

STUDENT COMMENTS

1966-1967 ANNUAL SURVEY OF LABOR RELATIONS LAW

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I. INTRODUCTION

This comment is the sixth 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 object of the comment is to report those decisions which significantly add substance to, or depart from, prior policy in the application of the Labor Management Relations Act, and to analyze in detail those cases which are the most significant. The subject matter comprises, for the most part, decisions of the United States Supreme Court, the lower federal courts, and the National Labor Relations Board reported during the Survey year ending March 1, 1967. In addition, state court decisions of significance are included, and some cases which were decided after the end of the Survey year are reported because of their relevance to decisions which were given during the Survey year.

II. BOARD AND COURT JURISDICTION

A. *Jurisdictional Standards of the NLRB*

The Supreme Court has held that Congress, in passing the NLRA, has given the Board the maximum jurisdiction to regulate labor relations available to a federal agency under the interstate commerce clause of the Constitution.¹ The determining factor for the Board, in deciding if jurisdiction should be asserted, is whether the "immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."² However, early in the history of the NLRA, it was established that when the dollar volume of the company's business was so small as to be de minimis, the Board should reject jurisdiction over that company's labor disputes.³

Actually, the widest extent of the Board's jurisdiction is but the outermost of three concentric circles, the next of which bounds those cases over which the Board should assert jurisdiction, and the smallest circle enclosing that quantum of cases over which the Board, limited by its physical capabili-

¹ The prior comments are: 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 NLRB v. Denver Bldg. Council, 341 U.S. 675 (1951); NLRB v. Fainblatt, 306 U.S. 601 (1939).

³ Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 648 (1944).

⁴ NLRB v. Fainblatt, *supra* note 1, at 607.

ties, can effectively assert jurisdiction. Therefore the Board has had to exercise its discretion in choosing which cases of those presented to it were most deserving of its efforts.⁴ Until 1950 the Board exercised this discretion on a case-by-case basis.

But early in the 1951 fiscal year, after a long study of the pattern emerging from past decisions, the Board issued a series of unanimous decisions setting forth more precisely the standards to govern its future exercise of jurisdiction in the 48 States. In doing so, the Board declared: "The time has come, we believe, when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn."⁵ (Footnotes omitted.)

In 1954⁶ and again in 1958⁷ these standards were revised. Labor disputes involving businesses whose dollar volume of revenue fell below these standards would not be heard by the NLRB.

Thus, when the Supreme Court announced, in *Guss v. Utah Labor Relations Bd.*,⁸ that a state agency may assume jurisdiction over a case within the permissive legal jurisdiction of the LMRA only where the Board has made a formal cession of jurisdiction to the state agency,⁹ a "no-man's land"

⁴ NLRB v. Denver Bldg. Council, *supra* note 1.

⁵ 16 NLRB Ann. Rep. 15 (1951).

⁶ 21 NLRB Ann. Rep. 7-28 (1956).

⁷ 23 NLRB Ann. Rep. 8-12 (1958). On October 2, 1958, the Board announced its latest standards, which are as follows:

1. Nonretail: \$50,000 outflow or inflow, direct or indirect.
2. Office buildings: Gross revenue of \$100,000, of which \$25,000 or more is derived from organizations which meet any of the new standards.
3. Retail concerns: \$500,000 gross volume of business.
4. Instrumentalities, links, and channels of interstate commerce: \$50,000 from interstate (or linkage) part of enterprise, or from services performed for employers in commerce.
5. Public utilities: \$250,000 gross volume, or meet standard 1 (non-retail).
6. Transit systems: \$250,000 gross volume. (Except taxicabs, to which the retail test (\$500,000 gross volume of business) shall apply.)
7. Newspaper and communication systems: Radio, television, telegraph, and telephone: \$100,000 gross volume.
8. National defense: Substantial impact on national defense.
9. Business in the Territories and District of Columbia:
D.C.—Plenary.
Territories—Standards apply.
10. Associations: Regarded as single employer.

These are the standards currently in force.

⁸ 353 U.S. 1 (1957).

⁹ LMRA § 10(a), 61 Stat. 147 (1947), 29 U.S.C. § 160(a) (1964), provides that the Board's power to prevent unfair labor practices

shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry . . . even though such cases may involve labor disputes affecting commerce, unless [there are laws in the state which are inconsistent with the LMRA]. . . .

was created. Here were the cases over which the NLRB *might* have asserted jurisdiction but had not, and had also failed to grant jurisdiction to an appropriate state agency through a formal agreement.

As a result of this obvious deficiency, Congress passed sections 14(c)(1) and (2).¹⁰ The first section gave the Board full discretion to decline jurisdiction over any labor dispute provided "that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."¹¹ Complementing this, section 14(c)(2) provides that "nothing in this subchapter shall be deemed to prevent . . . any State [agency] . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction."¹² Although section 10(a) was not deleted or amended by the 1959 Landrum-Griffin Amendments, the addition of section 14(c)(2) did eliminate the *necessity* of the section 10(a) agreement with a state agency before that agency could assert jurisdiction over a labor dispute. Now, once the Board has refused jurisdiction, a state agency may hear the case; the Board may also make a formal agreement as to a category of cases, as provided in section 10(a). As a result, the "no-man's land" created by the decision in *Guss*¹³ became less of a problem—a party wishing a forum to settle a labor dispute need only petition the NLRB and then, if jurisdiction is declined, the state agency. Also, since the Board announced that "it will . . . apply the revised jurisdictional standards to all future . . . cases,"¹⁴ a state agency may consider a company whose business falls below these standards as prospectively rejected by the NLRB, and subsequently assert jurisdiction over the company's labor disputes.¹⁵

Yet it is not always clear whether the Board would assert jurisdiction under its standards. Realizing that there are cases which, because of their proximity to the Board's jurisdictional lines of demarcation, place a state agency in a position of uncertainty as to the propriety of assuming jurisdiction over a labor dispute, the Board promulgated regulations providing for advisory opinions on jurisdiction.¹⁶ These regulations provide that any party to a proceeding before any state agency, who is in doubt as to whether the Board would assert jurisdiction, may file a petition with the Board for an advisory opinion. They also provide that any state court or agency which is in doubt may petition the Board for a like advisory opinion. These petitions must contain, *inter alia*, the commerce data relating to the operations of the business involved in the proceedings.

¹⁰ Added by 73 Stat. 541 (1959), 29 U.S.C. §§ 164(c)(1), (2) (1964).

¹¹ Added by 73 Stat. 541 (1959), 29 U.S.C. § 164(c)(1) (1964).

¹² Added by 73 Stat. 541 (1959), 29 U.S.C. § 164(c)(2) (1964).

¹³ *Supra* note 8.

¹⁴ *Siemons Mailing Serv.*, 122 N.L.R.B. 81, 84, 43 L.R.R.M. 1056, 1058 (1958).

¹⁵ The Supreme Court has never affirmatively sanctioned this procedure. Rather, in reversing assertions of jurisdiction by state courts because they had improperly determined that the business involved in the labor dispute fell without the NLRB's jurisdictional standards, the Supreme Court has implied that it is proper for the state court to make the determination in the first instance. *Radio & Television Broadcast Technicians Local 1264, IBEW v. Broadcast Serv., Inc.*, 380 U.S. 255 (1965); *Hattiesburg Bldg. & Trades Council v. Broome*, 377 U.S. 126 (1964).

¹⁶ 29 C.F.R. §§ 101.39-43, 102.98-110 (1967).

Given the relevant commercial data on the company involved in the labor dispute, it would seem that the dollars-and-cents yardstick used by the NLRB would provide a clear measure of jurisdiction. Precision in this area is most important, for the number of cases within the judicial "no-man's land" is a function of the clarity of the demarcation line which dichotomizes NLRB and state jurisdiction. The less distinct the line, the more cases will be rejected by state courts *and* refused by the NLRB. This is, of course, precisely the reason that the advisory-opinion procedure of the Board was created. For, where it is unclear whether or not the Board would assert jurisdiction, and a state agency decides that the NLRB would take jurisdiction and therefore the state must not, there exists too great a possibility that the NLRB, making an independent determination of jurisdiction, would also reject the case and leave the parties involved without a forum.

In *Cox's Food Center v. Retail Clerks*,¹⁷ the Supreme Court of Idaho, wary of this type of situation, reversed a lower court which had made an independent determination that the Board would assert jurisdiction. The lower court had felt that the employer's business was large enough to make NLRB jurisdiction mandatory under section 14(c)(1). The state supreme court held that it was error for the lower court not to petition the NLRB for an advisory opinion on the jurisdictional question before dismissing the case.

Although the state supreme court found the lower court's ruling on NLRB jurisdiction to be in concert with the practice of the Board as it appeared, the court stated that primary concern should be attached to the possibility that the Board might not assert jurisdiction after the state refused. The facts in *Cox's Food Center* were deemed to present a problem close enough to merit a Board advisory opinion, which would guarantee that there would not be a failure of both state and NLRB jurisdiction. The closeness of the jurisdictional issue arose from the fluctuation in the employer's revenue. During the year in which the dispute arose (1961), Cox's had a dollar volume of \$538,000, which clearly fell within the Board's \$500,000 jurisdictional limit.¹⁸ But during the year following the initiation of the dispute, which year also preceded the litigation, Cox's had a \$168,000 volume. The argument in support of state jurisdiction was, of course, that the dollar volume of the 12 months preceding the litigation was determinative. The Idaho Supreme Court pointed out the fallacy of this contention by first citing *Jos. McSweeney & Sons*,¹⁹ for the proposition that the year preceding the start of the dispute was the determinative one. Secondly, the court pointed out that the NLRB did not intend the \$500,000 to be a hard and fast rule, devoid of consideration of the surrounding circumstances. Specifically, the court noted *Essex County & Vicinity Dist. Council of Carpenters*,²⁰ in which the NLRB asserted jurisdiction over a retail com-

¹⁷ 420 P.2d 645, 64 L.R.R.M. 2042 (Idaho 1966).

¹⁸ *Carolina Supplies & Cement Co.*, 122 N.L.R.B. 88, 43 L.R.R.M. 1060 (1958). See note 7 *supra*.

¹⁹ 119 N.L.R.B. 1399, 41 L.R.R.M. 1309 (1958).

²⁰ 95 N.L.R.B. 969, 28 L.R.R.M. 1397 (1951).

pany which had less than \$500,000 volume in the year preceding the dispute, because the Board found that the company would have done much more business but for a strike which was part of the dispute.

The important aspect of the case is, however, the court's reluctance to independently determine whether there would be NLRB preemption of jurisdiction where there is the slightest chance that the NLRB will not assert jurisdiction and where the relevant NLRB jurisdictional standard is not susceptible of mechanical application. Where an element of discretion and/or expertise is needed, the cautious attitude exhibited by the *Cox's* court is proper. A labor-management problem without a forum should be avoided at all reasonable costs.

An example of the deference afforded the NLRB's exercise of discretion and expertise in jurisdictional matters²¹ is provided by *NLRB v. Harrah's Club*.²² When the Board petitioned the Ninth Circuit to enforce a cease-and-desist order issued to a gambling casino because of its unfair labor practices, the casino objected on jurisdictional grounds. The casino claimed that the Board's assertion of jurisdiction was arbitrary and an abuse of discretion.

At the heart of the casino's argument lay the Board's failure to exercise jurisdiction over the racetrack industry, *qua* industry. From this it was argued that, because the Board's reasons for not asserting jurisdiction over racetracks were equally applicable to casinos, the Board was arbitrary and abusive of its discretion in this case. The Board had articulated the reasons for its refusal to assert jurisdiction over the racetrack industry in *Hialeah Race Course, Inc.*²³ First, the Board considered the racetrack industry as essentially local in character, and therefore a labor dispute therein would not be likely substantially to disrupt interstate commerce.²⁴ Secondly, racetracks are subject to detailed state regulation which, in the absence of Board regulation, may, and probably will, be extended to include labor relations.²⁵

The court in *Harrah's Club* noted that the Board denied that the rationale for refusing jurisdiction over racetracks was equally applicable to gambling casinos. The Board contended that the two "industries" were factually distinguishable. Furthermore, the Board contended that the existence of state regulation would not, *per se*, bar Board jurisdiction, but rather that the federal preemption doctrine would control.²⁶ Consequently, whether or not there was equal state regulation of both industries was not controlling. From this point, the court had little trouble with the case. Clearly the Board had statutory jurisdiction under section 10(a),²⁷ and this was not

²¹ The discretion is of course legally bounded by § 14(c)(2), since that section gives an absolute criterion. But there are areas not covered by § 14(c)(2), namely, those companies in an industry or type of business not included in the standards promulgated in 1958. See note 7 *supra*.

²² 362 F.2d 425, 62 L.R.R.M. 2507 (9th Cir. 1966).

²³ 125 N.L.R.B. 388, 45 L.R.R.M. 1106 (1959).

²⁴ *Id.* at 391, 45 L.R.R.M. at 1108.

²⁵ *Ibid.*

²⁶ See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

²⁷ 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1964).

disputed. This being so, the court found "the exercise of that jurisdiction is subject to review only on the question of whether, under the circumstances, *unjust discrimination* will result."²⁸ (Emphasis added.) The court reasoned that an arbitrary distinction between racetracks and gambling casinos is not conclusive of "unjust" discrimination. The gambling casino involved in the case had not alleged any harmful results obtaining from the NLRB's assertion of jurisdiction in the one instance and rejection in the other. Nor could the court assume any unjust discrimination inherent in the situation. Therefore, even admitting that the distinction made by the Board was arbitrary—which the court did not do—the casino had not made a case. Beyond the constitutional limitations on federal jurisdiction and the mandate of section 14(c)(1), the NLRB's assertion of jurisdiction, according to this court, is circumscribed only by a prohibition of arbitrary distinctions which result in unjust discrimination.

Section 14(c)(1)²⁹ was a congressional imprimatur on the Board's preexisting policy of refusing jurisdiction over any class or category of employers whose labor dispute had an impact on commerce not sufficiently substantial to warrant the exercise of Board jurisdiction.³⁰ But there is a proviso to this section which prohibits the Board from declining jurisdiction "over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."³¹ This means that the Board can reduce jurisdictional standards, but cannot raise them above the 1959 levels. However, this leaves the NLRB free to make reasonable adjustments in its assessment of a particular business as properly falling within one category or another, and the Board did make such an adjustment in *Athens T.V. Cable, Inc.*³²

In this case the Board was concerned with a new industry—community television antennas—in which a company is formed which offers to a local public the services of a television antenna that has great reception capabilities. Each customer of the community-antenna company pays a fee to have his television connected by cable to the community antenna. Previous to *Athens T.V.*, the Board had considered this type of business as falling within the retail-industry category.³³ Under the standards applicable to that industry, a community-antenna company would have to do \$500,000 gross volume in order to be subject to Board jurisdiction.³⁴ However, in *Athens T.V.*, the Board announced that henceforth such companies would be considered in the communications category. Consequently, community-antenna companies need only do \$100,000 gross volume to be within NLRB jurisdiction.³⁵

²⁸ 362 F.2d at 427, 62 L.R.R.M. at 2508.

²⁹ Added by 73 Stat. 541 (1959), 29 U.S.C. § 164(c)(1) (1964).

³⁰ See 16 NLRB Ann. Rep. 15 (1951).

³¹ LMRA § 14(c)(1), added by 73 Stat. 541 (1959), 29 U.S.C. § 164(c)(1) (1964).

³² 160 N.L.R.B. No. 95, 63 L.R.R.M. 1111 (1966).

³³ Warren Television Corp., 128 N.L.R.B. 1, 46 L.R.R.M. 1248 (1960).

³⁴ Carolina Supplies & Cement Co., *supra* note 18. See also note 7 *supra*.

³⁵ Raritan Valley Broadcasting Co., 122 N.L.R.B. 90, 43 L.R.R.M. 1062 (1958).

See note 7 *supra*.

B. District Court Jurisdiction over NLRB Proceedings

Normally, election proceedings conducted by the NLRB are reviewable by a court only if there is a later unfair-labor-practice determination by the Board in which a refusal to bargain is prompted by the conduct of the representation proceedings. In such a case, the record of the representation proceeding accompanies the unfair-labor-practice record to be reviewed by the circuit court under section 9(d) of the LMRA.¹ But in rare instances, a federal district court will accept jurisdiction over a petition to vacate a Board election. There were three noteworthy cases of this type in the Survey year: *Bullard Co. v. NLRB*;² *Uyeda v. Brooks*;³ and *Big Y Supermkts., Inc. v. McCulloch*.⁴

Section 10(f) of the LMRA⁵ provides that "any person aggrieved by a final order of the Board . . . may obtain a review of such order. . . ." In *American Fed'n of Labor v. NLRB*,⁶ the Supreme Court held that an election certification by the NLRB under section 9 of the LMRA⁷ is not a "final order" within the meaning of section 10(f) and is, therefore, not independently reviewable by a federal court. The Court stated that only where the NLRB has issued an order, predicated upon the results of an election, does the NLRA provide for court policing of the election proceeding.

In 1958, however, the Supreme Court, in *Leedom v. Kyne*,⁸ upheld the decision of a federal district court which had vacated a Board certification of an election result. The Supreme Court reasoned that the district court was not "reviewing" the election proceedings in the section 10(f) sense of review, but rather that it was enforcing the "statutory commands" which Congress had written into the LMRA. The Board had certified a bargaining unit which, by the Board's own admission, included professional and non-professional employees, without obtaining a polled consent of the professional employees. It was undisputed that such an action by the Board was in excess of its statutory powers.⁹ The Court's decision was that "a Federal District Court has jurisdiction of an original suit to vacate [the] . . . determination of the Board [when the Board acts] . . . in excess of its powers."¹⁰ In the course of its opinion, the Court announced the controlling principle: "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference

¹ 61 Stat. 144 (1947), 29 U.S.C. § 159(d) (1964).

² 253 F. Supp. 391, 61 L.R.R.M. 2670 (D.D.C. 1966).

³ 365 F.2d 326, 62 L.R.R.M. 2831 (6th Cir. 1966).

⁴ 263 F. Supp. 175, 64 L.R.R.M. 2227 (D. Mass. 1967).

⁵ 61 Stat. 148 (1947), as amended, 72 Stat. 946 (1958), 29 U.S.C. § 160(f) (1964).

⁶ 308 U.S. 401 (1940).

⁷ 61 Stat. 143 (1947), as amended, 73 Stat. 525 (1959), 29 U.S.C. § 159 (1964).

⁸ 358 U.S. 184 (1958).

⁹ LMRA § 9(b)(1), 61 Stat. 143 (1947), 29 U.S.C. § 159(b)(1) (1964), provides that "the Board shall not (1) decide that any unit is appropriate for [the purposes of collective bargaining] . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit."

¹⁰ 358 U.S. at 185.

would be strong that Congress intended the statutory provisions governing the general jurisdiction of the courts to control."¹¹

In *Boire v. Greyhound Corp.*,¹² the Supreme Court again ruled on district court jurisdiction to police NLRB activity. In *Boire*, the Court went to great pains to make it clear that the *Kyne* exception for judicial review of Board election proceedings was a very narrow one. It was emphasized therein that a federal district court may only accept jurisdiction to determine the validity of Board election proceedings where it is alleged that the Board has acted in contravention of a statutory mandate, that is, where the Board has made a mistake of law. But where it appears that the Board has made a mistake of fact, even though such mistake leads to a conclusion which does not comport with the law, a federal court must not disturb the election results.

Of no small weight in the *Kyne* Court's deliberations was the fact that, apart from district court jurisdiction to vacate the Board determination, the professional employees would have had no means of protecting their statutory right to be segregated, for collective-bargaining purposes, from nonprofessional employees. Although the certification of a bargaining unit which integrated professional and nonprofessional employees may have later been overruled by a court of appeals, the professional employees would have had no control over such a court review. They would have had to depend upon the employer's choosing not to bargain with the union representing that bargaining unit; the employer would also have had to claim that his refusal to bargain was justified because the bargaining unit as certified was inappropriate, in order for the professional employees' complaint to be aired.

However, in *Bullard Co. v. NLRB*,¹³ a district court applied the *Kyne* exception to a fact situation markedly different from *Kyne*. In this case, the employer was standing in the position of the professional employees in *Kyne*, claiming that the Board had violated a statutory mandate when it certified the results of an election. It is immediately apparent that this case lacks the basic reason for the *Kyne* exception, namely, the necessity of providing a forum for the aggrieved party, because, as seen above, the employer in *Bullard* could have placed his complaint before an appellate court by refusing to bargain with the union which had been certified following the election. Yet the district court in *Bullard* rejected this distinction.

The union in *Bullard* had lost an NLRB-conducted election and subsequently had objected to the Board's certification of the results, claiming irregularities in the conduct of that election. After hearing the union's objections, the Board held that

the objections relate to alleged irregularities by the Board agent conducting the election. Although . . . the Board agent did not in fact engage in any irregularities, there is a possibility that some of his conduct may erroneously have given such an appearance. The mere appearance of irregularity in a Board agent's conduct of an

¹¹ *Id.* at 190, quoting *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 300 (1943).

¹² 376 U.S. 473 (1964).

¹³ *Supra* note 2.

election departs from the standards the Board seeks to maintain in assuring the integrity and secrecy of its elections and constitutes a basis for setting aside the election.¹⁴ (Emphasis added by district court.)

Accordingly, the NLRB ordered a second election. In the instant case, the employer sought to enjoin the second election on the basis of section 9(e)(2)¹⁵ and to compel certification of the first election on the basis of section 9(e)(1).¹⁶

The district court first directed itself to the contention that an employer cannot avail itself of the *Leedom v. Kyne* remedy for errors in an NLRB election proceeding. The NLRB had presented cases to the court supporting the proposition that an employer had no standing to pursue a *Leedom v. Kyne* remedy.¹⁷ However, the *Bullard* court read a much narrower holding into these cases, because it found that the employer in each case had failed to allege that the NLRB had not complied with a specific statutory command. The court found further authority for the position that employers are not per se barred from a *Leedom v. Kyne* remedy in *Boire v. Greyhound Corp.*¹⁸ The *Bullard* court noted that the *Boire* case could have been easily disposed of by holding that employers are barred from a *Leedom v. Kyne* remedy, but the Supreme Court chose instead to decide the case on different grounds.

In the *Bullard* court's analysis of *Leedom v. Kyne*, it noted the possibility that the Board's election proceedings would have been reviewed by a court of appeals in an unfair-labor-practice case at the initiation of the union. By the *Bullard* court's reasoning, the union could have refused to bargain on behalf of the nonprofessional employees; this would have been an unfair labor practice in violation of section 8(b)(3).¹⁹ The *Bullard* court felt this route of appeal to be a rebuttal of the contended distinction between a union or employee seeking relief from a federal district court and an employer doing so. That the employer can seek a remedy for the Board's error by obtaining review of a finding of an unfair labor practice is, then, not controlling according to the court, because the union in *Leedom v. Kyne* could also have done so.

It is submitted that the *Bullard* court's hypothetical section 8(b)(3) violation is of tenuous substance—section 8(b)(3) seems to embrace only

¹⁴ Id. at 392, 61 L.R.R.M. at 2671, quoting from the Board decision.

¹⁵ 61 Stat. 145 (1947), as amended, 29 U.S.C. § 159(e)(2) (1964). This section provides: "No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

¹⁶ 61 Stat. 144 (1947), as amended, 29 U.S.C. § 159(e)(1) (1964). This section provides, inter alia, that "upon [proper showing of interest] . . . the Board shall take a secret ballot of the employees in such unit and certify the results thereof. . . ."

¹⁷ The cases cited by the Board included: *Kingsport Press, Inc. v. McCulloch*, 336 F.2d 753, 56 L.R.R.M. 2561 (D.C. Cir. 1964); *General Cable Corp. v. Leedom*, 278 F.2d 237, 45 L.R.R.M. 3005 (D.C. Cir. 1960); *Norris v. NLRB*, 177 F.2d 26, 24 L.R.R.M. 2084 (D.C. Cir. 1949).

¹⁸ Supra note 12.

¹⁹ 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1964). This section declares that it shall be an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided it is the representative of his employees. . . ."

a union's refusal to bargain *with* an employer, not a union's refusal to bargain *for* any class of employees represented by it. Further, whether or not the union's refusal to bargain for nonprofessional employees would be a section 8(b)(3) violation, this would not aid a professional employee who sought to be represented as part of a segregated bargaining unit. There is no unfair labor practice that an employee or a group of employees could commit which would eventually result in a review of the appropriateness of the bargaining unit. Thus the *Bullard* court seems to have been incorrect in rejecting the alleged distinction between *Kyne* and the case before it.

Once the court had disposed of the issue of the standing of an employer to contest NLRB election proceedings, there remained the legal issue of whether the NLRB had acted in excess of its powers by failing to certify the first election and by scheduling the second election. The court stated that, if the first election was valid, the Board had acted in excess of its powers, because, as seen above, the statute requires the Board to certify such elections. The court assumed the election was valid because of what it considered to be the Board's own admission to that effect.²⁰ This closed the issue. It is submitted that the court was too quick to conclude that the election was valid, and specifically it is submitted that nowhere does the Board admit the election was valid. What the Board declared was that the agent did not act irregularly.²¹ It was the court, not the Board, which concluded that, because the irregularity was of appearance only, the election was valid. The LMRA does not enumerate specifically the requisites of a valid election. Rather, such a determination is within the ambit of the Board's discretion, and discretionary action by the Board is *not* properly within the *Leedom v. Kyne* exception. The *Bullard* decision seems clearly wrong, and the result in this case should not be permitted to stand.

In the two other cases, *Uyeda v. Brooks*²² and *Big Y Supermks., Inc. v. McCulloch*,²³ the narrowness of the *Leedom v. Kyne* remedy was maintained. In *Uyeda*, an employee sought injunctive relief from a district court, asking that the regional director be compelled to cancel the certification of an election and to count the complaining employee's ballot, redetermining the results of the election on that basis. In an unreported summary judgment by the district court, the regional director was ordered to cancel the certification of the election. On appeal, the district court was reversed.²⁴

The regional director had voided the ballots of the plaintiff and his brother because both were brothers of the employer. The regional director noted that although section 2(3)²⁵ specifically excludes only the parents or spouse of the employer from the definition of employee, it does not follow that only these relationships are valid grounds for disallowing a vote. The

²⁰ 253 F. Supp. at 395, 61 L.R.R.M. at 2674.

²¹ See text accompanying note 14 *supra*.

²² *Supra* note 3.

²³ *Supra* note 4.

²⁴ The instant case involves the second appeal by the regional director from the district court decision in this case. In the first appeal the court of appeals ruled that the issues had not become moot by reason of the regional director's compliance with the district court order. 348 F.2d 633, 59 L.R.R.M. 2850 (6th Cir. 1965).

²⁵ 61 Stat. 137 (1947), 29 U.S.C. § 152(3) (1964).

court agreed that the Board, in its discretion, might determine that other relationships are sufficient to exclude a person from a bargaining unit, and thereby render him ineligible to vote, if such a relationship visits a special status upon the employee which distinguishes his interests from those of the other employees.²⁶ Since the record supported the finding of such a special relationship, the court ruled that it had not been shown that the NLRB had acted in excess of its delegated powers or in contravention of a specific provision of the LMRA.

In *Big Y Supermkts., Inc. v. McCulloch*,²⁷ the employer brought an action in a district court to enjoin the NLRB from conducting elections in two of the employer's four supermarkets on the grounds that it was contrary to section 9(c)(5).²⁸ The court easily reached the conclusion that to entertain such an action would by necessity involve a review of the Board's discretion in determining appropriate units. This is clearly not within the *Leedom v. Kyne* exception, which is limited to mistakes of law, not of fact.

When the Supreme Court first sanctioned the original jurisdiction of a federal district court to assure that the specific statutory commands of the NLRA were not violated by the Board, there was a strong dissent, the thrust of which was a floodgate argument—even a narrowly drawn exception to the review of NLRB election proceedings will result in a spate of charges before district courts which, even though dismissed, would retard the Board's workings.²⁹ It is submitted that none of the reported cases should have ever been entertained by a district court, let alone result in an injunction as in *Bullard*. For example, in *Uyeda* the issues discussed had been in litigation since 1963, and it was not until 1966 that they were finally settled. The Board should not be subjected to this harassment unless there is clear evidence not only that a statutory mandate has been transgressed, but also that the complaining party has been harmed in some substantial fashion, the redress of which would not exist but for a district court injunction. This is the holding of *Leedom v. Kyne*, yet district courts continue to entertain such suits for far less compelling reasons.

C. State Court Jurisdiction over Acts of Violence

*San Diego Bldg. Trades Council v. Garmon*¹ is the definitive opinion on federal preemption of labor-relations regulation. The question before the Court was whether certain state laws were properly applied to peaceful union activity. Specifically, the Court granted certiorari to determine whether a state "had [legislative] jurisdiction to award damages arising out of peace-

²⁶ 365 F.2d at 329, 62 L.R.R.M. at 2832, citing *Cherrin Corp. v. NLRB*, 349 F.2d 1001, 59 L.R.R.M. 3016 (6th Cir. 1965).

²⁷ *Supra* note 4.

²⁸ 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(5) (1964). This section provides: "In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

²⁹ "Unless drastically limited, time-consuming court procedures would seriously threaten to frustrate the basic national policy of preventing industrial strife and achieving industrial peace by promoting collective bargaining." *Leedom v. Kyne*, 358 U.S. 184, 191 (1958) (Brennan, J., dissenting).

¹ 359 U.S. 236 (1959).

ful union activity which it could not enjoin."² It was held that the state court had improperly applied state law, because regulation of the activity in question had been preempted by the National Labor Relations Act. The rule handed down by the Court in *Garmon* was:

when . . . 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.³

The Court added that the protection or prohibition of the activity in question need not be a certainty, but rather state jurisdiction would be barred if the federal regulation was even "arguably" applicable to the facts of the case. So long as the activity in question was "arguably" within federal exclusive jurisdiction, state assertion of jurisdiction would only be tolerated, the Court indicated, where the federally regulated conduct "touched interests so deeply rooted in local feelings and responsibility that, in the absence of compelling congressional direction," deprivation of state jurisdiction would run contrary to our scheme of federalism.⁴ Indeed, the Court had sanctioned state jurisdiction in previous cases only where the conduct in question was marked by violence and imminent threats to the public order.⁵

In *United Mine Workers v. Gibbs*,⁶ the Supreme Court once again emphasized the importance of maintaining the dichotomy between state and federal jurisdiction. The case evolved from a rivalry between the UMW and the Southern Labor Union over representation of employees in the Appalachian coal fields. A mining company had shut down an old mine, laying off one hundred members of Local 5881, UMW, and shortly thereafter attempted to open a new mine, near the old, under the auspices of a wholly owned subsidiary. Because the new mine was to be worked by members of the Southern Labor Union, the members of Local 5881 engaged in two days of violent activity and nine months of picketing at the new mine site in an attempt to secure the working positions for its members. The plaintiff in this suit, Gibbs, had been hired by the wholly owned subsidiary to organize and superintend the opening of the new mine. Included with this employment was a contract for haulage of the mine's product to the railroad loading station. Gibbs brought suit against the UMW, alleging that the union had acted in concert against him, and that it had been responsible for his loss of the superintendent's job and of the haulage contract through the violent activity and the picketing by the members of Local 5881. Plaintiff claimed that these allegations supported not only a section 303 suit under the LMRA,⁷

² *Id.* at 239. "Legislative jurisdiction" is the power of a sovereign to assert its laws over a certain transaction. It is to be distinguished from the power a court has to assert jurisdiction over parties before it.

³ *Id.* at 244.

⁴ *Ibid.*

⁵ *UAW v. Russell*, 356 U.S. 634 (1958); *United Constr. Workers v. Laburnum Corp.*, 347 U.S. 656 (1954).

⁶ 383 U.S. 715 (1966).

⁷ 61 Stat. 158 (1947), as amended, 73 Stat. 545 (1959), 29 U.S.C. § 187 (1964). This section provides that activity in violation of § 8(b)(4) of the act is unlawful, and

but also a suit sounding in tort under Tennessee common law.⁸ It should be noted here that Gibbs did not bring any action against Local 5881 or its members, but rather only against the UMW International, as the principal responsible for the acts of its agents, namely the local and its members.

There were three major issues before the Court. First, the section 303 suit had been dismissed by the trial court,⁹ and this raised the problem of pendent jurisdiction: that is, was the state claim properly before a federal tribunal.¹⁰ The Supreme Court found that the district court was not in error in hearing the state claim even though the federal claim had been dismissed, because, although it was a separate cause of action, the state claim was parallel to and arose out of the same nucleus of operative facts as did the section 303 suit. The second issue, the only one necessary to the decision, was whether the strict proof requirements of Section 6 of the Norris-LaGuardia Act had been adhered to by the court below in finding the International liable for the acts of the individual members of Local 5881.¹¹ The Court found that these standards were not properly articulated by the trial court in its instructions to the jury. The Court then found that if the proper standards of proof were applied to the facts as presented, the requisite showing of possible authorization of or participation in the violence at issue was not made by the plaintiff. On that ground the Court reversed the case and held for the defendant union.

But it is the third issue, preemption, which is of concern here: whether the application of state law was properly confined to those areas allowable

that any person whose business or property is injured by such activity may sue in any federal district court to recover both the damages sustained and the cost of the suit. Section 8(b)(4) of the LMRA, 61 Stat. 141 (1947), as amended, 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4) (1964), makes it an unfair labor practice for any labor organization or its agents to boycott, or cause to be boycotted, any entity engaged in commerce when the purpose is secondary to the legitimate interests of the labor organization.

⁸ As alleged, the tort was "conspiracy . . . to maliciously, wantonly and willfully interfere with [plaintiff's] . . . contract of employment and . . . contract of haulage." 383 U.S. at 720. For examples of cases construing the Tennessee common-law tort of conspiracy, see *Dukes v. Brotherhood of Painters, Local 437*, 191 Tenn. 495, 235 S.W.2d 7 (1950); *Brumley v. Chattanooga Speedway & Motordrome Co.*, 138 Tenn. 534, 198 S.W. 775 (1917).

⁹ 220 F. Supp. 871, 54 L.R.R.M. 2080 (E.D. Tenn. 1963).

¹⁰ Pendent jurisdiction is a concept which cannot be easily explained. Addressing itself to this concept, the Court summarized in the following manner:

The Court held in *Hurn v. Oursler*, 289 U.S. 238, that state law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law. The Court distinguished permissible from nonpermissible exercises of federal judicial power over state law claims by contrasting "a case where two distinct grounds in support of a single cause of action are alleged, only one of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action." 289 U.S. at 246.

383 U.S. at 722.

¹¹ For a discussion of this aspect of the case, see pp. 896-97 *infra*.

under *Garmon*. Specifically, it was claimed by the defendant union that, even if the state claim was a proper remedy for the allegedly violent activity, it could not be applied to all the activity in question. The Court, agreeing with the defendant, stated that "the permissible scope of state remedies in this area is *strictly* confined to the *direct* consequences of such conduct [violence], and does not include consequences resulting from associated peaceful picketing. . . ."¹² (Emphasis added.) The Court thus had to determine whether the damages awarded to Gibbs under the state claim were "strictly" limited to the "direct consequences" of violent activity, and it found that they were not so limited.

The suit had been brought for damages under both federal law (under section 303) and state law. The facts alleged in support of these claims covered both the violent and the peaceful activity. Similarly, the damages claimed were not specifically categorized as resulting exclusively from the violent or exclusively from the peaceful activity. The vitality of both causes of action made the task of characterizing the damages as resulting from one or the other unnecessary. However, when the section 303 suit was dismissed, such a characterization became critical. The problem was twofold: (1) whether the acts of violence resulted in damages which were severable from the results of the peaceful picketing; and (2) if the results were severable, whether the court below was sufficiently careful to make clear to the jury that the plaintiff could only recover for the direct results of the violent acts.

First, the Court noted that, as in *Milk Wagon Drivers Union v. Meadowmoor Dairies*,¹³

acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. . . . [P]icketing . . . set in a background of violence [could justify a conclusion] . . . that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful.¹⁴

The Court concluded that, where such special facts are proved, the consequences of all the activity, violent and peaceful, may be used in assessing the proper remedy under state law. "Where the consequences of peaceful and violent conduct are separable, however, it is clear that recovery [under state law] may be had only for the latter."¹⁵

Observing the checkered history of the tort of conspiracy as a weapon against labor movements,¹⁶ the Court took a dim view of its use here, characterizing it as "poorly defined" and highly susceptible to judicial expansion. It concluded that on the record as a whole the "notion of 'conspiracy' was employed here to expand the application of state law substantially

¹² 383 U.S. at 729.

¹³ 312 U.S. 287 (1941).

¹⁴ *Id.* at 294.

¹⁵ 383 U.S. at 732.

¹⁶ The Court cited, *inter alia*, *Riley v. Dun & Bradstreet, Inc.*, 195 F.2d 812 (6th Cir. 1952); *Original Ballet Russe Ltd. v. Ballet Theatre, Inc.*, 133 F.2d 187 (2d Cir. 1943); *Sayre, Labor and the Courts*, 39 *Yale L.J.* 682, 684-87 (1930). 383 U.S. at 732 n.19.

beyond the limits to be observed in showing direct union involvement in violence."¹⁷ The Court pointed out that the plaintiff's complaint did not specifically confine its prayer for damages under state law to the direct results of violence, and that counsel's argument to the jury similarly lacked this circumscription. Further error was noted in the trial court's instructions to the jury. The distinction between conduct arguably within the protection or prohibition of the LMRA which is subject to valid state jurisdiction, and conduct which is not, was characterized by the trial court as turning on the lawfulness of the activity. The Supreme Court declared that this instruction was confusing and erroneous, and stated that it is violence, not unlawfulness, which distinguishes conduct properly regulated by the state.

That this part of the opinion could be considered dictum makes it even more important, because the Supreme Court chose to discuss the issue in spite of the opportunity to avoid it. The Court made it quite clear that only under very special circumstances would it let a single instance of violence be held to permeate otherwise peaceful activity by a labor organization so as to allow state remedies to be applied to the totality of the activity. Indeed, the Court would not accept the "impression" of the court of appeals

that the threat of violence remained throughout the succeeding days and months. The night and day picketing that followed the spectacular beginning was but a guaranty and warning that like treatment would be accorded further attempts to open the Gray's Creek area. The aura of violence remained to enhance the effectiveness of the picketing. *Certainly there is a threat of violence when the man who has just knocked me down my front steps continues to stand guard at my front door.*¹⁸ (Emphasis added.)

The rejection of such an impression leaves very few imaginable situations where peaceful picketing could be validly held to have been totally tainted by isolated acts of violence.

III. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. *Appropriate Bargaining Unit*

At the heart of labor-management relations lies the bargaining unit. It is here that the right of self-organization is first realized by the employee, whose interest is the focus of the LMRA. It is all important that these bargaining units be appropriate and do not mix antagonistic interests or unnecessarily submerge the legitimate interest of a small group of employees in the interests of a larger group. Congress has entrusted to the NLRB the determination of which group of employees should be considered appropriate. It is the exercise of this power with which this section deals.

1. *Craft Severance*

On March 1, 1954, the NLRB announced its decision in *American Potash & Chem. Corp.*,¹ which embodied the policy guidelines that the

¹⁷ Id. at 732-33.

¹⁸ 343 F.2d 609, 616, 59 L.R.R.M. 2279, 2284 (6th Cir. 1965).

¹ 107 N.L.R.B. 1418, 33 L.R.R.M. 1380 (1954).

Board would use in determining whether the severance of a bargaining unit comprised of the craftsmen in a larger unit would be appropriate. Under the *American Potash* doctrine, once the group petitioning for severance demonstrated to the Board that it constituted a true craft unit² and that the association seeking to represent the unit had traditionally represented such craft groups, the Board would grant the petition for a severance election. On December 28, 1966, the Board announced that "it is patent . . . that the American Potash tests do not effectuate the policies of the Act,"³ and, in a series of three cases, the Board proceeded to state the tests which would best effectuate the policies of the LMRA in determining the appropriateness of a craft severance petition.

Of the three cases, *Mallinckrodt Chem. Works*,⁴ *E. I. Du Pont de Nemours & Co.*,⁵ and *Holmberg, Inc.*,⁶ *Mallinckrodt* is the most definitive. In this case the Board listed six areas of inquiry which would henceforth bear upon the appropriateness of the craft severance:

1. Whether or not the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen performing the functions of their craft on a nonrepetitive basis, or of employees constituting a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists.⁷

2. The history of collective bargaining of the employees sought and at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation.

3. The extent to which the employees in the proposed unit have established and maintained their separate identity during the period of inclusion in a broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation.

4. The history and pattern of collective bargaining in the industry involved.

5. The degree of integration of the employer's production processes, including the extent to which the continued normal opera-

² In our opinion a true craft unit consists of a distinct and homogeneous group of skilled journeymen craftsmen, working as such, together with their apprentices and/or helpers. To be a "journeyman craftsman" an individual must have a kind and degree of skill which is normally acquired only by undergoing a substantial period of apprenticeship or comparable training.

Id. at 1423, 33 L.R.R.M. at 1383.

³ *Mallinckrodt Chem. Works*, 162 N.L.R.B. No. 48, 64 L.R.R.M. 1011, 1016 (1966).

⁴ 162 N.L.R.B. No. 48, 64 L.R.R.M. 1011 (1966).

⁵ 162 N.L.R.B. No. 49, 64 L.R.R.M. 1021 (1966).

⁶ 162 N.L.R.B. No. 53, 64 L.R.R.M. 1025 (1966).

⁷ In a footnote to this consideration, the Board stated that it was dissatisfied with the growing laxity of the originally stringent tests for the validity of a group as a craft unit. 162 N.L.R.B. No. 48, 64 L.R.R.M. at 1016 n.14.

tion of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit.

6. The qualifications of the union seeking to "carve out" a separate unit, including that union's experience in representing employees like those involved in the severance action.⁸ (Footnotes omitted.)

More than changing the *American Potash* tests, the *Mallinckrodt* decision expanded the scope of the Board's inquiry into appropriateness. It should be noted that the character of the unit of employees sought to be severed and the character of the union seeking to represent them continue to be relevant factors under *Mallinckrodt*, as seen in considerations one and six above. It is to be noted also that consideration number three is but an adjunct to number one in that it also tests the distinctiveness of the group seeking severance. In this respect, the relevant qualities of the group sought to be severed, *qua* group, will henceforth be subject to a more extensive scrutiny.⁹

In addition to expanding the already existing *American Potash* tests, the Board added other considerations which were to be equally relevant to the appropriateness of the severance, namely, considerations two, four, and five above. These considerations direct themselves to the interests of the larger unit from which severance is sought and the interests which all involved—employees, employers, unions, and the country—have in maintaining stable labor relations. Specifically, there seems to be a tacit presumption in number five that a larger bargaining unit, having established itself, is the more appropriate and should not be carved up to permit severance. The Board has also deemed relevant the interest which the employer has in bargaining collectively with all the employees vital to the operation of a particular production process. Consideration four, on the other hand, seems no more than a statement that the Board recognizes that lessons may be learned by analogy, *i.e.*, what has worked in other businesses in the industry will probably work in the particular business involved, all else being equal.

In *Mallinckrodt* the Board expressed dissatisfaction with the *American Potash* tests on two grounds. First, these tests did not adequately provide for consideration of the interests of the larger bargaining units, nor for those of the employer; rather, *American Potash* concentrated solely on the interests of the group seeking to be severed on the basis that a deserving group could, almost as a matter of right, obtain severance. Second, the *American Potash* tests made static the denial of craft severance in the "*National Tube*" industries.¹⁰ In *Mallinckrodt* the Board announced that it would apply

⁸ *Id.*, 64 L.R.R.M. at 1016. In a footnote to the last consideration, the Board indicated that the strict "traditional representative" test of *American Potash* would be loosened so that the "tradition" would no longer be a *sine qua non*, but rather one of the factors in determining the appropriateness of the union as a bargaining representative. *Id.*, 64 L.R.R.M. at 1016 n.15.

⁹ Compare the *American Potash* test for a true craft unit, note 2 *supra*, with considerations one and three in the text in light of the statement of the Board given in note 7 *supra*.

¹⁰ In *National Tube Co.*, 76 N.L.R.B. 1199, 21 L.R.R.M. 1292 (1948), the Board decided that members of a craft group would be denied severance if they were employed

the same tests to all industries, and, in a significant footnote, the Board stated:

To the extent that *American Potash* forecloses inquiry into all relevant factors, and to the extent that it limits consideration of the factors of industry bargaining history and integration of operations to cases arising in the so-called *National Tube* industries, it is overruled. To the extent that the decisions in *National Tube Company* . . . [its progeny] . . . and decisions relying thereon may be read as automatically foreclosing craft or departmental severance or the initial formation of such units in unorganized plants in the industries involved, they are hereby overruled.¹¹

The *Mallinckrodt* decision was quite explicit and cannot be criticized for a lack of candor. Yet there is a residuum of doubt as to the weight that each of the newly enumerated considerations will merit in future Board decisions. The Board declared only that it intends to be free "from the restrictive effect of rigid and inflexible rules in making . . . unit determinations,"¹² and that each case will be decided on a case-by-case basis after weighing all the relevant factors. The dissent in *Mallinckrodt* suggested that the Board now gives the new considerations at least as much weight as those considerations held over from *American Potash*. The main thrust of the dissent is that once the *American Potash* tests—a true craft unit and a traditional representative—have been met by the petitioner, the burden of proving "that the separate community of interests normally possessed by craftsmen has become submerged in the larger community of interests of the employees in the broader unit"¹³ should be placed upon those who would deny separate representation. Specifically, the dissent did not consider a showing of long-enduring bargaining history on a larger-unit basis to be a factor meriting as much weight as the *American Potash* considerations.

The clash of opinion can be aptly demonstrated by the differing results reached by the majority and dissent in *Mallinckrodt* and *Holmberg*. In both cases the facts showed that the employees in each group which sought to be severed possessed special skills which would have undoubtedly met the *American Potash* test for a true craft unit. And, further, neither of the majority opinions found that the union seeking to represent the severed group would not have been acceptable if the other elements required for severance

in an industry which involves highly integrated production processes and in which the prevailing pattern of bargaining is industrial in character. *National Tube* involved the basic steel industry. Three other cases were decided under *National Tube*, each finding another industry to be of a like quality: *Permanente Metals Corp.*, 89 N.L.R.B. 804, 26 L.R.R.M. 1039 (1950) (aluminum); *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 1076, 25 L.R.R.M. 1173 (1949) (lumber); *Corn Prods. Ref. Co.*, 80 N.L.R.B. 362, 23 L.R.R.M. 1090 (1948) (wet milling). In *American Potash* the Board decided that it would not extend the *National Tube* doctrine to any more industries, but would continue to reject petitions for severance from employees in those industries which had already been held to be *National Tube* industries.

¹¹ 162 N.L.R.B. No. 48, 64 L.R.R.M. at 1017 n.17.

¹² *Id.*, 64 L.R.R.M. at 1016.

¹³ *Id.*, 64 L.R.R.M. at 1019 (Member Fanning, dissenting).

were present. Yet the integrated nature of the production processes in which the employees were involved and the long bargaining history of the larger unit—25 years in *Mallinckrodt* and 24 years in *Holmberg*—balanced the scales in favor of continuation of the larger unit. Among the particulars which the majority opinions stressed were the fact that the would-be craft unit employees currently received wages equal to those which the union, seeking to sever and represent them, had obtained for its present constituents elsewhere. These employees also had their own seniority system for purposes of transfer, layoff, and recall, and the employees had long manifested a lack of concern for preserving a separate identity for bargaining purposes. In both of these cases, the dissent found the long bargaining history and adequate representation of the craftsmen insufficient to overcome the interests that craftsmen possess in having their individual community of interests separately represented.

Yet the thrust of the dissent's discontent is the apparent quantum of weight which the length of the bargaining history is now to be given as a factor militating against severance. Although the majority opinions cite sundry reasons for their denial of the petitions for severance in *Mallinckrodt* and *Holmberg*, the weight of these considerations in relation to bargaining history becomes suspect in the face of the total absence of bargaining history at the plant involved in *E. I. Du Pont de Nemours & Co.*,¹⁴ where the Board granted an election for a craft unit. It must be noted, however, that *Du Pont* involved an original unit determination as opposed to craft severance from a preexisting unit, and therefore definite conclusions that bargaining history is a factor whose weight is nearly controlling should not be quickly drawn from this case. Further decisions on craft severance should clear the muddy waters. It is certain, though, that whereas bargaining history was once irrelevant, it is now significant among those factors which are to be weighed in determining the appropriateness of severing a craft unit.

There is a limit to the weight bargaining history may have in such Board determinations. It is provided in section 9(b) that

the Board shall not . . . (2) decide that any craft unit is inappropriate . . . on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation. . . .¹⁵

This section was passed in 1947 as a direct result of the rule established in *American Can Co.*,¹⁶ that it would always be improper to "carve out" any smaller unit from a larger bargaining unit that had already been established.¹⁷ It has been the interpretation of this section which has led to the vacillation in craft severance policy by the Board. In *National Tube Co.*,¹⁸ which was decided shortly after the enactment of section 9(b)(2), the Board held that this section contained no language which would bar the

¹⁴ Supra note 5.

¹⁵ 61 Stat. 143 (1947), 29 U.S.C. § 159(b)(2) (1964).

¹⁶ 13 N.L.R.B. 1252, 4 L.R.R.M. 392 (1939).

¹⁷ S. Rep. No. 105, 80th Cong., 1st Sess. 25 (1947).

¹⁸ 76 N.L.R.B. 1199, 21 L.R.R.M. 1292 (1948).

Board from considering either a prior determination or the bargaining history of a particular employer as a factor in determining the appropriateness of a proposed craft unit, so long as that factor was not given *controlling* weight.

As noted earlier, the Board made an about face in *American Potash* which, in effect, reversed *National Tube* as to the proper interpretation of section 9(b)(2), and found the only relevant considerations to be the true craft status of the employees and the tradition of the petitioning union as a craft bargaining representative. The conclusion presents itself that, by now overruling *American Potash*, the Board has returned to the *National Tube* policy and will use the *National Tube* progeny as precedent in future Board decisions. One vital exception to this conclusion must be excised—the effect of an integrated production process where the *initial* establishment of bargaining units is being determined. This difficulty is evidenced by the *Du Pont* decision, which found a craft unit appropriate notwithstanding a highly integrated production process. *Mallinckrodt* and *Holmberg*, on the other hand, suggest that *National Tube*'s precedent for denying craft severance from an *existing* unit of employees, all of whom are necessary to an integrated production process, has been revitalized.

In sum, the Board has recognized that

we are in a period of industrial progress and change which so profoundly affect the . . . organization of industry that a concomitant upheaval is reflected in the types and standards of skills, the working arrangements, job requirements, and community of interests of employees.¹⁹

Consequently, the Board has decided to approach future cases with policy guidelines which consider the total fact situation as relevant to the decision at hand, rather than with mechanical rules which premise a conclusion on the finding of certain limited factors. No longer will there be a presumption that "the specific community of interests among members of a skilled craft outweighs the community of interests that exists among the employees in general."²⁰

2. Multi-Employer Bargaining Units

Section 9(b) of the act is a congressional mandate for the Board to determine which unit of employees is appropriate for collective-bargaining purposes to assure them "the fullest freedom in exercising the rights guaranteed by this subchapter."²¹ But section 9(b) further provides that the Board shall make its determination from among the employer unit, craft unit, plant unit, or subdivision thereof. There is no direct provision allowing the Board to certify as appropriate a multi-employer bargaining unit; yet there arise fact situations where it would clearly be in the best interests of all concerned, especially those of the employees, for the bargaining unit to include the employees of more than one employer. The Board finds statutory sanction for certifying multi-employer bargaining units in two

¹⁹ *Mallinckrodt Chem. Works*, 162 N.L.R.B. No. 48, 64 L.R.R.M. at 1016 n.16.

²⁰ *American Potash & Chem. Corp.*, supra note 1, at 1420, 33 L.R.R.M. at 1381.

²¹ 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1964).

types of situations:²² (1) where each employer involved exercises a sufficient amount of control over the employees in the multi-employer unit so that each may be considered a joint employer of the unit employees; and (2) where a group of employers joins together for the express purpose of bargaining collectively with the aggregate of their employees who are represented by a single union. Whereas a determination of the appropriateness of the multi-employer bargaining unit in the latter situation is but a recognition of a preexisting relationship, established through the consent of the parties involved, the same determination in the former requires the conclusions of law that a joint-employer relationship exists.

In *Jewel Tea Co.*,²³ *S. S. Kresge Co.*,²⁴ and *Thriftown Inc.*,²⁵ the Board utilized the joint-employer approach and found multi-employer bargaining units appropriate. The facts of all three cases were basically the same; each involved the owner of a retail department store who either licensed or rented certain portions of his store to persons who wished to sell specific wares within the department-store complex. The issue before the Board was whether the appropriate bargaining unit should include the licensee's employees with the department-store owner's employees. In deciding that the appropriate unit should be all-inclusive, the Board examined two factors and determined that each department-store owner was the joint-employer of the licensee's employees. First, the Board looked to the contractual relationship between the department-store owner and the licensees for indicia of control by the department-store owner over the labor relations of the licensees. Second, the Board looked to the realities of the situation to see if, in fact, the department-store owner shared in the control of the labor relations of the licensees. If these two inquiries produced affirmative results, the Board would then proceed to inquire if there existed a substantial community of interest among the employees of the joint-employer unit. In all three cases, the Board found a community of interest among the employees of the store-wide unit and a sufficient amount of control being exercised by the department-store owner over the employees of the licensee, and the store-wide unit was certified.

In *Thriftown*, Members Fanning and McCulloch took issue with the majority's finding that a joint-employer relationship existed. Basically, the dissenters felt that the majority had placed too much weight on the *apparent* homogeneity within the store; such homogeneity was created for the eyes of the customers and, according to the dissenters, had little relevance to the legal concept of a joint-employer situation. The dissenters considered that the majority had abandoned the requirement of real control over labor

²² The Board's rationalization of this sanction is rather complex. Because § 2(2) of the LMRA, 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1964), defines an employer as "any person acting as an agent of an employer, directly or indirectly," the Board reasons that a group of employers acting in concert are agents of each other, and therefore that the employees involved may be considered in the employ of any one employer. Where a group of employers bargain with their employees through an association, the association becomes the employer of all the employees involved.

²³ 162 N.L.R.B. No. 44, 64 L.R.R.M. 1054 (1966).

²⁴ 161 N.L.R.B. No. 92, 63 L.R.R.M. 1385 (1966).

²⁵ 161 N.L.R.B. No. 42, 63 L.R.R.M. 1298 (1966).

relations as an element of a joint-employer relationship and had replaced it with the agency concept of apparent authority. They pointed out that whether or not the public may believe that the department store is under one management is irrelevant to the actual labor-management relations within the store and should, therefore, be given no weight as a factor in establishing a joint-employer relationship. Although the dissent's point is well taken, it does not appear that the Board overemphasized this aspect of the case in concluding that a joint-employer relationship existed.

The dissent further criticized the majority in *Thriftown* because the finding of a joint-employer situation in that case seemed to be based on such insignificant facts that the dissent could not imagine a retail department-store situation in which the all-inclusive unit would not be found to be appropriate. These fears were quickly allayed, however, with the decision of the Board in *Bargain Town U.S.A.*²⁶ The facts of *Bargain Town* were very similar to those of *Thriftown*, *Kresge*, and *Jewel Tea*. Without deciding the joint-employer issue, the Board declared that a bargaining unit consisting of only the department-store owner's employees was appropriate. In its opinion, the Board said that

even if the existence of a [joint-employer] . . . relationship were found it does not necessarily follow that the storewide unit including leased and licensed department employees is the *only* appropriate unit. The question for determination is whether the store unit sought by the Petitioner, which excludes the disputed employees, may also be an appropriate unit within the meaning of the Act.²⁷ (Emphasis added.)

If the decision in *Thriftown* raises any doubts as to the propriety of the Board's finding of a joint-employer relationship, they will seem petty compared to those raised by *NLRB v. Checker Cab Co.*²⁸ As noted above, a multi-employer bargaining unit has been certified by the Board either where a joint-employer relationship exists or where a group of employers join together to bargain collectively with their employees.²⁹ The facts of *Checker Cab* do not fit neatly into either of these categories.

Two hundred sixty-eight independent owners of taxicabs had joined together to support a business association which was to serve each of the cab owners. Under the agreement, the association acted as a hiring hall for cab drivers, accepted complaints about the drivers and recommended disciplinary action to the cab owner, and distributed a manual of conduct to all new drivers. The major purpose of the association, however, was apparently to promote the business of the independent cab owners by dispatching cabs, by advertising, and by providing potential customers with easy access to the cabs. All the independent cab owners denied that the association was

²⁶ 162 N.L.R.B. No. 94, 64 L.R.R.M. 1160 (1967).

²⁷ Id., 64 L.R.R.M. at 1161. The decision in this case was unanimous by a three-member panel composed of Members Zagoria, Fanning, and McCulloch.

²⁸ 367 F.2d 692, 63 L.R.R.M. 2243 (6th Cir. 1966).

²⁹ See note 22 supra.

formed for the purpose of bargaining collectively with the drivers.³⁰ Therefore a multi-employer bargaining association was not present here, because there was lacking the necessary mutual consent of the employers and the union. Thus, if the drivers constituted an appropriate bargaining unit, it could only be on the basis of a joint-employer relationship. In this respect it should be noted that each independent cab owner had final authority on hiring and firing his cab drivers, each managed his own cabs, each handled the wages of his own employees and attended to the withholding of taxes. Lastly, the association neither owned nor operated any cabs, and did not hold a license to do so. Nevertheless, the NLRB found that the cab drivers employed by all the independent cab owners who belonged to the association constituted a unit appropriate for collective-bargaining purposes³¹ and the court of appeals affirmed. To find a joint-employer relation, the Board would have had to find either that the association exercised sufficient control over the cab drivers of all 268 cab owners or that each cab owner had sufficient control over the cab drivers of the other 267 cab owners. The Board could not have found the latter, for the number of relationships involved was staggering. As to the former, the facts militate against such a finding unless the recommendations of the association were, in fact, authoritative, which does not seem to be the case.

Perhaps the Board, in its zeal to certify as an appropriate unit a group of employees whose community of interest was obviously substantial, was less than precise in its determination as to the joint-employer relationship. The great harm here is not the result so much as the lack of clarity used in rationalizing it. The test of a joint-employer relationship, if it is to play an important part in Board determinations, should not be a phantom concept; if it is, the danger results that it will become no more than a facade, camouflaging other significant considerations.

In *Mallinckrodt*, the Board demonstrated an acute awareness of the necessity of exercising its full expertise in unit determinations. This awareness led to the overruling of *American Potash*, for that case shackled the Board's exercise of discretion. In *Checker Cab*, the Board may have been a bit too eager to exercise its expertise, and in doing so, it may have slighted one of the bounds placed upon it by Congress—that of section 9(b), which allows only employer units or subdivisions thereof.

B. Union Communication with Employees

1. "Name and Address" Rule

In *Excelsior Underwear, Inc.*,¹ the Board announced a new rule applying to election procedure which was designed to "maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation."² The *Excelsior* rule requires that an employer file a

³⁰ The cab owners comprised the employers in this case, and the drivers working for them comprised the would-be unit.

³¹ 153 N.L.R.B. 651, 59 L.R.R.M. 1503 (1965).

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

² Id. at 1241, 61 L.R.R.M. at 1218.

list with the regional director containing the names and addresses of all eligible voters in the appropriate unit within seven days after the scheduling of an election.³ The regional director is then to make the information contained in that list available to all interested parties, and "failure to comply with this requirement shall be grounds for setting aside the election. . . ."⁴

If the employer fails to comply with the *Excelsior* rule, the Board may select a course of action from three alternatives. First, the NLRB may set aside the results of the election and reschedule another one. Although this remedy does not exert any legal pressure upon the employer to comply with the *Excelsior* rule, it does result in a harassment in the form of repeated elections which might persuade the employer to comply. Second, the Board may issue a subpoena for the lists pursuant to section 11(1) of the LMRA,⁵ and then, if the employer fails to provide the list, petition a federal district court for enforcement of that subpoena pursuant to section 11(2).⁶ This second remedy would, of course, be the most appropriate and effective in keeping with the purpose of the rule, namely, to guarantee an informed electorate, for the list then would be available to the union, enabling it to communicate with the employees more thoroughly. Finally, the Board may find that the employer's refusal to supply the list is an unfair labor practice⁷ and issue an order directing the employer to bargain with the union even if the union loses the election.⁸

The Board has established two questions, the answers to which determine whether the *Excelsior* rule has been violated: (1) has the employer made a good-faith attempt to comply with the rule; and (2) has the employer's attempt resulted in substantial compliance with the rule. A regional director applied these criteria in *Retail Office Employers, Inc.*,⁹ and *Valley Die Cast Corp.*¹⁰ In each case the union objected to the validity of the election on the ground that the list supplied by the employer did not contain all the names and correct addresses of the eligible voters. In both cases it was found that the employer had made a good-faith attempt to supply all the names and correct addresses. In neither case was it found that the list's deficiency was substantial enough to merit a new election.

In *Valley Die* the complaining union lost the election 170 votes to 121. On the day of the election the union did not have the correct addresses of 48 out of 314 eligible voters. The election was lost by 49 votes, which means

³ The Board made one exception to the rule's application. It shall not apply to an expedited election conducted pursuant to LMRA § 8(b)(7)(c), added by 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7)(c) (1964). *Id.* at 1242 n.14, 61 L.R.R.M. at 1219 n.14.

⁴ *Id.* at 1240, 61 L.R.R.M. at 1218.

⁵ 61 Stat. 150 (1947), 29 U.S.C. § 161(1) (1964).

⁶ 61 Stat. 150 (1947), as amended, 29 U.S.C. § 161(2) (1964).

⁷ In *Excelsior*, the Board declined to comment on whether a refusal to comply with the rule would be a violation of LMRA § 8(a)(1), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1964). 156 N.L.R.B. at 1246, 61 L.R.R.M. at 1221.

⁸ This type of remedy for violation of the *Excelsior* rule has not yet been litigated either before the NLRB or before a court. It is submitted that such a remedy would not be unprecedented in light of *Bernel Foam Prods., Inc.*, 146 N.L.R.B. 1277, 56 L.R.R.M. 1039 (1964).

⁹ 62 L.R.R.M. 1642 (1966).

¹⁰ 160 N.L.R.B. No. 142, 63 L.R.R.M. 1190 (1966).

that with the same number of votes cast, an opposite selection on 25 ballots could have changed the election results. In this respect, 48 missing addresses seems to be substantial, and the inference is that the good faith of the employer's attempt tipped the scales in his favor.

The Board has made it clear that it will not accept other methods of facilitating union-employee communication as a substitute for compliance with the *Excelsior* rule, for example, delivering the names and addresses of the appropriate union agents to each employee and informing the employees that the union would like to confer with them;¹¹ informing the employees that the union wants their addresses and distributing to each employee a stamped envelope addressed to the regional director of the NLRB;¹² or supplying the list to a third party who would, at the employer's expense, mail all union literature to the employees.¹³ Elections conducted under these circumstances were set aside. The good faith of the employer in offering these substitutes was deemed irrelevant. Thus, it seems that good faith only becomes a factor when the employer is attempting to comply with the letter of the rule, and not just its spirit.

In two other cases, *Crane Packing Co.*¹⁴ and *Northern Metal Prods. Co.*,¹⁵ the Board again did not consider the actual effect of the employer's failure to comply with *Excelsior*, and thus visited an ostensibly per se approach upon the *Excelsior* remedy. In *Northern Metals*, the Board set aside an election in which two unions were vying for representative status. The defeated union objected to the election on the ground that the employer had not supplied the regional director with a list of the employees' names and addresses as per the *Excelsior* rule. This failure to comply meant, of course, that neither union had received a list. The decision is consistent with the rationale of *Excelsior*, that only an educated electorate can best select its bargaining representative; yet it does not necessarily follow that the absence of the list resulted in an uneducated electorate. In its decision, the Board did not consider this possibility. In *Crane Packing*, the NLRB stated that a violation of the *Excelsior* rule would result in the election being set aside notwithstanding the existence of convenient alternate methods of communication available to the union.

It is possible to conclude from these decisions that, irrespective of the effect, a refusal by the employer to supply the names and addresses of the employees will insure the union a second chance at the polls. Perhaps the Board should exercise some discretionary restraint in situations where, for example, the employer has not supplied the required list, but the union knows all the names and addresses and loses the election anyway. Certainly rules which lend themselves to a mechanical application have their place within an administrative setting to expedite otherwise burdensome decisions. Yet when expediency derogates from statutory mandates, the propriety and

¹¹ *Montgomery Ward & Co.*, 160 N.L.R.B. No. 88, 63 L.R.R.M. 1107 (1966).

¹² *British Auto Parts, Inc.*, 160 N.L.R.B. No. 40, 62 L.R.R.M. 1591 (1966).

¹³ *Union Bleachery*, 160 N.L.R.B. No. 147, 63 L.R.R.M. 1208 (1966).

¹⁴ 160 N.L.R.B. No. 15, 62 L.R.R.M. 1398 (1966).

¹⁵ 161 N.L.R.B. No. 142, 63 L.R.R.M. 1478 (1966).

worth of the expedient rule must be determined on balance. In this light, the statement of a federal district court judge seems very relevant:

While professing not to do so, it does seem to me that the Board does inferentially, at least, take the position it is protecting the union rather than the employees' interests, in some of the arguments that are propounded in the *Excelsior* case.

It is the employees whose rights are to be protected under the law, and whose interests are to be preserved and fostered and nurtured by the Board, in its impartial capacity as an Agent of the Government.¹⁶

2. Subpoenas and the "Name and Address" Rule

During the current Survey year, the NLRB sought court enforcement of subpoenas issued pursuant to *Excelsior* for the names and addresses of eligible employee voters in five instances, only three of which will be noted¹⁷ as they exemplify the issues contained in all five. The Board was granted enforcement three times and denied enforcement twice.

The key issue in the two noted cases in which enforcement was denied, *NLRB v. Montgomery Ward & Co.*¹⁸ and *NLRB v. Hanes Hosiery Div.*,¹⁹ was the courts' construction of sections 11(1)²⁰ and 11(2)²¹ of the LMRA. Both courts found that under these sections the Board could validly subpoena only material which was to be used in "matters under investigation." The lists of names and addresses for which the Board had issued subpoenas were not for use in "investigations," but rather were solely for the purpose of facilitating the unions' communication with the employees, and therefore the subpoenas were outside of the Board's power under sections 11(1) and 11(2). In the third noted case, *NLRB v. Wolverine Indus. Div.*,²² the rationale of the court as it enforced the subpoenas added little substance to the issue beyond the conclusion that it thought enforcement was a good idea. Following some interesting, if not relevant, parallels between the campaign activity of the League of Women Voters and that of the United Mine Workers,²³ the court concluded "that . . . the subpoena . . . is a valid aid to the Board in administering the processes it is called upon to administer under the law."²⁴

Under section 11(1) of the LMRA 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*."²⁵ (Emphasis

¹⁶ *NLRB v. Montgomery Ward & Co.*, 64 L.R.R.M. 2061, 2062 (M.D. Fla. 1966).

¹⁷ The two cases not to be discussed both enforced the NLRB's subpoena. *NLRB v. British Auto Parts*, 64 L.R.R.M. 2786 (C.D. Calif. 1967); *NLRB v. Rohlen*, 64 L.R.R.M. 2168 (N.D. Ill. 1967).

¹⁸ 64 L.R.R.M. 2299 (M.D. Fla. 1967).

¹⁹ 63 L.R.R.M. 2513 (M.D. N.C. 1966).

²⁰ 61 Stat. 150 (1947), 29 U.S.C. § 161(1) (1964).

²¹ 61 Stat. 150 (1947), 29 U.S.C. § 161(2) (1964).

²² 64 L.R.R.M. 2060 (E.D. Mich. 1966).

²³ See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), discussed pp. 783-86 *supra*.

²⁴ 64 L.R.R.M. at 2061.

²⁵ 61 Stat. 150 (1947), 29 U.S.C. § 161(1) (1964).

added.) Under section 11(2) of the LMRA, the federal district courts are specifically granted jurisdiction to enforce subpoenas issued by the Board and to issue contempt citations for failure to comply.²⁶ Both the *Hanes* court and the *Montgomery Ward* court found that they did not have jurisdiction under section 11(2) to enforce the subpoena before them, because the Board's subpoena was not within the scope of section 11(1), *viz.*, matters under investigation or in question. The objection of these courts was previously voiced in another *Montgomery Ward* case:

All the Board wants is [to act] . . . as a conduit in handing [the voter list] . . . over to the Union, and I think, therefore, that it just does not—is not connected with an effort to secure evidence or testimony of a witness in connection with any matter that is under investigation.²⁷

In the *Hanes* case the court also assumed, *arguendo*, that it did have section 11(2) jurisdiction and concluded that enforcement of the subpoena would then be within the discretion of the court, in which case, the court stated, it would still refuse enforcement. In *Montgomery Ward* the court assumed that it did not have section 11(2) jurisdiction, but instead possessed an inherent jurisdiction.²⁸ In the exercise of this inherent jurisdiction, the court refused to enforce the subpoena on the ground that the equities of the case did not call for a subpoena. It was added by the *Montgomery Ward* court, in dicta, that a different factual matrix—one with more compelling equities—might induce the court to exercise its inherent jurisdiction and enforce such a subpoena, notwithstanding a lack of section 11(2) jurisdiction. The court contrasted the facts before it—seventy employee voters, of which the union lacked the names and addresses of only six—to the more compelling case of thousands of eligible voters with a substantial number of names and addresses unavailable to the union.

3. *Union Access to Employees.*

In a decision unique for its facts, the Second Circuit recently ruled that the NLRB may require an employer to grant nonemployee union organizers access to its premises. *NLRB v. S & H Grossinger's Inc.*²⁹ involved union attempts to organize the employees of a 468-acre spa remotely situated in the Catskill Mountains. The employer had from 565 to 786 employees, depending upon the season, of which 60 per cent lived within the confines of the spa. The facilities available to the employees were such that they rarely found need to leave the employer's premises. When they did leave, it was usually by auto, in attire indistinguishable from that of the spa's clientele. As a result, the union organizers waiting at the frontier had great difficulty

²⁶ 61 Stat. 150 (1947), 29 U.S.C. § 161(2) (1964).

²⁷ *Supra* note 16, at 2062.

²⁸ Although the court did not specifically refer to 28 U.S.C. § 1337 (1964), it was noted in *Hanes* and is therefore probably the source of jurisdiction to which the court was referring. That section reads: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

²⁹ 372 F.2d 26, 64 L.R.R.M. 2295 (2d Cir. 1967).

communicating with the employees. Nor did the resident employees have telephones in their rooms through which the union organizers could communicate with them. The court also agreed with the Board that radio and newspaper advertising were both expensive and relatively ineffective, and consequently were not a useful alternative.³⁰ The court concluded that "no effective alternatives [were] . . . available to the union in its organizational efforts."³¹ Under such circumstances, the court agreed with the Board that the nonemployee union organizers should be granted access to the employer's premises.

In its decision to enforce the Board's access order, the court found it necessary to construe two important Supreme Court decisions. In *Republic Aviation Corp. v. NLRB*,³² the Court held a broadly defined no-solicitation rule to be invalid as enforced against the employees. In *NLRB v. Babcock & Wilcox Co.*,³³ the Court held, in a decision carefully confined to its facts, that a nonemployee's right to solicit or distribute literature on the employer's property was not coterminous with an employee's right. The *Grossinger* court read these two cases to require a rule that

the Board in each case . . . balance the necessities of the union for direct access to employees against the employer's right of control over his own property and any detriment which might result from the admission to that property of union organizers.³⁴

It does not appear from the opinion that the employer's argument stressed the possibility of any detriment to his business resulting from union access. Rather he seemed to have emphasized his proprietary right to exclude whomsoever he pleased from his property.

The Board order was twofold, only one part of which was enforced by the court. The Board had ordered the employer to grant union organizers access to his property *and* had ordered the employer to cease and desist from making speeches to the employees during working hours on company premises unless it gave the union a similar opportunity to address the employees. This combination was too extreme for the court; only the former remedy was enforced. The court reasoned that the Board does have the power to issue such an order, but only if the employer is enforcing a no-solicitation rule.³⁵ Inasmuch as the Board order granting access was en-

³⁰ Cf. *NLRB v. United Aircraft Corp.*, 324 F.2d 128, 130, 54 L.R.R.M. 2492, 2493 (2d Cir. 1963).

³¹ 372 F.2d at 29, 64 L.R.R.M. at 2298.

³² 324 U.S. 793 (1945).

³³ 351 U.S. 105 (1956).

³⁴ 372 F.2d at 30, 64 L.R.R.M. at 2298.

³⁵ See *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640, 30 L.R.R.M. 2305 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953). It should be noted that the *Bonwit* rule had been discredited in *NLRB v. F. W. Woolworth Co.*, 214 F.2d 78, 34 L.R.R.M. 2293 (6th Cir. 1954), which denied enforcement of a cease-and-desist order similar to that in *Bonwit* in an essentially correlative fact situation. Further doubt was cast upon *Bonwit* in *NLRB v. United Steelworkers of America*, 357 U.S. 357 (1958), in which the Court made it clear that the NLRB must make a careful analysis of both the employer's and the union's interests, properly balancing the two, before it orders any remedies similar to that in *Bonwit*. The Court concluded, on the facts of that case, that an employer may enforce a

forced, "there is no occasion for the Board's order providing the union with an equal opportunity for addressing the employees."³⁶ The *Grossinger* court appears to have applied the law suggested by the Court in *Babcock & Wilcox*, to wit, the remedy for union nonaccess to employees is indeed a function of the severity of that nonaccess. In *Babcock & Wilcox*, the Supreme Court had hypothesized facts almost identical to *Grossinger*:

[I]f the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property.³⁷

4. *Contract Bar to Solicitation*

Is a broad no-solicitation rule, which would be a violation of section 8(a) (1)³⁸ if imposed unilaterally by the employer, valid if it is incorporated into a collective-bargaining agreement? In *General Motors Corp.*³⁹ the NLRB held that it would be a violation, and found that both the union and the employer had committed unfair labor practices by so agreeing.⁴⁰ The collective-bargaining agreement provided that bulletin boards would be erected and thenceforth would be the sole method of communication between the employees and the union. No other distribution or solicitation would be allowed. This effectively precluded an intervening union or independent employees from distributing literature, because the currently certified union had exclusive use and control of the bulletin board.

The Board defined the issue as striking the proper balance between the integrity of a collective-bargaining agreement and the right of the individual employees to communicate through the distribution of organizational material. The Board reasoned that the preservation of a collective-bargaining agreement's integrity is premised on a respect for the negotiating

valid no-solicitation rule and use methods of persuading the employees which were not available to the union. The Court stated that it should affirmatively appear that a considerable imbalance would result before the NLRB could properly impinge upon the employer's freedom of speech and rights of property. In 1963 the Board reaffirmed its stand on the *Bonwit* rule in *May Dep't Stores Co.*, 136 N.L.R.B. 797, 49 L.R.R.M. 1862 (1962), enforcement denied, 316 F.2d 797, 53 L.R.R.M. 2172 (6th Cir. 1963). There the Board held that it was a violation of § 8(a)(1) of the LMRA, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1964), to: "(1) enforce a broad but privileged [no-solicitation] rule; (2) make antiunion speeches to massed assemblies of employees; and (3) at the same time deny to organizing unions a similar right of reply," because this combination created "an imbalance in the opportunities for organizational communication." 136 N.L.R.B. at 800, 49 L.R.R.M. at 1863. Later, the Sixth Circuit did enforce a similar order in a similar fact situation, distinguishing it from *May* on the ground that there was a "glaring imbalance" in organizational communication. *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889, 891, 58 L.R.R.M. 2115, 2117 (6th Cir. 1965).

³⁶ 372 F.2d at 30-31, 64 L.R.R.M. at 2299.

³⁷ 351 U.S. at 113.

³⁸ 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1964).

³⁹ 158 N.L.R.B. No. 149, 62 L.R.R.M. 1210 (1966).

⁴⁰ The union's unfair labor practice correlative to the employer's § 8(a)(1) violation is in § 8(b)(1)(A) of the LMRA, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964).

and bartering which produced the agreement. Consequently, a specific clause of the agreement should be afforded this respect unless it does not appear to be the result of a *quid pro quo* bargain. The Board thought it naive to suggest that either the union or the employer was sacrificing any rights in agreeing to the no-solicitation clause. The realities, as the Board saw them, were that a mutual benefit accrued to both in the form of a bargaining relationship free from the harassment of another union vying for the position of bargaining representative. The court considered the no-distribution clause as more the result of collusion than give-and-take bargaining.

This decision by the Board is a reaffirmation of a policy first announced in *Gale Prods.*⁴¹ The Board decision in *Gale* was denied enforcement; the court of appeals considered the integrity of the collective-bargaining agreement to be the paramount consideration.⁴² It was in the face of this denial of enforcement and two others,⁴³ that the Board once again issued an order to invalidate a contract bar to solicitation in *General Motors*.

It is submitted that the analysis of the Board in *General Motors* is correct, and that the result is just. As was suggested before, the rights of a union within the statutory framework of the LMRA are derived from its representative status. As a representative, it has a right to bargain collectively for the employees. But when a union uses this right to silence the voice of discontent, it is an abuse of power and should be remedied.

C. Recognition Without Election: Authorization Cards

Although the LMRA provides for an election to determine who, if anyone, shall represent the employees of an appropriate bargaining unit,¹ employers, employees, and labor organizations may, within certain limitations, decide this question for themselves. It is this latter method of establishing a collective-bargaining relationship which is the subject of this section.

After the NLRB conducts an election, it certifies the result.² A union which has been certified as the collective-bargaining representative enjoys certain benefits resulting from the certification. One of the more important benefits is the one-year period during which the Board will protect the bargaining status of the union: during that year the employer must bargain in good faith with the union without questioning its majority status.³ In *Keller Plastics Eastern, Inc.*,⁴ the NLRB decided that in situations involving "a bargaining status established as a result of [the employer's] voluntary recognition of a majority representative, . . . like situations involving certi-

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

⁴² 337 F.2d 390, 57 L.R.R.M. 2164 (7th Cir. 1964).

⁴³ *General Motors Corp. v. NLRB*, 345 F.2d 516, 59 L.R.R.M. 2080 (6th Cir. 1965); *Armco Steel Corp. v. NLRB*, 344 F.2d 621, 59 L.R.R.M. 2077 (6th Cir. 1965).

¹ LMRA § 9(c), 61 Stat. 144 (1947), as amended, 73 Stat. 525 (1959), 29 U.S.C. § 159(c) (1964).

² LMRA § 9(c)(1), 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1) (1964).

³ *NLRB v. Holly-Gen. Co.*, 305 F.2d 670, 50 L.R.R.M. 2676 (9th Cir. 1962).

⁴ 157 N.L.R.B. No. 55, 61 L.R.R.M. 1396 (1966).

fications, . . . the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining."⁵ The *Keller* facts did not involve a refusal-to-bargain charge against the employer; rather, the employer was charged with unlawfully executing a contract with a minority union.⁶ Notwithstanding the union's minority status at the execution of the contract, the Board dismissed the charge against the employer. The Board emphasized that the union did have a majority status at the time it was recognized by the employer, and because of this the Board concluded that the recognition was lawful. If the recognition is valid, the Board reasoned, then the union and the employer should not be required to forfeit the fruits of their bargaining merely because three weeks later, at the time of execution of the contract, the union had apparently lost its majority status.

The rationale of *Keller* was extended by the Board in two later decisions, *Montgomery Ward & Co.*⁷ and *Universal Gear Serv. Corp.*⁸ *Keller* was permissive—an employer *may* bargain with a minority union if the union had majority support when recognized. *Montgomery Ward* and *Universal* made bargaining in such a situation mandatory. After a period of three days following recognition in *Montgomery Ward*, and of fifteen weeks in *Universal*, decertification petitions signed by a majority of the employees were filed with the NLRB. The employers then refused to bargain with the unions on the ground that the decertification petitions had shown that the unions did not enjoy the support of a majority of the employees. The Board sustained the union charges that the employers had committed an unfair labor practice by refusing to bargain with the unions.⁹

In all three of these cases, it was crucial to the holding that, at the time of recognition, the union did, in fact, have the support of the majority of the employees, for the Supreme Court has held that "there could be no clearer abridgement of § 7 of the Act, assuring the employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity," than to grant "exclusive bargaining status to an agency selected by a minority of . . . employees, thereby impressing that agent upon the nonconsenting majority."¹⁰ The fact of majority support in these cases was established by authorization cards signed by a majority of the employees, indicating that they wished the designated union to be their bargaining representative. The validity of these cards as true indications of the employees' choice is thus critical to the protection of the employees' section 7 rights stated above.

⁵ *Id.*, 61 L.R.R.M. at 1397.

⁶ Under LMRA § 8(a)(2), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(2) (1964), it is "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" In *ILGWU v. NLRB*, 366 U.S. 731 (1961), the Court held that recognizing and bargaining with a minority union violated this section.

⁷ 162 N.L.R.B. No. 27, 64 L.R.R.M. 1001 (1966).

⁸ 157 N.L.R.B. No. 99, 61 L.R.R.M. 1527 (1966).

⁹ LMRA § 8(a)(5), 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964), provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . ."

¹⁰ *ILGWU v. NLRB*, supra note 6, at 737.

The Board measures the validity of an authorization card by the clarity of the language used on it and by the oral representations which are made about it during the organizational drive by the union.¹¹ If, considering these two factors, it does not appear that the signatory employee was misled as to the purpose of the card, the Board will sustain the validity of the card.¹² Yet there still remains the question of whether an employee intends to make a decision comparable to that made in an election booth when he signs an authorization card; that is, does the employee give the signing of the card sufficient consideration to make it a true indication of his choice of a bargaining representative. There can be no real test of this factor. To date, the Board has decided to presume that an employee is sufficiently cognizant of the significance of an authorization card.¹³

Apparently the Board has decided to extend that presumption to the *Keller* situation. In *Sound Contractors Ass'n*,¹⁴ the Board held that it must "affirmatively appear . . . that the employer extended recognition . . . in good faith on the basis of a previously demonstrated showing of majority and at a time when only that union was actively engaged in organizing the unit employees,"¹⁵ before the Board will visit the *Keller* protection upon a bargaining relationship. In *Sound Contractors*, the complaining union had alleged only that there had been a voluntary recognition by the employer followed by his refusal to bargain with the union. The Board held that this was not an unfair labor practice, because the union had not affirmatively shown the basis on which the employer had recognized it, nor whether it had minority or majority support at the time of recognition. The union did not have evidence of these elements in the form of authorization cards.

Sound Contractors held that there could not be a lawful voluntary recognition where there was more than one union actively campaigning at the time of recognition. In *Retail Clerks Local 770 v. NLRB*,¹⁶ the Ninth Circuit upheld the Board's ruling that an employer did not commit an unfair practice by relying on authorization cards in recognizing one union where there were two competing for the representative position. The two decisions, however, are not contradictory, because in *Retail Clerks* the court sustained the Board's finding that in fact only the recognized union was *actively* campaigning. Moreover, the union which was recognized produced authorization cards signed by an overwhelming majority of the employees.

¹¹ *NLRB v. Winn-Dixie Stores, Inc.*, 341 F.2d 750, 58 L.R.R.M. 2475 (6th Cir. 1965). For a detailed discussion of the Board's treatment of authorization cards, see Comment, 7 B.C. Ind. & Com. L. Rev. 909, 933-38 (1966).

¹² *NLRB v. Winn-Dixie Stores, Inc.*, supra note 11.

¹³ *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999, 32 L.R.R.M. 1580 (1953). See, however, a speech made by NLRB Chairman McCulloch in which he cited the following statistics to show the unreliability of cards:

In 58 elections, the unions presented authorization cards from 30 to 50 percent of the employees; and they won 11 or 19 percent of them. In 87 elections, the unions presented authorization cards from 50 to 70 percent of the employees, and they won 42 or 52 percent of them.

¹⁴ 50 L.R.R.M. 36 (1962).

¹⁵ 162 N.L.R.B. No. 45, 64 L.R.R.M. 1009 (1966).

¹⁶ *Id.*, 64 L.R.R.M. at 1009.

¹⁷ 370 F.2d 205, 64 L.R.R.M. 2155 (9th Cir. 1966).

Although the *Retail Clerks* decision is distinguishable from *Sound Contractors*, the validity of the former may still be questioned in view of the doctrine of *Midwest Piping & Supply Co.*¹⁷ Basically, this doctrine requires the employer to remain strictly neutral where there is competition for the position of bargaining representative. As a result, employers are required to let the NLRB determine, through an election, which of the competing unions has the support of a majority of the employees.¹⁸ The Board has hollowed out exceptions to this rule, and it is tempting to place *Retail Clerks* within one, but it is submitted that this could only be accomplished by a strained construction of these exceptions. In *Shea Chem. Corp.*,¹⁹ the Board held that the *Midwest Piping* rule would not apply where the representation claim of one of the rival unions was invalid for such reasons as: (1) the existence of a contract with another union which would bar an election; (2) Board certification of the rival union for less than a year; or (3) the inappropriateness of the unit in which majority status is claimed. *Retail Clerks* goes farther; it allows an employer to recognize a rival union on the basis of authorization cards where both unions could legitimately represent the employees, if there is no substantial question as to which union does have majority support.

*Conren, Inc. v. NLRB*²⁰ presents yet another situation in which authorization cards play a vital role in establishing a lawful collective-bargaining relationship. In this case the Seventh Circuit enforced a Board order directing an employer to bargain with a union upon request. In so ordering, the Board found that the union's demand for recognition occurred when it had the support of the majority of the employees as evidenced by authorization cards signed by thirty-two of the fifty-three unit employees. The Board also found that the employer did not entertain a good-faith doubt as to the union's majority status when the employer refused to bargain with it. These facts clearly established the commission of an unfair labor practice which the Board has often remedied with a bargaining order.²¹

Conren, therefore, would not be uncommon but for the fact that, nine and one-half months prior to the union's demand for recognition, there had been a representation election in which a majority of the voting employees elected to remain unrepresented. The significance of this election arises from section 9(c)(3), which states that "no election shall be directed in any bargaining unit or any subdivision within which in the preceding 12 month period, a valid election shall have been held."²² The employer contended that, since the union could not obtain an NLRB election, the employer's duty to bargain with or recognize that union was obviated. The court sustained the Board's rejection of this argument with the following rationale:

¹⁷ 63 N.L.R.B. 1060, 17 L.R.R.M. 40 (1945).

¹⁸ Novak Logging Co., 119 N.L.R.B. 1573, 41 L.R.R.M. 1346 (1958).

¹⁹ 121 N.L.R.B. 1027, 42 L.R.R.M. 1486 (1958).

²⁰ 368 F.2d 173, 63 L.R.R.M. 2273 (7th Cir. 1966), 8 B.C. Ind. & Com. L. Rev. 652 (1967).

²¹ See, e.g., Bernel Foam Prods. Co., 146 N.L.R.B. 1277, 56 L.R.R.M. 1039 (1964); Joy Silk Mills Inc., 85 N.L.R.B. 1263, 24 L.R.R.M. 1548 (1949).

²² 61 Stat. 144 (1947), as amended, 73 Stat. 542 (1959), 29 U.S.C. § 159(c)(3) (1964).

[T]he language and legislative history of section 9(c) clearly indicates that Congress was aware of the alternative methods of establishing and determining union representative status [yet] . . . it concerned itself only with limiting the frequency of Board directed and conducted elections for such purpose when it enacted section 9(c)(3). . . . [Therefore] . . . to so extend a similar post election proscriptive period to a union's acquisition of representative status by means of authorization cards would, in our opinion, constitute an attempt by the court to usurp a legislative prerogative.²³

The majority expressed no opinion on the *value or propriety* of foregoing all questions of representation for 12 months following an election.

Vigorously dissenting, Judge Kiley found that this question of value and propriety was precisely the issue upon which the court should decide the case. According to the dissent, the basic policy behind section 9(c)(3) is the protection of industrial stability, and the dissent asserted that "union soliciting of cards within a year of [a] . . . valid election is as disruptive of industrial peace as a second election."²⁴ The dissent further contended that it was the court's duty to explore this issue rather than refrain from doing so. As authority for this, the dissent cited two cases in which courts had to resolve conflicting expressions of employee desires on representational questions. These cases were considered inapposite by the majority. In the first case, *Brooks v. NLRB*,²⁵ the Supreme Court sustained the representative status of a union, chosen in a valid election, notwithstanding the fact that a petition, signed by a clear majority of the employees and stating that they did not wish to be represented by the union, was handed to the employer one week after the election and one day before certification. In the second case, *NLRB v. Blades Mfg. Corp.*,²⁶ the Eighth Circuit held that it was not an unfair labor practice for an employer to refuse to recognize a union chosen in an election which was conducted within a year after a previous valid election. The rule established by these cases, according to the dissent in *Conren*, is that a court should validate that method of employee expression which is the most reliable, and thereby assure to the employees their freedom of choice.

On the facts of *Conren*, the dissent maintained that the previous election conducted by the NLRB was clearly more reliable than the later authorization-card evidence. The dissent cited language from the *Brooks* case to buttress its contention:

[T]he binding effect of an election, which provides responsibility in the electorate and needed coherence in administration, is "equally relevant to labor relations"; [and] . . . the revocation of authority conferred or withheld in a "solemn and costly" election should occur by no less a solemn occasion.²⁷

²³ 368 F.2d at 174, 63 L.R.R.M. at 2274.

²⁴ Id. at 177, 63 L.R.R.M. at 2276.

²⁵ 348 U.S. 96 (1954).

²⁶ 344 F.2d 998, 59 L.R.R.M. 2210 (8th Cir. 1965).

²⁷ 368 F.2d at 176, 63 L.R.R.M. at 2276.

It is submitted that both the majority and the dissent failed to consider a basic presumption which lies at the heart of the LMRA: the objective of industrial stability is usually best served by the existence of a representative who will bargain with an employer in the interests of the employees.²⁸ Although in *Brooks* the bargaining status of one union was voided, there remained the union originally certified as the winner of the first election. The same is true of *Blades Mfg. Corp.* In *Conren* the Board was allowing a bargaining representative, who apparently had enjoyed majority status, to enter the labor-management relations of a business where there had not been a union before. Thus, such a construction of the certification year does not seem to be disruptive of industrial stability; it seems, rather, to be quite the opposite.

Two other cases fortify the assertion that a viable collective-bargaining relationship should be sustained where possible. In *Hoban v. United Aircraft Corp.*,²⁹ the district court sustained the NLRB's contention that the employer should continue to bargain with a minority union with which he had bargained previously while having full knowledge of the union's minority status. The union had been certified as the representative of the employees many years earlier but had lost its majority status in the five- or six-year period preceding the employer's refusal to bargain. In spite of its reluctance to order an employer to bargain with a minority union, the court nevertheless chose this alternative rather than allowing the severance of a collective-bargaining relationship.

Similarly, in *Johnston Grain Co. v. NLRB*,³⁰ the court sustained the representative status of a union with a questionable majority where the alternative was to leave the parties with no collective-bargaining relationship. In that case a group of employees had filed a decertification petition with the NLRB in an attempt to end the status of the current bargaining representative through an election.³¹ This petition was filed after the certification year had elapsed. The court sustained the Board's finding that the employer was committing an unfair labor practice by refusing to bargain with the union despite the expiration of the certification year and the employees' decertification petition.

It should be pointed out that, in both of these cases, the courts and the Board grounded the order to bargain with a minority union on bases other than their preference for the existence of a collective-bargaining relationship.³² Yet this does not detract from the fact that, in the ultimate analysis,

²⁸ See NLRA § 1, 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1964); LMRA § 1, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964).

²⁹ 63 L.R.R.M. 2081 (D. Conn. 1966).

³⁰ 365 F.2d 582, 63 L.R.R.M. 2039 (10th Cir. 1966).

³¹ Under LMRA § 9(c)(1)(A)(ii), 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1)-(A)(ii) (1964), an employee may file a petition for a decertification of his current bargaining representative. If the petition is accompanied by evidence of a lack of support for the current representative, the NLRB will conduct an election. See 29 C.F.R. § 101.17 (1967).

³² In *Hoban v. United Aircraft Corp.*, supra note 29, the court found reason to order the employer to bargain with the minority from the fact that he had been doing so with full knowledge of the union's minority status since 1960. In addition, it appeared that the only reason the employer had for ultimately refusing to bargain was to assert

such a preference must be implicit in the kind of determinations that were made in these cases.

Finally, *NLRB v. Alva Allen Indus. Inc.*³³ should be noted to dispel any notion that the decision should *always* go in favor of maintaining a collective-bargaining relationship. The court held that it was not an unfair labor practice for an employer to refuse to recognize or to bargain with a certified union when there were only eleven days remaining in the certification year. In refusing to enforce the Board's unfair-labor-practice finding and order, the court emphasized the employer's good-faith belief in the union's loss of majority support, and added that it did not consider the concept of a "certification year" to be a "black-letter" 365-day period but rather a reasonable time approximating one year.³⁴ The Board had contended that any refusal to bargain within a one-year period was *per se* an unfair labor practice. Perhaps if the Board had instead argued the merits of the charge, as it had in *Hoban* and *Johnston Grain*, the result would have been different. In any event, the court did choose to permit the severance of a collective-bargaining relationship when it could easily have maintained it.

One of the basic reasons for the passage of the Wagner Act³⁵ was the belief that securing to the workingman certain rights within his employment relationship would safeguard "commerce" from the injury and interruption which had previously resulted from industrial strife.³⁶ Basic among these rights was collective bargaining through representatives of the employees' own choosing. To protect this right, Congress instructed the NLRB to conduct an election among the employees or to use any other suitable means to determine if there was a party which a majority of the employees wished to have represent it for the purpose of collective bargaining.³⁷ In 1947, Congress decided that such a determination would best be made through an election.³⁸ Yet, as illustrated in the cases discussed in this section, less formal means of selecting bargaining representatives are not only condoned by the NLRB but also enjoy the protection of Board orders when they are questioned. No doubt, voluntary agreements between employees and employers should be encouraged; this is not only true democratic action but also promotes industrial stability. However, as stabilizing as a voluntary agreement between an employer and a union may be, it should not override the right guaranteed to the majority of the employees of a bargaining unit to select a representative of its own choosing.

Authorization cards are far less reliable than elections.³⁹ Yet bargaining leverage against the union to drop unfair-labor-practice charges against the employer in return for continued bargaining. In *Johnston Grain Co. v. NLRB*, *supra* note 30, the court thought it decisive that the employer had privately agreed to bargain with the union after the certification year had elapsed.

³³ 63 L.R.R.M. 2515 (8th Cir. 1966).

³⁴ Accord, *Brooks v. NLRB*, *supra* note 25.

³⁵ 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1964).

³⁶ Wagner Act § 1, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).
§ 151 (1964).

³⁷ Wagner Act § 9(c)(1), 49 Stat. 453 (1935).

³⁸ LMRA § 9(c)(1), 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1). The amendment deleted the words "any other suitable method," leaving only the election process.

³⁹ See note 13 *supra*.

representatives are being recognized on this basis at an increasing rate. Indeed, in *Keller*, *Universal Gear*, and *Montgomery Ward*, recognition obtained through authorization cards was held sufficiently valid to withstand an equally persuasive indication of employee discontent with the bargaining representative. And, in *Conren*, authorization cards were a sufficient indication of union majority support to overcome the usual bar to the establishment of employee representation different from that established by an election held within the previous twelve months. It is submitted that in using this admittedly less reliable tool for determining the employees' choice, the Board should be extremely careful not to abridge the employees' freedom of choice. The rights extended to unions by the LMRA are derived from their representational status: This raises serious doubts as to the propriety of Board orders directing employers to bargain with unions which have proved their majority status with such unreliable evidence as authorization cards; such doubts are increased when the union is of an admittedly minority status.

D. *Withdrawal from a Multi-Employer Bargaining Unit*

Under the LMRA, a group of employers may join together and bargain with their employees' bargaining representative through a single agent;¹ this is known as the multi-employer bargaining unit. Multi-employer bargaining units are established through the mutual consent of the employers and the unions involved. The significance of such consent is evidenced by the Board's use of bargaining history as the primary test of the appropriateness of the unit.² This section deals not with the establishment of such a unit, but rather with the right of the participants to withdraw therefrom.

In *Retail Associates, Inc.*,³ the Board announced a set of basic rules for valid withdrawals from multi-employer bargaining units. First, after negotiations have started, mutual consent of all the parties is required for withdrawal. Second, a unilateral decision to withdraw must be accompanied by adequate written notice given prior to the termination or modification date of the multi-employer bargaining agreement. The Board also made some requirements as to the intent of the party withdrawing. It may not be done for the purpose of achieving a momentary expediency, or as part of the bargaining strategy. Rather, a valid withdrawal must be made with

¹ The NLRB claims the right to certify a multi-employer bargaining unit on the following basis: LMRA § 9(b), 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1964), provides that the Board shall select the appropriate bargaining unit from either the employer, craft, or plant unit, or subdivision thereof. The Board maintains that this does not prohibit a multi-employer bargaining unit, because § 2(2) of the act, 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1964), defines "employer" as including the agent of an employer. The Board synthesizes these two sections to find that each employer is the agent of the other(s) for collective-bargaining purposes where the employers involved have mutually consented to join in a bargaining association. The courts have upheld such a unit as appropriate. See *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 95 (1956), which comments favorably on multi-employer bargaining units.

² See *Continental Baking Co.*, 99 N.L.R.B. 777, 785, 30 L.R.R.M. 1119, 1122 (1952), where the Board declared that "collective bargaining is facilitated by adhering to the methods of the past, in the absence of any indication that a change in these methods has become necessary."

³ 120 N.L.R.B. 338, 41 L.R.R.M. 1502 (1958).

the intent to cease multi-employer bargaining on a relatively permanent basis and to adopt an individual bargaining relationship. Such intent must be unequivocal and expressed in good faith. These rules as announced by the Board have met with the approval of the courts.⁴

Until 1965 these rules were applied only to employers; a union's right to withdraw had not been litigated. In that year, however, the Board, in *Hearst Consol. Publications, Inc.*⁵ and *Evening News Ass'n*,⁶ held that a union had a right to withdraw equal to that of an employer.⁷ During the Survey year, these decisions were upheld by *Publishers' Ass'n v. NLRB*⁸ and *Detroit Newspaper Publishers Ass'n v. NLRB*,⁹ respectively.

In both cases the employers raised substantially the same argument in defense of their refusals to bargain individually with the withdrawing unions. The argument attacked the logic behind the Board's conception of a union's status in a multi-employer bargaining unit as being equal to that of an employer. Member Brown, dissenting in *Hearst* and in *Evening News*, advocated the employers' contention. Member Brown pointed out that the union's withdrawal disintegrates the multi-employer bargaining unit for all involved; on the other hand, should an employer withdraw, the community of interest among the others in the group is not substantially lessened.¹⁰ Consequently, a withdrawal by the union results in individual bargaining between the union and each employer of the association, whereas a withdrawal by an employer results in individual bargaining only with that employer.

Because of this difference in the effect of a union's withdrawal vis-à-vis that of an employer, Member Brown advocated more stringent requirements for union withdrawal than for employer withdrawal. The union, he contended, should be required to make a positive showing that it has legitimate reasons for withdrawing, such as an historical weakness in bargaining success, a lack of industrial tranquility in the bargaining unit, or the heterogeneity of the employers involved as to employment and labor practices.

The majority of the Board found the deciding factor to be the consensual nature of the multi-employer bargaining unit. If the consent of both

⁴ See *NLRB v. Sheridan Creations Inc.*, 357 F.2d 245, 61 L.R.R.M. 2586 (2d Cir. 1966); *NLRB v. Jeffries Banknote Co.*, 281 F.2d 893, 46 L.R.R.M. 2919 (9th Cir. 1960).

⁵ 156 N.L.R.B. 210, 61 L.R.R.M. 1011 (1965).

⁶ 154 N.L.R.B. 1494, 60 L.R.R.M. 1149 (1965).

⁷ In both cases, the Board found that the employers in the association involved, who had refused to bargain individually with a union which had made a good-faith and timely withdrawal from the multi-employer bargaining unit, had committed an unfair labor practice in violation of §§ 8(a)(1) and 8(a)(5). The validity of the union's withdrawal was determined under the *Retail Associates* rules.

⁸ 364 F.2d 293, 62 L.R.R.M. 2722 (2d Cir. 1966).

⁹ 372 F.2d 569, 64 L.R.R.M. 2403 (6th Cir. 1967).

¹⁰ As an example of this, in *Hearst* the dissent noted Ice Cream, Frozen Custard Indus. Employees, Local 717, 145 N.L.R.B. 865, 55 L.R.R.M. 1059 (1964). In the *Ice Cream* case, the Board had found that the multi-employer bargaining unit had remained viable even though there was a period in which certain member employers had signed individual collective-bargaining agreements with unions. It should be noted that by signing the individual agreements the employers and unions involved had, in effect, mutually agreed to a withdrawal, albeit temporarily.

groups is needed to establish the unit,¹¹ then the consent of both should be a requisite to continuation. The Board concluded that, having exercised its discretion in setting standards for employer withdrawal from such units, it would be an abuse of that discretion to fail to apply those same standards to union withdrawal, because, when all relevant factors are considered, the two parties have an equal claim to withdrawal. The argument that a union stands in a different position is grounded on irrelevant factors, according to the majority.

The argument of Member Brown, when distilled, is a comment on the bargaining power resulting to a union which withdraws, as opposed to the power resulting to an employer which withdraws, from a multi-employer bargaining unit. Since the employer is severed from his compatriots, he wields less strength at the bargaining table; a multi-employer union which breaks up the unit greatly enhances its bargaining position. In rebuttal, the Board quoted the Supreme Court as saying that our labor policy does not "contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union."¹² The Board further found that allowing equal freedom of withdrawal from the multi-employer bargaining to unions would enhance the growth of such units. A greater restriction on union withdrawal would tend to inhibit unions from initially consenting to such units.

Both reviewing courts agreed with the Board that a union may have a right of withdrawal equal to that of an employer. But such a right, it was held, may be circumscribed and applied by the Board in its section 9(b) discretion to determine appropriate units.¹³

The more significant discussion by the courts and the Board involved the effect of their holdings upon the employer's right to "lock out" union employees when there is a "whipsaw" strike. In *NLRB v. Truck Drivers Local 449*,¹⁴ the Supreme Court held that employers who are a part of a multi-employer bargaining unit may lock out all bargaining-unit employees if the employees strike against only one member of the unit. The employers in *Publishers' Ass'n v. NLRB*¹⁵ and *Detroit Newspaper Publishers Ass'n v. NLRB*¹⁶ claimed that allowing a union to withdraw would be in derogation of the employers' right to protect their joint bargaining position by a lockout.¹⁷ Both courts were careful not to suggest that the union could avoid the employer's right to lock out by withdrawing. While the *Publishers' Ass'n* court merely noted that that issue was not before it and that bargaining

¹¹ See *Local 128, Retail Clerks v. Leedom*, 42 L.R.R.M. 2031 (D.D.C. 1958), in which the Board was enjoined from conducting an election in a multi-employer unit on the ground that one of the local unions objected to a multi-employer bargaining unit. See also *Great Atl. & Pac. Tea Co.*, 146 N.L.R.B. 361, 54 L.R.R.M. 1384 (1963).

¹² 154 N.L.R.B. at 1497, 60 L.R.R.M. at 1150, quoting *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960).

¹³ See note 1 *supra*.

¹⁴ 353 U.S. 87 (1957). This case is commonly referred to as the *Buffalo Linen* case.

¹⁵ *Supra* note 8.

¹⁶ *Supra* note 9.

¹⁷ This problem was specifically left untouched by the Supreme Court in *NLRB v. Truck Drivers Local 449*, *supra* note 14, at 94 n.22.

strength and tactics are not proper bargaining-unit criteria, the *Detroit Newspaper Publishers* court went into the subject further. This court stated that it would consider legitimate a lockout by the employers involved in the case if there were a union withdrawal, accompanied by a strike against one of the members of the former association. The court said that the lockout would be legitimate, not to protect the employers' joint bargaining strength, but rather as an

economic weapon [used] . . . in order to prevent [a] . . . business from being ruthlessly destroyed . . . particularly in the newspaper industry where the commodity, news, is perishable, competition with other media is keen, and the employer is compelled to deal with a multitude of unions.¹⁸

In support of this conclusion, the court cited *NLRB v. Truck Drivers Local 449*,¹⁹ *NLRB v. Brown*,²⁰ and *American Ship Bldg. Co. v. NLRB*,²¹ implicit in which cases the court found the right of employers to use the lockout as a weapon in support of a legitimate bargaining position.

Finally, in *Detroit Newspaper Publishers*, the court rejected the employers' claim that under section 8(b)(1)(B)²² the union would be committing an unfair labor practice by refusing to bargain on a multi-employer basis. In disagreeing, the court pointed out that, after the withdrawal by the union, the employers would still have the right to be represented in separate bargaining by the multi-employer association.²³

There seems little doubt that the reviewing courts were correct in holding that the validity of employer *and* union withdrawal from multi-employer bargaining units is within the discretion of the NLRB. Nor can it be strongly argued that the Board's discretion has been abused. But conversely, it is submitted, the Board could have imposed higher withdrawal standards upon unions, as suggested by the dissent in both Board opinions, and still not abuse its discretion. The wisdom of the Board's ruling, then, is the questionable aspect of these cases. One case involved twenty-five years of multi-employer bargaining with the union, the other, fifty. Both cases involved a highly competitive industry with a perishable commodity, news—charac-

¹⁸ 372 F.2d at 572, 64 L.R.R.M. at 2406.

¹⁹ Supra note 14.

²⁰ 380 U.S. 278 (1965).

²¹ 380 U.S. 300 (1965).

²² 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(B) (1964). This section provides: "It shall be an unfair labor practice for a labor organization or its agents to . . . restrain or coerce . . . an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances. . . ."

²³ If this is in fact so, it raises some interesting problems with respect to the employer's duty to bargain in good faith. If the multi-employer association, while bargaining for individuals, could insist, to the point of impasse, upon bargaining issues grounded in the welfare of the multi-employer group, then the union's withdrawal would be meaningless (especially if the employers could still lock out, as suggested by the court). On the other hand, if the association could not bargain as it did while the multi-employer unit was intact, the court's guarantee of the employers' unrestrained choice of bargaining representative is of little value.

teristics which indicate that multi-employer bargaining units can best serve all concerned. Thus, perhaps Judge Kaufman was reasonable to fear,

as did the dissenting member of the Board . . . , that our decision will not alleviate and might, perhaps, exacerbate the antagonisms which have been the antithesis of labor-management peace. Thus . . . multiemployer bargaining will be disrupted upon the whim of one of the parties without any reasons assigned and with more abrasiveness sure to follow as a result.²⁴

IV. ARBITRATION

A. Powers of the Arbitrator

1. Questions of Arbitrability

In 1960 the Supreme Court held that, within the arbitration system, the function of the courts is quite limited.¹ Indeed, "it is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."² Two years later, the Court held, more specifically, that "under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."³

Thus, the Court has limited the judicial function in the arbitration process to a determination of what the parties have agreed to arbitrate. If, upon looking at the contract, a court determines that the parties have agreed to arbitrate a specific issue, the court can go no further. All matters of substance will then be left to the arbitrator under the contract.

Since "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit,"⁴ the question of who determines the issue of arbitrability is a matter of some importance. There is a hint in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,⁵ that the question of arbitrability may be taken away from the courts by agreement of the parties.⁶ In *Torrington Co. v. Metal Prods. Workers, Local 1645*,⁷ the Second Circuit held that "the parties may voluntarily submit arbitrability to an arbitrator,"⁸ but, if a dispute arises, the one who alleges that this

²⁴ *Publishers' Ass'n v. NLRB*, supra note 8, at 297, 62 L.R.R.M. at 2725 (Kaufman, J., concurring).

¹ *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960).

² *Id.* at 568.

³ *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 241 (1962).

⁴ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

⁵ 363 U.S. 574 (1960).

⁶ Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose.

Id. at 583 n.7.

⁷ 347 F.2d 93, 59 L.R.R.M. 2588 (2d Cir.), cert. denied, 382 U.S. 940 (1965).

⁸ *Id.* at 95, 59 L.R.R.M. at 2590.

was the agreement of the parties has the burden of "clearly demonstrating" that the allegation is true.⁹

During the current Survey year, the earlier *Torrington* principle was reasserted in another case involving the same two parties. In *Metal Prods. Workers, Local 1645 v. Torrington Co.*,¹⁰ the appellant union moved to vacate an arbitration award holding that a grievance concerning the method to be used to recall strikers was not arbitrable. The company denied that it had agreed to arbitrate a dispute on such a matter. There was a clause in the applicable collective-bargaining agreement giving the arbitrator the power to rule upon whether the parties had agreed to arbitrate a given grievance.¹¹ The arbitrator determined that the company was not required to arbitrate the dispute, and the union brought this action to vacate that determination.¹²

The court held that the clause in the agreement granting the arbitrator the power to decide the question of arbitrability was the "clear demonstration" required by *Warrior & Gulf*¹³ and the earlier *Torrington* case.¹⁴ Once the arbitrator determined that there was no arbitrable dispute, the courts would no longer intervene.¹⁵

This was a relatively easy case, because the collective agreement specifically stated that the parties had agreed to let the arbitrator determine arbitrability. In a more difficult case, where there is no such clear statement, the court still has the obligation to interpret the contract to determine whether the parties had agreed to submit the issue of arbitrability to the arbitrator. Apparently, since the party alleging that fact must "clearly demonstrate" its existence, and since someone must determine the question of arbitrability, there is a presumption that arbitrability is for the courts. It seems that this presumption is quite strong for several reasons. One is that it is not known what standard the arbitrator should use in making his decision. In *Warrior & Gulf* the Court said that "in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . ."¹⁶ Thus, a court must apply a very lenient standard on

⁹ Id. at 96, 59 L.R.R.M. at 2590, citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, supra note 5, and footnote to the Court's opinion, supra note 6.

¹⁰ 358 F.2d 103, 62 L.R.R.M. 2011 (2d Cir. 1966).

¹¹ The court quoted the clause giving that power. Id. at 105, 62 L.R.R.M. at 2013.

¹² The union claimed that the employer had agreed to use the procedures of the new collective agreement to recall the workers or to recall all workers and to lay off those who were unneeded, in accordance with the terms relating to seniority in the collective agreement. By the powers under the agreement, the arbitrator was to settle grievances concerning the interpretation or application of the agreement.

¹³ Supra note 5, at 583 n.7.

¹⁴ Supra note 7, at 96, 59 L.R.R.M. at 2590.

¹⁵ 358 F.2d at 106, 62 L.R.R.M. at 2013.

¹⁶ Supra note 5, at 584-85. The Court also stated that

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.

Id. at 582-83.

questions of what should be arbitrated, although an arbitrator, not held to such a standard, may interpret his powers more strictly.

In addition, the question of arbitrability is a matter of general contract interpretation, and an arbitrator is no more qualified for contract interpretation than a court. Until this Survey year, not even the NLRB was permitted to interpret a collective agreement. In *NLRB v. C & C Plywood Corp.*,¹⁷ the Court allowed the Board to construe a collective agreement which contained no arbitration clause, but only insofar as was necessary to determine the validity of an asserted contract defense to an unfair-labor-practice charge.¹⁸ It would thus appear that the courts are quite jealous of their prerogative to decide the question of arbitrability and will yield only where the parties clearly have intended otherwise.

2. Arbitrator's Use of Prior Practice

Another question with regard to the scope of the arbitrator's power is whether he may use the prior practice of the parties in discharging his duty to interpret and apply the collective contract. This leads to a further question: If the arbitrator may so use prior practice, how broad or how limited is that power? In yet another case involving the Torrington Company and Local 1645,¹⁹ the Court of Appeals for the Second Circuit affirmed a federal district court decision²⁰ which had vacated an arbitrator's award in favor of the appellant union because the arbitrator had used prior practice as a basis for his award and, in doing so, had exceeded his authority.

The case arose when the company announced in 1962 that it was discontinuing the unilaterally instituted policy of giving its employees time off with pay to vote on election day.²¹ At that time the union had a weak and narrow arbitration clause in its collective agreement, permitting the arbitrator little or no leeway to overrule company action. The union filed an unfair-labor-practice charge which was later dismissed. In 1963 the parties began negotiating a new collective agreement, and the company immediately affirmed its stand on the issue of paid time off for voting. The union asked for a contrary provision, but, in the ensuing negotiations and strike that followed, both parties agreed to continue the old agreement subject to certain amendments which did not include any statement as to voting time off. In 1964 the parties signed their current contract, which contained no mention of time off for voting. During the period between 1962 and the signing of the new collective agreement, the company refused to pay employees for time missed in order to vote.

In 1964, following the institution of the new collective agreement, the company again made it clear that such time off would not be permitted. However, the union had obtained a new, broader arbitration clause and filed

¹⁷ 385 U.S. 421 (1967), noted p. 997 *infra*.

¹⁸ *Id.* at 428.

¹⁹ *Torrington Co. v. Metal Prods. Workers, Local 1645*, 362 F.2d 677, 62 L.R.R.M. 2495 (2d Cir. 1966).

²⁰ 60 L.R.R.M. 2262 (D. Conn. 1965).

²¹ The policy had been in force for twenty years but had never been a part of any collective agreement. 362 F.2d at 678, 62 L.R.R.M. at 2496.

a grievance under it in December 1964.²² The arbitrator found that the past practice of the company in permitting paid time off for voting was firmly established and

that the company therefore had the burden of changing this policy by negotiating with the Union, and that in the negotiations which culminated in the current bargaining agreement the parties did not agree to terminate this practice.²³

The company brought the current suit in the federal district court to vacate the arbitrator's award of back pay for the election days which had passed since the practice had ceased. The court held that the arbitrator had exceeded his authority "by going outside the terms of the contract itself to include a benefit which he ruled was implied."²⁴ The district court stated that

labor contracts generally affirmatively state the terms which the contracting parties agree to; not what practices they agree to discontinue. This agreement made no provision for "paid voting time" and the arbitrator exceeded and abused his authority when he attempted to read into the agreement this implied contractual relationship.²⁵

On this rationale the district court vacated the arbitrator's award.

The union argued on appeal that the district court had exceeded *its* authority by examining the merits of the award. The court of appeals dismissed that argument by holding that the arbitrator's award is subject to review by a court on the issue of whether he "exceeded the limits of his contractual authority."²⁶ Thus, by reviewing the power of the arbitrator, the district court was merely performing its duty.

The court then held that the district court had properly found that the arbitrator had exceeded his authority as granted in the collective agreement because he had added to the terms of the existing agreement a past practice of the company which had been discontinued long before negotiations on a new contract had begun. The Second Circuit rejected what had been found to be the arbitrator's conclusion, that since the company had been the one to raise the issue in negotiations and had been the first to drop the issue from discussion, "the company cannot complain if its policy

²² The old arbitration clause bound the arbitrator not to overrule company decisions unless he found "that the Company misinterpreted or violated the express terms of the agreement." *Id.* at 681 n.7, 62 L.R.R.M. at 2499 n.7. The new agreement eliminated this provision and gave the arbitrator full power to interpret and apply the agreement. *Id.* at 678 n.2, 62 L.R.R.M. at 2496 n.2. Both arbitration agreements, however, required that the arbitrator not add to, delete, or modify the collective agreement. *Id.* at 681 n.7, 62 L.R.R.M. at 2499 n.7.

²³ *Id.* at 679, 62 L.R.R.M. at 2497.

²⁴ *Supra* note 20, at 2263.

²⁵ *Id.* at 2264.

²⁶ 362 F.2d at 680, 62 L.R.R.M. at 2498. Support for such a holding may be found in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (dictum); *Carey v. General Elec. Co.*, 315 F.2d 499, 508, 52 L.R.R.M. 2662, 2668 (2d Cir. 1963).

under the old contract is now continued."²⁷ The court stated that the policy of paid voting time had been revoked before negotiations began, and, when the company reiterated its position during the bargaining, it was merely an invitation to the union to bargain on the issue. Thus, it was up to the union to press the issue at the bargaining table, and, since it did not, "the company was surely justified in applying in November 1964 a policy it had rightfully established in 1962"²⁸ The court held that while

in some cases, it may be appropriate exercise of an arbitrator's authority to resolve ambiguities in the scope of a collective bargaining agreement on the basis of prior practice, . . . the mandate that the arbitrator stay within the confines of the collective bargaining agreement . . . requires a reviewing court to pass upon whether the agreement authorizes the arbitrator to expand its express terms on the basis of the parties' prior practice.²⁹

The court held that the arbitrator had added to the terms of the collective agreement, and that such action was beyond the scope of his authority.³⁰

The basic problem in the *Torrington* case is the extent to which prior practice may be used as a factor in the arbitrator's decision. The majority admitted that it may be used somewhat, but only if authorized by the collective agreement.³¹ This differs from the dissent only in its interpretation of the contract and of the powers that the contract gives to the arbitrator. The dissent found that the broad arbitration clause which became effective in 1964 "was a clear recognition by the parties that there can be 'implied' as well as 'express' terms in the agreement."³² The majority, on the other hand, ignored the implication from the change in the arbitration clause and based its decision upon that part of the contract which forbade the arbitrator to add to its terms.³³ The majority seemed to determine that a contract clause which forbids the arbitrator to add to, delete from, or modify the contract limits the arbitrator to the four corners of the contract in arbitrating questions which have been raised during negotiations but which have not been incorporated into the contract. Only where the issue has not been made a part of the negotiations may it "be appropriate to resolve a question . . . on the basis of prior practice in the plant or industry"³⁴

Another case decided during the Survey year seems to bear out the result in *Torrington*. In *Local 77, Am. Fed'n of Musicians v. Philadelphia Orchestra Ass'n*,³⁵ the union brought suit to vacate an arbitrator's award

²⁷ 362 F.2d at 681, 62 L.R.R.M. at 2498.

²⁸ Id. at 682, 62 L.R.R.M. at 2499.

²⁹ Id. at 680, 62 L.R.R.M. at 2498.

³⁰ Judge Feinberg dissented. While agreeing that an arbitrator's award may be reviewed by a court to see if it was within his authority, Judge Feinberg felt that past practice was an acceptable means of resolving a dispute, and that use of past practice was not beyond the arbitrator's authority. The dissenter chastised the majority for reviewing the merits of the decision. Id. at 682, 62 L.R.R.M. at 2500.

³¹ Id. at 680, 62 L.R.R.M. at 2498.

³² Id. at 683, 62 L.R.R.M. at 2500.

³³ See note 22 supra.

³⁴ 362 F.2d at 681, 62 L.R.R.M. at 2499.

³⁵ 252 F. Supp. 787, 62 L.R.R.M. 2102 (E.D. Pa. 1966).

in favor of the orchestra association. The court granted the association's motion to dismiss on the ground that the award was not beyond the authority of the arbitrator. The dispute arose because the association had scheduled a flying tour of Central and South America. Although the collective-bargaining agreement made no mention of air travel, it did specifically speak of travel by train or bus. The union objected to travel by air, and by mutual agreement the issue was submitted to arbitration. The arbitrator gave his award in favor of the association, finding that the contract did permit the association to require the orchestra members to fly.³⁶

In his opinion, the arbitrator said that

there is no mention of air travel in the contract at all, and it is agreed that when this language first was negotiated, there was no problem regarding air travel. It seems clear to me that the language was written in 1952 without any mutual intent at all concerning air travel, one way or the other.³⁷

Thus, the mutual intent of the parties had to be gleaned from their action during the life of the contract, for without resorting to this prior action the arbitrator could not decide the issue. After reviewing the past practice of the parties, which established that the members of the orchestra had flown without objection many times, the arbitrator stated that

in my judgment, this history indicates that the parties have recognized and accepted air travel as an acceptable and permissible mode of travel. To that extent I think there *has* been shown a mutual intent and understanding, to the effect that travel by airplane, just as much as travel by railroad, is a proper mode of transportation . . . under the contract.³⁸

The arbitrator went on to conclude that the association could require air travel under the contract.

The union instituted this suit to vacate the award, claiming that it was beyond the power of the arbitrator because, in giving the award, the arbitrator modified or amended the contract, which he was forbidden to do.³⁹ The court dismissed the union petition, holding that "the Award is one which draws its essence from the contract."⁴⁰ Since the court could not review the merits of the award, it merely examined the arbitrator's methods and stated that "the Arbitrator did indeed carry out with fidelity his obligation to interpret and apply the contract."⁴¹

These two cases seem to spell out both the right of the arbitrator to use past practice in reaching his conclusions and the scope of that right. *Torrington* expresses, as dictum, the point of view that it is proper for the

³⁶ Id. at 793 (App. A).

³⁷ Id. at 796-97 (App. B).

³⁸ Id. at 797 (App. B).

³⁹ The only mention in the case of this limitation on the arbitrator's power is in the arbitrator's award itself. Id. at 799 (App. B). But this is essentially what makes the ruling similar to that in *Torrington*.

⁴⁰ Id. at 792, 62 L.R.R.M. at 2105.

⁴¹ Id. at 791, 62 L.R.R.M. at 2105.

arbitrator to look to past practice only when the issue before him has not been raised during negotiations.⁴² In *Local 77* the parties had negotiated on the general issue before the arbitration, but there had been no discussion of air travel specifically, because the contract was negotiated at a time when "travel by air had not developed to the point where it was regarded as feasible for the Orchestra's tours."⁴³ Since the arbitrator in *Local 77* found the travel clause of the collective-bargaining agreement uninformative on the issue of air travel, and since no prior negotiation history could be examined in order to determine the intent of the parties, prior practice became an essential and useful tool to the arbitrator. This is in contrast to *Torrington*, where there had been discussion of the issue of paid time off for voting to which the arbitrator could have turned to aid him in interpreting and applying the collective agreement. The arbitrator did not have to resort to prior practice in such an instance, because the intent of the parties could be gleaned from the discussions and negotiations involved in the making of the contract.

The consensus of the two cases seems to be that prior practice is a fit tool of the arbitrator's trade—at least where the contract forbids him to add to, delete from, or modify the contract—when there are no discussions or negotiations between the parties to which he may turn to discover their intent. It is perhaps possible to broaden this power by also allowing the use of past practice when the discussions which did take place are ambiguous in their result. Thus, in *Local 77*, the arbitrator found that the parties' discussion of travel offered him no insight into their intent as to air travel specifically, and thus the prior practice could be used.

3. Arbitration Awards and the Criminal Law

In 1960, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,⁴⁴ the Supreme Court decided that an arbitrator's award must be enforced if "it draws its essence from the collective bargaining agreement."⁴⁵ In the current Survey year, a federal district court, in *UAW, Local 985 v. W. M. Chace Co.*,⁴⁶ went a step further when it answered in the negative the question "whether this Court can summarily order a party to arbitration to follow the dictates of the arbitrator when to do so may require him to commit [a] misdemeanor . . ."⁴⁷

The case arose when, following a strike, the employer failed to recall ten female employees whose jobs had been moved to Puerto Rico during the strike. Since male employees with less seniority had been recalled, the ten women invoked the grievance procedure contained in the collective-bargaining agreement. This included arbitration, and the arbitrator ordered reinstatement of the female employees. The employer refused to abide by the arbitrator's award, and the union sued to enforce the award, moving for judgment on

⁴² See p. 816 *supra*.

⁴³ 252 F. Supp. at 795 (App. B).

⁴⁴ 363 U.S. 593 (1960).

⁴⁵ *Id.* at 597.

⁴⁶ 64 L.R.R.M. 2098 (E.D. Mich. 1966).

⁴⁷ *Id.* at 2099.

the pleadings on the ground that the award drew its essence from the contract. The employer moved for dismissal, claiming that to comply with the award would be to violate Michigan statutory law concerning the type of work female employees could legally do. The court denied both motions, because the award was not clear enough for the court to determine whether Michigan law would be violated, or for the court to say with finality that the award was drawn from the essence of the contract.

The contract which the arbitrator was to interpret had two provisions relating to female employees. One of these permitted such an employee to displace employees with lesser seniority if lifting and weight restrictions did not apply.⁴⁸ The other allowed female employees to take jobs which were not prohibited by law.⁴⁹ Michigan also had a statute which, the court held, made it a misdemeanor for an employer to assign a female to a "task disproportionate to her strength."⁵⁰ The union, pressing for summary enforcement of the award, argued that in reaching his decision the arbitrator had considered both the contract clauses relating to female employees and the Michigan statute and had found that neither prevented his making the award. Since the award was based upon the arbitrator's understanding of the contract, it was contended that *Enterprise Wheel* required the court to enforce it.

The court rejected these contentions and held that it could look beyond the arbitrator's opinion to determine the lawfulness of enforcing the award.⁵¹ The court went on to state that "it is too plain for argument that no court will order a party to do something, if in order to comply with the court's directive, he must commit a crime."⁵² From the arbitrator's award the court could not determine that the tasks which would be assigned to the women would not be disproportionate to their strength. The arbitrator had failed to direct the employer to be certain that the work assigned would not violate the statute, or to order the employer to assign the women to work in a specified fashion which would not violate the statute; he had only ordered the employer to reinstate the female employees in certain jobs which might or might not violate the statute. Since the award, as issued, was insufficient for the court to determine that the work assigned would not be disproportionate to the strength of the female employees, the award could not be summarily enforced.⁵³

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ The statute provided as follows:

Any employer of labor in this state, employing both males and females, who shall discriminate in any way in the payment of wages as between sexes who are similarly employed, shall be guilty of a misdemeanor. No female shall be assigned any task disproportionate to her strength . . .

Mich. Stat. Ann. § 28.824 (Supp. 1965). While the court noted that the above section did not clearly state that assigning to females work which was beyond their strength was a misdemeanor, it found that "this is the result at least by virtue of M.S.A. § 28.199." 64 L.R.R.M. at 2099 n.2.

⁵¹ Id. at 2100.

⁵² Ibid.

⁵³ The court also denied the employer's motion to dismiss, because "the record

It appears that only one other court has had occasion to consider a similar situation. In *In the Matter of W. Union Tel. Co.*,⁵⁴ the New York Court of Appeals affirmed a per curiam decision of the New York Supreme Court, Appellate Division, that an arbitrator's award which "tends to condone and encourage the commission of illegal acts"⁵⁵ could not be enforced by a court. The case arose because a union, Local 40 of the American Communications Association, whose employees worked for Western Union, resolved to force Western Union and other companies to deal fairly with other employees who were on strike. Local 40 did not strike, but its members refused to handle messages which were transmitted to or from companies whose employees were on strike. When Western Union informed members of Local 40 that they would be suspended if they failed to handle the messages, the union asked for arbitration. The arbitrator determined that the employees could take the course of action they had initiated, and he ordered the company to reinstate those employees who had been suspended.

The union brought an action to enforce the award, and the Supreme Court, Special Term, ordered enforcement. On appeal, the Appellate Division reversed, because the award allowed the employees to pursue a course of conduct which would violate penal statutes.⁵⁶ The union appealed to the New York Court of Appeals, which affirmed the Appellate Division on the same grounds.

Thus, the case law which is available appears to support the decision of the district court in *Local 985*, but, in the federal labor-law domain, that case stands alone. The proposition expounded in *Local 985* is that where the award of the arbitrator would, if followed, cause the party against whom it was issued to breach the penal law of the state, the award will not be enforced. The case may, perhaps, be read more deeply in that the courts will be permitted to go behind the contractual power of the arbitrator to the merits of the issue before him. If an award is drawn from the essence of the collective-bargaining agreement, but its enforcement would cause the party to commit a crime, there would be a clear conflict between the limited review power of the courts over arbitration proceedings and the duty of the courts as instruments of public policy and the police power. It seems clear from *Local 985* that the latter duty would prevail.

shows no more clearly that the assignments ordered by the arbitrator would give rise to a violation of M.S.A. § 28.824 than it does that they would not." Id. at 2101.

⁵⁴ 299 N.Y. 177, 86 N.E.2d 162 (1949), affirming 274 App. Div. 754, 79 N.Y.S.2d 545, 22 L.R.R.M. 2237 (1948) (per curiam).

⁵⁵ 274 App. Div. at 754, 79 N.Y.S.2d at 547, 22 L.R.R.M. at 2238.

⁵⁶ N.Y. Sess. Laws 1901, ch. 661, § 1, now N.Y. Pen. Law § 743 (McKinney Supp. 1966), reads:

A person who: . . .

2. Being such clerk, operator, messenger or other employee . . . in a telegraph office shall wilfully refuse or neglect duty to transmit or deliver messages received at such office . . . is punishable by a fine of not more than one thousand dollars or by imprisonment for not more than two years, or by both such fine and imprisonment. (Emphasis added.)

B. *Implied Intent to Arbitrate*

The preference for arbitration as a solution to the recurring internal problems of labor and management was illustrated during the Survey year by a decision of a federal district court in Ohio. *UAW v. Defiance Indus., Inc.*¹ involved a pension-plan agreement which was to be administered by a committee of two members from the union, two from the company, and an impartial chairman who would vote only in case of a deadlock. Employing its power to determine whether or not a party to a collective-bargaining agreement was bound to arbitrate,² the court held that disputes arising under the pension plan were in fact subject to arbitration.

The case arose when, in 1961, the company closed its Muncie, Indiana plant and took the position that the shutdown terminated the pension plan.³ The union filed the instant suit to compel payments under the plan, claiming that the shutdown alone was not sufficient, under the agreement, to terminate the plan.⁴ Thereafter, in 1964, a former employee applied for pension payments, and an employer-designated member of the pension board rejected his claim because the employee had failed to comply with a procedural requirement of the plan. The other employer-member apparently agreed with this ruling, but the two union members of the board disagreed and asked for the election of an impartial chairman to break the deadlock.⁵ The request was refused, and the union moved that the court action be stayed pending arbitration of that dispute, and that the company be required to arbitrate the employee's claim to pension payments.

The district court granted both of the union's motions. It rejected the company's contention that because the pension plan had created no final force in the decisions of the impartial chairman, the parties did not intend to create an arbitration procedure. The court stated, as an answer to this contention, that the language of the agreement was mandatory.⁶ In addition, the court said:

¹ 251 F. Supp. 650 (N.D. Ohio 1966).

² There is no mention in the court's decision that the pension plan was part of a larger collective-bargaining agreement.

³ It was not stated in the opinion whether the company had more than the one plant and, if so, whether its position was that the plan was terminated in all plants.

⁴ The plan provided:

As amended hereby, said Pension Agreement entered into the first day of September, 1955, shall continue in full force and effect until the 18th day of November, 1962, and from year to year thereafter unless by notice given not less than sixty (60) days prior to November 18, 1962, either party notifies the other of its desire to terminate or amend the Agreement.

251 F. Supp. at 651. The company closed the plant and notified the union on April 24, 1961.

⁵ The agreement provided that such an impartial chairman should "be selected by mutual agreement of the Company and the Union members of the Board, but shall vote . . . only in the event of a deadlock." *Id.* at 652.

⁶ The plan provided:

The Plan *shall* be administered by a Board of Administration [whose] . . . members *shall* serve without compensation from the Trust Fund. An impartial chairman *shall* be selected by mutual agreement of the Company and the

In light of the obvious advantages (economy, expedition, and finality) which arbitration brings to stalemates in the day-to-day administration of a pension plan, it would require a strained construction of the provisions of this contract for the Court to find lacking an intent to create an arbitration procedure.⁷

The court held that it was not significant that the power of the impartial chairman was limited to only a small portion of the pension agreement. It went on to say that the fact that the agreement did not contain the word "arbitration" was not important.⁸

Having thus determined that the agreement did require arbitration, the court stayed the judicial proceedings pending arbitration. The court relied upon the case of *Smith v. Union Carbide Corp.*,⁹ in which a court of appeals held that the district court, which had determined that proper arbitration procedure had not been used, should have returned the case to the arbitrators rather than have heard the case itself, *de novo*.¹⁰ The *Defiance* court used this case only because the agreement in *Union Carbide* provided for a decision as to employee disability by a panel of two physicians. If they disagreed, a third doctor was to cast the deciding vote. The court of appeals in *Union Carbide* labeled this procedure "arbitration," and no question appears to have been raised as to whether it was in fact arbitration.¹¹

A more helpful case was cited by the court in *Defiance* only for the proposition that the word "arbitration" need not appear in the agreement in order for it to require arbitration.¹² This was the Supreme Court decision in *General Drivers, Local 89 v. Riss & Co.*¹³ In that case the Court reversed a court of appeals holding that a reinstatement order by a contractually established joint committee was not entitled to enforcement because it was not an arbitration award within section 301 of the LMRA.¹⁴ The collective agreement in *Riss* provided a grievance procedure which ended with a decision to be made by a Joint Area Cartage Committee. It specifically stated that the decision of such committee was final and binding, and provided penalties for failure to comply.¹⁵ The Sixth Circuit had held that "there is

Union members of the Board, but *shall* vote at meetings of the Board only in the event of a deadlock. (Emphasis added.)

Ibid.

⁷ *Id.* at 653.

⁸ *Ibid.*

⁹ 350 F.2d 258, 60 L.R.R.M. 2110 (6th Cir. 1965).

¹⁰ *Cf. Thrift v. Bell Lines, Inc.*, 256 F. Supp. 475, 63 L.R.R.M. 2361 (D.S.C. 1966), where the court allowed a trial *de novo* on the merits after a finding that the arbitration proceeding had been unfair.

¹¹ If the parties never raised the issue of whether the procedure in *Union Carbide* was arbitration, and the court never discussed it, but merely treated it as arbitration, there is some question as to the value of the case as precedent for *Defiance*, which raises precisely that issue.

¹² 251 F. Supp. at 653.

¹³ 372 U.S. 517 (1963) (*per curiam*).

¹⁴ 298 F.2d 341, 49 L.R.R.M. 2550 (6th Cir. 1962).

¹⁵ This part of the agreement was quoted but ignored by the court of appeals. *Id.* at 342, 49 L.R.R.M. at 2551.

no finality to this grievance procedure," and thus "the order of the Joint Area Cartage Committee was not an arbitration award which could be enforced by the courts. . . ."¹⁶

In reversing, the Supreme Court stated that "if, as petitioners allege, the award of the Joint Cartage Committee is *under the collective bargaining agreement final and binding*, the District Court has jurisdiction under § 301 to enforce it. . . ."¹⁷ (Emphasis added.) The Supreme Court recognized that the word "arbitration" was not necessary to have an enforceable award,¹⁸ but it did require that the collective-bargaining agreement make that award final and binding.

It is not established by the facts of *Defiance* whether the award of the board of administration was final and binding under the collective-bargaining agreement. However, under the explicit holding of *Riss*, the decision could not have been in favor of arbitration unless the agreement itself made the arbitration final and binding. Thus, if the court in *Defiance* intended to follow *Riss*, it must have found evidence that the pension plan did indeed make the decision of the impartial chairman final and binding. This could have been the meaning of the court when it referred to the language of the pension plan as "mandatory."¹⁹ Perhaps this is sufficient, but the enunciation of the court is weak when compared with the strong language of the Supreme Court in *Riss*.

If, however, the court in *Defiance* neither found nor required final and binding force in the decision of the impartial chairman, it has opened the door to further holdings that parties have agreed to arbitrate in every situation where arbitration would have "obvious advantages."²⁰ This would go well beyond the generally accepted rule that parties may be required to arbitrate only what they have agreed to arbitrate. This would also greatly increase the use of arbitration, perhaps in circumstances and instances where no standards have been provided for arbitration in the relevant collective agreement. The value of such a rule is difficult to assess and would appear to be an unwarranted expansion of the arbitration system.

C. Arbitration and Section 303

Section 303 of the Labor Management Relations Act creates a legal action for damages in favor of an employer who is injured by unlawful secondary activity.¹ The question of whether such legal action should be stayed

¹⁶ Ibid.

¹⁷ 372 U.S. at 519.

¹⁸ Ibid.

¹⁹ 251 F. Supp. at 652.

²⁰ Id. at 653.

¹ 61 Stat. 158 (1947), as amended, 73 Stat. 545 (1959), 29 U.S.C. § 187 (1964). This section provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the

pending arbitration of the damage claim under a broad arbitration clause was answered in the negative in *Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees, Local 584*.² The dispute between the parties arose when the company opened a retail milk depot, and the union, claiming that the operation of the depot violated the collective-bargaining agreement,³ submitted the dispute to arbitration. Subsequently, the union induced work stoppages among the employees of a neutral employer in an effort to get that employer to cease doing business with Old Dutch Farms. After a charge by Old Dutch Farms, the NLRB found this action to be unlawful secondary activity under sections 8(b)(4)(i)(B) and 8(b)(4)(ii)(B).⁴ Shortly thereafter the company began this action to recover damages under section 303.

The union moved to stay the court proceedings pending arbitration of the damages claim because the claim fell within the broad arbitration clause, which provided that

any and all disputes and controversies arising under or in connection with the terms and provisions of this agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein, [sic] expressly provided but germane to the subject matter of this agreement . . . shall be submitted for arbitration to an arbitrator.

. . .⁵

The district court stayed the court proceedings, holding that the dispute arose out of the contract relationship because it was based on the "depot" clause of the contract and because the contract contained a "no-strike" clause.⁶ There was no requirement, stated the court, that arbitration be limited to breaches of contract, as long as there is a "specificity of subject matter" on which the arbitration could operate.⁷ The district court went on to hold that the arbitration clause was broad enough to include questions of the contract relationship as well as of the contract itself.

The company appealed this decision, and the Court of Appeals for the Second Circuit reversed "on the ground that the employer is not precluded by the arbitration clause . . . from asserting in the district court a claim for tort damages based on the alleged unlawful secondary activity of the union and forced to rely upon arbitration for relief."⁸ It was up to the court to

United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

² 359 F.2d 598, 62 L.R.R.M. 2007 (2d Cir.), cert. denied, 385 U.S. 832 (1966).

³ The relevant clause of the collective agreement provided that "it shall be a violation of this agreement for any party . . . to sell or distribute milk retail from wholesale trucks or for employers to establish, service, or deliver to depots for the purpose of distributing or selling milk." *Id.* at 599 n.1, 62 L.R.R.M. at 2008 n.1.

⁴ 146 N.L.R.B. 509, 55 L.R.R.M. 1349 (1964), enforced, 341 F.2d 29, 58 L.R.R.M. 2290 (2d Cir. 1965).

⁵ 359 F.2d at 600, 62 L.R.R.M. at 2008.

⁶ 243 F. Supp. 246, 59 L.R.R.M. 2745 (E.D.N.Y. 1965).

⁷ *Id.* at 248, 59 L.R.R.M. at 2747.

⁸ 359 F.2d at 600, 62 L.R.R.M. at 2008.

determine whether the company had agreed to arbitrate its tort damage claim.⁹ The action involved no alleged breach of contract even though it was based on union activity brought about by the employer's alleged breach of the "depot" clause of the collective agreement.¹⁰ The wrongfulness of the union's secondary activity under section 8(b)(4) was independent of whatever company action caused the union to act. Thus, even if an arbitrator were to find that the company had breached the collective-bargaining agreement, the secondary activity of the union would still be actionable under section 303 if the employer were "injured in his business or property."

The court went on to say that:

The resolution of the present controversy requires (1) a determination of whether the union violated Section 8(b)(4) of the NLRA, and (2) an assessment of the actual business injuries sustained by the employer. Courts hardly can be considered less competent than a labor arbitrator . . . to determine whether particular union activities violate a federal labor statute or to assess the extent of an employer's business injuries.¹¹

In a footnote, the court stated that it was not a prerequisite to a section 303 action that the NLRB give a prior determination that the alleged union activity was a violation of section 8(b)(4), nor would the courts be bound by such a determination.¹² Thus, the court appears to be saying that section 303 tort damage actions are within the exclusive jurisdiction of the courts, which are as competent as the NLRB to determine if unlawful secondary activity has taken place and as competent as an arbitrator to assess its effects. The court stated that

this leads to the conclusion that absent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and

⁹ See *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 241 (1962).

¹⁰ See note 3 *supra*.

¹¹ 359 F.2d at 602-03, 62 L.R.R.M. at 2010.

¹² *Id.* at 602-03 n.7, 62 L.R.R.M. at 2010 n.7. The court relied on *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952), where the Supreme Court said that "certainly there is nothing in the language of [§ 303] . . . which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed." *Id.* at 244. The Court pointed out that § 303(a)(4) makes secondary activity "unlawful for the purpose of this section only." *Ibid.* (Emphasis added.) This separates the judicial proceedings for damages from the administrative proceedings under § 8(b)(4).

This, however, does not explain what the effect would be if the NLRB rejected the contention that certain union activity was a violation of § 8(b)(4), but the court, in a § 303 suit, determined that it was. In addition, while *Local 584* states that the courts are not bound by a determination of the NLRB that a certain activity is or is not an unlawful secondary activity, it does not state what the result would be if the court had made the prior determination; would the NLRB be bound? If the *Juneau* case is good authority, it would seem that the administrative and judicial processes are totally separate, and that the NLRB would not be bound by a prior determination of a court.

In the recent case of *Taube Elec. Contractors v. IBEW, Local 349*, 63 L.R.R.M. 2502 (S.D. Fla. 1966), the district court held that § 303 provides a remedy in the courts totally independent of that available from the NLRB under § 8(b)(4). The court cited *Juneau* with approval.

determine the validity of tort damage claims by one party against another, it must be assumed that the employer did not intend to forego his rights under Section 303 and that the parties did not intend to withdraw such disputes from judicial scrutiny.¹³

The decision in *Local 584*, brought down to its most basic and broadest level, is simply a reiteration of the general rule that a party may not be required to arbitrate that which he has not agreed to arbitrate.¹⁴ The tort damage claim could be made subject to the jurisdiction of an arbitrator, but only if the parties expressly provided for such a power in their collective-bargaining agreement. This is quite different from statements made in earlier decisions that courts should construe arbitration clauses so liberally that all matters of disagreement should be arbitrated *except* those matters which the parties had specifically excluded.¹⁵ It may be assumed that the difference results from the fact that a damage remedy is provided by section 303 as a matter of public law; the parties will thus not be presumed to have intended any other form of remedy unless they provide for it explicitly. Perhaps if no statutory remedy were provided, the liberal rule of "arbitrate unless specifically excluded" would be applied.

D. NLRB Jurisdiction in the Face of Concurrent Arbitration

The question of NLRB jurisdiction over unfair labor practices where there is concurrent arbitration was raised during the Survey year in *NLRB v. Acme Indus. Co.*¹ In this case, the Supreme Court reversed a decision of a court of appeals which had set aside an order of the NLRB. This order had compelled the Acme Industrial Company to give to the union, with which it had a collective-bargaining agreement, certain requested information. The case arose because of a union claim that the company had refused to give it information necessary to enable the union to determine whether the company was violating the collective-bargaining agreement. The agreement had two clauses which were relevant to the dispute. The first stated that the company would not subcontract work if it would cause the layoff of employees.² The second permitted employees in one location to move to another location if the equipment in the plant in which they were employed were moved.³ In

¹³ 359 F.2d at 603, 62 L.R.R.M. at 2011.

¹⁴ See *John Wiley & Sons v. Livingston*, 375 U.S. 543, 547 (1964); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

¹⁵ *Id.* at 581, 584-85.

¹ 385 U.S. 432 (1967), reversing 351 F.2d 258, 60 L.R.R.M. 2220 (7th Cir. 1965).

² This clause read:

Section 3. It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company

351 F.2d at 259-60, 60 L.R.R.M. at 2220-21.

³ This clause read:

Section 10. In the event the equipment of the plant or of any department, entirely or partially, is hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new

1964 the union discovered that the company was removing some equipment from its plant and asked the reason for such activity. When the company stated, through its foreman, that no violation of the agreement had taken place and refused to answer the question, the union filed grievances charging violation of the contract clauses. After the union had again requested specific information concerning the move and the company had again refused, the union filed unfair-labor-practice charges with the NLRB.

The Board found that "the information sought by the Union was necessary in order to enable the Union to evaluate intelligently the grievances filed and to determine whether such grievances were meritorious, and whether to press for arbitration."⁴ Since such a determination was a proper function of the union, the Board held that the company "has failed to bargain with the Union, in violation of Section 8(a)(5) and (1) of the Act."⁵ As a result, the Board ordered the company to cease and desist from this refusal to bargain, and to furnish to the union the necessary information.

The company petitioned the court of appeals to set aside the order of the Board, and the union cross-petitioned for enforcement of the order. The court found that the grievances filed by the union under the arbitration clause of the collective-bargaining agreement were still pending at the time of the unfair-labor-practice hearing. This being the case, the court determined that federal labor policy, as stated in Section 203(d) of the Labor Management Relations Act⁶ and in *United Steelworkers of America v. American Mfg. Co.*,⁷ was applicable to actions of the NLRB. Therefore, the court concluded that

where the determination of the relevancy of information necessarily involves factors interrelated with or dependent upon construction of the substantive provisions of the labor agreement, and those provisions are the bases of pending grievances already submitted under the grievance and arbitration procedures of the agreement, Board intervention in the guise of determining and enforcing the peripheral matter of the duty to furnish information requested contributes nothing to any objective of the Act and in our opinion is improper.

location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering production and maintenance employees at such location.

Id. at 260, 60 L.R.R.M. at 2221.

⁴ 150 N.L.R.B. 1463, 1465, 58 L.R.R.M. 1277, 1278 (1965).

⁵ Ibid.

⁶ 61 Stat. 154 (1947), 29 U.S.C. § 173(d) (1964). This section provides:

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

⁷ 363 U.S. 564 (1960). The Supreme Court said:

The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.

Id. at 568.

The order clashes with the policy of effectual achievement of contractual arbitration.⁸

The NLRB appealed the case to the Supreme Court, which reversed the court of appeals. The Court stated that "the only real issue in this case . . . is whether the Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights under § 8(a)(5)."⁹ The Court found that the Board is *not* in the same position as the courts, which review the fairness of the arbitration process or the agreement of the parties to arbitrate: "The relationship of the Board to the arbitration process is of a quite different order."¹⁰ Thus, the statements in *United Steelworkers of America v. American Mfg. Co.*¹¹ which require a court to afford a preeminent position to the arbitrator "do not throw much light on the problem."¹²

The parts of the LMRA which deal with the powers of the Board shed more light on the relation between the Board and the collective-bargaining agreement. Section 8(d) defines rather explicitly the duty to bargain collectively as a duty to discuss questions involving the collective agreement.¹³ Failure of the employer to comply with section 8(d) is an unfair labor practice under section 8(a)(5).¹⁴ Finally, section 10(a) gives the NLRB power to prevent unfair labor practices, such as a refusal to bargain, even though the agreement between the parties prescribes another means of adjustment.¹⁵ Thus, the Court seems to be saying that, while a court must defer to arbitration because its powers are limited to determining if and what the parties agreed to arbitrate and to reviewing the award of the arbitrator under certain circumstances, the Board has jurisdiction, even where there are concurrent arbitration proceedings, to determine the existence of and the remedy for an alleged unfair labor practice.¹⁶

⁸ 351 F.2d at 261, 60 L.R.R.M. at 2222.

⁹ 385 U.S. at 436.

¹⁰ *Ibid.*

¹¹ *Supra* note 7.

¹² 385 U.S. at 436.

¹³ 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964):

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 . . . any question arising [under the agreement]

¹⁴ 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964).

¹⁵ 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1964):

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise

¹⁶ It is important to note that in this case the issue did not concern the existence of a contractual defense to an unfair-labor-practice charge. In a case decided with *Acme*, *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), the Supreme Court held that the Board could examine the contract to determine the merits of such an alleged

Alternatively, the Court decided that even if the arbitrator's preeminence under *American Mfg. Co.*¹⁷ applied to the Board as well as to the courts, "that policy would not require the Board to abstain here."¹⁸ The order of the NLRB that the company deliver information to the union was not "a binding construction of the labor contract. [The Board] . . . was only acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities."¹⁹ Since the Board was in no way determining the merits of the dispute, the prerogative of the arbitrator on those substantive issues was unhampered. In fact, the Board was aiding the arbitration procedure by permitting the union to effectively and knowledgeably evaluate the problem in order to determine whether it could or should use the arbitration process.

Thus, the Supreme Court held that it was an unfair labor practice, within the domain of the Board, for an employer to refuse to give to the union information necessary for it to determine whether the company had violated contract clauses and was thereby subject to arbitration proceedings. The Court used two grounds. First, the LMRA itself provided that the NLRB had such jurisdiction.²⁰ By analogy, it is settled that if an act is both an unfair labor practice and a breach of the collective-bargaining agreement, the Board is not deprived of jurisdiction because the courts have concurrent jurisdiction;²¹ similarly, it would seem that the Board would be equally competent to deal with an unfair labor practice which is itself subject to arbitration or which derives from a collateral issue which is arbitrable. Second, the action which was an unfair labor practice in this case was the refusal to give the union the information required to properly fulfill its role in the arbitration process; it was not the same as the alleged breach of contract. The latter was the moving of equipment in violation of the contract. The NLRB did not interpret the contract to see if it had been breached; it merely ordered the employer to make available to the union information upon which the union could make that decision and bring the issue to arbitration. The issues which the Board had to decide were not the same as those which the arbitrator had to decide, and thus no reason to await arbitration existed.

defense. In *C & C*, however, there was no arbitration clause covering the dispute. Therefore the decision did not determine the relationship between the Board and an arbitrator, but between the Board and the courts as to the contract defense. For an expanded analysis of the questions raised and treated by these two cases, see p. 997 *infra*.

¹⁷ *Supra* note 7.

¹⁸ 385 U.S. at 437.

¹⁹ *Ibid.*

²⁰ This jurisdiction has also been recognized by the NLRB. See *International Harvester Co.*, 138 N.L.R.B. 923, 925, 51 L.R.R.M. 1155, 1156 (1962), where the Board said:

There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held.

²¹ *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), held that, where an unfair labor practice was also a breach of contract, it is within the domain of the courts and not preempted by NLRB jurisdiction, but it did not say that the NLRB was deprived of jurisdiction.

V. SECTION 301 SUITS

A. *Right of an Individual Employee to Sue*

During the current Survey year several important cases were decided concerning the right of an individual employee to bring suits against his employer,¹ his collective-bargaining representative,² or both.³ The employee's right to sue his employer is a new aspect of labor law and is just beginning to develop, whereas the union's duty of fair representation and the employee's right to sue to enforce that duty have long been recognized.⁴ However, the courts have been deciding this latter form of action under section 301⁵ only recently.⁶ It was not until the Supreme Court decided that an individual employee could sue his employer for breach of a collective-bargaining contract under section 301⁷ that the courts began to place actions against the unions into the same category. It appears that this trend may have recently reached a peak. The best way to study the process is to look at each line of development separately—first, individual suits against employers, and then suits against the unions for breach of their duty of fair representation.

1. *Individual Suits Against the Employer*

In 1962 the Supreme Court held⁸ that an individual employee has the right to sue his employer for breach of contract under Section 301 of the Labor Management Relations Act.⁹ In *Republic Steel Corp. v. Maddox*,¹⁰ decided in 1965, the Court restricted that right to employees who have attempted to use the grievance procedures established in the collective-bargaining agreement.¹¹ During this Survey year, the Fifth Circuit has further limited the individual's right to sue under section 301.

In *Haynes v. United States Pipe & Foundry Co.*,¹² an employee who

¹ *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 62 L.R.R.M. 2389 (5th Cir. 1966).

² *Vaca v. Sipes*, 386 U.S. 171 (1967).

³ *Thrift v. Bell Lines, Inc.*, 256 F. Supp. 475, 63 L.R.R.M. 2361 (D.S.C. 1966).

⁴ *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

⁵ LMRA § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).

⁶ See *Vaca v. Sipes*, supra note 2; *Humphrey v. Moore*, 375 U.S. 335 (1964).

⁷ *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

⁸ *Ibid.*

⁹ 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964). This section provides that: 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.

¹⁰ 379 U.S. 650 (1965).

¹¹ The Court said:

As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by the employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available.

Id. at 652.

¹² 362 F.2d 414, 62 L.R.R.M. 2389 (5th Cir. 1966).

had been discharged during the term of a collective-bargaining agreement sued his former employer for wrongful discharge in an Alabama state court. The employer removed the action to the federal district court under section 301 and defended on the basis that the grievance procedure provided in the collective-bargaining agreement was exclusive and, therefore, that the employee could have no recourse to the courts.

The grievance procedure prescribed in the collective-bargaining agreement covered employee discharges and involved a four-step process. The last step required that the union representative meet with the plant manager to discuss the grievance, after which the plant manager was to render a decision. This decision would be "final and binding upon all parties involved, unless the International Vice-President of the Union notifies the Plant Manager . . . of the Union's intentions to strike in protest of such decision . . ."¹³ It was assumed by the court that the plaintiff had exhausted the remedies provided in the collective-bargaining agreement.¹⁴

The Fifth Circuit affirmed the district court's dismissal of the plaintiff's claim on the ground that the remedy in the collective-bargaining agreement was exclusive and final, and thus was a good defense to any individual action brought in a court. "[W]hen a dispute arises within the scope of a collective bargaining agreement, the parties are relegated to the remedies which they provided in their agreement."¹⁵

In reaching its decision, the Fifth Circuit relied upon the Supreme Court's holding in *Maddox* and upon basic federal labor policy. It noted that in *Maddox* the employee had not exhausted his contractual remedies and the grievance procedure provided therein for final and binding arbitration. Although *Maddox* involved an arbitration provision, the court said that this was not a significant difference, because basic federal labor policy favored the use of private remedies,¹⁶ and arbitration was only one such remedy.

The basic question in the *Haynes* case was whether *Maddox* supported the plaintiff's contention that once the contractual grievance procedure had been exhausted, the courts were available for individual suits even if the contract remedies were intended to be exclusive. The Fifth Circuit answered that exhaustion of grievance procedures made no difference and that implications in *Maddox* to the contrary were not compelling.¹⁷

A close examination of *Maddox* can lead one to the conclusion that the reasons for allowing an individual suit in *Haynes* are more compelling than the Fifth Circuit considered them to be. The language in *Maddox* is broad

¹³ *Id.* at 415-16, 62 L.R.R.M. at 2390. It might be argued from the wording that if notification of a strike is given, the decision of the plant manager is not final, and further steps are contemplated. This follows from the fact that the plant manager's decision is final "unless" notification of an intent to strike is given.

¹⁴ *Id.* at 417, 62 L.R.R.M. at 2391. The final step, notification by the International Vice-President of intent to strike, had not been taken.

¹⁵ *Ibid.*

¹⁶ *Ibid.* The basic federal policy referred to is enunciated in LMRA § 203(d), 61 Stat. 154 (1947), 29 U.S.C. § 173(d) (1964), which states that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

¹⁷ 362 F.2d at 417-18, 62 L.R.R.M. at 2391.

and speaks of the necessity for "exclusive" grievance procedures,¹⁸ of the importance of having the union represent the employees in grievance claims rather than having each employee sue the employer,¹⁹ and of the requirements of federal law.²⁰ Nevertheless, the broad language in *Maddox* is not totally in support of the *Haynes* result, because the *Maddox* decision requires only that the employees "attempt use of the contract grievance procedure."²¹ It speaks of the dangers of permitting the employee "to completely sidestep available grievance procedures."²² (Emphasis added.) Finally, the Court stated that the employee's "suit in the present case is simply on the contract, and the remedy sought . . . did not differ from any that the grievance procedure had power to provide."²³ Coupling these statements with the fact that there was an arbitration agreement in *Maddox* could lead to the conclusion that, despite broad language throughout the opinion, the Court was concerned only with a contract containing arbitration as a part of the grievance procedure. In addition, it should be remembered that *Smith v. Evening News Ass'n*,²⁴ the case which first recognized the individual right to sue under section 301, noted that "there was no grievance arbitration procedure in this contract which had to be exhausted before recourse could be had to the courts."²⁵ (Emphasis added.) It would seem that *Smith* recognized the need for individual suits in the absence of arbitration.

What the Fifth Circuit is saying, in essence, is that the employer and the union may eradicate the individual employee's right to sue under *Smith* by merely making *exclusive* whatever grievance procedures appear in the contract. While *Maddox*, read literally, merely requires the individual employee to attempt to exhaust his contractual remedies, *Haynes* goes farther and states that, as long as those remedies have been made exclusive in the collective-bargaining contract, the employee is bound by them alone. This point of view is definitely consistent with statements of various commentators concerning the purposes of collective bargaining.²⁶ These writers feel that the labor laws are explicitly designed to prevent "the workingman's handicap in seeking fair and equitable terms of employment through individual dealings with his employer . . ."²⁷ By requiring dealings on an employer-to-union basis, the inequities are to be reduced or eliminated. Once this balance of power has been established, to permit the individual employee to sue the employer each time he disagrees with his union's handling of a problem

¹⁸ 379 U.S. at 653.

¹⁹ *Id.* at 656.

²⁰ *Id.* at 655. The Court refers to the requirement that federal law be applied in § 301 suits, and federal laws express a policy favoring private settlement.

²¹ *Id.* at 652.

²² *Id.* at 653. See also *Vaca v. Sipes*, *supra* note 2, at 203 (Black, J., dissenting).

²³ 379 U.S. at 657.

²⁴ *Supra* note 7.

²⁵ *Id.* at 196 n.1. See also Wyle, Labor Arbitration and the Concept of Exclusive Representation, 7 B.C. Ind. & Com. L. Rev. 783, 796 (1966), wherein the footnote by the Court in *Maddox* is noted as significant.

²⁶ See Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Wyle, *supra* note 25.

²⁷ Wyle, *supra* note 25, at 783-84. LMRA § 1, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1964), states the federal policy concerning the laborer's bargaining disadvantage.

would undermine its effectiveness.²⁸ The employer would be less concerned with union demands than with individual grievances, and the whole balance favored by the overriding federal labor policy would be destroyed.

Despite the merit of this argument, however, in certain instances it would seem inequitable to leave the aggrieved individual employee without a remedy beyond that which his union and employer see fit to provide for him. Such is the *Haynes* type of situation, where the employee is bound by the decision of the plant manager. This is far different from submitting a dispute to a neutral person or board. The former procedure naturally leads to a decision by an interested party. In the latter procedure the employee will be given a hearing by disinterested officials unassociated with the ultimate effects of their decisions.²⁹ The lack of stature of a single employee does not limit his right to have a remedy. It is true that the individual employee cannot compel arbitration,³⁰ but a union is more likely to take an individual grievance to arbitration than to strike over it. However, in the *Haynes* situation the employee is at the mercy of a possibly biased official and cannot have his decision reviewed in any court, no matter how wrong it may be, as long as it is reasonably fair and within the power of the decision maker.³¹ The only recourse is the drastic one of successfully inducing the union to strike, but, since unions are not likely to strike too often in behalf of the complaints of one member, that avenue is largely ineffective. In fact, if a union were to strike, it would be a result exactly contrary to the theories of "industrial peace" surrounding federal labor law.³² Thus, for the court in *Haynes* to rely on the broad language in *Maddox* as to the exclusiveness of contract remedies, and yet to neglect the matter of neutral arbitration—a basic factor in determining the fairness of the settlement procedure—was to ignore that which should have been a significant consideration.

The court in *Haynes* did allude to a possible exception to the rule of exclusivity of remedy which it had laid down. It stated that the "appellant does not contend that the union did not faithfully represent him. . . . He does not charge fraud on the part of either the company or the union."³³ This statement intimates that had the employee been able to allege such activity, he might have been permitted to go into court even if the contract remedies were exclusive. This is consistent with a similar statement in

²⁸ One of the most vital parts of the balance of power is the private-settlement provisions of the usual collective-bargaining contract. One type of private settlement is arbitration. "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined. . . ." *Vaca v. Sipes*, supra note 2, at 191.

²⁹ The decision of an arbitrator may be reviewed by a court only to determine if it is unfair or not within the power of the arbitrator. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Very likely the decision of the plant manager is subject to the same review. It is basically the personal interests which differentiate the two forms of grievance procedure.

³⁰ *Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179, 52 L.R.R.M. 2038 (2d Cir. 1962).

³¹ See note 29 supra.

³² See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

³³ 362 F.2d at 418, 62 L.R.R.M. at 2392.

Maddox that "if the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available."³⁴

The clear inference from such dicta is that an employee who wishes to bring an individual breach-of-contract suit against his employer will be unable to do so as long as the contract grievance procedures have been made exclusive—unless he can show that there has been some form of fraud on the part of the union or of the employer or that the union has breached its duty of fair representation, thus preventing his full and free use of the contract procedures. The clearest statement of this inference in a suit against an employer has been in the recent case of *Thrift v. Bell Lines, Inc.*³⁵

In *Thrift* the employee was discharged and exhausted all the procedures provided in the collective-bargaining agreement, including arbitration. He then brought suit in a federal district court against both the employer and the union. In seeking damages for wrongful discharge, Thrift alleged that at the arbitration stage the employer had presented evidence against him which both the union and the employer knew to be false. He further alleged that the union had refused to offer available evidence to refute the charges. These allegations amounted to a charge of collusion between the union and employer to prevent the employee from receiving a fair hearing at the arbitration proceeding. The employer moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

This fact situation is essentially quite similar to that in *Haynes*, the primary difference being the plaintiff-employee's allegation of collusion which prevented his effective use of the grievance procedures provided in the collective-bargaining agreement. The district court denied the defendant company's motion to dismiss:

[T]he allegations of plaintiff, if only to the effect that the decision reached by virtue of the grievance procedure was erroneous, would not suffice. But plaintiff has proceeded to accuse defendants of using false information and withholding other pertinent information in violation of his rights to have fair and nondiscriminatory treatment when he resorted to grievance procedures. If these rights have been denied him, he has a cause, and this he has alleged.³⁶

Thus, under *Thrift*, in an action for damages for wrongful discharge, an employee will have a right to sue his employer regardless of the exclusiveness of the contract grievance procedure if his bargaining representative and employer collude to prevent him from fairly using the available contract remedies.³⁷

³⁴ 379 U.S. at 652.

³⁵ 256 F. Supp. 475, 63 L.R.R.M. 2361 (D.S.C. 1966).

³⁶ *Id.* at 477, 63 L.R.R.M. at 2363.

³⁷ There is a procedural problem raised by the decision in *Thrift*. It seems that, having found that the union and employer colluded in the arbitration proceeding, the court would order the arbitration redone—fairly. The arbitration procedure is itself inherently fair, and the unfairness of the participating parties could be cured by requiring the union and employer to act fairly. In *Thrift*, however, the court retained jurisdiction.

In both *Thrift* and *Haynes*, the discharged employees were dissatisfied with the final results of the grievance procedures provided by the collective-bargaining agreements, and both sought further relief in the courts. Because Thrift alleged that the union and employer had acted improperly during the grievance procedures, he was able to transfer his grievance to a cause of action in the courts. Haynes, however, failed to allege similar facts, and his claim was dismissed. It seems that the current status of individual suits under section 301 is that the contract grievance procedures are final if so declared, unless the employee can allege actions by the employer or by the union or by both which prevent the fair operation of those procedures.

The *Maddox* decision was the subject of judicial discussion in another aspect of labor law. In *Walker v. Southern Ry.*,³⁸ the Supreme Court, in a per curiam opinion, decided explicitly that the *Maddox* requirement of exhaustion of administrative remedies did not apply to individual suits under the Railway Labor Act, and reversed a contrary holding by the Court of Appeals for the Fourth Circuit.³⁹ While this holding deals with the Railway Labor Act and is thus outside the traditional scope of this Survey, it is discussed because of its association with *Maddox*.

The facts⁴⁰ of *Walker* are again similar to the *Haynes* decision. The plaintiff was a fireman for defendant railroad company. In 1957 he was displaced by another with greater seniority. Plaintiff thereupon left work and remained away until, allegedly, just before his seniority expired. The railroad claimed that his seniority had run out, and he brought this suit for wrongful discharge.⁴¹ The district court gave judgment for the plaintiff, and the defendant railroad appealed, contending that the district court had no jurisdiction because plaintiff had not pursued the grievance procedures established in the collective-bargaining agreement. The court of appeals reversed the district court, stating:

At the time of the District Court's decision the law clearly permitted an immediate suit by a discharged employee against his railroad for a breach of the collective agreement. . . . But closely following the entry of judgment in this action, the Supreme Court decided [*Maddox*]. . . . Although that case did not deal with a railroad employee, nevertheless we read the opinion as requiring in our case an exhaustion of remedies both under the collective bargaining and before the Adjustment Board prior to suit.

True, the [*Maddox*] . . . opinion observed that the Court did

In *Haynes* and similar situations, the process has within itself the making of bias and lack of fairness, because the decision is made by an interested party. The courts should probably be more careful in this type of situation and retain jurisdiction to hear the merits.

³⁸ 385 U.S. 196 (1966), rehearing denied, 385 U.S. 1020 (1967).

³⁹ 354 F.2d 950, 61 L.R.R.M. 2102 (4th Cir. 1965).

⁴⁰ The facts are taken from the opinion of the court of appeals. *Ibid.*

⁴¹ The running of seniority refers to the length of time a displaced employee will retain a place on the recall list in accordance with his seniority.

not mean to overrule *Moore v. Illinois Central R.R.* . . . but the ratio decidendi embraces the instant controversy.⁴²

The Supreme Court reversed the Fourth Circuit on two basic grounds.⁴³ First, in individual suits under the Labor Management Relations Act, the exclusive contract grievance procedure has been voluntarily entered into by the parties, while "provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate. . . ."⁴⁴ Second, there was great dissatisfaction with the length of time it could take to arbitrate such a dispute.

To the reader sympathetic to the plight of the individual claimant under section 301, these reasons seem hardly sufficient to distinguish the two basic situations except in form. The federal policy favoring arbitration is so strong in the nonrailway-labor field that it might easily be said to be more compulsory than not,⁴⁵ even though not specifically embodied in the statute. In any event, like the individual plaintiff under the Railway Labor Act, the individual plaintiff under section 301 rarely, if ever, has any say as to whether he wishes voluntarily to exclude his right to sue in favor of an exclusive contract grievance procedure. Finally, it seems somewhat anomalous that the railway employee, who is specifically required by statute to arbitrate his discharge, may sue for damages if he chooses not to arbitrate, while his brother under the LMRA, who is not bound by any such statutory requirement, is denied an equal right.

2. *Individual Suits Against the Union*

The recent developments in private suits against employers have been paralleled by developments in the individual's right to sue his collective-bargaining representative for breach of the duty of fair representation. This cause of action began in 1944 when, in *Steele v. Louisville & N.R.R.*,⁴⁶ the Supreme Court answered affirmatively the question

whether the Railway Labor Act . . . imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all of the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation.⁴⁷

⁴² 354 F.2d at 951, 61 L.R.R.M. at 2103.

⁴³ There was a strong dissent by three Justices who felt that *Maddox* was controlling. 385 U.S. at 199 (Harlan, Stewart, & White, JJ., dissenting).

⁴⁴ *Id.* at 198.

⁴⁵ See *UAW v. Defiance Indus., Inc.*, 251 F. Supp. 650, 62 L.R.R.M. 2002 (N.D. Ohio 1966), where an arbitration agreement was read into a collective-bargaining agreement which did not, by its terms, contain one. This case is discussed pp. 821-23 *supra*.

⁴⁶ 323 U.S. 192 (1944).

⁴⁷ *Id.* at 193-94.

Negro employees of the railroad had brought suit, alleging that the union, to which they were denied membership solely on the grounds of race, had agreed with the employer to eliminate Negroes from the latter's rosters. The Supreme Court held that the Railway Labor Act made the union the exclusive bargaining agent for all members of the relevant bargaining unit; this included Negroes ineligible for membership. The result of such a grant of power is

not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.⁴⁸

Like a legislature, the union must fairly represent the interests not only of those who are members of the majority, but also of all those who lost their individual rights to bargain when the union became the exclusive bargaining agent.⁴⁹ It must "represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."⁵⁰ The Court concluded that this "duty which the statute imposes . . . contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty."⁵¹

Thus, the Supreme Court construed the statutory requirement that the majority union be the exclusive bargaining agent of all employees in the relevant unit so that it included a positive, enforceable duty to represent all of those employees fairly and in good faith. In *Wallace Corp. v. NLRB*,⁵² the Court applied this same rationale to unions subject to the National Labor Relations Act.⁵³ Under both the NLRA and the RLA, the union is required to meet these high standards because the minority, nonunion employees are prohibited by law from choosing a representative of their own. Since this is the case, the minority members must be entitled to rely upon the majority's fair representation of their minority interests. In addition, the Court has recognized that the existence of the duty confers a federal right upon the minority employees to seek enforcement.⁵⁴ This federal right is based only upon the breach of a duty of fair representation, and no statutory authorization to sue is needed.

In *Ford Motor Co. v. Huffman*,⁵⁵ the Supreme Court continued to recognize the right of an individual to bring suit against a union for breach of the duty of fair representation. It permitted a suit by an employee who claimed that he had been discriminated against by the union's acceptance of provisions in a collective-bargaining contract which reduced his ranking on the seniority roster. Again, no statute permitting such a suit was involved.

⁴⁸ *Id.* at 198.

⁴⁹ *Id.* at 202.

⁵⁰ *Id.* at 204.

⁵¹ *Id.* at 207.

⁵² 323 U.S. 248 (1944).

⁵³ *Id.* at 255.

⁵⁴ *Steele v. Louisville & N.R.R.*, *supra* note 46, at 204.

⁵⁵ 345 U.S. 330 (1953).

The right to sue was, for all practical purposes, a federal common-law right, unquestioned by the Court. Similar actions were permitted on the strength of *Huffman* in *Trotter v. Amalgamated Ass'n of St. Elec. Ry. Employees*⁵⁶ and in *Pekar v. Local 181, Int'l Union of United Brewery Workers*.⁵⁷

In 1962, in *Miranda Fuel Co.*,⁵⁸ the National Labor Relations Board concluded that the labor organization's breach of the duty of fair representation is a violation of section 8(b)(1)(A).⁵⁹ The Board based its decision on "the 'right' guaranteed employees by Section 7 of the Act 'to bargain collectively through representatives of their own choosing.'"⁶⁰ This provision gives employees "the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent."⁶¹ The clear meaning of this holding is that a union's breach of the duty of fair representation is an unfair labor practice. Thus it is subject to the exclusive jurisdiction of the NLRB under *San Diego Bldg. Trades Council v. Garmon*.⁶²

Although the NLRB's order in *Miranda* was denied enforcement by the Second Circuit,⁶³ the Board has continued to hold that it has jurisdiction in such cases.⁶⁴ In addition, in *Local 12, United Rubber Workers v. NLRB*,⁶⁵ the Fifth Circuit has supported the Board's *Miranda* decision.

In response to the *Miranda* decision of the NLRB, the Supreme Court reaffirmed court jurisdiction over breach of the duty of fair representation cases. In *Humphrey v. Moore*,⁶⁶ Mr. Justice White, for the majority, dealt with a charge by an employee that the exclusive bargaining agent had deceived him concerning his rights to job and seniority and had "deceitfully connived with the E & L drivers and with the International union to deprive Moore and others of their employment rights. . . ."⁶⁷ The majority held that "these allegations are sufficient to charge a breach of duty by the union,"⁶⁸ and that "this action is one arising under § 301 of the Labor

⁵⁶ 309 F.2d 584, 51 L.R.R.M. 2424 (6th Cir. 1962), cert. denied, 372 U.S. 943 (1963).

⁵⁷ 311 F.2d 628, 52 L.R.R.M. 2123 (6th Cir. 1962), cert. denied, 373 U.S. 912 (1963).

⁵⁸ 140 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).

⁵⁹ 61 Stat 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964). This section provides:

(b) 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 of this title. . . .

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

⁶¹ *Ibid.*

⁶² 359 U.S. 236 (1959). The Court therein said: "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.

⁶³ *Supra* note 58.

⁶⁴ *Hughes Tool Co.*, 147 N.L.R.B. 1573, 56 L.R.R.M. 1289 (1964).

⁶⁵ 368 F.2d 12, 63 L.R.R.M. 2395 (5th Cir. 1966). See also *NLRB v. Local 1367, Int'l Longshoremen's Ass'n*, 368 F.2d 1010, 63 L.R.R.M. 2559 (5th Cir. 1966) (*per curiam*). *Local 12* and its unfair-labor-practice aspects are discussed pp. 883-84 *infra*.

⁶⁶ 375 U.S. 335 (1964).

⁶⁷ *Id.* at 343.

⁶⁸ *Ibid.*

Management Relations Act.⁶⁹ This being the case, the Court could apply the doctrine of *Smith v. Evening News Ass'n*⁷⁰ that an unfair labor practice which is also a breach of contract is not within the exclusive jurisdiction of the NLRB, but is also subject to the jurisdiction of the courts.⁷¹ The Court in *Humphrey* thus assumed jurisdiction by stating that:

Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts. . . .⁷²

Basically, *Humphrey* dealt with a situation in which one local union represented the employees of two companies which transported new automobiles for the Ford Motor Company in Louisville, Kentucky. When informed by Ford that there was room for only one such company, the two agreed, in effect, to an absorption of one by the other. Employees of the absorbing company, including Moore, asked their union how this would affect their job and seniority status. They were informed that the employees of the absorbed company could not transfer, and that the status of the employees of the absorbing company was protected. At a subsequent meeting of a contractually established joint committee of the union and employer, it was agreed that the employees of the absorbed company could in fact transfer and maintain their seniority. As a result of this, employees of the absorbing company with less seniority than transferring employees were discharged; Moore was one of those discharged. It was in this fact situation that the majority found a section 301 breach-of-contract action. The result is hard to understand⁷³ or explain.⁷⁴ In view of the time at which the case appeared⁷⁵ and the implications in it, one is left with the clear impression that it was the Court's purpose to let the NLRB know that actions of this kind were to remain within the jurisdiction of state and federal courts. Even granting this, however, the facts of the case would have to be severely

⁶⁹ Ibid.

⁷⁰ 371 U.S. 195 (1962).

⁷¹ Id. at 197.

⁷² 375 U.S. at 344.

⁷³ In his concurring opinion, Mr. Justice Goldberg said:

I do not . . . agree that Moore stated a cause of action 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

Id. at 351.

⁷⁴ See Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 Mo. L. Rev. 373, 387 (1965):

Humphrey might be interpreted to mean that where a cause of action otherwise is alleged under 301, then the fair representation issue may also be litigated in the nature of ancillary jurisdiction. Or *Humphrey* might be interpreted to mean that 301 includes the fair representation claim when it is alleged that such unfair representation has resulted in a breach of the contract.

⁷⁵ The case appeared just after the NLRB persisted in applying its *Miranda Fuel* doctrine despite the denial of enforcement by the Second Circuit.

strained to find a breach of contract upon which to base a section 301 action. The breach of contract would be most easily found if the duty of fair representation could be read into the collective-bargaining contract.⁷⁶ This seems very close to what the Court is doing in *Humphrey*, although it is certainly not explicit.

Ultimately, once it passed this jurisdictional problem, the Court reverted to the essential rationales of the *Steele-Wallace* line of cases. It found that the union had acted honestly and in good faith as had been required since the *Steele* decision in 1944. Thus, the same criteria of good faith and lack of arbitrariness were used under section 301 as had been used for twenty years without it.

The lack of a clear meaning in *Humphrey* prompted the Eighth Circuit during this Survey year to accept one of the possible conclusions available to it.⁷⁷ In *Woody v. Sterling Aluminum Prods., Inc.*,⁷⁸ the court of appeals held that charges that a union had conspired and colluded with the employer in bad faith, to the detriment of the employees, were not based on a collective-bargaining agreement, and consequently were within the exclusive jurisdiction of the NLRB. The plaintiffs were former employees of defendant company who were seeking damages for the company's breach of the collective-bargaining agreement. They further alleged that the collective agreement had been collusively arranged by the defendant union. The agreement in question was negotiated to end a strike and contained a provision recognizing the right of the company to close its plant and terminate employees during the contract period. Termination allowances were to be paid only if the plant were closed during the term of the current contract. The company terminated employees and closed the plant the day the agreement ran out, and the plaintiff brought this action.

The federal district court dismissed the action,⁷⁹ and the Eighth Circuit affirmed, distinguishing the case from *Humphrey v. Moore* because, "unlike Moore . . . plaintiffs' allegations here are not *contract oriented* and not, therefore, 'within the cognizance of federal and state courts.'"⁸⁰ (Emphasis added.) Since the allegations

were not predicated upon the collective bargaining agreement so as to give the court jurisdiction under § 301, but rather looked beyond the agreement to the exclusive bargaining representatives' obligation

⁷⁶ One may ask at this point what difference it makes whether the court has jurisdiction of the unfair representation claim under 301 or, as it always has in the past, under the rationale of *Steele* and its progeny. The answer, I think, may be found in the preemption doctrine. . . . If the duty of fair representation is derived solely from the NLRA, and if the Board's *Miranda-Hughes Tool* doctrine is upheld, then arguably the Board's jurisdiction would be exclusive under the rule of the *Garmon* case. On the other hand, if the duty to represent fairly can be derived from the contract, the courts would retain their 301 jurisdiction.

Murphy, *supra* note 74, at 387.

⁷⁷ See *ibid.*

⁷⁸ 365 F.2d 448, 63 L.R.R.M. 2087 (8th Cir. 1966), cert. denied, 386 U.S. 957 (1967).

⁷⁹ 243 F. Supp. 755, 60 L.R.R.M. 2295 (E.D. Mo. 1965).

⁸⁰ 365 F.2d at 456, 63 L.R.R.M. at 2093.

of fair representation, [they were] . . . within the exclusive jurisdiction of the National Labor Relations Board.⁸¹

Thus, the court was assuming that *Humphrey* did require some relation to the contract in the union's activities, but it failed to define just what it meant by "contract oriented." Obviously it did not mean bad faith in negotiating the contract, for that is exactly what the plaintiffs alleged. They had alleged a breach of contract, but the Eighth Circuit found only an allegation of a breach of the duty of fair representation, and this, it ruled, was for the NLRB.

On February 27, 1967, Mr. Justice White and the Supreme Court again attempted to explain how and why an employee's suit against his labor representative for breach of the duty of fair representation could avoid falling subject to the *Garmon* preemption doctrine. In *Vaca v. Sipes*,⁸² the Court combined the questions of suits against employers and suits against labor organizations. It stated that "the problem . . . is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures."⁸³ Yet, the suit was against the union.

The case arose when an employee of Swift & Company was discharged. He had been suffering from high blood pressure and had been on sick leave in a hospital. Upon release from the hospital, he was certified by his family physician as fit to resume work. The company doctor, however, refused to so certify him, and the employee was permanently discharged. The employee sought to use the union grievance procedure, and the union processed the grievance up to the last step—arbitration. It refused to go further because a doctor, which the union had retained to examine the employee, had concurred with the company doctor that the employee was not sufficiently recovered to work. It was at this point that the employee brought two suits in a state court of Missouri. One suit was against the union, and one was against the employer; both were for damages for wrongful discharge.

The union defended on the ground that the courts had no jurisdiction because the charge was arguably an unfair labor practice and 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.

While reversing on the ground that federal law should be applied,⁸⁴ the

⁸¹ *Ibid.* In so ruling, the court appears to be upholding the Board's *Miranda* doctrine. It is one thing to say that the suit is not contract-oriented and therefore not properly brought under § 301. It is quite another thing, however, to say that the allegations are within the exclusive jurisdiction of the NLRB. To reach the latter conclusion, the court must be holding that the breach of duty was an unfair labor practice, but the court does not articulate this step.

⁸² 386 U.S. 171 (1967). For the purposes of its decision, the Court assumed that a breach of the duty of fair representation was an unfair labor practice. *Id.* at 186. For a discussion of the unfair-labor-practice implications, see pp. 884-85 *infra*.

⁸³ *Id.* at 185.

⁸⁴ The state court had decided that a mere failure by the union to take a dispute to arbitration breached its duty of fair representation if the employee had in fact been wrongfully discharged. Under the applicable federal law, the Supreme Court said, it

Supreme Court held that the state court had correctly determined that the cause of action was within the jurisdiction of both state and federal courts. Affirming state court jurisdiction, the Court addressed itself to both the *Miranda* and *Garmon* doctrines. As to the *Garmon* preemption doctrine, the Court stated that it "has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB."⁸⁵ The Court later added:

A primary justification for the pre-emption 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 applicable to cases involving alleged breaches of the union duty of fair representation.⁸⁶

Since decisions in such cases usually require a study of the substantive issues involved in the union negotiations and grievance handling, it cannot be said that the NLRB is more competent to deal with them than the courts. In addition, the NLRB "General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."⁸⁷ Thus, the employee could be successfully stymied in his attempt to get redress of his grievance.

The Court then proceeded to explain why a suit for breach of the duty of fair representation should at least be analogized to a standard section 301 suit. "[T]he fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L.M.R.A. § 301 charging an employer with a breach of contract."⁸⁸ Since the *Maddox* doctrine will deny an employee access to the court if he fails to attempt to exhaust his contractual remedies,⁸⁹ a union can totally prevent his obtaining redress by refusing to process his grievance through all of the required steps.⁹⁰

[W]e think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon 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.⁹¹

An employee's suit against his employer is no less a section 301 action be-

must also be shown that the union acted arbitrarily or in bad faith in processing the employee's grievance. *Id.* at 193-94.

⁸⁵ *Id.* at 179.

⁸⁶ *Id.* at 180-81.

⁸⁷ *Id.* at 182.

⁸⁸ *Id.* at 183.

⁸⁹ But cf. *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 62 L.R.R.M. 2389 (5th Cir. 1966), discussed pp. 830-34 *supra*. The *Haynes* court seems to have read out the word "attempt."

⁹⁰ The Court expressed strong doubts "that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract." 386 U.S. at 186.

⁹¹ *Ibid.*

cause the employee must prove a breach of duty by the union in order to get into court. "[T]he result should be no different if the employee . . . sues the employer and the union in separate actions."⁹²

Thus, the Supreme Court has taken positions on two basic questions. First, it appears to have held that a breach of the duty of fair representation is within the jurisdiction of the courts, at least where there is also a section 301 suit against the employer.⁹³ This would be so even if it were assumed that such a breach of duty were also an unfair labor practice.⁹⁴ Thus, the Board's *Miranda* doctrine has been overruled at least in part.⁹⁵ Second, the Court seems to have retreated somewhat from its *Humphrey v. Moore* decision that a suit for breach of the duty of fair representation is a section 301 action. *Vaca v. Sipes* would require that the suit against the union at least be accompanied by a concurrent section 301 suit against the employer. This is more in keeping with the language of section 301, which speaks of "violation of contracts."⁹⁶ By its new holding, the Court avoids such questions as whether, if a suit against the union were under section 301, the *Maddox* exhaustion rule would be applicable. But it leaves open the problem of the suit by an employee against his union when such suit is unassociated with a section 301 action against the employer. Arguably this would still be subject to the jurisdiction of the NLRB.

B. Statutes of Limitations in Section 301 Cases

In his dissent in *Smith v. Evening News Ass'n*,¹ Mr. Justice Black worried that "by permitting unfair labor practice claimants to choose whether they will seek relief in the courts [under section 301] . . . or before the Board,"² the Court would defeat the congressional policy which had been embodied in the six-month statute of limitations for filing a charge alleging an unfair labor practice.³ He felt that, "by permitting suits like this one to

⁹² Id. at 187.

⁹³ The Court reasoned that

the employer has committed a wrongful discharge in breach of [the bargaining] . . . agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice.

Id. at 185-86.

⁹⁴ Id. at 186.

⁹⁵ The concurring Justices, Fortas, Warren, and Harlan, would apply the *Miranda* and *Garmon* doctrines because a breach of the duty of fair representation is an unfair labor practice, and is not a breach of the collective-bargaining agreement.

⁹⁶ LMRA § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).

¹ 371 U.S. 195, 201 (1962). This was the first case to hold that an individual employee could sue his employer for breach of the collective-bargaining agreement under § 301.

² Id. at 202.

³ LMRA § 10(b), 61 Stat. 146 (1947), 29 U.S.C. § 160(b) (1964), reads in part as follows:

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that

be filed, it is now not only possible but highly probable that unfair labor practice disputes will hang on like festering sores that grow worse and worse with the years."⁴

On March 24, 1966, a majority of six Justices, including Justice Black, held in *UAW v. Hoosier Cardinal Corp.*⁵ that the statute of limitations to be applied to section 301 suits is the appropriate state statute. The case arose between the union and the employer over a collective-bargaining agreement which provided that employees who qualified for a vacation but were terminated before they took it would receive the accrued vacation pay upon termination. The company refused to make payments required by this clause. The employees brought a class action in an Indiana state court in 1958 to recover the amounts due, but this was dismissed as an impermissible class action under state law. The employees then assigned their claims to the union, which also filed a complaint in the state court; this too was dismissed. In 1960 the employees again tried a class action and again failed.⁶ Finally, four years later, and seven years after the employees had been terminated, the union brought the instant suit in the federal district court in Indiana.⁷

The trial court dismissed the complaint, finding that the contract was a hybrid of the oral employment contract and the written collective-bargaining agreement, and thus was governed by the Indiana statute of limitations for contracts not in writing.⁸ As such, it was barred because brought more than six years from the date the cause of action arose.⁹ The dismissal was affirmed by the Court of Appeals for the Seventh Circuit¹⁰ and then by the U.S. Supreme Court.¹¹

Before the Supreme Court, the union argued that the decision in *Textile Workers v. Lincoln Mills*¹² required the application of federal law to a suit under section 301, and thus the state statute of limitations could not be applied; instead, a federal limitation should be devised.¹³ In the alternative, the union contended that even if a state statute of limitations were applicable, it should be the longer limitation concerning written contracts.¹⁴ The Court gave its answer to the union arguments in three parts. First, it had to determine the issue of whether there should be a court-created

respect . . . : *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board

⁴ 371 U.S. at 203.

⁵ 383 U.S. 696 (1966).

⁶ This description of the previous activities in the state courts is from the Supreme Court opinion. *Id.* at 698-99. None of the previous actions was under § 301.

⁷ 235 F. Supp. 183, 57 L.R.R.M. 2516 (S.D. Ind. 1964).

⁸ Ind. Ann. Stat. § 2-601 (Supp. 1966).

⁹ 235 F. Supp. at 187, 57 L.R.R.M. at 2519. The court noted that its decision was in accord with Indiana cases involving a contract partly oral and partly written. *Id.* at 188, 57 L.R.R.M. at 2520.

¹⁰ 346 F.2d 242, 59 L.R.R.M. 2448 (7th Cir. 1965).

¹¹ *Supra* note 5.

¹² 353 U.S. 448 (1957).

¹³ The union suggested no particular limitation for its proposed federal rule.

¹⁴ Ind. Ann. Stat. § 2-602 (Supp. 1966).

federal limitation period. Second, once it had been decided that the Court could not create a federal limitation, the Court had to determine what limitation should be applied. Finally, after deciding that a state statute of limitations was applicable, the Court had to determine which of two possibly applicable state limitations the federal law would apply.

The Court conceded that *Lincoln Mills* did affirmatively require the application of federal law in the field of section 301 suits, and admitted that there are areas where the implementation of federal labor policy is so important that the courts would have to invent federal rules.¹⁵ However, said the Court, "the problem presented here . . . is not of that nature."¹⁶ The purpose of uniform federal standards in labor law is to facilitate the smooth operation of the federally fostered consensual proceedings between union and management. These include "the formation of the collective agreement and the private settlement of disputes under it."¹⁷ However, as the Court pointed out,

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. Thus, although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us.¹⁸

The Court dismissed the argument that since Congress had not inserted a limitation in section 301, it intended the courts to create one.

It is clear that Congress gave attention to limitations problems in the Labor Management Relations Act, 1947; it enacted a six months' provision to govern unfair labor practice proceedings In this context and against the background of the relationship between Congress and the courts on the question of limitations provisions, it cannot be fairly inferred that when Congress left § 301 without a uniform time limitation, it did so in the expectation that the courts would invent one.¹⁹

Having decided that it was not within the power of the courts to provide a federal rule as to limitations, the Court then turned to the question of what limitations provision it should apply. It stated that, since 1830,²⁰ state statutes of limitations have been applied to "govern the timeliness of federal causes of action unless Congress has specifically provided otherwise."²¹ The Court again applied this rule and held, accordingly, that as a matter

¹⁵ 383 U.S. at 701.

¹⁶ *Ibid.*

¹⁷ *Id.* at 702.

¹⁸ *Id.* at 702-03.

¹⁹ *Id.* at 703.

²⁰ *McLuney v. Silliman*, 28 U.S. (3 Pet.) 270 (1830), held that "the acts of limitations of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States. . . ." *Id.* at 277.

²¹ 383 U.S. at 703-05.

of federal law, the timeliness of a section 301 suit was to be determined "by reference to the appropriate state statute of limitations."²²

This conclusion brought the Court to its third step—which state statute of limitations should the federal courts apply. There were two contracts involved in *Hoosier Cardinal*: the oral contract of employment between the company and each of its individual employees, and the written collective-bargaining agreement between the company and the union.²³ The Court, having designated Indiana law as the governing law, determined that Indiana's six-year statute of limitations on oral contracts should apply.²⁴ The union had urged that the twenty-year limitation on written contracts be applied because section 301 contemplated suits for breach of the collective agreement.²⁵

The Court stated that a section 301 suit could not be "based solely upon the separate hiring contracts, frequently oral, between the employer and each employee."²⁶ But the Court saw no reason why "the separate contracts of employment may not be taken into account in characterizing the nature of a specific § 301 suit for the purpose of selecting the appropriate state limitations provision."²⁷ The rationale behind this statement is more clearly presented in the opinion of the district court.²⁸ It stated that the *status* necessary to receive vacation pay was created by the individual employment contract; the collective-bargaining agreement established the *right* to and the rates of vacation pay, after a party had acquired such status. Thus, the suit was truly on a contract partly oral and partly written.²⁹ "Indiana has clearly held that in a case where a contract is partially in writing and partially oral the six-year statute of limitations applies. . . ." By "taking into account" the oral contract, the Supreme Court meant that, although a right was created by the breach of the written contract, the status necessary to establish damages required proof of the oral contract of hire. It is to the total employment relationship that the collective-bargaining agreement applies.

In addition to finding that Indiana would apply the six-year statute of limitations, the Court found that federal labor policy favored a more rapid disposition of cases than would be permitted if a twenty-year statute of limitations were used.³¹ "Since state statutes of limitations governing con-

²² *Id.* at 705.

²³ The relationship between the oral contract of hire and the collective-bargaining agreement was discussed at length in *J. I. Case Co. v. NLRB*, 321 U.S. 332, 334-36 (1944).

²⁴ Ind. Ann. Stat. § 2-601 (Supp. 1966).

²⁵ Under LMRA § 8(b), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964), the collective-bargaining obligation includes "the execution of a written contract incorporating any agreement reached."

²⁶ 383 U.S. at 706.

²⁷ *Ibid.*

²⁸ *Supra* note 7.

²⁹ *Id.* at 187, 57 L.R.R.M. at 2519.

³⁰ *Id.* at 188, 57 L.R.R.M. at 2520.

³¹ The Court cited the unfair-labor-practice limitation of six months. 383 U.S. at 707. Note, however, that the Court chose the Indiana six-year limitation not

tracts not exclusively in writing are generally shorter than those applicable to wholly written agreements, their applicability to § 301 actions comports with [federal policy]. . . ."³²

The reasoning of the majority had been foreshadowed in earlier case law.³³ In *International Union of Operating Eng'rs v. Fischbach & Moore, Inc.*,³⁴ for example, the Court of Appeals for the Ninth Circuit reversed the district court decision that state statutes of limitations could not be applied to suits under Section 303 of the Labor Management Relations Act.³⁵ The court of appeals used the same argument as the Supreme Court later was to use in *Hoosier Cardinal*: Even though a uniform limitation would be desirable and there is no reason why the six-month unfair-labor-practice limitation should not be applied, the setting of a uniform federal limitation is in the congressional domain.³⁶ Then, referring back to past federal court practice, as did the Court in *Hoosier Cardinal*, the Ninth Circuit used the applicable state statute of limitations.

It seems clear from such cases as *Hoosier Cardinal* and *Fischbach & Moore* that, while the judiciary would prefer to see a uniform federal limitation on section 301 and section 303 suits, the courts are precluded from creating their own limitation by due regard for the legislative prerogative. The problems which will result from the *Hoosier Cardinal* rule are quite obvious. Where there is a multi-state employer, employees or unions suing under section 301 will be prone to forum shop for the best available statute of limitations. Those who cannot forum shop may well be barred by their home statute, while their brothers in another state—with the same cause of action arising out of the same facts—will still be free to sue. Where the action is a multi-state one, there is the further problem of conflict of laws.

There is the additional problem of which state statute of limitations to apply even if the suit affects only one state. As in *Hoosier Cardinal*, the court may have to decide what kind or kinds of contracts are involved before it can choose the applicable statute. Also, where the union and the employees sue separately, why should one suit be treated differently from the other? Finally, when an employee sues the union, what contract is involved in the union-employee relationship and what limitation applies?

The solution to these problems lies within easy reach—a uniform federal limitation—but the grasp must be that of Congress.

because it was the shorter of the two, but because Indiana would have applied it. To have done otherwise would have been to create a federal limitation.

³² Ibid. The dissent felt that federal law should be applied, and that only such state law as effectuates federal policy should be incorporated. However, the dissenting opinion suggested no federal rule of limitation which should be fashioned. Id. at 709-14 (White, J., dissenting).

³³ See, e.g., *Reliford v. Eastern Coal Corp.*, 260 F.2d 447, 42 L.R.R.M. 2526 (6th Cir. 1958), cert. denied, 359 U.S. 958 (1959) (§ 301 action); *Kreshool v. International Longshoremen's Ass'n*, 242 F. Supp. 551, 59 L.R.R.M. 2804 (D. Del. 1965) (§ 303 action).

³⁴ 350 F.2d 936, 60 L.R.R.M. 2141 (9th Cir. 1965), cert. denied sub nom. C. D. Draucker, Inc. v. International Union of Operating Eng'rs, 384 U.S. 904 (1966).

³⁵ 198 F. Supp. 911, 49 L.R.R.M. 2631 (S.D. Cal. 1961). See also Note, 3 B.C. Ind. & Com. L. Rev. 542 (1962); Note, 60 Mich. L. Rev. 1164 (1962).

³⁶ 350 F.2d at 938, 60 L.R.R.M. at 2142.

C. Supervisory Unions and Section 301

In *Isbrandtsen Co. v. District 2, Marine Eng'rs Beneficial Ass'n*,¹ a federal district court rather hesitantly² reached the conclusion that a union composed entirely of supervisory employees is a "labor organization" within the meaning of section 301.³ The case arose between the employer and the union when the former sold some of its ships and, as a result of the sale, had to discharge some supervisory employees who were members of the union. The union brought suit in a state court to compel arbitration of the employees' claims for severance pay. The employer petitioned the federal district court for removal under section 301. Following removal the union asked for remand to the state court on two grounds: First, that the federal court had no jurisdiction under section 301, because the union was not a "labor organization" within the meaning of that section, and, second, that there was no diversity of citizenship on which to base federal jurisdiction not otherwise granted by statute.

The basis of the first union claim was that a "labor organization" under section 301 must be defined in the same way that it is defined in the "National Labor Relations Act as amended by [the Labor Management Relations Act]."⁴ The relevant section of the NLRA defines "labor organization" as

any organization of any kind, or any agency or employee representation committee or plan, in which *employees* participate and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.⁵ (Emphasis added.)

The key word in the definition is "employee," which is also to be defined according to the NLRA as amended.⁶ This term is explicitly defined so as to exclude "any individual employed as a supervisor."⁷ The conclusion to the union argument was that, since all its members⁸ were employed as supervisors, they were not "employees" within the definition of "labor organization," and therefore the union was not a "labor organization" within the meaning of the NLRA or section 301. From this it should follow that, absent diversity of citizenship, a federal court had no jurisdiction over the dispute.

¹ 256 F. Supp. 68, 62 L.R.R.M. 2488 (E.D.N.Y. 1966).

² The court itself stated that "the soundness of this court's interpretation of LMRA § 301 should be reviewed, especially in the light of conflicting data within this Circuit, with respect to the interpretation of the very section of the LMRA here involved." *Id.* at 77, 62 L.R.R.M. at 2495.

³ 61 Stat. 156 (1947), 29 U.S.C. § 185 (1964).

⁴ LMRA § 501(3), 61 Stat. 161 (1947), 29 U.S.C. § 142(3) (1964).

⁵ NLRA § 2(5), 49 Stat. 450 (1935), as amended, 61 Stat. 138 (1947), 29 U.S.C. § 152(5) (1964).

⁶ LMRA § 501(3), 61 Stat. 161 (1947), 29 U.S.C. § 142(3) (1964).

⁷ NLRA § 2(3), 49 Stat. 450 (1935), as amended, 61 Stat. 137 (1947), 29 U.S.C. § 152(3) (1964).

⁸ The court noted that it was not clear that all members of the union were supervisory employees, but "for the purposes of this motion, the court is assuming that all members of District 2, MEBA are supervisors within the meaning of the National Labor Relations Act." 256 F. Supp. at 71 n.3, 62 L.R.R.M. at 2490 n.3.

The district court denied the motion to remand. It held that if section 301 were read properly, a court should concentrate upon the relationship of the parties. In common usage, the union *was* a labor organization and the supervisory personnel *were* employees. Section 301 was meant "to provide for federal jurisdiction over breach of collective-bargaining contracts if the *parties* were in an industry affecting interstate commerce."⁹ It was conceded that the employer was "in an industry affecting commerce."¹⁰ The court went on to say that

interpreting the phrase "labor organization representing employees in an industry affecting commerce" in its ordinary meaning comports with the expressed legislative intent of avoiding industrial strife by making labor unions suable as entities in the Federal courts.¹¹

In reaching this conclusion, the court noted that there were conflicting holdings within the Second Circuit as to whether a union of supervisory employees was within the purview of section 301. In *A. H. Bull S.S. Co. v. National Marine Eng'rs Beneficial Ass'n*,¹² the appellate court was called upon to determine whether the issuance of an injunction by a district court was in error. The employer had obtained the injunction pending a determination by the district court of an allegation that the union had breached the collective-bargaining agreement by striking. In ruling that the injunction should not have issued, the court of appeals held that whether the employees in the union were supervisors was a question of fact and "if they are 'supervisors,' then MEBA is not a 'labor organization representing employees' for the purposes of this action."¹³ The court said that since the district court had failed to determine the preliminary jurisdictional issue, there was no justification for the issuance of the injunction.

The other side of the question is represented by *National Marine Eng'rs Beneficial Ass'n v. NLRB*,¹⁴ which was a proceeding to review a cease-and-desist order of the NLRB concerning alleged unfair labor practices by the union. The court of appeals enforced the cease-and-desist order, because it had found that the Engineers Association had admitted nonsupervisory employees to membership. Thus, it was a "labor organization" for the purposes of section 8(b). The court made no independent mention of section 301, but did distinguish *Bull* because it was decided under that section.¹⁵

It would seem that both *Bull* and *National MEBA* support a result contrary to that reached in *Isbrandtsen*.¹⁶ *Bull*, decided under section 301, required a finding that, if the members of the union were *all* supervisory employees, the union was not a "labor organization" under federal labor law,

⁹ Id. at 76, 62 L.R.R.M. at 2494.

¹⁰ Id. at 71, 62 L.R.R.M. at 2489.

¹¹ Id. at 77, 62 L.R.R.M. at 2494.

¹² 250 F.2d 332, 41 L.R.R.M. 2126 (2d Cir. 1957), cert. denied sub nom. *A. H. Bull S.S. Co. v. Scafarers' Int'l Union*, 355 U.S. 932 (1958).

¹³ Id. at 336, 41 L.R.R.M. at 2129.

¹⁴ 274 F.2d 167, 45 L.R.R.M. 2499 (2d Cir. 1960).

¹⁵ Id. at 174, 45 L.R.R.M. at 2504.

¹⁶ Supra note 1.

and section 301 did not give federal jurisdiction. *National MEBA*, decided under section 8(b), found that the national union was a "labor organization" under the NLRA because it admitted nonsupervisory employees to membership. Thus, if District 2, in *Isbrandtsen*, had admitted nonsupervisory employees, it would have been a labor organization under the NLRA and consequently under section 301 also. This follows from the requirement in section 501(3) that the term "labor organization" be defined the same for both purposes.¹⁷ However, the court assumed that District 2 did not admit nonsupervisory members and thus was plainly not a "labor organization" under section 301 according to the strict language of the statute.

The holding in *Isbrandtsen* seems clearly contrary to the statutory language of the LMRA. The language of section 501(3) explicitly states that the terms "employee" and "labor organization" should be defined the same way for purposes of unfair labor practices and actions arising under section 301. Applying that requirement strictly, District 2 should not have been subject to federal jurisdiction in this instance; it should have been able to have its case remanded to the state courts.

VI. UNFAIR LABOR PRACTICES

A. Board Procedure

Under established law, any person, even if he has no direct interest in the outcome of a labor dispute, may file unfair-labor-practice charges with the NLRB.¹ In turn, the party charged with unfair labor practices is always a party in Board proceedings,² and, if the Board initiates proceedings in a circuit court to enforce an order issued pursuant to a finding that unfair labor practices have been committed, the one charged is automatically a party in these proceedings.³ Further, any person who is aggrieved by a final order of the Board in an unfair-labor-practice proceeding has a right to petition for circuit court review.⁴

During the current Survey year, an important decision was handed down concerning the right of a successful charging party, not directly affected by a Board order, to intervene in a circuit court review of that order. In *NLRB v. Local 2, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus.*,⁵ the Second Circuit held that the union violated

¹⁷ 61 Stat. 161 (1947), 29 U.S.C. § 142(3) (1964).

¹ 29 C.F.R. § 102.9 (1966) provides that "a charge that any person has engaged or is engaging in any unfair labor practice affecting commerce may be made by any person." Any person filing a charge, even if he has no direct interest, is automatically a party to Board proceedings.

² 29 C.F.R. § 102.8 (1966).

³ LMRA § 10(e), 61 Stat. 147 (1947), 29 U.S.C. § 160(e) (1964). This section provides in part:

The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of such order Upon the filing of such petition, the court shall cause notice thereof to be served upon such person [the party found by the Board to have committed an unfair labor practice], and thereupon shall have jurisdiction of the proceeding. . . .

⁴ LMRA § 10(f), 61 Stat. 148 (1947), 29 U.S.C. § 160(f) (1964).

⁵ 360 F.2d 428, 62 L.R.R.M. 2211 (2d Cir. 1966).

sections 8(b)(1)(A) and 8(b)(2)⁶ by causing an employer to refuse to hire four Negroes. The company denied employment to the four men as a result of a strike called by the union in order to prevent such hiring.⁷ The Board found that the union was liable to the four men for all losses in pay from the date of the strike to a date five days after the union's sending of a notice of withdrawal of its objection.

The Second Circuit modified the back-pay remedy, but enforced the order of the Board in all other respects. The charging party in the case was a civic organization known as the Urban League, and, upon petition by the union for review of the Board's decision, the Urban League sought to intervene as a party before the court. At that time, the court deferred decision on the motion to intervene and permitted the Urban League to participate as *amicus curiae*.⁸

When the motion to intervene was later considered, the majority held that a successful charging party in the Board proceeding, *although having no direct interest in the controversy*, has a per se right to intervene as a party in the subsequent circuit court action. No further circuit court proceedings remain in *Local 2*, and the only action left is the separate back-pay proceeding before the Board, which may or may not be appealed. Thus, although the Urban League may not receive a benefit by virtue of the court's ruling, the decision will likely be of considerable importance in future circuit court proceedings.

Prior to *UAW v. Scofield*,⁹ a successful charging party was not allowed to intervene on the side of the Board in circuit court proceedings.¹⁰ The basis for the prior ruling was that only the public interest was involved in unfair-labor-practice proceedings, and the Board could adequately protect the rights of the public.¹¹ However, in *Scofield* the Supreme Court held that a successful charging party had a right to intervene in appellate court proceedings. The rationale was (1) that the LMRA does bestow private rights upon individual employees as well as protect the public interest, and (2) that it is as important to the charging party as to the charged party to have the opportunity to persuade the appellate court.¹²

⁶ 61 Stat. 141 (1947), 29 U.S.C. §§ 158(b)(1)(A), (2) (1964). Section 8(b)(1)(A) provides: "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]. . . ." Section 8(b)(2) provides: "It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section. . . ."

⁷ Although the four men came to the jobsite, they were never actually hired.

⁸ The court did not state whether the company and/or the Board had contested the Urban League's intervention, or whether it was considering the Urban League's motion on its own initiative.

⁹ 382 U.S. 205 (1965).

¹⁰ *NLRB v. Retail Clerks Ass'n*, 243 F.2d 777, 38 L.R.R.M. 2555 (9th Cir. 1956); *Stewart Die Casting Corp. v. NLRB*, 132 F.2d 801, 11 L.R.R.M. 739 (7th Cir. 1942); *Aluminum Ore Co. v. NLRB*, 131 F.2d 485, 11 L.R.R.M. 693 (7th Cir. 1942).

¹¹ See cases cited note 10 *supra*.

¹² 382 U.S. at 218. Private rights include the right of individual employees not to be discriminated against in regard to a term or condition of employment because of their union activity and the right to have the company bargain with their chosen bargaining

In *Scofield*, however, the charging party was the union, which would directly benefit from the court order, and the Court stated: "that the charging party may have vital 'private rights' in the Board proceeding is clear in this very case"¹³ Thus, it is not apparent whether the Court meant that a successful charging party has a per se right to intervene in circuit court proceedings even when the charging party is not directly benefited by the Board order. Nevertheless, the majority opinion in *Local 2* seems correct in interpreting *Scofield* as creating this per se right, because, in the beginning of its opinion, the Court stated that "we think that Congress intended to confer intervention rights upon the successful party to the Labor Board proceedings in the court in which the unsuccessful party challenges the Board's decision."¹⁴ The language used seems deliberately broad and intended to state an inclusive rule. Moreover, the Court stated that it would have to ascribe "capriciousness" to Congress if it provided review for the unsuccessful charged party but not for the successful charging party.¹⁵ The Court thus seems to have ruled that Congress intended to allow any person who had the *formal status* of a charging party to intervene in any subsequent court action.

B. Duty to Bargain

1. Employer's Decision to Subcontract or Terminate

In the area of subcontracting, there are three main fact variations under which unfair-labor-practice questions arise: (1) situations in which the company subcontracts work previously done by its own employees, which work is subsequently performed by the employees of other employers, and for the performance of which the company continues to supply and maintain the necessary capital, thus having no capital recoupment; (2) situations in which the company subcontracts work which continues to be performed as in (1), but in which the company does not supply and maintain capital and thus does have capital recoupment; (3) situations in which the company terminates *part* of its operations and does not have the work performed by anyone else, recouping the capital formerly used in these operations.¹

In the leading subcontracting case, *Fibreboard Paper Prods. Corp. v. NLRB*,² the company, for economic reasons, subcontracted maintenance work previously performed by some of the company's employees, but continued

representative. The public interest involved stems from the fact that Congress has deemed unfair labor practices to be a significant cause of work stoppages.

¹³ *Id.* at 220. The union charged that the employer had refused to bargain, and it obtained a Board order compelling the employer to bargain. The Court in *Scofield* also decided that a successful charged party in Board proceedings had a right to intervene as a party in appellate court proceedings brought by an unsuccessful charging party. *Id.* at 208.

¹⁴ *Ibid.*

¹⁵ *Id.* at 222.

¹ In all of these situations, it is assumed that the company is motivated by economic considerations, and not by an antiunion animus. Otherwise the company would be guilty of an unfair labor practice in each instance. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965).

² 379 U.S. 203 (1964).

to maintain and supply all the capital necessary to the subcontracted operations. Thus, *Fibreboard* fits within situation (1) above. The Supreme Court held that the subcontracting was a "term or condition of employment" and consequently a mandatory subject of collective bargaining under section 8(a)(5).³ The Court accordingly found that the company had violated section 8(a)(5) when it did not notify and bargain with the union about its decision to subcontract the maintenance work.

The Board and the circuit courts have differed on the question whether *Fibreboard* applies to situation (2)—where there is subcontracting and recoupment of capital investment. The Board recently has reaffirmed its position that *Fibreboard* controls such situations. In *Ozark Trailers, Inc.*,⁴ the employer had ceased for economic reasons all operations in one of its three plants which were engaged in the manufacture of truck bodies, without notifying the union and without bargaining about the decision. Most of the equipment located at the closed Ozark plant was then moved to one of the other plants for storage. However, the production at the other two plants did not increase substantially. Nor did the company partially terminate its operations; instead, the employer contracted with an independent company for the manufacture of truck bodies, with the independent company supplying all the capital. Since the employer in *Ozark* did not supply the capital to the contractor, this appears to be an instance of subcontracting with capital recoupment, whereas *Fibreboard* was an instance of subcontracting without capital recoupment.

Nonetheless, the Board found that *Fibreboard* was applicable to the facts of *Ozark*. The Board held that the employer violated section 8(a)(5) by not bargaining about both the decision to subcontract and its effects.⁵ The Board concluded that the question of whether the employer must bargain about subcontracting should not turn on whether or not the company recouped part of its capital investment. It quoted from the Supreme Court's decision in *Fibreboard*:

The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." . . . A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit.⁶

The Board reasoned that, since termination of employment occurred as a

³ 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964).

⁴ 161 N.L.R.B. No. 48, 63 L.R.R.M. 1264 (1966).

⁵ Requiring the company to bargain about the *decision* to subcontract obviously implies the less-inclusive requirement of bargaining about the *effects* of such subcontracting. Bargaining about the decision means discussing with the union the question whether there will be subcontracting at all. Bargaining about the effects of subcontracting means discussion of what severance pay, pension benefits, and the like should be given to employees.

⁶ 161 N.L.R.B. No. 48, 63 L.R.R.M. at 1267, quoting 379 U.S. at 210.

result of the employer's decision to subcontract, regardless of whether he recouped any of his capital, the employer had failed to bargain concerning a "term or condition of employment." The Board also felt that to require bargaining under these circumstances would effectuate one of the primary purposes of the act—to promote the peaceful settlement of disputes by subjecting labor-management controversies to the mediatory influence of negotiation.⁷

In *NLRB v. American Mfg. Co.*,⁸ the Fifth Circuit supported the Board's interpretation of *Fibreboard*. In this case, the employer, a manufacturer of oilfield pumping equipment, discontinued the transportation of its products by its own vehicles and employees, and subcontracted the transportation operations to public carriers. The company thereupon dismissed some of its employees and sold the vehicles, with a resultant recoupment of capital. The NLRB found that the employer had violated sections 8(a)(1), (3), and (5), because the employer had contracted out the work in order to rid itself of the union. The Fifth Circuit reversed that part of the Board's order which required the company to resume the transportation operations, because evidence was entirely lacking in the record which would warrant a finding that resumption would further the policies of the act, but sustained the Board's findings of the violations.

In dicta, however, the Fifth Circuit added:

Of course it is now clear that the Board was correct in finding that the Employer must negotiate the decision to subcontract. *Quite apart from antiunion conduct, or here the claim of economic justification*, the decision to subcontract work is a subject for mandatory bargaining. Any doubt which may have existed was put to rest by *Fibreboard Paper Products Corp. v. NLRB*. . . .⁹ (Emphasis added.)

The court did not mention the factual distinction that in *Fibreboard* there was subcontracting but no capital recoupment, whereas in *American Mfg.* there was subcontracting and such recoupment. Thus, the court simply concluded that *Fibreboard* required bargaining where there was contracting out which resulted in the substitution of employees by those of an independent contractor to do the same work under similar conditions, apparently irrespective of whether there was capital recoupment.

These decisions conflict with the Eighth Circuit's decision in *NLRB v. Adams Dairy, Inc.*¹⁰ There the court, upon remand from the Supreme Court¹¹ to reconsider its previous opinion in light of *Fibreboard*, reaffirmed its holding that the employer's decision to subcontract the distribution of its dairy products was not a mandatory bargaining subject. For economic reasons, the employer had decided unilaterally to have independent contractors distribute

⁷ See LMRA § 101, 61 Stat. 136, (1947), 29 U.S.C. § 151 (1964).

⁸ 351 F.2d 74, 60 L.R.R.M. 2122 (5th Cir. 1965).

⁹ Id. at 80, 60 L.R.R.M. at 2126.

¹⁰ 350 F.2d 108, 60 L.R.R.M. 2084 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966).

¹¹ 379 U.S. 644 (1965), vacating and remanding 322 F.2d 533, 54 L.R.R.M. 2171 (8th Cir. 1963).

his products. He therefore discharged his driver-salesmen and sold the trucks. The court distinguished its case from *Fibreboard* on the basis that

there was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment. To require Adams to bargain about its decision to close out the distribution end of its business would significantly abridge its freedom to manage its own affairs. Bargaining is not contemplated in this area under the history and usage of § 8(a)(5).¹²

In a partial termination case, *NLRB v. Royal Plating & Polishing Co.*,¹³ the Third Circuit rejected the Board's view that under *Fibreboard* an employer must bargain about the *decision* to terminate, and limited its agreement with the Board to the extent that the Board held that bargaining about the *effects* of the termination was mandatory under section 8(a)(5). In this case, an employer, for economic reasons, unilaterally decided to terminate operations at one of his two plants, without subcontracting the work or having it performed at the other plant. Although engaged at the time in negotiations for a new contract, the employer failed to notify the union of his decision. Relying on the rationale of *Fibreboard*, the Board found a violation of section 8(a)(5) in the employer's failure to discuss both the decision to terminate and the effects of the termination.¹⁴

Because the Board's finding of an unfair labor practice was in part based on its determination that the employer must bargain about whether or not to close the plant, the court remanded the case for the Board to determine whether failure to discuss the effects of the termination constituted in this case a substantial or a technical violation. The court distinguished *Fibreboard* on the ground that in *Royal Plating* there was no substitution of employees, while there was a recoupment of capital investment and a change in economic direction. The court also distinguished *Fibreboard* on the basis that, in *Royal Plating*, the Newark Housing Authority, by the exercise of its power of eminent domain, would have forced the company to sell the premises. The court noted that the union could only attempt to persuade the employer to relocate the plant and could not cause him to keep the plant in operation. Under these circumstances, the court did not feel that bargaining could be meaningful, except as to the effects of the termination of operations.

It is clear that the present state of the law is in conflict on the effect of *Fibreboard* on partial terminations and on subcontracting which involves a change in capital structure. Resolution of the conflict must await a Supreme Court determination. Since the operations which were terminated in *Royal*

¹² 350 F.2d at 111, 60 L.R.R.M. at 2087.

¹³ 350 F.2d 191, 60 L.R.R.M. 2033 (3d Cir. 1965).

¹⁴ 148 N.L.R.B. 545, 57 L.R.R.M. 1006 (1964). Member McCulloch, one of the five on the panel in this case, concurred solely on the ground that the employer violated § 8(a)(5) by refusing to bargain concerning the effects upon employees of the plant closing. Id. at 546 n.2, 57 L.R.R.M. at 1007 n.2. Member Jenkins found that the employer did not bargain in good faith, because it failed to disclose all the facts during the contract negotiations; Member Jenkins thus did not reach or decide whether there is a duty to reveal the decision apart from contract negotiations. Id. at 551, 57 L.R.R.M. at 1008.

Plating had become extremely unprofitable, it is inconceivable that the union could persuade the employer to relocate the operations. Therefore, it is submitted that the Third Circuit was correct in requiring the employer to bargain only about the effects of the partial termination and not about the decision to partially terminate. On the other hand, the Board's view of *Fibreboard* seems preferable to that of the Eighth Circuit in *Adams Dairy*. It is submitted that a change in economic direction or recommitment of capital is not a material consideration under the LMRA, and that it is insufficient to distinguish a case otherwise similar on its facts to *Fibreboard*. The essential facts of *Fibreboard* and *Adams Dairy* are otherwise identical—subcontracting of work and substitution of employees in order to achieve cost savings.

Another recent decision has illustrated the difficulty in determining whether there has been contracting out within the meaning of *Fibreboard*, and a further difficulty in determining what activity is sufficient to satisfy the requirement of bargaining about such contracting. In *United Auto Workers v. NLRB*,¹⁵ the District of Columbia Circuit Court, reversing the Board, found that the employer had violated section 8(a)(5) by contracting out work without bargaining with the union. In this case, finished cars had been driven by General Motors employees from the end of the assembly line to a position near a parking lot. From there the cars had been moved by employees of another company, under a contract with General Motors, to the parking lot, where they were parked for shipment as directed by dispatchers of the independent contractor.

On May 2, 1963, General Motors told the union that, in order to increase efficiency, the employees of the contractor would perform all the driving of cars. However, before it put the change into effect that June, General Motors met with the union six times to discuss the proposed change. At these meetings the union protested against the proposal, but offered no counter-proposals. The union and General Motors eventually reached a settlement, which provided that the drivers who were replaced would be assigned comparable work, and that the union would not process grievances on behalf of the displaced employees. However, the settlement was intended only as a stop-gap solution until the dispute was settled either through arbitration or an unfair-labor-practice proceeding.

The Board found that there was no violation of section 8(a)(5).¹⁶ The reasons the Board assigned for this conclusion were: (1) that the employer's decision constituted a change in the method of operation rather than contracting out; (2) that the management-rights clause which gave the employer a right to make changes in "the methods, processes and means of manufacturing" without bargaining with the union covered this change; and (3) that the change, which required the reassignment of six men, did not result in any significant detriment to the unit which comprised over 1,500 employees.

¹⁵ 64 L.R.R.M. 2489 (D.C. Cir. 1967).

¹⁶ In its original decision, *General Motors Corp.*, 149 N.L.R.B. 396, 57 L.R.R.M. 1277 (1964), and in its Supplemental Decision, 158 N.L.R.B. No. 24, 62 L.R.R.M. 1009 (1966), the Board reached the same result, using the same rationale. The circuit court had remanded the first decision to the Board for clarification of its opinion. *United Auto Workers v. NLRB*, 60 L.R.R.M. 2283 (D.C. Cir. 1965).

The circuit court, however, held that there was contracting out within the contemplation of *Fibreboard*. The court pointed to the fact that the drivers had lost their jobs, even though they received similar jobs elsewhere in the plant, and that their jobs were now carried on by employees of the independent contractor.¹⁷ The court also held that this was not a de minimis violation of the act, because the change reduced by six the number of jobs performed by the members of the bargaining unit.¹⁸

The court concluded further that the management-rights clause was not a waiver of the union's statutory right to bargain concerning subcontracting, since only a clear and unmistakable provision would suffice to waive a right under the LMRA, and the clause in question did not meet this standard.¹⁹ From this case, it seems fairly clear that only an express use of the term "contracting" will be held to constitute a waiver of the right to bargain concerning subcontracting.²⁰

In the other troublesome aspect of this case, the Board had further held that even assuming there was contracting out, the company had bargained sufficiently to fulfill its bargaining requirements.²¹ This conclusion was attained without an express holding that it is *necessary* for the company to bargain until impasse is reached before it can act unilaterally. From the facts it does not appear that an impasse was reached in the bargaining, and therefore, if this interpretation of the facts is correct, the Board has implicitly held that under the circumstances of this case the ordinary duty to bargain until impasse is reached²² will not be applied. Unfortunately, the circuit court did not address itself to the issue of whether bargaining to an impasse is required in subcontracting cases. Yet its finding that the company had failed to bargain within the meaning of section 8(a)(5), although the company had repeatedly discussed the proposed change with the union, certainly seems to require bargaining to an impasse.

In its first Supplemental Decision in *Royal Plating & Polishing Co.*,²³ the Board stated that

the Act requires that an employer give the employees' bargaining representative notice and opportunity to confer about and discuss

¹⁷ 64 L.R.R.M. at 2490.

¹⁸ The court distinguished this case from *Puerto Rico Tel. Co. v. NLRB*, 359 F.2d 983, 62 L.R.R.M. 2069 (1st Cir. 1966), and *District 50, UMW v. NLRB*, 358 F.2d 234, 61 L.R.R.M. 2632 (4th Cir. 1966), which held that contracting out was de minimis, and that there need be no bargaining. The basis of the court's distinction was that in those cases neither the bargaining unit nor the employees were adversely affected in any respect as a direct result of the contracting out, whereas in *United Auto Workers* the number of jobs in the bargaining unit was reduced by six.

¹⁹ Cf. *California Portland Cement Co.*, 101 N.L.R.B. 1436, 31 L.R.R.M. 1220 (1952); *Hekman Furniture Co.*, 101 N.L.R.B. 631, 31 L.R.R.M. 1116 (1952); *Tidewater Associated Oil Co.*, 85 N.L.R.B. 1096, 24 L.R.R.M. 1518 (1949).

²⁰ Even assuming *arguendo* that the change was a change in manufacturing, the court concluded that the management-rights clause was not an unmistakable waiver by the union, where the change amounts to contracting out. 64 L.R.R.M. at 2490.

²¹ 158 N.L.R.B. No. 24, 62 L.R.R.M. at 1010.

²² See *NLRB v. Katz*, 369 U.S. 736 (1962); *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).

²³ 152 N.L.R.B. 619, 59 L.R.R.M. 1141 (1965).

the closing down of a plant *not for the purpose of securing the employees' agreement before he may proceed*, but to give his employees an opportunity to induce him to follow a different course of action which may safeguard both his and their rights and interests.²⁴ (Emphasis added.)

This statement quite clearly holds that an employer is not necessarily required to bargain to an impasse before it can act. Thus far, other decisions of the Board and the courts have simply stated that an employer must bargain with the union.²⁵ It would seem that there should be flexibility in the employer's duty to bargain concerning subcontracting, and not a mechanical requirement of bargaining to impasse. In some cases, subcontracting may be imperative to an employer and of little detriment to the employees. On the other hand, in *Fibreboard* the Supreme Court upheld an order that the company, which had replaced its maintenance employees and had not reassigned them, reinstate its maintenance department and all employees it had replaced.²⁶ The severity of the remedy indicates that the Supreme Court might require bargaining to an impasse in such cases. However, unlike *Fibreboard*, the employer in the General Motors case had announced the change in advance, had met with the union six times, and had assigned the replaced drivers to comparable jobs. Under these circumstances, it is submitted that the employer had met his bargaining requirement.

2. Employer's Duty to Provide Information

a. *Fringe-Benefit Data.* An employer must provide the union with a list of the job classifications and wage schedules of the unit employees, including incentive and bonus rates, in order for the union to bargain intelligently with the employer.²⁷ If an employer refuses to grant benefits on the basis of inability to pay, it must furnish the union with information substantiating its claim.²⁸ Moreover, the benefits to employees under a group insurance plan whose premiums are paid by the employer are considered wages, and the employer must furnish the union with a statement of the benefits thereunder.²⁹

In a recent decision, *Sylvania Elec. Prods., Inc. v. NLRB*,³⁰ the First Circuit held that the costs to the employer of a noncontributory group insurance plan, while not constituting wages, must be revealed under the particular circumstances of the case. In an earlier case involving the same

²⁴ Id. at 622, 59 L.R.R.M. at 1143.

²⁵ See *NLRB v. American Mfg. Co.*, 351 F.2d 74, 60 L.R.R.M. 2122 (5th Cir. 1965); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 60 L.R.R.M. 2033 (3d Cir. 1965).

²⁶ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

²⁷ *NLRB v. Perkins Mach. Co.*, 326 F.2d 488, 55 L.R.R.M. 2204 (1st Cir. 1964); *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 52 L.R.R.M. 2174 (2d Cir. 1963); *Union Elec. Steel Corp.*, 140 N.L.R.B. 138, 51 L.R.R.M. 1576 (1962).

²⁸ *NLRB v. Southland Cork Co.*, 342 F.2d 702, 58 L.R.R.M. 2555 (4th Cir. 1965); *NLRB v. Taylor*, 338 F.2d 1003, 57 L.R.R.M. 2560 (5th Cir. 1964).

²⁹ *W. W. Cross & Co. v. NLRB*, 174 F.2d 875, 24 L.R.R.M. 2068 (1st Cir. 1949); *Inland Steel Co. v. NLRB*, 170 F.2d 247, 22 L.R.R.M. 2506 (7th Cir. 1948).

³⁰ 358 F.2d 591, 61 L.R.R.M. 2657 (1st Cir. 1966).

company,³¹ the Board had held that the employer must divulge the cost to him of additional premiums resulting from the employer's proposed increase in a noncontributory group insurance plan, as well as the benefits thereunder, on the basis that premiums were wages within the meaning of the act. However, the First Circuit reversed,³² on the ground that so expansive an interpretation of "wages" would break down the distinction in the statute between mandatory and nonmandatory bargaining subjects.

In the most recent *Sylvania* case, the Board again ordered *Sylvania* to furnish premium-cost data.³³ In this case, the union was considering whether to bargain for an increased wage or an increase in benefits. On appeal, the First Circuit distinguished the earlier *Sylvania* case as holding that an employer is not obligated to disclose the premium-cost data in order for the union to determine whether the employer, and thereby the employees, are receiving the best coverage for their money. The court in the present case then held that the employer must reveal this same information in order to enable the union properly to evaluate the respective merits of an increased benefit plan and an increased wage.

Considering the fact that benefits and wage increases are interrelated in most contract negotiations, the exception articulated by the court in *Sylvania* seems broader than the rule. The effect of this case is thus to require the employer to furnish premium-cost data to the union in all but the most unusual instances. In addition, the holding conflicts with the following dicta of the Seventh Circuit in *Inland Steel Co. v. NLRB*:³⁴

[C]ontributions made [by an employer] . . . to a pension plan . . . represent a part of the consideration for services performed, and payments made in the discharge of such obligations would, in our view, be "wages" or included in "conditions of employment."³⁵

It is submitted that an employee's "wages" include the premium payments made by the employer. As the Seventh Circuit pointed out, these are part of the consideration which the employer pays for the employee's services. There seems no substantial difference between the employer paying the premiums on the one hand and, on the other hand, paying the employee cash which is then used by the employee to purchase insurance.

b. *Time Studies by Unions.* One of the most important wage systems is the incentive or piece-work system. Under such systems a time study is required in order to determine the amount of production of average employees. Typically, pay is based on this "standard" amount of production, with additional pay for production above the standard level.

Under established law, the employer must bargain with a majority union concerning an incentive wage system, because he is under an obligation to bargain on wages.³⁶ An employer must also furnish to the union information

³¹ *Sylvania Elec. Prods., Inc.*, 127 N.L.R.B. 924, 46 L.R.R.M. 1127 (1960).

³² 291 F.2d 128, 48 L.R.R.M. 2313 (1st Cir. 1961).

³³ 154 N.L.R.B. 1756, 60 L.R.R.M. 1178 (1965).

³⁴ 170 F.2d 247, 22 L.R.R.M. 2506 (7th Cir. 1948).

³⁵ *Id.* at 253, 22 L.R.R.M. at 2512.

³⁶ *J. I. Case Co. v. NLRB*, 253 F.2d 149, 41 L.R.R.M. 2679 (7th Cir. 1958); *NLRB v. East Tex. Steel Castings Co.*, 211 F.2d 813, 33 L.R.R.M. 2793 (5th Cir. 1954).

concerning an existing or proposed incentive plan, if such information is necessary to enable the union to negotiate or process grievances under the contract.³⁷ Moreover, the employer is required to furnish time-study data to the union, even if there is no pending grievance or negotiations, when the union merely seeks the information to determine whether a basis exists for initiating a grievance or for making demands in future negotiations.³⁸ However, in *NLRB v. Otis Elevator Co.*,³⁹ the Second Circuit held that an employer is not required to grant the union access to his premises to conduct an independent time study for any purpose, if there are adequate alternative sources for the information sought by the union.

In seeming contradiction to its decision in *Otis*, the Second Circuit, in *Fajnr Bearing Co. v. NLRB*,⁴⁰ recently required an employer to allow the union to conduct independent time studies on his premises in order to determine whether to initiate a grievance. The court distinguished its previous holding in *Otis* on the basis that in *Otis* the union failed to show, as it did here, that there were no other means by which the union could evaluate employee performance. Because of the extent to which time studies are based on the personal observation and judgment of the time-study engineer,⁴¹ the court sustained the union's claim that it could not assess the accuracy of the company's studies without making its own investigations. In basing its result on this reasoning, the court seems to have distinguished *Otis* out of existence, because it has effectively said that there is no adequate alternative source for the information other than the engineer who made the study. Thus, it is not unwarranted to say that the employer must permit the union to make its own study whenever issues about piece rates arise.

3. Mandatory Bargaining Subjects

Ever since *NLRB v. Wooster Div. of Borg-Warner Corp.*,⁴² the Board and the courts have been wrestling with the problem of defining mandatory subjects of bargaining under section 8(a)(5). The test may be simply stated to be that those subjects are mandatory which constitute "terms or conditions of employment." It is in applying this general standard to the infinite variety of fact situations that the difficulties arise.

³⁷ See cases cited note 36 supra.

³⁸ *J. I. Case Co. v. NLRB*, supra note 36.

³⁹ 208 F.2d 176, 33 L.R.R.M. 2129 (2d Cir. 1953).

⁴⁰ 362 F.2d 716, 62 L.R.R.M. 2415 (2d Cir. 1966).

⁴¹ The court summarized the testimony of the union time-study engineer as follows: the engineer observes workers and concludes whether an objective "normal" worker would work faster or slower. He would then "normalize" the time of the actual performance upward or downward. The engineer also appraises the effect on production of environmental factors such as heat and light, and allows for a decrease in production caused by fatigue. *Id.* at 720, 62 L.R.R.M. at 2417.

⁴² 356 U.S. 342 (1958). The Court there held that a prestrike ballot clause and a recognition clause which excluded the international union certified as the representative and substituted its local affiliate were lawful bargaining subjects, but were non-mandatory. The Court also held that a party violated § 8(a)(5) by insistence on a nonmandatory subject of bargaining.

In *Westinghouse Elec. Corp. v. NLRB*⁴³ the employer refused to bargain with the union about price increases in three plant cafeterias operated by an independent contractor.⁴⁴ In a three-to-two decision, the Board found that the employer had refused to negotiate a mandatory subject of bargaining in violation of sections 8(a)(1) and (5).⁴⁵ The Board noted that the employer did have a substantial degree of control over the prices and that there were inadequate eating facilities outside the plant. It concluded that the on-site eating facilities were an inducement to employment and were necessary in order to attract and retain enough employees to man the plants. The dissent contended that cafeteria prices were not sufficiently important to constitute a condition of employment, and that loss of patronage resulting from high prices would lower the prices.

In a two-to-one decision, the Fourth Circuit affirmed the Board's decision. Noting the statement in *Fibreboard Paper Prods. Corp. v. NLRB* that "in common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment,"⁴⁶ the court adopted the expansive interpretation that "the availability of food and drink at reasonable prices [is] . . . an obviously important part of one's physical working environment."⁴⁷ The dissent maintained that not every action of the employer which indirectly or incidentally affects the interests of his employees comes within the term "conditions of employment."⁴⁸ It concluded that cafeteria prices were only remotely connected to conditions of employment and did not have the requisite material impact on employee interests.

This case illustrates the expansive interpretation which is often given to the words "terms and conditions of employment." If the court had based its decision on the inadequacy of outside eating facilities, its decision would be unquestionably correct. However, it is doubtful that the Supreme Court in *Fibreboard* intended to include everything which was "physical" and which was in the employer's working environment as a mandatory bargaining subject. If this were the case, there would be practically nothing which would not be a mandatory subject. In *Fibreboard*, the subcontracting of work by the employer and the consequent termination of employment were found to be terms or conditions of employment. Obviously there was a substantial impact on the interests of the employees, whereas changes in cafeteria prices, assuming outside facilities are adequate, would be of minimal importance. In addition, the price changes would have only a remote relation to the actual performance by employees of their jobs. The Supreme Court probably had in mind such things as the heat, light, and safety conditions under which the employees must work. The decision in *Westinghouse*, therefore, goes well beyond the *Fibreboard* result, and extends the concept of the mandatory bargaining subject to a new outer limit.

⁴³ 369 F.2d 891, 64 L.R.R.M. 2001 (4th Cir. 1966).

⁴⁴ There had been an increase of five cents in the price of hot-food entrees and of one cent in the price of carry-out coffee.

⁴⁵ 156 N.L.R.B. 1080, 61 L.R.R.M. 1165 (1966).

⁴⁶ 379 U.S. 203, 222 (1964) (Stewart, J., concurring).

⁴⁷ 369 F.2d at 894, 64 L.R.R.M. at 2003.

⁴⁸ Id. at 898, 64 L.R.R.M. at 2006.

C. *Per Se Violations*

In order to hold that an employer has committed a violation of section 8(a)(3), the Board must generally find, on the basis of specific evidence, that the employer acted with a discriminatory motive.¹ However, in *NLRB v. Erie Resistor Corp.*,² the Supreme Court held that an employer violated section 8(a)(3) by granting superseniority of twenty years to strike replacements and to those who abandoned the strike, and further held that because the action was so prejudicial to employee interests, the grant of superseniority in itself violated the act; no specific evidence of illegal intent was required. Later, in *American Ship Bldg. Co. v. NLRB*, the Supreme Court stated that an act supplies its own evidence of illegal intent if it is "prejudicial to union interests and . . . devoid of significant economic justification."³ Two cases during the current Survey year have again presented the question of what employer conduct constitutes a per se violation of this section.

In *NLRB v. Great Dane Trailers, Inc.*,⁴ the union had terminated the collective-bargaining agreement in accord with its provisions and had commenced an economic strike. Thereupon the employer announced on July 12, 1963, that vacation benefits, which would have been payable even to the strikers if the contract were still in existence, would be paid only to employees who had never struck and to those strikers who had abandoned the strike by July 1 of that year.⁵ The Board found that the denial of vacation pay unlawfully discriminated against employees because of their adherence to the strike.⁶ The Board did not base its findings on any evidence of unlawful motivation except that supplied by the refusal to pay the vacation benefits.

The Fifth Circuit reversed on the basis that the employer's conduct did not constitute a per se violation and that the Board had failed to establish a discriminatory intent. Relying on *American Ship Bldg.*, the court stated that the LMRA permits a wide range of employer activity which is reasonably related to legitimate business interests, even though the activity incidentally tends to discourage union participation. The court quoted the following language from *American Ship Bldg.*: "In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose."⁷ The Fifth Circuit then stated: "Based upon the term 'so compelling', we conclude that if the 'employer's conduct' carries with it any other reasonable inferences of a *legitimate motive*, the inference of ille-

¹ *NLRB v. Brown*, 380 U.S. 278 (1965); *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

² 373 U.S. 221 (1963).

³ 380 U.S. 300, 311 (1965).

⁴ 363 F.2d 130, 62 L.R.R.M. 2456 (5th Cir. 1966).

⁵ The collective-bargaining agreement provided that all employees with one year's seniority were entitled to one week's vacation, and to two week's vacation when they reached five year's seniority. In the event an employee did not work 1,525 hours in a given year, he was not entitled to a full vacation but only to a pro rata share.

⁶ 150 N.L.R.B. 438, 58 L.R.R.M. 1097 (1964).

⁷ 363 F.2d at 134, 62 L.R.R.M. at 2459, quoting *American Ship Bldg. Co. v. NLRB*, supra note 3, at 311-12.

gality does not control."⁸ The court went on to say that it was reasonable here "to infer that the Company might have acted (1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods."⁹

It is submitted that this case is distinguishable from the two leading cases which have permitted a company to take action that incidentally tends to discourage union activity. In the first of these cases, *NLRB v. Mackay Radio & Tel. Co.*,¹⁰ the Supreme Court held that a company could permanently replace striking employees during an economic strike, although such action might incidentally discourage union activity, where such action was necessary to continue the company's operations. In the second case, *American Ship Bldg Co. v. NLRB*,¹¹ the Supreme Court held that an employer, in order to put economic pressure on the union, could lock out his employees after an impasse in bargaining had been reached. In this case, the employer had acted out of fear that he would be struck when he was busiest and when the strike would have a severe economic effect on him. Thus, in both cases, the employer was allowed to take action which incidentally tended to discourage union activity when he acted in order to avert economic harm of the most severe nature.

However, in *Great Dane*, the company could not claim that its refusal to pay vacation benefits was motivated by economic necessity or extraordinary financial hardship, as was the case in the two leading decisions. As the Fifth Circuit pointed out, the company may have been motivated by a desire to reduce expenses. Yet the company had done so only by treating strikers differently from other employees, in a situation devoid of the compelling economic circumstances which prompted the decisions in *Mackay Radio* and *American Ship Bldg*. Moreover, in order to encourage longer tenure and discourage early leaves immediately before vacation periods—if these were in fact the company's aims—the company could easily have denied benefits only to nonstrikers who were not working immediately before July 1. For these reasons, it is submitted that the holding in *Great Dane* is incorrect.

The Supreme Court has granted certiorari,¹² and the decision of the Court should clarify the area of per se violations and antiunion animus. However, under the law as articulated by the Fifth Circuit, an employer may take action which incidentally tends to discourage union activity, unless there is specific evidence of illegal intent, or an inference thereof; such an inference may not be made from the mere act itself, unless there is *no* possible inference of a legal motive.

In *Great Lakes Carbon Corp. v. NLRB*,¹³ the second case which examines employer activity for a per se violation, the union had engaged in an unsuccessful economic strike against the company. After the strike

⁸ Id. at 134, 62 L.R.R.M. at 2459.

⁹ Ibid.

¹⁰ 304 U.S. 333 (1938).

¹¹ 380 U.S. 300 (1965).

¹² 385 U.S. 1000 (1967).

¹³ 360 F.2d 19, 62 L.R.R.M. 2088 (4th Cir. 1966), enforcing 152 N.L.R.B. 988, 59 L.R.R.M. 1266 (1965).

ended, the company and the union entered into a collective-bargaining contract in July 1959. The contract granted to the permanent replacements hired during the strike and to the employees who abandoned the strike prior to its termination absolute preferential standing on the seniority lists with respect to future layoffs, preferred shifts, open jobs, and vacation times. When the contract expired in 1962, a new contract was entered into which retained these superseniority provisions.

In 1964, three employees filed unfair-labor-practice charges, alleging that the company had discriminated against them by awarding promotions to other employees who were junior according to the ordinary seniority provisions of the contract, but who were treated as senior solely by virtue of the superseniority clause. Relying on *Erie Resistor*, the Fourth Circuit found that the employer had violated sections 8(a)(1) and (3) by giving effect to agreements which, as the court found, were unlawful on their face.¹⁴ The court gave no weight to the employer's contention that *Erie Resistor* was distinguishable from this case; this contention was based on the fact that in the earlier case the employer had granted superseniority *during* the strike, while here the superseniority was granted *after* the strike. The employer argued in effect that *Erie Resistor* was not applicable, because the harmful effects of superseniority on the effectiveness of the strike weapon are much greater when superseniority is initiated during a strike—presumptively to break the strike—rather than after the strike has ended.

The court, however, concluded that *Erie Resistor* was controlling, relying on the following language from that case:

[Superseniority creates] . . . a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is reemphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.¹⁵

The court in *Great Lakes* also noted that the superseniority provision in *Erie Resistor* was limited to layoffs, whereas the superseniority provision presently before the court was more extensive, covering layoffs, vacation times, preferred shifts, and open jobs. Thus, the court's application of *Erie Resistor* to the facts of this case seems entirely proper, since the superseniority provision in *Great Lakes* obviously had effects over a wider range of subjects, and, persisting long after the strike is ended, would intimidate employees from exercising their statutory rights.

¹⁴ It was necessary that the court find that the superseniority plan was invalid on its face, because otherwise the violation would not have been a continuing one, and the proceedings would have been barred by the six-month statute of limitations applicable to unfair labor practices under LMRA § 10(b), 61 Stat. 146 (1947), 29 U.S.C. § 160(b) (1964). See *Local Lodge 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960); *Bowen Prods. Corp.*, 113 N.L.R.B. 731, 36 L.R.R.M. 1355 (1955).

¹⁵ 360 F.2d at 21, 62 L.R.R.M. at 2090, quoting *NLRB v. Erie Resistor Corp.*, supra note 2, at 231.

In his concurring opinion in *Erie Resistor*,¹⁶ Mr. Justice Harlan, although agreeing with the result reached by the majority, stated that he was "unsure whether the Court intends to hold that the Board has power to outlaw all such [superseniority] . . . plans . . . or only to sustain its action in the particular circumstances of *this* case"¹⁷ Since the superseniority plan in *Great Lakes* was more far-reaching than that in *Erie Resistor*, the Fourth Circuit's decision does not shed any light on this question, which must still be considered open.

D. Economic Strikers

Under established law, an employer may not discharge an economic striker or a striker protesting an unfair labor practice committed by the employer.¹ However, he may temporarily or permanently replace strikers during an economic strike,² and he may discharge a striker who is engaging in a strike for an unlawful purpose.³ After an economic strike, the employer must reinstate strikers if jobs are still available at the time of the application for reinstatement.⁴ If no jobs are available at that time, the employer is not required to reinstate the strikers; nor is the employer required to seek out the employees or put them on a preferential hiring list for future openings.⁵

These rules work successfully if the employer resumes full operations immediately after the termination of the strike, or if he permanently reduces the size of his operation. However, a recent case has presented the question whether these rules should be applied when the employer does not resume full-scale operations until some time after the end of the strike, although at all times planning to resume full operations.

In *NLRB v. Fleetwood Trailer Co.*,⁶ 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. Only after two months did the employer hire additional workers, and only after five months did the company return to full operation. However, officers of the company testified that at all times the company intended to resume normal operations as soon as possible. For failure to give these six employees preference in hiring, the Board found violations of sections 8(a)(1) and (3), and ordered the company to reinstate these employees.

¹⁶ 373 U.S. at 237.

¹⁷ *Ibid.*

¹ *NLRB v. Delsea Iron Works, Inc.*, 316 F.2d 231, 53 L.R.R.M. 2029 (3d Cir. 1963); Editorial "El Imparcial," *Inc. v. NLRB*, 278 F.2d 184, 46 L.R.R.M. 2077 (1st Cir. 1960).

² *NLRB v. Mackay Radio & Tel. Co.*, 305 U.S. 333 (1938).

³ *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 59 L.R.R.M. 2210 (8th Cir. 1965); *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661, 53 L.R.R.M. 2367 (7th Cir. 1963).

⁴ *Local 200, Teamsters Union v. NLRB*, 233 F.2d 233, 38 L.R.R.M. 2095 (7th Cir. 1956); *Brown & Root, Inc.*, 132 N.L.R.B. 486, 48 L.R.R.M. 1391 (1961); *Atlas Storage Div.*, 112 N.L.R.B. 1175, 36 L.R.R.M. 1171 (1955).

⁵ See cases cited note 4 *supra*.

⁶ 366 F.2d 126, 63 L.R.R.M. 2155 (9th Cir. 1966).

In denying enforcement, the Ninth Circuit held that the strikers' jobs had been abolished or absorbed, since the determination of whether a striker's job has been abolished is made "at the time the strikers apply for work after the strike."⁷ Thus, since no jobs were available at the time of application two days after the strike, the strikers' status as employees and their concomitant preferential hiring rights ceased at that time. Both the majority and the concurring opinion relied upon *Brown & Root, Inc.*⁸ and *Atlas Storage Div.*⁹ as controlling authority; these cases established the rule that a striker whose job has been absorbed is to be treated in the same manner as a striker who has been permanently replaced.¹⁰

The court gave credence to the self-serving testimony of the employer's administrative vice-president that it would take only a month to secure supplies and resume full operations, and therefore concluded that the employer did not intend to resume prestrike production after the strike. The court rejected as not supported by substantial evidence the Board's contrary finding, based on the testimony of several officers, that the employer intended to resume full-scale operations as soon as possible. However, the court reversed the Board even while assuming *arguendo* that the Board's fact findings were correct.¹¹

The dissent, on the other hand, concluded that *Brown & Root* and *Atlas* were distinguishable from the facts of *Fleetwood* and were thus not controlling. The dissent stated that in *Atlas* the distinguishing factors were that there was no evidence of the employer's intent to rebuild its labor force and that the striker's job had been filled by a permanent replacement. The dissent stated further that in *Brown & Root* the number of permanent replacements exceeded the prestrike number of employees, and therefore the strikers had definitely been replaced and were not entitled to preferential hiring rights. In order to safeguard the right to strike, the dissent would have substituted the rule that the applications for reemployment continue to be binding until the employer has completed his planned increase in production.

It is submitted that the majority opinion is incorrect, and that the dissenting opinion is sound. A job is not *abolished* or *absorbed* when it is the employer's intent to resume prestrike operations as soon as possible, since these italicized terms connote permanency. The situation seems closer to that of temporary replacements than to permanent replacements. In *Fleetwood*, while there were not temporary replacements taking the place of the employees, there was a temporary *displacement* of employees from their jobs, also occasioned by the strike. Since the employer had neither hired permanent replacements nor decided permanently to reduce its operations, the cases relied on by the court seem inapposite. The Supreme Court has granted

⁷ Id. at 129, 63 L.R.R.M. at 2157.

⁸ 132 N.L.R.B. 486, 48 L.R.R.M. 1391 (1961).

⁹ 112 N.L.R.B. 1175, 36 L.R.R.M. 1171 (1955).

¹⁰ As part of a strike settlement, the union and employer agreed that strikers would not be rehired on a preferential basis, and that if hired at all they would be hired as new employees with a consequent loss of status. Because of the way it decided the case, the court did not have to decide whether the union could effectively bargain away these rights. The dissent also refrained from considering this question.

¹¹ 366 F.2d at 129-30, 63 L.R.R.M. at 2158.

certiorari,¹² and may well reverse the appellate decision for reasons expressed in that court's dissenting opinion.

E. Jurisdictional Disputes

Under the provisions of section 8(b)(4)(D),¹ it is an unfair labor practice for a union to picket an employer in order to force him to assign particular work to the employees represented by that union. Under section 10(k),² the Board, when confronted with such a dispute, is required to decide which of the two or more competing groups of employees should do the work.³ The typical work-assignment dispute covered by section 8(b)(4)(D) involves two unions whose members work for the same employer.⁴ However, in the construction industry, another typical work-assignment dispute covered by the section involves two unions whose members work for different sub-contractors.⁵

In order for the section to become operative, two or more groups of employees must actually claim the work.⁶ If only one group of employees claims the work, then there is a dispute merely between the employer and the union, and there is not the requisite dispute between two groups of employees.⁷ If work has been assigned to one group of employees for a considerable length of time, another group may not picket in order to force the assignment of the work.⁸ Also, if neither contending group of employees has been assigned the work in the past, neither may picket.⁹

However, in a recent case, *International Longshoremen's Ass'n*,¹⁰ the

¹² 87 Sup. Ct. 1305 (1967).

¹ 73 Stat. 543 (1959), 29 U.S.C. § 158(b)(4)(D) (1964). This section provides:

It shall be an unfair labor practice for a labor organization . . . (4) . . . to induce . . . any individual . . . not to perform any services . . . where . . . an object thereof is: . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization . . .

² 61 Stat. 149 (1947), 29 U.S.C. § 160(k) (1964). This section provides that whenever a violation of § 8(b)(4)(D) is charged, "the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practices shall have arisen . . ."

³ *NLRB v. Radio & Television Broadcast Eng'rs*, 364 U.S. 573 (1961).

⁴ See, e.g., *McLeod v. Newspaper & Mail Deliverers' Union*, 209 F. Supp. 434, 51 L.R.R.M. 2292 (S.D.N.Y. 1962); *McLeod v. New York Mailers Union*, 205 F. Supp. 479, 50 L.R.R.M. 2001 (S.D.N.Y. 1962).

⁵ See, e.g., *International Bhd. of Carpenters v. C. J. Montag & Sons*, 335 F.2d 216, 56 L.R.R.M. 2755 (9th Cir. 1964); *Vincent v. Steamfitters Local 395*, 288 F.2d 276, 47 L.R.R.M. 2808 (2d Cir. 1961); *Local 825, Int'l Union of Operating Eng'rs*, 137 N.L.R.B. 1425, 50 L.R.R.M. 1419 (1962).

⁶ *Penello v. Local 59, Int'l Sheet Metal Workers*, 195 F. Supp. 458, 48 L.R.R.M. 2495 (D. Del. 1961); *Local 272, Sheet Metal Workers*, 136 N.L.R.B. 1402, 50 L.R.R.M. 1017 (1962); *National Ass'n of Broadcast Employees*, 127 N.L.R.B. 1070, 46 L.R.R.M. 1153 (1960).

⁷ See cases cited note 6 supra.

⁸ *NLRB v. Local 1291, Longshoremen's Union*, 345 F.2d 4, 59 L.R.R.M. 2012 (3d Cir. 1965).

⁹ *International Bhd. of Carpenters v. C. J. Montag & Sons*, supra note 5; *Vincent v. Steamfitters Local 395*, supra note 5.

¹⁰ 158 N.L.R.B. No. 125, 62 L.R.R.M. 1239 (1966).

Board, in a two-to-one decision, held that even a group of employees who have done particular work for a number of years may not picket to regain the work, when the work is assigned to members of another group of employees. The Board held that the fact that the union was attempting to regain the work for its members was immaterial, and that there was a jurisdictional dispute within the scope of section 8(b)(4)(D).

In this case, a shipping terminal, owned by the Erie, Pennsylvania, Port Authority, was operated by the Western Stevedoring Company under a Port Authority franchise from 1959 until April 1, 1965. Western's employees were represented by the International Longshoremen's Association (ILA). In October 1964, the Lawrence Erie Company, a stevedoring and construction company operating one nearby dock and several construction enterprises, submitted a bid for the terminal franchise. In the same month, Lawrence Erie renewed its collective-bargaining contract with the United Mine Workers (UMW), and job classifications were added to the contract which would have been necessary only if Lawrence Erie was the successful bidder for the terminal franchise. In December 1964, Lawrence Erie was awarded the franchise. In anticipation of operating the terminal, the company hired six new employees, including two former Western employees.

A few days before it was to commence operating the terminal in April 1965, Lawrence Erie received a letter from the ILA, demanding that it hire the employees of Western to operate the franchise. Lawrence Erie refused to do so on the grounds that it did not intend to replace its employees, represented by the UMW, with the employees of Western. Lawrence Erie suggested that the employees of Western apply for any future job openings; this offer was refused. When the first ships arrived at the terminal after Erie began to operate it, the ILA picketed the terminal in order to force Lawrence Erie to hire the former Western employees to work there.

In a proceeding following the filing of an unfair-labor-practice charge, the Board ruled that the ILA had violated section 8(b)(4)(D). The majority found that this was a jurisdictional dispute, because an object of the ILA activity was to force Lawrence Erie to assign the terminal work to the former Western employees, represented by the ILA. Pursuant to section 10(k), the Board also found that the disputed work should be awarded to the employees of Lawrence Erie, rather than to the former employees of Western. The reasons assigned by the Board for this decision were: (1) Lawrence Erie's past history of recognizing the UMW as the representative of its dock workers; (2) the interchange of employees from one dock to another which allowed Lawrence Erie to operate more efficiently and to provide steady work for its employees; (3) the existing collective-bargaining contract between Lawrence Erie and the UMW, rather than the ILA; and (4) the fact that the members of both the UMW and the ILA possessed the requisite skills to perform the duties incident to the operation of the terminal.¹¹

The dissent contended that there was no jurisdictional dispute, because an object of the ILA's picketing was to protest the hiring practices of Law-

¹¹ The Board used these factors cumulatively and did not give particular stress to any one of them.

rence Erie. It was argued that the object of forcing an assignment of work could not realistically be distinguished from this lawful object of the ILA's protest picketing. The dissent further stated that even if there were a jurisdictional dispute, the work should have been assigned to the Western employees, represented by the ILA, because they had worked at the terminal longer than the employees of Lawrence Erie and had acquired important seniority and other rights from their work there. In addition, the dissent pointed out that only the Western employees had experience with nonself-unloading, nonbulk cargoes prior to the dispute, which was important because of the majority's view that both groups possessed the requisite skills.

Although the dissent is not without merit, it is submitted that the majority is correct. If this dispute had *not* been held to be a jurisdictional dispute, then the picketing by the ILA, and the work stoppage caused thereby, might have continued indefinitely. Even if the ILA picketing were to be successful and the employer were to replace the employees represented by the UMW with employees represented by the ILA to perform the work at the terminal, undoubtedly the UMW would then picket in protest. This is just the kind of vicious circle which led Congress to enact sections 8(b)(4)-(D) and 10(k).¹² By interpreting these facts as a jurisdictional dispute, a solution can be achieved in what otherwise might be an insoluble controversy.

At first glance, it seems proper to award the work at the terminal to the Lawrence Erie employees, because only in the most unusual circumstances should an employer be ordered to take work from his own employees and assign it to those of another employer.¹³ However, as the dissent points out, Lawrence Erie was continuing in the same place and using the same facilities as the operations previously conducted by Western, and therefore Lawrence Erie stood in the position of a successor to Western. It is submitted that, because of this functional continuity, the Board should have ordered that the employees of Western were entitled to preferential hiring rights at Lawrence Erie.¹⁴ Thus, the employees hired by Erie preparatory to operating the terminal should have been replaced by former Western employees in accordance with Western's normal seniority procedures.

F. *Contract Clauses and Section 8(e)*

1. *"Hot Cargo" and "Work Preservation" Clauses*

Section 8(e) prohibits "hot cargo" agreements between employers and unions, but the proviso to that section permits agreements banning the subcontracting of construction work to be done at the jobsite.¹ The present state

¹² See *NLRB v. Radio & Television Broadcast Eng'rs*, *supra* note 3.

¹³ *Local 1266, United Bhd. of Carpenters*, 137 N.L.R.B. 68, 50 L.R.R.M. 1054 (1962); *District 50, UMW*, 136 N.L.R.B. 1068, 49 L.R.R.M. 1936 (1962).

¹⁴ See *Chemrock Corp.*, 151 N.L.R.B. 1074, 58 L.R.R.M. 1582 (1965); *Maintenance, Inc.*, 148 N.L.R.B. 1299, 57 L.R.R.M. 1129 (1964).

¹ LMRA § 8(e), 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (1964), 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

of the law is that *primary* subcontracting clauses are not within the ambit of section 8(e), and such clauses may be obtained and enforced by strikes and picketing.² On the other hand, entry into *secondary* subcontracting clauses is prohibited by section 8(e), except in the construction and garment industries,³ and, even in these industries, while valid secondary subcontracting clauses may be *obtained* by picketing, they may not be *enforced* by picketing or other forms of economic pressure.⁴

In *Orange Belt Dist. Council of Painters No. 48 v. NLRB*,⁵ the District of Columbia Court of Appeals defined primary subcontracting clauses as those which are "germane to the economic integrity of the principal work unit" and which seek "to protect and preserve the work and standards [the union] has bargained for" Primary clauses have also been described as those which will directly benefit employees covered thereby, and which seek to protect the wages and job opportunities of the employees covered by the contract.⁷ On the other hand, secondary clauses have been described as those which "extend beyond the [contracting] . . . employer and are aimed really at the union's difference with another employer."⁸ In two very important recent decisions,⁹ the Supreme Court, by 5 to 4 decisions, has held that section 8(e) does not prohibit subcontracting agreements between an

employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person

"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." However, the section prohibits not only "hot cargo" agreements, but any agreement whereby the employer agrees to cease or refrain from doing business with any other person.

The construction-site proviso states:

[N]othing 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

Section 8(e) also provides an exemption for "hot cargo" clauses in the garment industry when the goods are worked on by another person or are a part of an integrated production process.

² *NLRB v. Joint Council of Teamsters No. 38*, 338 F.2d 23, 57 L.R.R.M. 2422 (9th Cir. 1964); *Teamsters Local 710 v. NLRB*, 335 F.2d 709, 56 L.R.R.M. 2570 (D.C. Cir. 1964); *Orange Belt Dist. Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 55 L.R.R.M. 2293 (D.C. Cir. 1964); *NLRB v. Local 825, Int'l Union of Operating Eng'rs*, 326 F.2d 213, 55 L.R.R.M. 2112 (3d Cir. 1964).

³ See cases cited note 2 *supra*.

⁴ *NLRB v. Local 825, Int'l Union of Operating Eng'rs*, *supra* note 2; *Orange Belt Dist. Council of Painters No. 48 v. NLRB*, *supra* note 2; *NLRB v. Local 12, Operating Eng'rs*, 293 F.2d 319, 48 L.R.R.M. 2776 (9th Cir. 1961); *Lebus v. Local 406, Operating Eng'rs*, 188 F. Supp. 392, 47 L.R.R.M. 2050 (E.D. La. 1960); *Northeastern Ind. Bldg. Trades Council*, 148 N.L.R.B. 854, 57 L.R.R.M. 1081 (1964).

⁵ 328 F.2d 534, 55 L.R.R.M. 2293 (D.C. Cir. 1964).

⁶ *Id.* at 538, 55 L.R.R.M. at 2296.

⁷ Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1119 (1960).

⁸ *Local 636, United Ass'n of Plumbers v. NLRB*, 278 F.2d 858, 864, 45 L.R.R.M. 3023, 3027 (D.C. Cir. 1960).

⁹ *National Woodwork Mfrs. Ass'n v. NLRB*, 87 Sup. Ct. 1250 (1967); *Houston Insulation Contractors Ass'n v. NLRB*, 87 Sup. Ct. 1278 (1967).

employer and union designed to preserve work customarily done by members of the union, and that picketing to enforce such agreements is primary activity, not prohibited by section 8(b)(4)(B), and therefore outside the prohibition of section 8(e).

In the first of these cases, *National Woodwork Mfrs. Ass'n v. NLRB*,¹⁰ the employer was subject to a subcontracting provision which stated that "no member of the District Council will handle . . . any doors . . . which have been fitted prior to being furnished on the job. . . ."¹¹ Carpenters in the locality had customarily cut and fitted doors at the jobsite, although it was possible to purchase from door manufacturers precut and prefitted doors ready to be hung. At the direction of the union, the carpenters refused to handle premachined doors which the employer had purchased, and the employer withdrew these doors, substituting "blank doors" which were fitted and cut by carpenters on the jobsite. The contractual provision and the union's enforcement thereof were subsequently challenged by the Woodwork Manufacturers Association.

Reversing the Seventh Circuit,¹² the Supreme Court held that the union had violated neither section 8(b)(4)(B) nor section 8(e), since these sections do not prohibit primary activity and agreements, including subcontracting clauses designed to preserve work customarily performed by union members. The Court said that, even assuming *arguendo* that the subcontracting clause fits within the literal language of section 8(e), this should not end the inquiry into Congress' purpose in enacting the statute, because the Court must give effect to the intent of Congress.¹³ The Court's examination of the legislative history of labor enactments from the time of the Clayton Act in 1914 revealed a desire on the part of Congress to protect neutral employers from contending parties and at same time to allow unions to engage in primary labor disputes with their employers. Finally, analyzing the provisions of section 8(b)(4) of the LMRA,¹⁴ the Supreme Court stated:

The prohibition of subsection (B) against a noncertified union's forcing recognition from an employer was designed to protect the employer trapped between the union and his employees, a majority of whom may not desire to choose the union as their representative. The prohibition of subsection (C) against a demand for recognition when another union has been certified protects the employer trapped between the noncertified and the certified unions. The prohibition of subsection (D) against coercion to force an employer to assign certain work to one of two unions contesting for it protects

¹⁰ 87 Sup. Ct. 1250 (1967).

¹¹ *Id.* at 1253.

¹² 354 F.2d 594, 60 L.R.R.M. 2458 (7th Cir. 1966). The Seventh Circuit, reversing a Board finding that the clause was not proscribed, held that the "will not handle" clause violated § 8(e) without regard to any "primary" or "secondary" objective. The court concluded that § 8(e) was designed to prohibit product boycotts, and that the Supreme Court's decision in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), was controlling.

¹³ 87 Sup. Ct. at 1255.

¹⁴ 61 Stat. 141 (1947), as amended, 73 Stat. 542 (1959), 29 U.S.C. § 8(b)(4) (1964).

the employer trapped between the two claims. The central theme pervading these provisions of protection for the neutral employer confirms the assurances of those sponsoring the section that in subsection (A) Congress likewise meant to protect the employer only from union pressures designed to involve him in disputes not his own.¹⁵

Thus, the crucial criterion is whether the employer is involved in his own dispute with the union or whether the union is enmeshing the employer in a dispute which the union has with another employer, *i.e.*, is the union conduct addressed to the labor relations of the employer vis-à-vis his own employees.¹⁶

Considering the facts in *National Woodwork*, the Court sustained the Board's finding that the objective of the clause and of the union conduct to enforce it was the preservation of work customarily done by the carpenters.¹⁷ The Court concluded that the clause and the conduct were in fact primary, because they were intended to regulate the relations between the employer and his carpenters and to protect a legitimate economic interest of the employees by preserving the unit work. On the other hand, under the Court's reasoning, refusals to handle nonunion products would doubtless be secondary and prohibited, because the union's dispute would then be with the nonunion employer.¹⁸

Turning to the question whether section 8(e) prohibits even primary agreements against subcontracting, the Court stated that the 1959 Landrum-Griffin Act amendments to the LMRA¹⁹ were intended solely to close several loopholes,²⁰ and that "section 8(e) simply closed still another loophole."²¹ The loophole to which this section was addressed was the fact that, while a union could not picket an employer because he handled nonunion goods, the union and the employer could enter into contract provisions whereby the employer agreed not to handle such goods.²² With such a provision, the union could achieve its goal by applying pressure against the employer to comply with the agreement, by threat of an action for damages. The Court concluded that in enacting section 8(e) Congress meant only to remedy this particular evil and not to prohibit primary agreements. In addition, the Court expressed the belief that Congress would not prohibit agreements designed to protect the jobs of employees against the inroads of automation—the

¹⁵ 87 Sup. Ct. at 1258.

¹⁶ *Id.* at 1258-59. See also *Orange Belt Dist. Council of Painters No. 48 v. NLRB*, *supra* note 5.

¹⁷ 87 Sup. Ct. at 1269.

¹⁸ This comports well with the existing state of the law. See *NLRB v. Joint Council of Teamsters No. 38*, 338 F.2d 23, 57 L.R.R.M. 2422 (9th Cir. 1964); *Teamsters Local 413 v. NLRB*, 334 F.2d 539, 55 L.R.R.M. 2878 (D.C. Cir. 1964); *District 9, Int'l Ass'n of Machinists v. NLRB*, 315 F.2d 33, 51 L.R.R.M. 2496 (D.C. Cir. 1962).

¹⁹ Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.).

²⁰ For a detailed treatment of the loopholes which had developed and which prompted the amendments, see *NLRB v. Servette, Inc.*, 377 U.S. 46, 51-54 (1964).

²¹ 87 Sup. Ct. at 1263.

²² *Ibid.*

"most vital problem created by advanced technology"²³—without first having extended debates on the subject.²⁴

In the legislative debates concerning the 1959 amendments, it was clearly expressed that the intent of the section was to prohibit product boycotts,²⁵ such as the one in *Allen Bradley Co. v. Local 3, IBEW*.²⁶ In that case the New York City local of the IBEW and New York City electrical contractors and manufacturers had agreed that no electrical equipment would be purchased from outside the city; the manufacturers had also agreed to confine their New York City sales to contractors who employed members of the local. The Supreme Court held that the union and the employers had violated the antitrust laws.

Answering the contention of the Woodwork Manufacturers Association that Congress meant by sections 8(b)(4)(B) and 8(e) to outlaw *all* product boycotts, the Court stated that in *Allen Bradley* the electrical workers employed by the contractors were not trying to preserve their own work, but were preserving the work of the employees of the manufacturers. The Court further felt that *Allen Bradley* was distinguishable from *National Woodwork* because the boycott in *Allen Bradley* was not carried on as a "shield" to preserve the jobs of the local's members, but was intended to create a monopoly of present and future jobs.²⁷ The Court expressly stated that it was not deciding what result would obtain in a case where a union attempts to gain new jobs, when its own jobs are not threatened.²⁸

The dissent of Mr. Justice Stewart, in which Justices Black, Douglas, and Clark joined, concluded that the agreement and the union activity to enforce it violated both sections 8(b)(4)(B) and 8(e).²⁹ The dissent cited the Senate Report on the then section 8(b)(4)(A)—the precursor of section 8(b)(4)(B)—which stated that the section prohibited the type of secondary boycott conducted by the union in *Allen Bradley*.³⁰ In this connection the dissent differed from the majority's interpretation of *Allen Bradley* in two aspects: first, in the factual determination of the majority that the *Allen Bradley* boycott was intended to create new job opportunities, because, on the contrary, the record indicated that "the boycott was undertaken for the defensive purpose of restoring job opportunities lost in the depression";³¹ and, second, in the distinction between work preservation and work aggrandizement, which the dissent said the Court had created

²³ Id. at 1267.

²⁴ Id. at 1266-67. The Court also stated that its decision in *Fibreboard Paper Prods. Co. v. NLRB*, 379 U.S. 203 (1964), holding that subcontracting was a mandatory bargaining subject, implicitly recognized the legitimacy of work-preservation clauses. The reason assigned for this conclusion was that the mandatory bargaining would be rendered meaningless if subcontracting agreements secured as a result of such bargaining were in violation of §§ 8(e) and 8(b)(4).

²⁵ See, e.g., 93 Cong. Rec. 4132 (1947) (remarks of Senator Ellender); id. at 4198-99 (remarks of Senator Taft); id. at 5011 (remarks of Senator Ball).

²⁶ 325 U.S. 797 (1945).

²⁷ 87 Sup. Ct. at 1260.

²⁸ Id. at 1261.

²⁹ Id. at 1271.

³⁰ Id. at 1274, citing S. Rep. No. 105, 80th Cong., 1st Sess. 22 (1947).

³¹ Id. at 1275.

"out of thin air,"³² there being nothing in the language or in the legislative history of the section to sustain the distinction. Agreeing with the Court that section 8(e) was intended to prevent the circumvention of section 8(b)(4), the dissent concluded that the activity proscribed by section 8(b)(4) was also proscribed by section 8(e), with the exception of the activity excluded by the latter's provisos. Consequently, the dissent found that the agreement in *National Woodwork* violated section 8(e).

While there is merit to the position of the dissent, it is submitted that the majority is correct. For one thing, the references in the legislative history to *Allen Bradley* are addressed to its egregious character: the fact that it created a monopoly for the local's members in New York City.³³ Thus, Senator Ball, criticizing the measures suggested by the President as an alternative to section 8(b)(4)(A), stated that the President's measure "would not touch at all one of the worst situations which has arisen, such as that in New York where a local of the IBEW is using the secondary boycott to maintain a tight little monopoly for its own employees, its own members, and a few employers in that area."³⁴ Secondly, as Mr. Justice Harlan pointed out in a concurring memorandum opinion,³⁵ Congress was not squarely faced with the precise problems of this case; therefore, "in view of Congress' . . . recognition of the boycott as a legitimate weapon,"³⁶ and in view of the legitimate interests of a labor union in protecting employees against adverse effects resulting from changing technology, the Court should not presume that Congress outlawed such activity where the legislative record is so ambiguous.

In the second important Supreme Court case, *Houston Insulation Contractors Ass'n v. NLRB*,³⁷ the collective-bargaining agreement between the contractors association and Local 22 of the International Association of Heat & Frost Insulators provided that the employer would not contract out work relating to "the preparation, distribution and application of pipe and boiler coverings."³⁸ When Johns-Manville Company subcontracted such work, employees of Johns-Manville, at the direction of the union, refused to handle the subcontracted goods. Expressly relying on its holding in *National Woodwork*, the Court affirmed the Board's³⁹ and Fifth Circuit's⁴⁰ dismissals of section 8(b)(4)(B) charges against the union, because the union's activity was designed to preserve work customarily performed by the employees of Johns-Manville.

The NLRB has also had occasion to consider the work-preservation problem during the current Survey year. In one recent decision, *Highway*

³² Ibid.

³³ See S. Rep. No. 105, 80th Cong., 1st Sess. 22 (1947); 93 Cong. Rec. 4132 (1947) (remarks of Senator Ellender).

³⁴ 93 Cong. Rec. 5011 (1947).

³⁵ 87 Sup. Ct. at 1270.

³⁶ Id. at 1271.

³⁷ 87 Sup. Ct. 1278 (1967). This case is discussed more fully pp. 878-80 *infra*.

³⁸ Id. at 1279.

³⁹ International Ass'n of Heat & Frost Insulators, 148 N.L.R.B. 866, 57 L.R.R.M. 1065 (1964).

⁴⁰ 357 F.2d 182, 61 L.R.R.M. 2529 (5th Cir. 1966).

Truck Drivers, Local 107,⁴¹ a local of the Teamsters Union sought to obtain two subcontracting clauses which were substantially similar to those contained in many Teamsters' contracts throughout the country. The first subcontracting clause required the employer to pay union wages to all drivers, even if they were the employees of independent contractors, and required any employee of independent contractors to be an "employee" of the signatory employer while performing work for him. The second subcontracting clause required the employer not to subcontract to anyone not observing union wages, hours, and conditions of employment. When the employer refused to accept these clauses, the union struck and picketed in an effort to compel acceptance.

The General Counsel issued a complaint, which charged that both clauses violated section 8(e) and that the picketing to obtain them violated section 8(b)(4). The Board, however, found the clauses and the picketing lawful, on the basis that the clauses were designed to preserve unit work for unit members. Quoting with approval the language of *Meat & Highway Drivers, Local 710 v. NLRB*,⁴² the Board stated that a subcontracting clause was valid if it applied "to jobs fairly claimable by the bargaining unit,"⁴³ and if the purpose of the clause was "preservation of those jobs for the bargaining unit."⁴⁴

Applying this test, the Board found that the jobs covered by the clauses, which constituted all the driving jobs of the employer, were fairly claimable by the union because, although the employer customarily utilized independent contractors to perform substantial parts of its driving, the nature of the work performed by the unit employees was identical to that performed by the independent contractors.⁴⁵ The Board felt that the union had a "legitimate primary interest" in protecting all the work of the employer for the unit employees. The Board also found a legitimate intent to protect work for unit employees by the maintenance of wage standards, because such protection had been especially difficult in the trucking field and could be effectively policed only by such clauses.⁴⁶

If the clauses had *prohibited* subcontracting rather than having specified conditions for it, the aim of the clauses would clearly have been to gain additional jobs for unit members. Such clauses would therefore be intended as "swords" rather than "shields," and the question which the Supreme Court expressly reserved in *National Woodwork* would have been directly raised. It should be noted that the Court might well have held such clauses invalid, since it distinguished the valid clause in *National Woodwork* from the unlawful clause in *Allen Bradley* in part on the basis that the clause in *Allen Bradley* was used to increase the work performed by unit members.⁴⁷

However, the clauses in *Highway Truck Drivers* merely limited sub-

⁴¹ 159 N.L.R.B. No. 1, 62 L.R.R.M. 1224 (1966).

⁴² 335 F.2d 709, 56 L.R.R.M. 2570 (D.C. Cir. 1964).

⁴³ *Id.* at 713, 56 L.R.R.M. at 2573.

⁴⁴ *Ibid.*

⁴⁵ 159 N.L.R.B. No. 1, 62 L.R.R.M. at 1225.

⁴⁶ *Id.*, 62 L.R.R.M. at 1227 n.22.

⁴⁷ 87 Sup. Ct. at 1260.

contracting to employers who maintained union standards. For this reason, it is submitted that they were primary clauses. The employer was free to continue to subcontract all or part of his work. The clauses seem designed for defensive purposes in that they simply took away from the employer the incentive to subcontract based on securing cheaper labor.⁴⁸

2. Picket-Line Clauses

In another recent case involving section 8(e), the District of Columbia Circuit Court held that a picket-line clause was in violation of that section insofar as it applied to secondary picket lines.⁴⁹ In *Teamsters Local 695 v. NLRB*,⁵⁰ the contract clause read: "No employee shall be subject to discipline by the Employer for refusal to cross a picket line or enter upon the premises of another employer if the employees of such other employer are engaged in an authorized strike." In an action alleging violation of 8(b)(4)(B), the Board stated that a clause protecting employees from crossing *primary* picket lines was valid under section 8(e).⁵¹ However, the Board interpreted the instant clause as extending to *secondary* picket lines as well as to primary picket lines, and held that the clause thereby violated section 8(e) "insofar as, and to the extent that, it applies to secondary activity."⁵²

The court of appeals sustained the Board's holdings, relying upon the legislative history of the 1959 amendments and on the House Labor Committee report, which stated: "It is settled law that the National Labor Relations Act does not require a truckdriver to cross a *primary* picket line. . . . The employer *could agree* that he would not require the driver to enter the strike-bound plant."⁵³ (Emphasis added.) In addition, the court referred to the fact that Professor Archibald Cox, who had been one of the principal draftsmen of the legislation, stated that section 8(e) would not prohibit agreements sanctioning refusal to cross a lawful primary picket line.⁵⁴

In the 1953 case of *NLRB v. Rockaway News Supply Co.*,⁵⁵ the Supreme Court referred to the proviso to section 8(b)(4) which states:

[N]othing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by

⁴⁸ Cf. *Orange Belt Dist. Council of Painters No. 48*, 328 F.2d 534, 55 L.R.R.M. 2293 (D.C. Cir. 1964); *Truck Drivers, Local 413 v. NLRB*, 334 F.2d 539, 55 L.R.R.M. 2878 (D.C. Cir. 1964).

⁴⁹ A primary picket line is one formed by employees of the primary employer against that employer. A secondary picket line is generally one formed by employees of a primary employer against a secondary employer.

⁵⁰ 361 F.2d 547, 62 L.R.R.M. 2135 (D.C. Cir. 1966).

⁵¹ 152 N.L.R.B. 577, 59 L.R.R.M. 1131 (1965).

⁵² *Id.* at 582, 59 L.R.R.M. at 1132.

⁵³ 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 779.

⁵⁴ Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 272 (1959).

⁵⁵ 345 U.S. 71 (1953).

a representative of such employees whom such employer is required to recognize under this Act ⁵⁶

The Court found that this proviso "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree. And nothing in the Act prevents their agreeing upon contrary provisions if they consider them appropriate to the particular kind of business involved."⁵⁷ The difficulty created by the *Rockaway* opinion arises because it is possible to interpret this language as validating agreements protecting employees from discipline for refusals to cross *secondary* as well as *primary* picket lines.

However, in *Teamsters Local 695* the circuit court relied on the fact that the picket line involved in *Rockaway* was primary, and also relied on the legislative history of the 1959 amendments to narrow the interpretation of *Rockaway*. The court's decision seems correct because of the wording of the section and its legislative history, discussed above. An additional reason comes from the dissent in *Rockaway*, which emphasized that the act did not intend to deprive unions of the advantage achieved by the habitual practice of unionmen to respect union picket lines.⁵⁸ The dissent stated that the proviso to section 8(b)(4) made it clear that the section should not "be construed to make it *unlawful* for a man to refuse to cross a picket line thrown up to support a *lawful* strike."⁵⁹ (Emphasis added.) By the term "lawful strike," the dissent no doubt meant a strike which did not constitute an unfair labor practice. Thus, since the dissent was arguing for an interpretation of the proviso *more favorable to unions* than the majority interpretation, and since the majority spoke in terms of lawful picket lines, it seems clear that the Supreme Court would limit picket-line clauses to primary picket lines.

In addition, in *Meier & Pohlmann Furniture Co. v. Gibbons*,⁶⁰ the Eighth Circuit held that the act permits a picket-line clause which states that it will not be a cause for discharge of an employee to refuse to cross a picket line that has been "*legally authorized*."⁶¹ The Eighth Circuit thus also interpreted *Rockaway* to require that the picket line be *legally* established. Again, the references to legality doubtless mean activity which does not constitute an unfair labor practice.

Thus, under the rule of *Teamsters Local 695* and *Meier & Pohlmann*, picket-line clauses must be restricted to legal picket lines, that is to say, *primary* picket lines. However, such clauses, if broad enough to include secondary picket lines, will not be declared totally invalid under section 8(e), but invalid only insofar as they apply to secondary picket lines.

⁵⁶ LMRA § 8(b)(4), 61 Stat. 141 (1947), as amended, 73 Stat. 543 (1959), 29 U.S.C. § 158(b)(4) (1964).

⁵⁷ 345 U.S. at 80. The Court went on to hold that the collective-bargaining agreement required employees to cross picket lines around the premises of other employers, and therefore that the discharge of an employee for refusal to cross a picket line did not constitute an unfair labor practice.

⁵⁸ *Id.* at 81 (Black, J., dissenting).

⁵⁹ *Ibid.*

⁶⁰ 233 F.2d 296, 38 L.R.R.M. 2533 (8th Cir. 1956).

⁶¹ *Id.* at 301, 38 L.R.R.M. at 2536.

G. Secondary Boycotts

1. Activity in Aid of a Sister Local

Section 8(b)(4)(B),¹ the so-called secondary boycott provision of the LMRA, prohibits a union from forcing an employer to cease dealing with any other person, but the proviso to that section exempts from the prohibition any primary strike or primary picketing. In *National Woodwork Mfrs. Ass'n v. NLRB*,² the Supreme Court held, five to four, that "primary picketing" means picketing of the primary employer, with the intention of affecting the labor policies of that employer. In *Houston Insulation Contractors Ass'n v. NLRB*,³ decided the same day as *National Woodwork*, the Supreme Court, in another five-to-four decision,⁴ held that a local union, even though having no economic interest in a dispute between the primary employer and a sister local, may exert economic pressure against the employer in support of the sister local.

In *Houston Insulation*, the Armstrong Contracting & Supply Corporation was a signatory to a contract with Local 22 of the Heat & Frost Insulators which provided that all its "mitering," i.e., cutting straight lengths of asbestos at angles to cover pipe curves, was to be performed at its shop by members of Local 22; this provision also applied to jobs situated outside the jurisdiction of Local 22. In August 1963, Armstrong employees who were members of Local 113 of the Heat & Frost Insulators refused to apply mitered fittings purchased by Armstrong from a company which did not employ members of Local 22.

The contractors' association charged Local 113 with an unlawful secondary boycott, and the General Counsel issued a complaint.⁵ The Board rejected the contention of the General Counsel that the local had boycotted nonunion goods in violation of section 8(b)(4)(B).⁶ The Board concluded that the activity was intended to preserve work and was not directed against the use of nonunion goods, noting that although the supplier was nonunion, the local had never refused to apply nonunion, nonprefabricated products, and that the purchase of prefabricated products deprived Armstrong employees of work they had customarily performed. Since the local's conduct was designed to protest a deprivation of work and to preserve work for Armstrong's

¹ 61 Stat. 141 (1947), as amended, 73 Stat. 543 (1959), 29 U.S.C. § 158(b)(4)(B) (1964).

² 87 Sup. Ct. 1250 (1967). This case is discussed more fully pp. 871-74 *supra*.

³ 87 Sup. Ct. 1278 (1967).

⁴ The composition of the majority and of the dissent in *Houston Insulation* was the same as in *National Woodwork*.

⁵ Two complaints were before the Board in this case. One concerned activity by members of Local 22 who were employed by Johns-Manville Company, and the other concerned activity by members of Local 113 who were employed by Armstrong. The activity of Local 113 was centered around work preservation for members of Local 22 who were employed by Armstrong. Thus, while Local 22 was involved in both disputes, the disputes were completely distinct, and Local 22 was not charged with an unfair labor practice in the Armstrong dispute which is here discussed. The dispute between Local 22 and Johns-Manville is discussed p. 874 *supra*.

⁶ International Ass'n of Heat & Frost Insulators, 148 N.L.R.B. 866, 57 L.R.R.M. 1065 (1964).

employees, the Board held that such conduct constituted primary activity and was protected by the LMRA.

The dissent, however was of the opinion that the conduct of Local 113 violated section 8(b)(4)(B).⁷ It stated that since members of Local 113 had not previously performed the miting work, Local 113's conduct was directed not at protecting work of its members but at preserving only the work of Local 22 in its relation to Armstrong. The dissent contended that the activity was not protected, because Local 113 lacked a direct interest in the work it was attempting to preserve.

On appeal, the Fifth Circuit reversed the Board⁸ and found that Local 113 had violated section 8(b)(4)(B), agreeing with the dissent below. The court concluded that the activity was secondary because, since Local 113 would not do the miting in any event, it was acting solely to benefit Local 22. The court stated that a direct economic interest of Local 113's own members was essential for its conduct to be primary activity, and that an emotional interest in aiding a sister local was insufficient. It interpreted section 8(b)(4) as requiring unions to restrict their economic coercion to their own labor disputes, and not to use economic pressure in aid of another union, even though it represented employees of the same employer.

The court also rejected the position of the Board that Local 113 was the third-party beneficiary of Local 22's contract with Armstrong or, alternatively, that it was the agent of Local 22. It rejected the former on the ground that Local 113 would receive no benefit from its own activity, and the latter on the ground that there was no evidence in the record of an agency relationship. Moreover, the court felt that contract and agency principles of law, having "developed in other contexts for other purposes,"⁹ had no relevance to the question whether economic coercion by a union is valid.

The Supreme Court, however, reversed the Fifth Circuit with regard to the charges against Local 113, ruling that the LMRA protects the right of primary employees to take concerted action against the *primary employer* even though they have no direct interest at stake. The Court quoted with approval the language of a 1954 Board decision: "Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union."¹⁰ The dissent incorporated by reference the dissent expressed in *National Woodwork*, and thus was based on the contention that sections 8(b)(4) and 8(e) prohibit all work-preservation clauses and economic pressure to enforce them.¹¹

The holding of the Court that unions, although not directly interested in a dispute, may take concerted action against the primary employer, seems a not unwarranted application of the section 7 right of employees to engage in activities for their mutual aid and protection. This right has long been held to permit employees having no direct interest in a dispute to engage in con-

⁷ Id. at 870, 57 L.R.R.M. at 1066 (Member Leedom, dissenting).

⁸ 357 F.2d 182, 61 L.R.R.M. 2529 (5th Cir. 1966).

⁹ Id. at 189, 61 L.R.R.M. at 2534.

¹⁰ 87 Sup. Ct. at 1281, quoting United Ass'n of Plumbers & Pipefitters, Local 106, 110 N.L.R.B. 206, 209, 34 L.R.R.M. 1624, 1626 (1954).

¹¹ Id. at 1281.

certed activities to protect a fellow employee.¹² The reason for the rule is that in this way the employees assure themselves of the support of the one they are helping.¹³

However, the disturbing aspect of the case is that it permits an essentially local dispute to become enlarged by permitting activity against the primary employer, wherever he operates. Instead of reducing the number and extent of strikes, this decision may incite their extension. Yet, since the activity, if it is to be permitted, must be directed to the labor disputes of the primary employer, the decision of the majority seems to be the correct interpretation of the statute.

2. *Ambulatory Worksites*

Under the LMRA, there may be lawful picketing of a primary employer even though the work situs of the employer is ambulatory.¹⁴ Thus, picketing of a ship operated by the primary employer may follow the ship.¹⁵ A recent decision has raised the question of when an ambulatory work situs of the primary employer becomes the work situs solely of the secondary employer.

In *National Maritime Union v. NLRB*,¹⁶ the Mid-America Transportation Company (MAT) was engaged in the transportation of bulk commodities by barge on the Mississippi River between docks at East St. Louis, Illinois and the fleeting or mooring area at Inver Grove, Minnesota. The National Maritime Union represented MAT's unlicensed maritime employees. Twin City Barge & Towing Company (Towing) provided towing and cleaning services for MAT in the Inver Grove area. Minnesota Harbor Service, Inc. (Harbor) supplied similar services in the St. Paul area. Farmers Union Grain Terminal Association (Farmers) was engaged in the storage and merchandizing of grain. It owned a terminal in downtown St. Paul, from which it shipped grain by barge. Farmers had a contract with MAT which required MAT to furnish and Farmers to use at least 100 barges during the 1964 navigation season, and provided that Farmers must clean the barges prior to the loading of grain and must load and unload the cargo. Most of Farmers' shipments were destined for the Gulf of Mexico, and MAT transported the cargo only as far as St. Louis.

On August 1, 1964, the Maritime Union commenced an economic strike against MAT, and picketed on several occasions at Farmers' dock in St. Paul. At all these times, MAT barges were at Farmers' dock. The picket signs stated that the union was on strike against MAT, and that "we have no dispute with any other employer." Employees of Farmers refused to load MAT barges so long as the union picketed. Farmers attempted to obtain barges from other sources with only partial success, but rejected a MAT

¹² *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 10 L.R.R.M. 852 (2d Cir. 1942).

¹³ *Ibid.*

¹⁴ *Local 28, Masters, Mates & Pilots*, 135 N.L.R.B. 1175, 49 L.R.R.M. 1943 (1962); *Local 861, IBEW*, 135 N.L.R.B. 250, 49 L.R.R.M. 1446 (1962); *Local 662, Radio & Television Eng'rs*, 133 N.L.R.B. 1698, 49 L.R.R.M. 1042 (1961).

¹⁵ *Seafarers Int'l Union v. NLRB*, 265 F.2d 585, 43 L.R.R.M. 2465 (D.C. Cir. 1959).

¹⁶ 367 F.2d 171, 63 L.R.R.M. 2268 (8th Cir. 1966).

offer to supply barges. Work on barges other than those operated by MAT proceeded as usual during the picketing.

On three occasions, employees of Towing refused to move MAT barges when they saw union pickets with signs identical to those carried at Farmers' dock. The towing of the barges of other companies was not interrupted by the picketing. The union also picketed at Harbor's property in St. Paul with a sign reading "NMU on strike," but this picketing induced no Harbor employee to cease work.

The Eighth Circuit, affirming the Board decision,¹⁷ found that NMU had violated section 8(b)(4)(B) by staging secondary boycotts against Farmers, Towing, and Harbor. The court stated that the union's activity fell within the strict language of clauses (i) and (ii) of section 8(b)(4). It also found that the union's activity was within the language of subsection (B), *exclusive of that subsection's proviso*. The court concluded that the question whether the activity was proscribed by section 8(b)(4) would turn on whether it was held to be primary picketing—protected by that proviso—or proscribed secondary picketing. The court ruled that the picketing was secondary, because:

The barges' status as an employment situs, if it was such on the trip upriver, ceased when MAT's transportation ended at Inver Grove. . . . [T]he barges had ceased to be the jobsite before [the] . . . picketing took place. They had then become, instead, the normal jobsites of secondary employees alone and the picketing was directed to and affected their normal work at such normal sites without the accompaniment of even proximateness of primary status.¹⁸

This case comports well with the requirement of *Sailors' Union*,¹⁹ that the employees of the primary employer be present at the ambulatory situs in order that the picketing be primary and legal. The case does not fit within the exception which permits picketing even though employees of the primary employer are temporarily absent during a small part of the picketing,²⁰ because here the employees of MAT were, of course, absent from the situs throughout the picketing. Thus, the court correctly ruled that the picketing was secondary and, consequently, unprotected.

H. *Union's Duty of Fair Representation*

In *Wallace Corp. v. NLRB*,¹ the Supreme Court declared that a union subject to the NLRA is under a duty to represent the unit employees fairly.

¹⁷ National Maritime Union, 152 N.L.R.B. 1447, 59 L.R.R.M. 1330 (1965).

¹⁸ 367 F.2d at 178.

¹⁹ 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950). This case is commonly known as the *Moore Dry Dock* case.

²⁰ *New Power Wire & Elec. Corp. v. NLRB*, 340 F.2d 71, 58 L.R.R.M. 2123 (2d Cir. 1965); *Seafarers Int'l Union v. NLRB*, supra note 15; *Teamsters, Local 618 v. NLRB*, 249 F.2d 332, 41 L.R.R.M. 2106 (8th Cir. 1957).

¹ 323 U.S. 248 (1944). *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), decided on the same day as *Wallace*, held that a duty of fair representation was imposed upon unions subject to the Railway Labor Act.

This duty was said to be implicit in section 9(a) as a corollary to the union's right to be the exclusive representative of the employees.² A long line of subsequent Supreme Court cases has firmly established this doctrine.³ Under the LMRA, however, there is no requirement that a union accept an individual into membership, even if the union refusal is based on arbitrary grounds.⁴ This is so despite the fact that sections 7 and 8(b)(1)(A) can be read together so as to state that "it shall be an unfair labor practice for a labor organization . . . to restrain employees [in their right] . . . to join labor organizations."

Since its decision in *Miranda Fuel Co.*,⁵ the Board has consistently held that a breach of the duty of fair representation violates sections 8(b)(1)(A), (2), and (3).⁶ Violations of section 8(b)(1)(A) have been found on the theory that the section 7 right of employees to bargain through representatives of their own choosing gives to employees a right to be free from invidious or unfair treatment by their bargaining representative in matters affecting their employment.⁷ Violations of section 8(b)(2) have been based on union attempts to cause discrimination against the employment status of employees for irrelevant or unfair reasons. The Board has found the requisite intent to encourage union activities when (1) such encouragement is a foreseeable result of the union activity, and (2) there is no legitimate purpose for the union's acts.⁸ Section 8(b)(3)⁹ has been found violated on the ground that the union's duty to bargain extends not only to the employer, but also to the unit employees.¹⁰

² 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964). This section states:

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

³ *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Syres v. Oil Workers, Local 23*, 350 U.S. 892 (1955); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

⁴ *Moynahan v. Pari-Mutual Employees Guild*, 317 F.2d 209, 53 L.R.R.M. 2154 (9th Cir.), cert. denied, 375 U.S. 911 (1963). For a similar decision under the Railway Labor Act, see *Oliphant v. Brotherhood of Locomotive Firemen*, 262 F.2d 359, 43 L.R.R.M. 2159 (6th Cir. 1958). If, in addition to the arbitrary denial of union membership, the union causes the employer to discriminate against an employee in the terms or conditions of employment, with an intent to encourage union activity, the union would violate § 8(b)(2).

⁵ 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962).

⁶ Decisions in which the Board has followed its *Miranda* holding include: *Local 12, United Rubber Workers*, 150 N.L.R.B. 312, 57 L.R.R.M. 1535 (1964); *United Auto Workers*, 149 N.L.R.B. 482, 57 L.R.R.M. 1298 (1964); *Local 1367, Int'l Longshoremen's Ass'n*, 148 N.L.R.B. 897, 57 L.R.R.M. 1083 (1964); *Local 1, Metal Workers*, 147 N.L.R.B. 1573, 56 L.R.R.M. 1284 (1964). See also *International Longshoremen's Ass'n*, 158 N.L.R.B. No. 125, 62 L.R.R.M. 1239 (1966).

⁷ See cases cited note 6 *supra*.

⁸ *Ibid.*

⁹ 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3). This section provides:

It shall be an unfair labor practice for a labor organization or its agents . . . (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)

¹⁰ See *Miranda Fuel Co.*, *supra* note 5.

In *NLRB v. Miranda Fuel Co.*,¹¹ however, the Second Circuit reversed the Board's finding of unfair labor practices. In this case, each member of the three-judge panel offered a separate opinion. The opinions of two judges agreed that the result reached by the Board should be reversed, but only the opinion of Judge Medina reached the question whether the failure of the union to fairly represent the employees constitutes an unfair labor practice. He concluded that it was not the intention of Congress to make a breach of the duty of fair representation, which duty arises out of section 9(a), an unfair labor practice under section 8. He considered that only discrimination which was subjectively intended to encourage union activity could be the basis of an unfair labor practice by the union. In sum, he rejected the Board's position that section 7 gives employees a right to fair representation which is protected by section 8(b)(1)(A).

In *Local 12, United Rubber Workers v. NLRB*,¹² the Fifth Circuit became the first circuit court to expressly sustain the Board's view that a failure by a union to fairly represent employees violates section 8(b)(1)(A) because such failure interferes with the employees' section 7 rights.¹³ Thus, the Second and Fifth Circuits are in conflict as to whether the breach of the duty of fair representation by a union constitutes an unfair labor practice.

In expressly disagreeing with the Second Circuit's decision in *Miranda*, the Fifth Circuit emphasized that, under the court's *Miranda* rule, many acts of discrimination against employees by unions would not be unfair labor practices, because of *Miranda's* requirement that the union intend thereby to encourage union membership. The court noted the established principle that section 9(a) implicitly imposes upon unions a duty of fair representation,¹⁴ and voiced doubt that Congress intended to require of unions a duty of fair representation without providing an effective means of enforcement of that duty. It also felt that court actions by employees for breach of the duty would be an inadequate method of enforcement.¹⁵ The court reasoned

¹¹ 326 F.2d 172, 54 L.R.R.M. 2715 (2d Cir. 1963).

¹² 368 F.2d 12, 63 L.R.R.M. 2395 (5th Cir. 1966).

¹³ In a per curiam decision, *NLRB v. Local 1367, Int'l Longshoremen's Ass'n*, 368 F.2d 1010, 63 L.R.R.M. 2559 (5th Cir. 1966), three Fifth Circuit judges who had not participated in *Local 12* found that the union had committed a violation of § 8(b)(1) in failing fairly to represent employees. However, one judge dissented from *Local 1367* and another judge, concurring in the result, found a violation only because there was a clear failure to represent fairly and the decision would expedite the remedy. He felt that *Local 12* set a dangerous precedent, which would be destructive of unions if carried forward to any extent, and that it would be better to allow individual employees to file suit. Thus, it is highly questionable, even in the Fifth Circuit, whether breach of the duty of fair representation is an unfair labor practice.

¹⁴ See cases cited note 3 supra.

¹⁵ The court was cognizant of the fact that breach of the union's duty was also in violation of Section 703(c) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 52 U.S.C. § 2000e-2(c). However, the court did not feel that it was the intent of Congress in passing that statute to supplant Board jurisdiction. Moreover, the court noted that the Civil Rights Act prohibited discrimination by unions only on grounds of race, religion, color, sex, and national origin, and that consequently there would be many instances of discrimination which only the LMRA would reach.

The court did not mention, as a possible alternative to unfair-labor-practice proceedings, the power of the Board to decertify the union as the bargaining representative of

that this remedy was unsatisfactory because of the prohibitive expense involved, and because the courts might find that the Board has exclusive jurisdiction under the *Garmon* preemption rule since the union's action arguably constitutes an unfair labor practice.¹⁶ In addition, the court pointed out that, under the Second Circuit's decision in *Miranda*, the duty of fair representation is in the unique position of being the only duty imposed by the LMRA the violation of which does not constitute an unfair labor practice.¹⁷

In view of this clear split between the Second and Fifth Circuits, it is apparent that the question of whether breach of the duty of fair representation is a violation of sections 7 and 8 will be resolved only by the Supreme Court.

In *Vaca v. Sipes*,¹⁸ the Supreme Court bypassed an opportunity to resolve this dispute. In this case an employee sued his union in a Missouri state court under section 301 for damages for breach of the collective-bargaining agreement arising out of the union's alleged arbitrary refusal to process his grievance. A divided Court held that the Missouri Supreme Court was correct in finding that the *Garmon* doctrine of Board preemption did not apply to suits against unions based upon such allegations, at least where there is a concurrent breach-of-contract suit against the employer under section 301, and that the state and federal courts had jurisdiction over the dispute even though the action arguably constituted an unfair labor practice.¹⁹ However, in reversing the Missouri court, the Supreme Court held that federal, and not state, substantive law applied.²⁰

The majority opinion took no position on whether the violation of the duty of fair representation constituted an unfair labor practice. Instead the Court stated that "we may assume for present purposes that such a breach of duty by the union is an unfair labor practice, as the NLRB and the Fifth Circuit have held."²¹ However, the concurring opinion of Mr. Justice Fortas, in which the Chief Justice and Mr. Justice Harlan joined, agreed only with the result of the majority, and contended that the preemption doctrine should apply even to suits for breach of contract in state and federal courts where the breach also constitutes an unfair labor practice.²² Relying on the Board's decision in *Miranda* and the Fifth Circuit's decision in *Local 12*, the concurring opinion held that "a complaint by an employee that the union has breached its duty of fair representation is subject to the exclusive jurisdic-

the employees. Doubtless the court would have rejected this as an insufficient remedy, because it does nothing to compensate the individual employees who have been the victims of misrepresentation.

¹⁶ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). The Supreme Court held that state and federal court jurisdiction is preempted whenever a controversy involves activity which "is arguably subject to § 7 or § 8 of the Act." *Id.* at 245. Of course, if the union activity is also a breach of the collective-bargaining agreement, the suit could be brought in a federal or state court under § 301. See *Humphrey v. Moore*, 375 U.S. 335 (1964).

¹⁷ 368 F.2d at 21, 63 L.R.R.M. at 2401.

¹⁸ 386 U.S. 171 (1967).

¹⁹ For a more detailed discussion of this aspect of the case, see pp. 841-43 *supra*.

²⁰ 386 U.S. at 174.

²¹ *Id.* at 186.

²² *Id.* at 198.

tion of the NLRB. It is a charge of unfair labor practice."²³ Thus, it is clear that the Board's position has substantial support in the Supreme Court. However, it is still impossible to predict what decision the full Supreme Court would reach upon direct confrontation with this important question.

Although the legislative history and the wording of sections 7 and 8(b)(1) do not clearly make the breach of the duty of fair representation an unfair labor practice, it is submitted that such a breach does constitute a violation of section 8(b)(1). First, it should be remembered that section 9 does not expressly impose the duty of fair representation upon unions, and yet such a duty has been consistently imposed. Second, in section 7 Congress did expressly grant employees a right to bargain collectively through representatives of their own choosing, and it is not lightly to be assumed that Congress would permit that right to be rendered virtually meaningless by union abuses.

I. *Union Discipline of Members*

Section 8(b)(1)(A) provides that it is an unfair labor practice for a union to restrain employees in the exercise of their section 7 rights.¹ However, under the proviso to that section, a union has the "right to prescribe its own rules with respect to the acquisition or retention of membership" in the union. The present state of the law is that the threat of sanction by a union against an employee for any reason other than failure to pay periodic union dues is in violation of sections 8(b)(1) and (2) when such sanction will affect his employment status.² Further, a union may not fine a member for exceeding production quotas unilaterally established by the union, since such rules are considered to go beyond the confines of purely internal union matters.³

The imposition of a fine by a union upon a member for filing unfair-labor-practice charges against the union constitutes "restraint" or "coercion" in violation of section 8(b)(1)(A).⁴ A union which imposes fines upon its

²³ *Ibid.*

¹ 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964).

² *NLRB v. Local 450, Int'l Union of Operating Eng'rs*, 281 F.2d 313, 46 L.R.R.M. 2611 (5th Cir. 1960); *Food Fair Stores, Inc.*, 131 N.L.R.B. 756, 48 L.R.R.M. 1128 (1961), enforced as modified, 307 F.2d 3, 50 L.R.R.M. 2913 (3d Cir. 1962); *United Auto Workers*, 130 N.L.R.B. 1035, 47 L.R.R.M. 1449, enforced, 297 F.2d 272, 49 L.R.R.M. 2310 (1st Cir. 1961).

LMRA § 8(b)(2), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964), provides: It shall be an unfair labor practice for a labor organization or its agents . . . (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

³ *Associated Home Builders, Inc. v. NLRB*, 352 F.2d 745, 60 L.R.R.M. 2345 (9th Cir. 1965).

⁴ *Ryan v. International Bhd. of Elec. Workers*, 361 F.2d 942, 62 L.R.R.M. 2339 (7th Cir. 1966); *Roberts v. NLRB*, 350 F.2d 427, 59 L.R.R.M. 2801 (D.C. Cir. 1965); *Local 138, Int'l Union of Operating Eng'rs*, 148 N.L.R.B. 679, 57 L.R.R.M. 1009 (1964); *Peerless Tool & Eng'r Co.*, 111 N.L.R.B. 853, 35 L.R.R.M. 1598 (1955).

members for crossing picket lines and attempts to secure payment by suit or by threat of suit has been held to violate section 8(b)(1).⁵ However, a union may lawfully expel a member from the union for filing a decertification petition against the union.⁶ This result is reached on the reasoning that a union should not have to keep within its ranks an "enemy," that is to say, a person who desires to remove the union as the bargaining agent.

In a recent decision, *Cannery Workers*,⁷ the Board further restricted the sanctions that a union may impose when it held that the union violated the act by expelling an employee from union membership for filing unfair-labor-practice charges against the union. As mentioned above, a union violates the act by fining an employee for filing unfair-labor-practice charges; the Board extended this rule to include expulsion because it found that mere loss of union membership was "coercive," even without loss of employment or fine, since, by being expelled, the employee loses his share in strike funds, pension funds, and the like to which he has contributed. Also, the Board noted that the employee loses the means to affect the way in which the union represents him.

The Board further concluded that the union rule which required the exhaustion of internal union remedies before a member brings an unfair-labor-practice charge against the union could not be enforced by coercive means, which included suit or threat of suit by the union. The basis for this decision was the overriding public interest in preventing restrictions on access to Board processes.

In deciding this case, the Board was faced with a previous decision, *Tawas Tube Prods., Inc.*,⁸ in which it had held that a union did not violate section 8(b)(1)(A) when it expelled a member for filing a decertification petition against the union. The Board distinguished *Cannery Workers* from *Tawas* because of the different nature of the member's act in each case. Unfair-labor-practice charges relate to fixed past events, whereas in representation disputes the circumstances are fluid and relate to the future event of an election; also, the filing of unfair-labor-practice charges does not constitute an attack on the union's existence, unlike the filing of a decertification petition.

The Board is undoubtedly correct in allowing a union to expel a member who files a decertification petition, because "to tolerate an active opponent within their ranks would undermine their collective action [to achieve or maintain majority status] . . . and thereby tend to distort the results of the election."⁹ The Board properly considered that unity among union members on the issue whether the union should be the bargaining representative is essential to effective union efforts to win the support of a majority of the employees. It would be very difficult for a union ever to win a representation election if there were divisions within its own ranks. But the Board is also

⁵ *Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656, 61 L.R.R.M. 2498 (7th Cir.), cert. granted, 385 U.S. 810 (1966) (No. 216).

⁶ *Local 4028, United Steelworkers*, 154 N.L.R.B. 692, 60 L.R.R.M. 1008 (1965); *Tawas Tube Prods., Inc.*, 151 N.L.R.B. 46, 58 L.R.R.M. 1330 (1965).

⁷ 159 N.L.R.B. No. 47, 62 L.R.R.M. 1298 (1966).

⁸ 151 N.L.R.B. 46, 58 L.R.R.M. 1330 (1965).

⁹ 159 N.L.R.B. No. 47, 62 L.R.R.M. at 1301.

correct in not extending this principle to activity such as was before it in *Cannery Workers*, because such activity cannot cause the future problems which justify expulsion.

J. Remedies

The National Labor Relations Board is vested with broad discretionary power to remedy unfair labor practices. 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.¹ The Board adapts its remedy to fit the circumstances of the particular case in order to dissipate the effects of the unfair labor practices.² The aim of the statute is to return the parties to the status which existed before the unfair labor practices were committed.³

1. Subcontracting and Termination Cases

The cases discussed in Section VI B(1) above, requiring bargaining over subcontracting and partial terminations, have posed especially difficult remedial problems.

In *Ozark Trailers, Inc.*,⁴ the trial examiner had ordered back pay for the employees from the date of his decision until one of the following conditions occurred:

- (1) Reaching mutual agreement with the Union relating to the subjects which the Respondents are hereby required to bargain about;
- (2) bargaining to a genuine impasse;
- (3) the failure of the Union to commence negotiations within 5 days of the receipt of the Respondents' notice of their desire to bargain with the Union; or
- (4) the failure of the Union to bargain thereafter in good faith.⁵

The Board, however, modified the remedy on the basis that the trial examiner's order was "too speculative,"⁶ and ordered back pay for any loss of pay from the date the company decided to close the plant at the end of January 1964 to the date the Ozark plant was closed on March 1, 1964.

In its second supplemental order in *Royal Plating & Polishing Co.*,⁷

¹ 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964). The Board's remedy will be upset only if it patently fails to effectuate the policies of the act. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

² See, e.g., *Fibreboard Paper Prods. Corp. v. NLRB*, supra note 1, at 216; *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953).

³ In *Fibreboard*, the Supreme Court said: "There has been no showing that the Board's order restoring the *status quo ante* to insure meaningful bargaining is not well designed to promote the policies of the Act." Supra note 1, at 216.

⁴ 161 N.L.R.B. No. 48, 63 L.R.R.M. 1264 (1966).

⁵ Id., 63 L.R.R.M. at 1269-70.

⁶ Id., 63 L.R.R.M. at 1270. The Board did not state in what respect the trial examiner's remedy was too speculative. Apparently, the Board objected to the fact that this remedy would have no readily ascertainable time limit.

⁷ 160 N.L.R.B. No. 72, 63 L.R.R.M. 1045 (1966). In its original order, 148 N.L.R.B. 545, 57 L.R.R.M. 1006 (1964), the Board required back pay for lost wages from the date of termination of each employee's employment to the date he secured

the Board ordered back pay for lost wages from the date of termination of each employee's employment until one of the four conditions of the trial examiner's order in *Ozark* occurred. However, an employee's recovery could not exceed the amount of wages lost from the closing of the first plant to the time that the employee secured equivalent employment elsewhere, and could not exceed the lost wages from the closing of the first plant to the closing of the second plant.

The Board's remedies, typified by *Ozark* and *Royal Plating*, often produce unsatisfactory results. Under the Board's *Ozark* remedy, which created employer liability for lost wages between the time of the decision to close the plant and the actual closing, an employer could limit his liability by accelerating the date of the plant closing or by terminating all jobs on the day of closing. Given the delay and uncertainty of a back-pay award, employees in areas of high prosperity would quickly find equivalent employment, and lost wages would be minimal. In such cases, this remedy does not deter employers from violating the act, and fails to provide more than token compensation to employees for violations of their bargaining rights. Only in areas of depressed economic conditions, where new employment is difficult to find, would employees receive adequate relief for deprivation of their statutory bargaining rights. Thus, the efficacy of such a remedy frequently depends upon the economy of the area in which the violation occurred. The remedy in *Royal Plating* produces the same results because, *inter alia*, it also limits liability to lost wages from the date of closing to the date new employment is secured.

From the foregoing, it is clear that the Board is unsure as to what the proper back-pay remedy should be where there is failure to bargain over subcontracting or partial liquidation of a business. It is submitted that the trial examiner in *Ozark* formulated a better remedy than that of the Board in many similar cases. His remedy would roughly recreate the balance of power that would have existed if there had been no refusal to bargain. Since the company's back-pay liability was connected to its good faith in further negotiations, the union's bargaining power would be at least partially restored, and the employer would be under pressure to reach agreement in order to reduce his back-pay liability. Moreover, the bargaining would be carried on in much the same manner that it would have been under ordinary circumstances.

The basic difficulty probably derives from the fact that the back-pay remedy is traditionally a remedy for discriminatory discharge and not for refusal to bargain. The trial examiner's remedy in *Ozark* seems itself capable of improvement. Imposing a time limit, as was done in the final order in *Royal Plating*, would also serve as a stimulus to meaningful bar-

equivalent employment elsewhere. However, the obligation was limited to December 4, 1963, the date the company was required to vacate the premises under its agreement of sale with the Newark Housing Authority. In the first supplemental order, 152 N.L.R.B. 619, 59 L.R.R.M. 1141 (1965), the original order was amended to limit the back-pay obligation to August 31, 1963, the date the employer completely went out of business by closing his second plant.

gaining and, additionally, prevent an undue liability from being imposed upon the employer.

2. *The Runaway Shop*

The "runaway" shop—the company which relocates in order to rid itself of a union—has also presented remedial difficulties. In *Garwin Corp.*,⁸ the Board found that the employer had transferred operations from New York to Florida in order to avoid bargaining with the union, a violation of sections 8(a)(1), (3), and (5) of the act. The Board also found that the company violated sections 8(a)(1) and (5) in failing to consult with the union concerning its decision to move to Florida.

Modifying the trial examiner's award of the traditional remedy,⁹ the Board set precedent by ordering the employer to bargain with the New York local union for one year as the exclusive bargaining representative of the Miami employees, even though the Board was aware that the union might not represent a majority of the employees in the Miami plant. The Board further ruled that if the union could establish a majority at the Miami plant, any contract it signed with the employer would bar any representation petitions for the full contract-bar period of up to three years, according to the length of the contract signed. However, if the union remained a minority union, a contract with the employer purporting to last more than one year from the date of the Board's decision would be effective for only the one year during which the employer was under a duty to bargain with the New York local. Even if no contract was entered into between the employer and the union, the employer was required to bargain with the union for one year from the time of the Board's decision.

In *Local 57, Garment Workers v. NLRB*,¹⁰ the District of Columbia Court of Appeals reversed and remanded that part of the order in *Garwin* which compelled the Florida company to bargain with the New York local. Although recognizing that the Board must be granted broad discretionary authority to formulate remedies, the court rejected the order on the ground that it was unrelated to the redressing of the harm done to the New York employees, who the Board assumed would not migrate to Florida, and further, that it infringed upon the fundamental right of free choice of the workers at the new location.

The case raises the problem of devising an effective remedy in cases where the employer moves the plant a considerable distance. In cases of "runaways" of short distance, an order requiring the employer to make an

⁸ 153 N.L.R.B. 664, 59 L.R.R.M. 1405 (1965).

⁹ The traditional remedy in the runaway-plant situation consists of requiring an offer of reinstatement to all discriminated employees or of preferential hiring in the event that jobs are not then available. The employer is given an option to return to the old location or to remain in the new location; the employer electing the latter must pay relocation expenses of employees who accept the offer of reemployment. Employees are also made whole for any loss of pay from the time of the termination of their employment to the time of an unconditional offer of reemployment. See *id.* at 680-82. The Board's remedy in *Garwin* was in addition to the traditional remedy.

¹⁰ 374 F.2d 295, 64 L.R.R.M. 2159 (D.C. Cir. 1967).

offer of reinstatement can be an effective remedy. In *NLRB v. Lewis*,¹¹ for example, the Ninth Circuit enforced a Board order requiring an employer to bargain with a minority union after a twelve-mile move, on the assumption that absent the employer's antiunion animus, employees probably would have followed the employer to the new site. However, in *NLRB v. Rapid Bindery, Inc.*,¹² the Second Circuit refused to enforce a similar remedy, because there was no showing that the union represented a majority of employees in the new plant.

In the short-distance situation, this remedy is effective because the employees can be expected to follow the employer, and the union will, therefore, have real bargaining power. The effectiveness of the Board's order in *Garwin* in deterring employers is to be doubted, however, because "runaways" of considerable distance usually relocate in areas of minimal union strength, where the union will be unable to exert much pressure upon the employer. Moreover, required bargaining in this type of situation does not benefit the former employees and conflicts with the LMRA's policy of employee free choice.¹³ Nevertheless, the Board's decision does point out the inadequacy of the old remedy and the need for a stronger one.¹⁴

Perhaps the remedy of the trial examiner in *Ozark*¹⁵ would be an appropriate supplement to the traditional remedy, serving to better protect the rights of the former employees and to deter employers from moving their plants because of antiunion animus. Such a remedy obviously would not lead to the employer's return to the old location, but the Board has considered an affirmative order to return to be too severe a sanction.¹⁶ However, the trial examiner's proposal would at least partially restore the bargaining power of the union and put the employer under pressure to reach an equitable settlement with the union concerning the severance pay and pension rights of the New York employees in order to limit his liability.

3. *Interference with Organizational Activities*

In two separate unfair-labor-practice proceedings, one decided in 1966¹⁷ and the other in 1967,¹⁸ the NLRB found that J. P. Stevens & Company had discriminatorily discharged a total of eighty-eight employees in violation of sections 8(a)(1) and (3), and had discharged seven employees in violation of sections 8(a)(1) and (4) for participating in Board proceedings. The Board also found that the employer had engaged in at least thirty threats of reprisal or promises of benefit in its successful attempts to prevent organization.

¹¹ 246 F.2d 886, 40 L.R.R.M. 2371 (9th Cir. 1957).

¹² 293 F.2d 170, 48 L.R.R.M. 2658 (2d Cir. 1961).

¹³ LMRA § 7, 61 Stat. 140, 29 U.S.C. § 157 (1964), provides that employees have the right to join or not to join a union and to be represented by the representative of their choice.

¹⁴ The circuit court in *Garment Workers*, while conceding that the conventional Board remedy was inadequate, did not suggest an appropriate remedy.

¹⁵ See text accompanying note 5 *supra*.

¹⁶ *Garwin Corp.*, *supra* note 8, at 665-66, 59 L.R.R.M. at 1408.

¹⁷ *J. P. Stevens & Co.*, 157 N.L.R.B. No. 90, 61 L.R.R.M. 1437 (1966).

¹⁸ *J. P. Stevens & Co.*, 163 N.L.R.B. No. 24, 64 L.R.R.M. 1289 (1967).

Because of the massive nature of the unfair labor practices, the Board, in the first *J. P. Stevens & Co.* case, in addition to the usual cease-and-desist, reinstatement, back-pay, and posting requirements, ordered the company, to convene the employees during working hours in each department and have their department supervisors read to them a copy of the Board's notice to employees.¹⁹ The Board also required the employer to mail copies of the notice to all employees²⁰ and to give the union reasonable access to the plant bulletin boards for one year.²¹

In the second case, the Board again found that the employer had committed a great number of unfair labor practices. In order to undo the effects of these activities, the Board found it necessary for the first time in an unfair-labor-practice proceeding to require the employer to supply the union, upon its request, with the names and addresses of all employees in its plants.²² This remedy was supplementary to the ordering of remedies similar to those ordered in the first case. In addition to the flagrant nature of the employer's conduct, the Board relied on the fact that the union had no access to the plants.²³ The Board concluded that the numerous unfair labor practices necessitated its remedy, because (1) all union spokesmen among the employees had been either discharged or intimidated into silence,²⁴ and (2) by its remedy the union would be able to reach employees outside the plant and make known its views in an atmosphere relatively free of coercion.²⁵

In view of Supreme Court decisions stating that the Board must be granted broad discretion in formulating remedies,²⁶ a decision on appeal will probably hold that the Board has acted within its authority.²⁷ However, the order requiring the employer to furnish a list containing the names and addresses of its employees is subject to the same "property-rights" arguments that were used to attack the Board rule requiring an employer to deposit with the regional director, within seven days after the ordering of an election, a similar list.²⁸

¹⁹ The Board concluded that such a remedy was necessary to dispel the effects of the illegal interrogations, promises, and threats by the employer's supervisors.

²⁰ The purpose of this remedy was to inform any employees who may have been absent when the notices were read.

²¹ The employer had used the bulletin boards to commit unfair labor practices. The Board felt that requiring the employer to permit union access to the bulletin boards would reduce the effects of the employer's wrongful acts.

²² See *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 61 L.R.R.M. 1217 (1966), wherein the Board adopted a "name and address" rule applicable in representation proceedings.

²³ 163 N.L.R.B. No. 24, 64 L.R.R.M. at 1291.

²⁴ *Ibid.*

²⁵ *Id.*, 64 L.R.R.M. at 1291-92.

²⁶ *May Dep't Stores v. NLRB*, 326 U.S. 376, 391-92 (1945); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

²⁷ LMRA § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964), provides that the Board may order any person to cease and desist from committing unfair labor practices and to take any other affirmative action which will effectuate the purposes of the act.

²⁸ See *Excelsior Underwear, Inc.*, *supra* note 22. For a discussion of the current case activity concerning this rule, see pp. 794-97 *supra*.

4. Section 10(j) Injunctions

In 1932, Congress passed the Norris-LaGuardia Act,²⁹ which deprived the federal courts of jurisdiction to grant injunctions in labor disputes except under particular specified conditions.³⁰ Certain exceptions to the Norris-LaGuardia Act were carved out by the Taft-Hartley Act in 1947. Section 10(h) of that act³¹ 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)³² and 10(j)³³ 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).

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."³⁴ In *McLeod v. General Elec. Co.*,³⁵ the Board exercised its section 10(j) discretion and successfully petitioned a district court to enjoin General Electric from refusing to bargain with a committee representing its electrical workers.

General Electric had refused to bargain with the committee because there were, sitting on it, members of other independent unions who represented other employees of General Electric. The company maintained that the use of such a committee was an attempt by the unions to impose multi-union bargaining upon it, and that each union was "locked" in its bargaining position, *i.e.*, no union would come to terms with the employer unless each of the others did. The district court, agreeing with the Board, found that General Electric's objections to bargaining with the committee were without merit. The court first noted that the Electrical Workers Union had testified that it did not intend to engage in or attempt to impose multi-union bargaining upon the company. Moreover, the court added that the company could not hypothesize these reasons as a justification for refusing to bargain, but rather must enter the bargaining and let the Electrical Workers prove

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

³⁰ 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.

³¹ 61 Stat. 149 (1947), 29 U.S.C. § 160(h) (1964).

³² 61 Stat. 147 (1947), 29 U.S.C. § 160(e) (1964).

³³ 61 Stat. 149 (1947), 29 U.S.C. § 160(j) (1964).

³⁴ *Ibid.*

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

that they were willing to negotiate as an independent union without a "locked" bargaining position.

In granting the injunction, the district 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."³⁶

On appeal, less than a month later, the Second Circuit reversed, and vacated the injunction.³⁷ At the outset, the court made it clear that its opinion dealt only with the propriety of the injunction and not with the substance of the unfair labor practice. 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-LaGuardia 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." Unfortunately, however, this latter requirement comes perilously close to the Norris-LaGuardia requirement for injunctive relief—a requirement that does not apply to section 10(j) injunctions.³⁸

Furthermore, the court of appeals noted that the basic scheme of the LMRA was to have the NLRB apply, in the first instance, its knowledge and expertise to the facts of a labor dispute. Only after this is the federal judiciary to review, under sections 10(g) and 10(f), the Board's decisions in unfair labor practices. In a rather piqued opinion, the court stated that it did not consider the length of time which would be required for a Board resolution of this dispute to be a valid ground for issuing a temporary injunction pending that resolution, even though the labor dispute "involved important issues of labor law, many unions, and hundreds of thousands of workers engaged in the nation's defense effort."³⁹ Such a case should be resolved by the Board, not the district court, and certainly not the court of appeals "on its summer recess."⁴⁰ In rather obtuse fashion, the court of appeals could not fathom the Board's failure to utilize *its* adjudication machinery "*with dispatch*" to settle this dispute, in spite of the court's previous acknowledgement of the Board's lack of celerity in the resolution of cases before it.

Mr. Justice Harlan, hearing a petition for a stay pending Supreme Court action on a petition for certiorari, found for the regional director and stayed enforcement of the order of the court of appeals;⁴¹ in other words,

³⁶ *Id.* 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).

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

³⁸ LMRA § 10(h), 61 Stat. 149 (1947), 29 U.S.C. § 160(h) (1964).

³⁹ 366 F.2d at 850, 63 L.R.R.M. at 2066.

⁴⁰ *Ibid.*

⁴¹ 87 Sup. Ct. 5 (1966).

he reinstated the temporary injunction. Harlan agreed with the federal district court below as to the standards by which a federal court should evaluate a board petition for injunction under section 10(j). At the same time, Harlan felt that this issue was of such "continuing importance to the proper administration of the Labor Act"⁴² that the full court should make the final disposition of the case.⁴³ Thus, one must still await a ruling by the Supreme Court on the proper standards which should be applied by the lower federal courts in determining the propriety of a section 10(j) injunction.

VII. LABOR UNIONS AND THE ANTITRUST LAWS

An accommodation of the antitrust laws and the labor laws is still being sought by the courts and the legislatures. During the current Survey year, there were two cases decided which shed new light on the direction that this accommodation is taking:¹ *Lewis v. Pennington*² and *Carroll v. American Fed'n of Musicians*.³

Lewis v. Pennington represents the latest chapter in an overflow of litigation⁴ between coal operators in Tennessee and the United Mine Workers of America (UMW) resulting from labor disputes that arose in 1955 and continued intermittently through 1959. The antitrust aspects of the case centered around a protective wage clause, of the kind commonly known as a "most favored nation" clause, which the UMW and the larger coal producers had agreed upon. By its terms, the union obligated itself not to enter into or be party to any agreement covering wages and working conditions that would be applicable to employees covered by the contract on any bases other than those specified in the contract between the UMW and the large producers. The union further obligated itself to perform and enforce the conditions of the clause, without discrimination or favor, and to use its best efforts to obtain full compliance with the contract terms by each party signatory thereto. Using this "most favored nation" contract clause as the mainstay of their charge, the small coal producers of the

⁴² Ibid.

⁴³ General Electric has since reached agreement on a three-year contract with the Electrical Workers. 63 L.R.R.M. 163 (1966). At press-time for this Survey, the case was still pending before the NLRB and the Supreme Court, but, in light of the agreement, both bodies may drop the case.

¹ For a concise statement of the law as it stood prior to these decisions, see 1965-1966 Annual Survey of Labor Relations Law, 7 B.C. Ind. & Com. L. Rev. 909, 954-61 (1966).

² 257 F. Supp. 815, 62 L.R.R.M. 2604 (E.D. Tenn. 1966).

³ 372 F.2d 155, 64 L.R.R.M. 2276 (2d Cir. 1967).

⁴ The case was first reported as *Pennington v. United Mine Workers*, 325 F.2d 804, 54 L.R.R.M. 2761 (6th Cir. 1963), on an appeal from the trial court. The circuit court affirmed the trial court's judgment in favor of the coal operators which sustained their contention that, inter alia, the UMW had violated the antitrust laws. On appeal from the circuit court, the Supreme Court reversed, 381 U.S. 657 (1965), and the case as reported here is the trial court decision on remand from the Supreme Court. For a detailed analysis of the Supreme Court decision, see 1965-1966 Annual Survey, supra note 1, at 954. See also Handler, Recent Antitrust Developments—1965, 40 N.Y.U.L. Rev. 823 (1965).

area alleged that the UMW and the large coal producers⁵ had conspired to impose a wage and fringe-benefit standard upon the small producers which would be impossible for them to maintain, except by operating unprofitably. This conspiracy, they alleged, was in violation of the Sherman Act.⁶

When the case was originally before the Supreme Court,⁷ it was held that, although a union may seek a standard wage agreement on a multi-employer basis, if the union should agree with one set of employers to impose a certain wage scale on another bargaining unit, this would be grounds for union forfeiture of its exemption from the antitrust laws.⁸ Two particular statements by Mr. Justice White, writing for the majority, caused grave concern to industries engaged in pattern bargaining,⁹ an activity very similar to that cited as grounds for forfeiture of the antitrust exemption. He considered two fact situations: (1) a union-employer agreement to set a wage scale which marginal producers could not meet, and (2) an agreement between an employer and a union to impose a higher wage scale on a second employer. To Mr. Justice White, the latter situation was a clear violation of the antitrust laws. But he considered the former as even more malignant, "without regard to predatory intention or effect in the particular case,"¹⁰ because the union has thereby surrendered its flexibility in negotiation, contrary to the intent of federal labor policy.

On their face, these statements seemed to be a blanket condemnation of the "most favored nation" clauses and of similar employer-union agreements imposing specified labor standards, which were in wide use in certain industries. But, on remand, the district court made two very important rulings on the elements and proof requirements necessary to sustain the antitrust charges against the UMW. The district court stated that it must be demonstrated that the UMW and the major coal producers had entered into an industrywide bargaining agreement with the *predatory intent* of eliminating the small producers by means of the imposition of high wage scales. In other words, the court said that the mere showing of an agreement imposing high wage scales, accompanied by evidence that the effect of that imposition is to drive small producers out of business, is not sufficient. The district court found support for this proposition in a footnote to Mr. Justice

⁵ The large coal producers were never joined as defendants.

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

⁷ *Supra* note 4.

⁸ Under §§ 6 and 20 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964), 38 Stat. 738 (1914), 29 U.S.C. § 52 (1964), and the policy declaration of the NLRA, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964), as interpreted by the Supreme Court in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), unions have the right to eliminate all labor-market competition, regardless of its effect on the product market, because such activity could not be considered the kind of curtailment of price competition prohibited by the Sherman Act. It was further held, in *United States v. Hutcheson*, 312 U.S. 219 (1941), that no union engaged in a labor dispute would be subjected to the antitrust laws.

⁹ Pattern bargaining exists where a national union or a council of local unions promulgates a "standard" or "model" contract, the purpose of which is to create a pattern for like contracts between the participating locals and their employers.

¹⁰ 381 U.S. at 668.

White's opinion,¹¹ which indicated to the court "that the antitrust law is not designed to protect marginal operators; that ill effects alone on the marginal operators is not enough to show intent."¹²

Mr. Justice White's footnote was careful to limit the scope of its condonation of union action to that which is without even tacit agreement or influence of employers.¹³ Therefore, it became important for the district court to construe the actual meaning of the "most favored nation" clause. The court first noted that a contract, subject to two reasonable constructions, should be given that construction which does not violate the law.¹⁴ The court, applying this rule of construction, found that the "most favored nation" clause involved in this litigation did not obligate the UMW to embody the same terms and conditions in contracts to be made with other parties not signatory to the present contract.¹⁵ That is to say, the clause did not contain the UMW's promise to enter into collective-bargaining agreements with other coal producers only if these agreements contained the same wage standard that the UMW had with the contracting larger coal producers.

It is submitted that the court was straining, at the least, in finding the above to be a reasonable construction of the contract clause. In fact, the court seems to be saying that the clause does not mean what it says, because, if it did so mean, the clause would be illegal. Despite the lack of clarity in construing such a clause, the court did condone it, and thus the case represents court approval of the "most favored nation" clause.

The second significant ruling which the district court made was that "the standard of proof necessary to show predatory intent is governed by . . . *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966)."¹⁶

¹¹ 381 U.S. at 665 n.2. In this footnote, Mr. Justice White stated:

Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency.

¹² 257 F. Supp. at 829, 62 L.R.R.M. at 2616.

¹³ *Supra* note 11.

¹⁴ 257 F. Supp. at 862, 62 L.R.R.M. at 2644, citing *Great No. Ry. v. Delmar Co.*, 283 U.S. 686, 691 (1931).

¹⁵ As quoted by the court, section A of the Protective Wage Agreement read: During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

Id. at 859 n.2., 62 L.R.R.M. at 2642 n.2.

¹⁶ *Id.* at 829, 62 L.R.R.M. at 2616.

In *Gibbs*, the Supreme Court had rendered an interpretation of Section 6 of the Norris-LaGuardia Act.¹⁷ It had been necessary for the Court to decide what standard of proof was needed in a damage suit to hold the UMW responsible for the acts of members of its local. The plaintiff in that case charged the UMW with violation of the Tennessee common-law tort of conspiracy to "maliciously, wantonly and willfully interfere with [plaintiff's] . . . contract of employment and with his contract of haulage."¹⁸ Speaking of the standard which the Court thought appropriate under section 6 for the type of case before it, the Court stated:

The plaintiff in a civil case is not required to satisfy the criminal standard of reasonable doubt on the issue of participation, authorization or ratification; neither may he prevail by meeting the ordinary civil burden of persuasion. He is required to persuade by a *substantial margin*, to come forward with "more than a bare preponderance of the evidence to prevail."¹⁹ (Emphasis added.)

It should be noted here, as it was by the *Gibbs* Court, that the section 6 standard of proof, outlined above, is not applicable under the LMRA, "which expressly provides that for the purposes of that statute, including section 303, the responsibility of a union for the acts of its members and officers is to be measured by reference to ordinary doctrines of agency"²⁰

But, as in *Gibbs*, *Lewis v. Pennington* does not involve damages arising under the LMRA. It is, rather, one of those "labor disputes" not within the ambit of the LMRA, and therefore one which falls within the mandate of "clear proof" expressed in Section 6 of the Norris-LaGuardia Act. The *Pennington* court emphasized the weight of this burden of "clear proof" in its discussion of the federal antitrust charge much more than it did in its discussion of the state tort claim, which charged tortious interference with plaintiff's business. Whereas the former was dismissed for lack of sufficient proof, the latter was sustained, and the plaintiff was awarded actual and punitive damages totalling \$311,787.41.

Although the court carefully reviewed the evidence in support of the state claim, the entire discussion is void of an express reference to Section 6 of the Norris-LaGuardia Act. In the discussion of the union's liability for its members' activities, the court did cite cases which applied the section 6 standard of proof;²¹ one may infer that this standard was applied to the

¹⁷ 47 Stat. 71 (1932), 29 U.S.C. § 106 (1964). This section provides:

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

¹⁸ Plaintiff's complaint, as quoted by the Court. 383 U.S. at 733.

¹⁹ *Id.* at 737.

²⁰ *Ibid.*

²¹ 257 F. Supp. at 869, 62 L.R.R.M. at 2650, citing *United Bhd. of Carpenters v. United States*, 330 U.S. 395 (1947), and *Garmcada Coal Co. v. International Union*, 230 F.2d 945 (6th Cir. 1956).

state claim. But it is submitted that the opinion would have benefited from a clearer and more candid statement of the law, one expressly applying the section 6 standard of proof to the state claim.

On balance, the Supreme Court's remand and the district court's interpretation, taken together, do not seem to be the condemnation of "most favored nation" clauses that Justice White's majority opinion had indicated. The district court, by construing the clause as it did, and by requiring a showing of "predatory intent" on the part of the union and the employers together with the higher standard of proof as demanded by *Gibbs*, has mollified the severity of what was thought to be the Supreme Court's condemnation of the widely used "most favored nation" clause.

As the district court's opinion in *Pennington* is important for its construction of the Supreme Court's remanding decision, so also, *Carroll v. American Fed'n of Musicians*²² is noteworthy for its interpretation of the principles expressed by the Supreme Court in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*²³ The Second Circuit held in *Carroll* that the musicians union had committed a per se violation of the Sherman Act by unilaterally fixing the prices of certain types of orchestral engagements. The difficult issue about which both *Jewel Tea* and *Carroll* revolve is the relationship between the union antitrust exemption and the activities of a union involving subject matter lying in the penumbra of the mandatory bargaining requirements of the LMRA.²⁴

In *Carroll*, the union had acquired a virtual closed shop in the New York City area by means of agreements with booking agents, recording companies, and the like. Consequently, the union's by-laws regulated substantially all of the musicians' employment. One of these by-laws required that each member orchestra leader follow a "Price List Booklet" which was a product of the union. The court found that

these regulations, in fact, establish price floors because the orchestra leader is required to charge the music purchaser [whoever hires the orchestra] not less than the total of his "leader's fees," the side-men's wages and other fees. The leader's fee is a specific percentage above the union wage scale, graduated according to the number of musicians performing.²⁵

Looking to *Jewel Tea*, the *Carroll* court found the basic legal issue to be "readily apparent."²⁶ First, would the activity involved be a violation of the Sherman Act but for the union exemption from antitrust law? Price fixing clearly would be. Next, the court found it necessary to determine whether such union activity falls within the test for union exemption from the antitrust laws. What is this test? The *Carroll* court found that, under

²² 372 F.2d 155, 64 L.R.R.M. 2276 (2d Cir. 1967).

²³ 381 U.S. 676 (1965).

²⁴ LMRA § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964). This section has been construed in a long line of cases. For an analytical synopsis of these cases, see generally Rubenstein, *The Emerging Antitrust Implications of Mandatory Bargaining*, 50 Marq. L. Rev. 51 (1966).

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

²⁶ Id. at 164, 64 L.R.R.M. at 2283.

Jewel Tea, this test should be whether the price of the orchestral arrangements was a mandatory subject of bargaining. Applying this test, the court concluded that "the price of orchestral engagements is not a subject of such direct and overriding interest to the unions, as representatives of sidemen and sub-leaders, that it is a mandatory subject of collective-bargaining."²⁷ Consequently, the court remanded the case to the district court to properly enjoin those price-fixing activities cited and to assess what damages, if any, the nonunion orchestra leaders who brought this action had suffered.

It should be noted how factually narrow this holding actually is. The price-fixing was only to be enjoined for engagements in which the orchestra leader was considered an employer of the other musicians. This distinction between the leader as employer and the leader as employee was, according to the court, "essential."²⁸ It is based on the type of engagement involved. A leader is the *employer* in engagements of one week or less which, by the custom of the trade, are not covered by preexisting collective-bargaining agreements negotiated by the union, but rather are governed by terms negotiated between the individual parties involved. A leader is an *employee* in the other class of engagements—those of one week or more—and thus is governed by the preexisting collective-bargaining agreements. In these latter instances, the "fixing of prices" is, according to the court, not an antitrust violation, because it then becomes in reality the fixing of wages.

At this point, it must be asked whether the difference here considered "essential"—leaders as employees and leaders as employers—goes to the essence of whether the union's objective is "intimately related" to wages, hours, and working conditions and of "immediate and direct" concern to the unions. For "intimate relation" and "immediate and direct" concern were the touchstones of Mr. Justice White's test of mandatory bargaining subjects as expressed in his opinion for the Court in *Jewel Tea*.²⁹ And it was this opinion upon which the *Carroll* court relied most heavily. The court's response to this question was that

arguments that musicians are interested in the prices charged by their employers [orchestra leaders], because they form the boundary of the wages they can expect to receive is not persuasive because it would justify an invasion of the proper function of management, which, with few exceptions, would go beyond any balancing of the labor and anti-trust laws and effect a complete paralyzation. . . . The same principle would support union-instigated price-fixing in any industry.³⁰

It is submitted, first, that, as the dissent and the trial judge would have it, the orchestra business is *sui generis*; it can readily be distinguished from almost any industry. Second, and more important, it is submitted that Mr. Justice Goldberg's argument that

²⁷ Id. at 165, 64 L.R.R.M. at 2284.

²⁸ Id. at 158, 64 L.R.R.M. at 2278.

²⁹ 381 U.S. at 689, 691.

³⁰ 372 F.2d at 165, 64 L.R.R.M. at 2284.

to believe that labor union interests may not properly extend beyond mere direct job and wage competition is to ignore not only economic and social realities so obvious as not to need mention, but also the graphic lessons of labor union history³¹

is applicable in this case and would surely be the prevailing opinion should this decision be appealed to the Supreme Court.³²

As a decision construing *Jewel Tea, Carroll* is important for two reasons: (1) it considers the union antitrust exemption coextensive with the subjects of mandatory bargaining; and (2) it points out that six of the justices in *Jewel Tea* are in essential agreement on "(1)."³³ According to the *Carroll* court, the apparent dichotomy of opinion among the six is due to their differing interpretations of the breadth of the matters subject to mandatory bargaining.³⁴ Whether or not the *Carroll* court has correctly construed the concurring opinions in *Jewel Tea* as essentially agreeing on (1) above, the correctness of (1) itself seems indubitable. As the court so convincingly put it,

the national labor policy demands that the parties be permitted freely to reach agreement on terms and conditions directly affecting the working man. . . . Indeed, neither management nor labor could refuse to bargain about such subjects. National Labor Relations Act §§ 8(a)(5), (b)(3), (d). . . .³⁵

While the *Pennington* Court ruminated on the legality of inter-bargaining-unit agreements on wages, the *Jewel Tea* Court pondered the proper scope of mandatory bargaining vis-à-vis the antitrust laws. Conceptually, these two areas may be categorized under the heading of "the proper scope of labor-oriented economic restraint," to wit, the legitimate self-interest of employees according to the preamble of the LMRA.³⁶ And it is this area which is the heart of the labor-antitrust conflict. To an extent, *Jewel Tea* and *Pennington* did make conceptual clarifications of the proper legal approach a court should take in a labor antitrust case, although the clarity was marred by the number of opinions issuing in the two Supreme Court decisions.

It remained for the lower courts to demonstrate how concrete facts would be fitted into the conceptual framework of these Supreme Court opinions. For without such a demonstration, employers and unions cannot sit at the bargaining table without the specter of *Jewel Tea* and *Pennington*

³¹ 381 U.S. at 728.

³² For an example of this type of reasoning in a different but related labor problem, secondary activity of unions, see *National Woodwork Mfrs. Ass'n v. NLRB*, 35 U.S.L. Week 4349 (U.S. April 17, 1967).

³³ These are Justices Brennan, Goldberg, Harlan, Stewart, Warren, and White.

³⁴ For a discussion of the divergence of interpretations in *Jewel Tea* on the co-extensiveness of the antitrust exemption and subjects of mandatory bargaining, see Handler, *supra* note 4, at 831; Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. Chi. L. Rev. 659, 724 (1965); 1965-1966 Annual Survey, *supra* note 1, at 960.

³⁵ 372 F.2d at 165, 64 L.R.R.M. at 2284.

³⁶ LMRA § 1, 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1964).

lurking overhead. The lower courts in *Pennington* and *Carroll* did apply the Supreme Court opinions to new and concrete facts—flesh was added to the precedential skeleton. Yet each of these cases is unique by its facts, so that they seem of dubious value to the employer or union in a different industry. It is submitted, however, that labor-antitrust cases will *always* be unique in their facts, and that what is to be garnered from these cases must be done by analogy. Quite certainly, the *Pennington* district court opinion teaches that there must be “clear proof” of “predatory intent” before an antitrust violation will be sustained. *Carroll* does not result in as clear a rubric; yet from the opinion can be distilled the precept that price fixing by a labor union will be considered a per se antitrust violation. It still remains unclear, however, precisely what distinguishes price fixing from wage fixing, and this is the problem in the first instance.

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