiring special treatment under the antitrust laws. If such was the majority's conception of that industry it should have confined the rules of law announced to that industry.

More appropriately, the Court should leave to Congress the task of making special provisions in the antitrust laws for the special circumstances of the music industry. On more than one occasion Congress has seen to it that the full rigors of the antitrust laws are not felt by industries which cannot survive under competitive conditions.²¹

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¹⁹ See note 5 *supra*.

²⁰ Mr. Justice White stated in his dissent:

I cannot believe that the Court intends . . . to hold that unilateral demands, enforced by threats, combined with willing cooperation or reluctant acquiescence by leaders . . . , cannot amount to a combination in restraint of trade.

391 U.S. at 120 n.9 (dissenting opinion).

²¹ *Id.* at 121-22 (dissenting opinion).