

STUDENT COMMENTS

1965-1966 ANNUAL SURVEY OF LABOR RELATIONS LAW

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I. INTRODUCTION

This comment is the fifth in a series of annual efforts by the Law Review to capsule the year's developments in federal labor relations law.¹ The object of this comment is to report those decisions which significantly depart from, or which add substance to, prior policy in the application of the Labor Management Relations Act, and to discuss in detail those which the writers believe to be the most significant. The subject matter comprises, for the most part, deci-

¹ The prior comments are: 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).

sions of the United States Supreme Court,² the lower federal courts, and the National Labor Relations Board, reported during the Survey year ending March 15, 1966.

II. JURISDICTION: BOARD PRE-EMPTION OF STATE LIBEL SUITS

Two recent Supreme Court decisions¹ in the field of labor relations appear at first glance to deal a serious blow to union organizational methods. However, upon closer inspection, they actually effectuate but a slight change in the status quo.

In *United Steelworkers v. R.H. Bouligny, Inc.*,² a union sought to remove a libel action commenced in a state court to the federal district court.³ Although at the circuit court level the union based its removal right on two premises, diversity jurisdiction and federal question jurisdiction, only the former basis of jurisdiction was raised in the Supreme Court.⁴ In affirming the circuit court, the Court found that the union, an unincorporated association,⁵ has citizenship in the state of each of its members. The Court admitted the union's arguments in favor of diversity jurisdiction were compelling but, citing *Chapman v. Barney*,⁶ advised the union to address its arguments to the Congress. The decision merely continues traditional court practices, reaffirming the traditional view that unincorporated associations are citizens of the state of citizenship of each member.⁷

But even if unions were still foreclosed from using the fact of diversity to obtain removal to a federal court, could they not use the *San Diego Bldg. Trades Council v. Garmon*⁸ pre-emption doctrine to preclude state court jurisdiction over libel suits arising out of organizational activity? In *Linn*

² It is interesting to note that, after its productive term in 1964-1965, the Supreme Court has ruled on relatively few substantial labor law questions during this Survey year.

¹ *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965).

² *Ibid.*

³ The federal district court allowed the removal on the ground that unions should be treated as corporations for diversity jurisdiction. *Id.* at 146. The circuit court reversed the district court on this issue. *R. H. Bouligny, Inc. v. United Steelworkers*, 336 F.2d 160 (4th Cir. 1964).

⁴ The Supreme Court found no merit in the union's request for remand on the basis of Board pre-emption of state libel suits. 382 U.S. at 147 n.2, citing *Linn v. United Plant Guard Workers*, 337 F.2d 68 (6th Cir. 1964).

⁵ The majority of the unions in the country are unincorporated associations. See S. Rep. No. 105, 80th Cong., 1st Sess. 15-17 (1947).

⁶ 129 U.S. 677, 682 (1889). Here a joint stock company sought federal diversity jurisdiction on the ground that it was a citizen of New York. The Court stated that even though the company was organized under the laws of New York, it is not a citizen since the statutes only make corporations citizens.

⁷ The union contended that it was a citizen of Pennsylvania, where it maintained its headquarters and principal place of business. The circuit court noted that the Supreme Court has held that unincorporated associations are citizens of the state of citizenship of each member and, therefore, since members of the union were situated in the forum state, there was no diversity. *R. H. Bouligny, Inc. v. United Steelworkers*, *supra* note 3, at 161.

⁸ 379 U.S. 650 (1965).

v. Local 114, United Plant Guard Workers,⁹ the Supreme Court answered this question: the Court held that where either party in a labor dispute circulates false and defamatory statements during an organizational campaign, a state court has jurisdiction, and state remedies will be applied if the complainant pleads and proves that the statements were made with malice and caused injury. The Court reasoned that the state's right to protect its citizens against defamation was paramount to the federal interest in uniform labor regulation. However, since the case was arguably subject to section 7 or section 8 of the LMRA, and therefore arguably within the exclusive jurisdiction of the Board, the Court looked to the exceptions to the *Garmon* rule.¹⁰

In considering the first exception to *Garmon*, the Court, relying on past Board decisions,¹¹ found that libel during organizational campaigns was only "a peripheral concern of the LMRA." The Court pointed out that the Board was concerned only with the effects of a statement on an election and, in fact, had stated that a party might lose its rights under the act with a statement that was deliberately malicious.¹²

In examining the second exception to *Garmon*, the Court also found that this was the type of situation in which there exists an overriding state interest which is "deeply rooted in local feeling and responsibility,"¹³ namely, the state's concern in protecting its residents from malicious libels.¹⁴ However, to prevent the possible abuse of this right to state action, the Court limited state jurisdiction to those cases in which both malice and harm can be shown.

Mr. Justice Black dissented on the grounds that the present decision would stifle free discussion and would encourage libel suits with their irritating and dispute-prolonging tendencies.¹⁵ Mr. Justice Fortas, also dissenting, felt that the majority opinion was an uncalled for exception to *Garmon* since, in the past, only violence or intimidation had excepted activity from the *Garmon* rule.¹⁶ Thus, absent the compelling state interest to prevent

⁹ Supra note 1, at 662.

¹⁰ Any activity which is arguably subject to §§ 7 and 8 of the LMRA is within the exclusive jurisdiction of the Board except (1) where the activity regulated is a peripheral concern of the LMRA or (2) where the regulated conduct touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress deprived the states of the power to act. *San Diego Bldg. Trades Council v. Garmon*, supra note 8, at 243-44.

¹¹ *Bettcher Mfg. Corp.*, 76 N.L.R.B. 526, 21 L.R.R.M. 1222 (1948); *Atlantic Towing Co.*, 75 N.L.R.B. 1169, 21 L.R.R.M. 1128 (1948).

¹² 383 U.S. at 61.

¹³ Id. at 62.

¹⁴ The Court analogized the present case to *UAW v. Russell*, 356 U.S. 634 (1958) (state may entertain a compensatory and punitive damage action by an employee for interference with his lawful occupation), and *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (state may enjoin union threats of violence which force employer to close his business).

¹⁵ 383 U.S. at 67. However, disputants now enjoy the same privilege that a newspaper enjoys; the argument that this will stifle free discussion and bring about a flood of litigation is contradicted by the experience of our newspapers. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁶ 383 U.S. at 69.

violence, libel does not differ substantially from illegal picketing—which states are unable to prevent even to protect a party's economic well-being. Justice Fortas further argued that, because of the subjective nature of "malice," the outcome would depend less on the familiarity of the jury with the customary labor rhetoric and more on the local community attitudes toward unionization.

What the majority have done in *Linn* is merely to turn the unqualified privilege for labor-management epithets into a qualified one. It has furnished an admonition to both union and management that there is no longer a need for the past practices of the organization campaigns, that it is time that both sides curtail the proliferation of unnecessary invectives and assume more responsible attitudes in their dealings. The question is simply whether, in an organizational campaign, the parties should be allowed to make false statements with impunity—either with knowledge of their falsity or with reckless disregard thereof—where such statements cause harm and when the harm can be redressed in a state court without any impingement on the Board's authority. The Court has answered firmly—no!

III. ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS UNDER SECTION 301

Section 301(a) of the LMRA¹ provides a mandate for the courts to establish a uniform body of federal substantive law based on federal labor policies.² This uniformity is to be achieved by applying section 301 law to all suits involving violations of collective bargaining agreements, whether brought in state or federal courts.³ In determining the developments and changes in section 301 law, it is necessary to cover five areas of collective bargaining agreement enforcement; arbitration agreements in collective bargaining agreements, individual rights under collective bargaining agreements, enforcement of collective bargaining agreements' no-strike clauses, exemplary damages in a section 301 action and timeliness of section 301 actions.

A. Arbitration

Duty to Arbitrate.—The Supreme Court has placed great emphasis on the use of arbitration in the enforcement of collective bargaining agreements.⁴ The guidelines for determining when a dispute is arbitrable were set out in

¹ 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964):

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.

² *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

³ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). See also *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

⁴ *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960): "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreements."

the *Steelworkers Trilogy*.⁵ In *United Steelworkers v. American Mfg. Co.*,⁶ the union claimed that the employer violated the arbitration clause, a standard arbitration clause with no exclusion clause.⁷ The Court held that whether the company violated the clause was the arbitrator's function—that the court's only function in a case where all questions are to be submitted to the arbitrator is to ascertain whether the party seeking arbitration is making a claim which on its face is governed by the contract; that is, have the parties agreed to arbitrate?

In *United Steelworkers v. Warrior & Gulf Nav. Co.*,⁸ there was not only a broad arbitration clause, but also an exclusion clause. The Court concluded that such an arbitration clause encompassed the whole employment relationship and therefore that the parties had agreed to arbitrate all differences between them, except those specifically excluded. The Court further stated that the collective bargaining agreement encompasses more than matters which appear on its face, in that it is also a guideline for solving unforeseeable problems which may arise in the future.⁹ Wherever such a broad arbitration clause is present,¹⁰ only the most forceful evidence of purpose to exclude a particular grievance from arbitration can prevent arbitration.

*United Steelworkers v. Enterprise Wheel & Car Corp.*¹¹ deals with the ability of the courts to review arbitrators' decisions. The majority of the cases during the Survey year have generally followed the Supreme Court's standards on the issue of arbitrability.¹² However, two recent Second Circuit cases seem out of line. In *Strauss v. Silvercup Bakers, Inc.*,¹³ there was a dispute between the company and the union as to whether cutting down the work week was a change in delivery methods. The collective bargaining agreement provided for arbitration of "all disputes"¹⁴ between the parties. The exclusionary clause excepted disputes concerning delivery methods. The district court,¹⁵ citing *Warrior*, held that since the exclusionary clause was vague

⁵ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

⁶ *Ibid.*

⁷ The standard form for an arbitration clause provides for "arbitration of . . . all disputes between the parties 'as to the meaning, interpretation and application of the provisions of this agreement.'" See *Id.* at 565.

⁸ *Supra* note 5.

⁹ This is so because "[a collective bargaining agreement] is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate." *Id.* at 578.

¹⁰ "[P]articularly where, as here, . . . the arbitration clause [is] quite broad." *Id.* at 585. The clause read: "Should differences arise between the Company and the Union . . . as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise. . . ." *Id.* at 576.

¹¹ *Supra* note 5.

¹² See, e.g., *Camden Indus. Co. v. United Bhd. of Carpenters*, 353 F.2d 178 (1st Cir. 1965); *Communication Workers v. Bell Tel. Lab. Inc.*, 349 F.2d 398 (3d Cir. 1965); *Association of Industrial Scientists v. Shell Dev. Co.*, 348 F.2d 385 (9th Cir. 1965); *Los Angeles Paper Bag Co. v. Printing Specialties Union*, 345 F.2d 757 (9th Cir. 1965).

¹³ 353 F.2d 555 (2d Cir. 1965).

¹⁴ In line with the Supreme Court's holding in *United Steelworkers v. Warrior & Gulf Nav. Co.*, *supra* note 5, at 585, this would be construed as a broad arbitration clause.

¹⁵ *Silvercup Bakers, Inc. v. Strauss*, 245 F. Supp. 199 (E.D.N.Y. 1965).

and the arbitration clause was broad there should be arbitration. The Second Circuit reversed, basing its decision on the fact that there cannot be arbitration unless there is first an agreement to arbitrate.¹⁶ Therefore, the district court should have looked at the bargaining history to determine with "positive assurance"¹⁷ whether the parties intended the dispute to be covered by the exclusionary clause.¹⁸ The inquiry is, however, to be limited to the duty to arbitrate.

Thus the Second Circuit, on facts very similar to those in *Warrior*, is requiring the district court to perform a function which was prohibited by *Warrior*.¹⁹ In *Warrior*, the Supreme Court did not feel it was up to the courts to look at the bargaining history to see if the parties intended subcontracting to be included in the exclusionary clause, but left such decisions to the arbitrator. Yet, in *Strauss*, the circuit court is ordering the district court, contrary to the rule of *Warrior*, to become entangled in the construction of the substantive provisions of the collective bargaining agreement through the back door of interpreting the arbitration clause.²⁰

In both cases there was a dispute as to whether a certain act of management was intended to be excluded from arbitration: in *Strauss*, the dispute was whether the cut in a work week is a change in delivery methods, in *Warrior*, the dispute was whether subcontracting was a management function. The district court's function is not to say with "positive assurance" that a change in the work week is within the exclusionary clause as required by the Second Circuit in this case,²¹ but to be able to say with positive assurance that the "arbitration clause is not susceptible of an interpretation that covers

¹⁶ Under the broad arbitration clause, the agreement is presumed unless specifically shown to be excluded. *United Steelworkers v. Warrior & Gulf Nav. Co.*, supra note 5, at 585. The court, however, felt that

the juxtaposition of an "all disputes" clause . . . with a clause excluding certain disputes from arbitration suggests that the parties intended to have questions concerning the scope of the exclusion decided in the first place not by the arbitrator, but in the courts.

353 F.2d at 557.

¹⁷ Id. at 558.

¹⁸ There is a conflict in the courts over whether there can be an inquiry into the bargaining history to see if the parties intended to exclude the dispute from arbitration. See *A.S. Abell Co. v. Baltimore Typographical Union*, 338 F.2d 190 (4th Cir. 1964); *Independent Petroleum Workers v. American Oil Co.*, 324 F.2d 903 (7th Cir. 1964), *aff'd per curiam*, 379 U.S. 130 (1964); *Pacific Northwest Bell Tel. Co. v. Communication Workers*, 310 F.2d 244 (9th Cir. 1962).

¹⁹ In *Warrior*, there was a dispute over whether the subcontracting was a strict function of management; here, the dispute is over whether a change in the work week is a change in delivery methods.

²⁰ See *United Steelworkers v. Warrior & Gulf Nav. Co.*, supra note 5, at 585.

²¹ In a seemingly contrary opinion, the Second Circuit, in *International Union of Elec. Workers v. General Elec. Co.*, supra note 18, at 488, stated that, under a broad arbitration clause,

unless the provisions of the collective bargaining agreement concerning . . . arbitration contain some clear and unambiguous clause of exclusion, or there is some other term of the agreement that indicates beyond peradventure of doubt that a grievance concerning a particular matter is not intended to be covered by the grievance and arbitration procedure set forth in the agreement . . .

there must be arbitration.

the asserted dispute."²² Here, where there is doubt, the court should resolve this in favor of arbitration coverage and avoid the inquiry into the specific provisions of the collective bargaining agreement.²³

The other Second Circuit case is also contrary to *Warrior*, but for a different reason. In *Torrington Co. v. Metal Prods. Workers*,²⁴ the collective bargaining agreement provided that arbitration could be required for a grievance with respect to "interpretation or application of any of the provisions of this agreement. . . ."²⁵ The dispute between the company and the union was over whether the recall of strikers was included in the collective bargaining agreement. Although there was no mention of recall in the collective bargaining agreement, the union contended that an oral agreement subsequent to the collective bargaining agreement included recall within the agreement. The district court,²⁶ unable to find any forceful evidence to exclude recall from arbitration, submitted the dispute to arbitration. In so deciding, the district court specifically refused to look at the bargaining history.

The circuit court reversed, because recall was not in the collective bargaining agreement and arbitration can only be compelled where the grievance concerns the interpretation and application of the collective bargaining agreement. Therefore, the district court should have looked at the bargaining history to see if the union and employer agreed that recall would be subject to bargaining.

The circuit court did not consider the collective bargaining agreement in the *Warrior* perspective, as encompassing the whole employment relationship, but limited its analysis to the face of the agreement. Therefore, it follows that "application and interpretation of the agreement" does not mean the written agreement per se, but all disputes in the parties' relationship. A broad arbitration clause,²⁷ as here, means the parties have agreed to submit all disputes except those specifically excluded. This decision seems contrary to *Warrior*, which considers a broad arbitration clause as creating a presumption that all disputes in any way concerned with the employment relationship are to be arbitrated; the presumption can be rebutted only by an express provision which shows the most forceful evidence of a purpose to exclude the claim.²⁸

Procedural Arbitrability.—The *Trilogy* decisions were directed only to the court's power to consider substantive provisions of a collective bargaining agreement where there was an arbitration agreement. In *John Wiley & Sons*,

²² *United Steelworkers v. Warrior & Gulf Nav. Co.*, supra note 5, at 582-83.

²³ "Doubts should be resolved in favor of coverage." *Id.* at 583.

²⁴ 347 F.2d 93 (2d Cir. 1965), cert. denied, 382 U.S. 940 (1965).

²⁵ *Id.* at 94.

²⁶ *Torrington Co. v. Metal Prods. Workers*, 237 F. Supp. 139 (D. Conn. 1965).

²⁷ A Third Circuit case, *Boeing Co. v. International Union, UAW*, 349 F.2d 412 (3d Cir. 1965), is quite similar to the *Torrington* case. However, in *Boeing*, the collective bargaining agreement provided that arbitration could come about only on the interpretation and application of the *specific* provisions of the agreement. The court found that a question outside the specific provisions was not arbitrable. This appears to be in line with the *Warrior* decision, since the word "specific" would negate the broadness of the collective bargaining agreement.

²⁸ *United Steelworkers v. Warrior & Gulf Nav. Co.*, supra note 5, at 585.

Inc. v. Livingston,²⁹ the Supreme Court extended the *Trilogy* rationale to prohibit courts from interpreting the procedural provisions of the collective bargaining agreement.³⁰ The Court rejected the employer's argument that the union had waived its right to arbitrate an issue by failing to observe the grievance procedure set out in the collective bargaining agreement and held that, once it is determined that the parties have agreed to submit the subject matter of a dispute to arbitration, the procedural questions which grow out of the dispute and bear on its final disposition should also be left to the arbitrator.³¹

In *Kennecott Copper Corp. v. IBEW*,³² the grievance procedure in the collective bargaining agreement set up a certain time within which the employer would have to answer a written grievance of the union. The employer failed to do this and admitted the failure. The union contended that the failure to answer automatically gave it the remedy it sought; the employer denied this and sought arbitration. The court refused to allow arbitration on the ground that the collective bargaining grievance procedure provided no processing after forfeiture and, therefore, the employer could not have arbitration. A second case, *Local 51, IBEW v. Illinois Power Co.*,³³ overturned the district court's holding that the *Wiley* case prevented it from determining whether the time factor was significant. The circuit court stated that nothing in *Wiley* prevents a court from determining whether a violation of the procedural steps leading to arbitration waives the right to arbitrate. The court then interpreted *Wiley* to say that a union could abandon its right to have its claim arbitrated by failing to comply properly with the procedural requirements of the collective bargaining agreement.³⁴

Both of these cases seem contrary to the rationale in *Wiley*; both courts have sought to determine whether or not the violation of the procedural provision of the collective bargaining agreement barred arbitration—a matter which *Wiley* requires to be left to the arbitrator.

²⁹ 376 U.S. 543 (1964). Before this decision, the courts divided over the question of who should determine the procedural questions. Cases favoring the arbitrator: *Deaton Truck Line, Inc. v. Local 612, Teamsters Union*, 314 F.2d 418 (5th Cir. 1962); *Local 748, IUE v. Jefferson City Cabinet Co.*, 314 F.2d 192 (6th Cir. 1963); *Radio Corp. of America v. Association of Professional Eng'rs*, 291 F.2d 105 (3d Cir. 1961); *International Tel. & Tel. Corp. v. Local 400, IUE*, 286 F.2d 329 (3d Cir. 1961). Cases favoring the court: *International Ass'n of Machinists v. Hayes Corp.*, 296 F.2d 238 (5th Cir. 1961); *Southwestern Elec. Power Co. v. Local 738, IBEW*, 293 F.2d 929 (5th Cir. 1961); *IBEW v. Westinghouse Elec. Corp.*, 198 F. Supp. 817 (E.D. Pa. 1961).

³⁰ There were two issues actually before the Court in *Wiley*. The first dealt with a successor employer's duty to arbitrate. See p. 919 *infra*. The second issue—the one pertinent to our present discussion—concerned the ability of a court to look at procedural questions. On the first issue, the Court stated that if a union failed to make its claim known, it could lose its right to arbitrate with the successor employer. It is important to note that the abandonment of the right refers only to the "successor employer" question and not to the question of procedural arbitrability.

³¹ 376 U.S. at 557-58.

³² 339 F.2d 343 (10th Cir. 1964).

³³ 61 L.R.R.M. 2084 (7th Cir. 1965).

³⁴ As pointed out, *supra* note 30, to read *Wiley* as permitting the courts to look at the timeliness of filing arbitration was a misuse of the Supreme Court's language on the issue of successor employers.

In *Rochester Tel. Corp. v. Communications Workers*,³⁵ the Second Circuit refused to consider the timeliness issue. The employer contended that the procedural questions involved did not grow out of the dispute. The court dismissed the contention: "We do not . . . read . . . *Wiley* to say that procedural defenses fall to the arbitrator only if factually related to the merits of the dispute."³⁶

The question of whether an issue is arbitrable has been settled by the Supreme Court to a large extent. However, in spite of Congress' and the Court's favoring of arbitration as a method of settling disputes, some lower courts still deny this remedy where it seems applicable. The courts should bear in mind that the arbitration of grievance is a major factor in achieving industrial peace so that in cases of doubt, arbitration should be ordered.³⁷

Staying of Section 301 Actions Pending Arbitration.—The issue whether a section 301 action can be stayed pending arbitration was settled in *Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers*.³⁸ The Supreme Court held that a section 301 suit should be stayed in the face of an agreement to arbitrate.³⁹ The Court stated that it "could enforce both the no-strike clause and the agreement to arbitrate by granting a stay until the claim for damages is arbitrated."⁴⁰ The Court also stated that since the parties had agreed to arbitrate "all disputes," they must necessarily arbitrate the damage issue. Finally, the Court noted that the duty to arbitrate could possibly be renounced by the union under certain circumstances, such as when it strikes in violation of a no-strike clause.⁴¹

The Court extended *Drake* in *Local 721, United Packinghouse Workers v. Needham Packing Co.*,⁴² again staying a section 301 suit, although the duty to arbitrate went only to the discharge grievance and not to the damages. Finally, in *Atkinson v. Sinclair Ref. Co.*,⁴³ the Court held that, before a stay could be granted, it must be shown that the party against whom the stay is sought has the right to bring arbitration proceedings. Unless it is affirmatively shown that the party is excluded, a stay will be granted.

The majority of the cases in this area have applied these criteria without difficulty.⁴⁴ Some courts have also added to the decisions. For example,

³⁵ 340 F.2d 237 (2d Cir. 1965).

³⁶ *Id.* at 239. For an extensive review of the *Wiley* decision's applicability to procedural arbitrability, see *In re Long Island Lumber Co.*, 15 N.Y.2d 380, 207 N.E.2d 380 (1965).

³⁷ *United Steelworkers v. Warrior & Gulf Nav. Co.*, *supra* note 5.

³⁸ 370 U.S. 254 (1962).

³⁹ There was a very broad arbitration clause which provided that:

The parties agree that they will promptly attempt to adjudge all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

Id. at 257 n.2. The grievance procedure climaxed with arbitration.

⁴⁰ *Id.* at 264.

⁴¹ *Id.* at 263. The Court gives an example of what could constitute a repudiation.

Id. at 263 n.10.

⁴² 376 U.S. 247 (1964).

⁴³ 370 U.S. 238 (1962).

⁴⁴ *Pietro Scalzitti Co. v. International Union of Operating Eng'rs*, 351 F.2d 576 (7th

in *Boeing Co. v. International Union, UAW*,⁴⁵ where, unlike *Atkinson*, the employer was not specifically precluded from arbitration, but the arbitration procedure was not open to him, the court, following *Atkinson*, refused stay of a section 301 action. In *Local 595, Int'l Ass'n of Machinists v. Howe Sound Co.*,⁴⁶ the court held that where an employer did not move in the lower court to stay the action, but only moved for a dismissal and summary judgment, the court should have stayed the action pending arbitration since this is basic to the employer's defense. And, finally, in *Trailways v. Amalgamated Ass'n of Street Employees*,⁴⁷ the union struck and the employer informed the union that he was rescinding the collective bargaining agreement; the court held that such an arguable section 8(d) violation would not release the employer from his duty to arbitrate.

Review of Arbitrator's Decision.—In *United Steelworkers v. Enterprise Wheel & Car Corp.*,⁴⁸ the third case in the *Steelworkers Trilogy*, the issue was the reviewability of arbitrators' decisions. The Court stated that the courts as a rule, should avoid reviewing the arbitrator's award if he confined himself to the construction of the collective bargaining agreement. The arbitrator, the Court stated, may draw guidance from many sources,⁴⁹ but must draw his award from the essence of the collective bargaining agreement and the evidence submitted to him.

In *International Ass'n of Machinists v. Jeffrey Galion Mfg. Co.*,⁵⁰ the Sixth Circuit found that the arbitrator exceeded his authority by deciding the award on contract provisions not before him. Here, the arbitrator had found that the governing provision of the collective bargaining agreement was not applicable to the claimed grievance and, therefore, that the company had not violated the agreement. However, he thereupon made an award against the company, basing his decision on matters not submitted to him. The court held that since the company had not violated the contract provisions which brought about the arbitration, the arbitrator's award was in excess of his authority.⁵¹

In *Torrington Co. v. Metal Prods. Workers*,⁵² the arbitrator found that the practice of allowing employees time off for voting was a firmly established practice—an implied part of the employment contract—and hence, since the

Cir. 1965). The Court stated that a dispute over the interpretation of the contract must be suspended pending arbitration. See also *East Shore Newspapers, Inc. v. St. Louis Stereotypers Union*, 59 L.R.R.M. 2494 (E.D. Ill. 1965); *Franchi Constr. Co. v. Local 560, Int'l Hod Carriers Union*, 248 F. Supp. 134 (D. Mass. 1965); *Los Angeles Paper Bag Co. v. Printing Specialties Union*, supra note 12.

⁴⁵ Supra note 27.

⁴⁶ 350 F.2d 508 (3d Cir. 1965).

⁴⁷ 343 F.2d 815 (1st Cir. 1965).

⁴⁸ Supra note 5.

⁴⁹ Id. at 597 (e.g., bargaining history and prior procedures in the industry).

⁵⁰ 350 F.2d 512 (6th Cir. 1965).

⁵¹ If an arbitrator were allowed to decide more than the issue which was submitted to him, this would open the proverbial Pandora's box. A party, by filing and following one grievance to arbitration, would then be able to present innumerable other grievances which would hinder the effectiveness of the arbitration process. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, supra note 5, at 597.

⁵² 237 F. Supp. 139 (D. Conn. 1965).

collective bargaining agreement did not state the practice was to be discontinued, it was still within the collective bargaining agreement. The court disagreed.⁵³ The court said that to allow the arbitrator to read into the contract an implied contractual relationship which has been bargained over but not included in the contract would be permitting arbitrators an unlimited rein to go outside the collective bargaining agreement and impose their own brand of industrial justice.⁵⁴ In so holding, the court apparently disregarded the *Steelworkers Trilogy*. Since both parties agreed that the issue was arbitrable, the dispute was whether the arbitrator had exceeded his authority, as established in the collective bargaining agreement.⁵⁵ The collective bargaining agreement bound the arbitrator to the terms of the agreement with no power to add to, delete from, or modify it in any way. However, the agreement is not merely the document itself but is a generalized code to govern the relationships of the parties.⁵⁶ Everything within this relationship is arbitrable except matters specifically excluded. In this case it seems that it was possible for the arbitrator to construe the employment relationship in such a manner so as to say that the parties are required to bargain over the dispute, despite the fact no mention of the issue is on the face of the agreement.

Finally, in *Kracoff v. Retail Clerks*,⁵⁷ the court determined that the misuse or abuse of power by the arbitrator was a violation of a collective bargaining agreement within the meaning of section 301. The court stated that although it could be argued that this abuse of power is not a violation of the contract by one of the parties thereto, it does in fact constitute a violation of the contract between employer and a labor organization within the meaning of the statute.⁵⁸ Further, section 301 does not state the violation of the contract must be by one of the parties, but merely confers jurisdiction when a contract "between employer and a labor organization"⁵⁹ is violated.

Successor Employer's Duty to Arbitrate.—In *Wiley*,⁶⁰ the Supreme Court was also concerned with the duty of a successor employer to arbitrate under the succeeded employer's collective bargaining agreement. The Court held that, under appropriate circumstances, that is, a substantial continuity of

⁵³ The court stated that labor contracts affirmatively recite the terms and conditions to which parties agree and not those which they have agreed to discontinue. The validity of this is subject to question. As *Warrior* pointed out, a collective bargaining agreement is a generalized code and thus would not contain all the matters the parties have agreed upon. Besides, it is likely that, if something is to be discontinued, a collective bargaining agreement would spell this out.

⁵⁴ 237 F. Supp. at 141.

⁵⁵ For a discussion of the arbitrator's authority, see *Carey v. General Elec. Co.*, 315 F.2d 499, 508 (2d Cir. 1963), cert. denied, 377 U.S. 908 (1964).

⁵⁶ *United Steelworkers v. Warrior & Gulf Nav. Co.*, supra note 5, at 578.

⁵⁷ 244 F. Supp. 38 (E.D. Pa. 1965).

⁵⁸ *Id.* at 41.

⁵⁹ *Ibid.* Even though the courts would have § 301 jurisdiction, a recent Sixth Circuit decision stated that, where an arbitrator violated the procedure set forth in the collective bargaining agreement, a court cannot proceed with the case and decide it on the merits, but must remand it to the arbitrator to proceed according to the contract. *Smith v. Union Carbide Corp.*, 350 F.2d 258 (6th Cir. 1965).

⁶⁰ *John Wiley & Sons, Inc. v. Livingston*, supra note 29.

identity and no abandonment of right to arbitrate by failing to make claims known,⁶¹ a successor employer would be bound to arbitrate with a union, even though not a party to the original contract.⁶²

In two recent decisions,⁶³ the *Wiley* holding has been extended to include successor employers where there has been a sale of assets⁶⁴ but no substitution of employees. In both, the sales agreement did not provide for the new employer's assuming the collective bargaining agreement of the old employer. However, both courts agreed that, under *Wiley*, the new employer had the duty to arbitrate.

A case which has undertaken an extensive analysis of the *Wiley* decision is *McGuire v. Humble Oil & Ref.*⁶⁵ Here the successor employer refused to arbitrate with the old union, Local 553, on the grounds that another union was now representing the employees of the old company and the NLRB had announced, under its unit clarification procedure, that Local 553 no longer represented these employees. The court found that the *Wiley* criteria are the similarity of the work performed by the employee, similarity of the employing industry and similarity in the employment relationship, which were all present in this case. The court discounted the physical location of the employer's industry and the fact that employees are now working out of different offices with different supervisors.⁶⁶

The obligation to arbitrate, the court noted, arose under the collective bargaining agreement between Local 553 and the old employer, and this obligation continues on to the new employer under these circumstances despite the fact there is another union, although the arbitrator should take into account the existence of the new union when forming a remedy. The court concluded that the arbitrator should take into account the provisions of and the practices under the old contract, under which the duty to arbitrate arose, and should also adjust the grievances in light of the changed circumstances created by the transfer of ownership.

This case, if it is followed as it should be, would lessen many of the disputes which arise in the sale of businesses under the above circumstances. It very clearly spells out the duties of the parties involved and gives to the arbitrator the authority which the Supreme Court has decided he holds.

One further case under this aspect of *Wiley* was a Board attempt to apply the *Wiley* criterion of substantive continuity of identity to a geographi-

⁶¹ *Id.* at 551. It is unclear whether a claim can be made after the merger. This, however, does not appear to be too important since a successor employer should be on notice of the existence of a collective bargaining agreement.

⁶² "The preference of national labor policy for arbitration . . . could be overcome only if other considerations compellingly so demanded." *Id.* at 549. The Court reiterated its earlier stand in *Warrior* that collective bargaining agreements call into existence a new common law which supersedes the traditional common law of contracts.

⁶³ *United Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891 (3d Cir. 1964); *Wackenhut Corp. v. International Union, United Plant Guard Workers*, 332 F.2d 954 (9th Cir. 1964).

⁶⁴ The fact situation in the *Wiley* case dealt with a successor employer resulting from a merger. The language of the Court is equally applicable to a successor employer resulting from a sale.

⁶⁵ 247 F. Supp. 113 (S.D.N.Y. 1965).

⁶⁶ *Id.* at 119.

cal shift, where there was no change of employer; this was reversed by the Supreme Court per curiam.⁶⁷

Arbitration After Expiration of Contract.—Arbitration will also be ordered by the courts after the contract in which the duty arose has expired. In *Local 595, Int'l Ass'n of Machinists v. Howe Sound Co.*,⁶⁸ the collective bargaining agreement had expired one day before the company closed its plant. Neither party had requested the arbitration before the collective bargaining agreement expired. The court held that since the union was now seeking a claim based on the expired agreement, it must proceed to arbitration even though the claim was not raised until after the expiration of the agreement.

In *International Tel. & Tel. Corp. v. Local 400, IUE*,⁶⁹ the court ordered arbitration where a union was in the process of being decertified, holding that rights which arose under the collective bargaining agreement would not fail with the decertification of the union. This appears to be the present trend. If rights arise under the collective bargaining agreement and there is an arbitration clause in the collective bargaining agreement, then the courts will order arbitration even if the collective bargaining agreement has expired and another union now represents the employees.⁷⁰

Board Interpretation of Collective Bargaining Agreements.—Two recent circuit court cases, both of which have been granted certiorari, have confronted the problem of the Board's ability to find an unfair labor practice when this finding depends upon interpretation of a collective bargaining agreement.

In *NLRB v. C & C Plywood Corp.*,⁷¹ the employer contended that the collective bargaining agreement gave him the right to institute a wage incentive plan and that the union had waived its right to bargain over this. The union denied this and filed a section 8(a)(5) unfair labor practice.⁷² The Board found that the employer had committed an unfair labor practice by instituting a wage incentive plan without consulting the union, which was an invasion of the union's statutory right to bargain about changes in terms and conditions of employment.⁷³

The Ninth Circuit Court held that the Board had exceeded its powers since the resolution of this dispute depended upon interpretation of the collective bargaining agreement. The employer's act would be an unfair labor practice, the court stated, if there were no collective bargaining agreement;

⁶⁷ *Piano Workers v. W.W. Kimball Co.*, 333 F.2d 761 (7th Cir. 1964), rev'd per curiam, 379 U.S. 357 (1964).

⁶⁸ Supra note 46.

⁶⁹ 248 F. Supp. 949 (D.N.J. 1965).

⁷⁰ See *McGuire v. Humble Oil & Ref.*, supra note 65.

⁷¹ 351 F.2d 224 (9th Cir. 1965), cert. granted, 34 U.S.L. Week 3353 (U.S. April 19, 1966) (No. 884). This case is scheduled for argument immediately following *Acme Ind. Co. v. NLRB*, 351 F.2d 258 (7th Cir. 1965), cert. granted, 86 Sup. Ct. 893 (1966). See 34 U.S.L. Week 3356.

⁷² Section 8(a)(5) states: "It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees. . . ." 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964).

⁷³ *C & C Plywood Corp.*, 148 N.L.R.B. 414, 57 L.R.R.M. 1015 (1964).

but here the agreement may have sanctioned the employer's action.⁷⁴ Therefore, before an unfair labor practice can be found, the Board had to decide that the contract did not preclude the union from protesting the employer's unilateral change in wages, and to do this the Board had to interpret the collective bargaining agreement, which is outside its jurisdiction.

In *Acme Ind. Co. v. NLRB*,⁷⁵ the union sought information relative to the removal of machinery from the employer's plant in order to decide whether it could complain under two clauses in the collective bargaining agreement: work transfer and subcontracting. The company refused to provide this information. The union filed grievances relating to the removal and, while these were pending, filed an 8(a)(5) unfair labor practice based on the employer's refusal to supply information which the union alleged it needed to process its grievances intelligently. The trial examiner dismissed the complaint on the basis that the dispute relates to a matter covered by the contract and therefore should be resolved through the arbitration procedure in the contract.⁷⁶

The Board found that the contract contained no clause specifically dealing with the duty to furnish information on matters relevant to the processing of grievances or any clause by which the union waived its statutory right to such information. Therefore, there was no arbitration procedure through which the union could have the information. The Board then found that the information sought was relevant to a grievance under the contract and therefore was necessary for the union to perform its function as the employee's representative, to present grievances effectively and intelligently.⁷⁷ In reversing the Board, the Seventh Circuit held:

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.⁷⁸

In *Acme*, the Board stated that under section 8(a)(5) the union is entitled to all information relevant to its effective duty as a bargaining

⁷⁴ The court stated that if "the disputed provisions of the collective-bargaining agreement do not more than affirmatively *prohibit* conduct already defined and forbidden by the Act as an unfair labor practice, the Board can never be ousted of jurisdiction . . ." (i.e., the parties cannot oust the Board of jurisdiction by parroting the LMRA). But where "the parties have arguably agreed affirmatively to permit conduct which, sans contract, the Act would admittedly condemn as an unfair labor practice," the question of whether the contract provisions sanction the action is "a matter for arbitration," (i.e., the parties may waive their statutory rights). 351 F.2d at 227.

⁷⁵ *Supra* note 71.

⁷⁶ *Acme Ind. Co.*, Trial Examiner Decision No. TDX-504-64, Case No. 13-CA-6396 (1964).

⁷⁷ *Acme Ind. Co.*, 150 N.L.R.B. No. 144, 58 L.R.R.M. 1277 (1965).

⁷⁸ 351 F.2d at 261.

representative. There can be no doubt that this is correct and applies regardless of the fact that the information sought is not wage and related data.⁷⁰

The only situation where a union would not be entitled to this information from the Board would be where, as stated in *Curtiss-Wright Corp. v. NLRB*,⁸⁰ the collective bargaining agreement clearly indicated that demands for information must be made through the grievance procedure and the collective bargaining agreement had a broad disclosure clause which would allow the arbitrator to order the employer to furnish the information. Here, also, the mandatory-nonmandatory dichotomy is irrelevant. Under either, the union has waived its right to receive this information in any manner outside the arbitration procedure.

The first problem in *Acme*, therefore, is whether the union can obtain the information through the grievance machinery. If the agreement clearly provides for this, then the Board has no jurisdiction and the arbitrator must order the information furnished. If the contract does not clearly provide for this, it is doubtful that the union can receive the information from the arbitrator's order. The Board therefore held that, under the latter situation, it can look at the contract to determine if the information is available through the grievance machinery. If the Board does not find this broad disclosure clause, then it should be able to order the employer to furnish the information relevant to the union's duty to police the collective bargaining agreement. If the Board is lacking in this power, then the union would have a statutory right to the information without any means of obtaining the information.

Herein arises the second issue in *Acme*: How does the Board determine if the information sought is relevant to the union's duty as a bargaining representative? At this point in *Acme*, the mandatory-nonmandatory dichotomy arises. If the information sought relates to a mandatory subject, then clearly the Board can order the employer to furnish the information to the union, which has a statutory right to the information. The Board would not have to refer to the collective bargaining agreement to find that it is relevant to the union's duties in policing the collective bargaining agreement.

If the matter sought relates to a non-mandatory subject of bargaining, then the Board will run into the *C & C Plywood* situation where it is apparently not allowed to interpret the collective bargaining agreement to find

⁷⁰ The Seventh Circuit avoided deciding the issue. It looked only to the issue of determining relevancy of the information sought. Assume in this case that the union could receive this information under the collective bargaining agreement and the arbitrator had determined that this nonmandatory information sought, that is, the information on the removal of machinery, was relevant. The employer would then be under a statutory duty to furnish the information. Therefore it can be safely said that *all* information which is relevant to the union's duty to process grievances and to police intelligently the collective bargaining agreement must be furnished the union. See *NLRB v. F.W. Woolworth Co.*, 352 U.S. 938 (1956), reversing per curiam 235 F.2d 319, 322-23 (9th Cir. 1956); *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 750 (6th Cir. 1963), cert. denied, 376 U.S. 971 (1964); *J.I. Case Co. v. NLRB*, 253 F.2d 149, 153-55 (7th Cir. 1958).

⁸⁰ 347 F.2d 61 (3d Cir. 1965); see *infra*, p. 976.

that the information sought is relevant to the union's intelligent performance of its duties. However, if the Board is precluded from determining relevancy of the information sought, and the arbitrator has no jurisdiction under the collective bargaining agreement to determine if the union is entitled to the information, then the union will be unable to receive information which it might have a statutory right to receive.

In this situation it appears that the Board should be given the right to determine that the information sought is relevant. This would not conflict with the *C & C Plywood* decision because the Board is not usurping an arbitrator's function, for it is not clear that the arbitrator can provide the union with information when nothing in the contract provides for the furnishing of information. This would also conform to the *Curtiss-Wright* decision which gives the union the right to all information necessary to enable the union to present and resolve a grievance matter. The only alternative to this is to force the union to process its grievance to arbitration without information.

B. Individual Employee Rights

In the famous *J.I. Case Co. v. NLRB* decision,¹ the Supreme Court held that a collective bargaining agreement encompasses all the employees' rights with the employer except those clearly outside its scope. Only those rights which are not inconsistent with the collective bargaining agreement and which would not undercut it can continue to exist. Subsequent decisions established the right of the collective bargaining representative, through bargaining, to change, modify or revoke all the employees' rights under the collective bargaining agreement so long as it acts in good faith.² The employee, however, was given the right to use section 301 to protect the individual rights given to him under the collective bargaining agreement,³ but only if he first attempts to process the grievance through the grievance procedure set up in the collective bargaining agreement.⁴

With the above as precedents, the courts have been given the mandate to create uniform federal law regulating individual rights under the collective bargaining agreement.⁵ Although one recent case has stated that "the courts are writing on a clean slate,"⁶ recent attempts to formulate this uniform law have been uniformly inconsistent.

In *Woody v. Sterling Aluminum Prods. Inc.*,⁷ the employee was seeking specific performance of an arbitration agreement between the company and the union. The court found that the employee had no standing to compel arbitration where the union refused to process his grievance. It held that the

¹ 321 U.S. 332, 335 (1944).

² *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1952).

³ *Smith v. Evening News Ass'n*, 371 U.S. 195, 200-01 (1962), 4 B.C. Ind. & Com. L. Rev. 766 (1963).

⁴ *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).

⁵ *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

⁶ *International Bhd. of Tel. Workers v. New England Tel. & Tel. Co.*, 240 F. Supp. 426, 429 (D. Mass. 1965).

⁷ 243 F. Supp. 755 (E.D. Mo. 1965).

right to arbitration is not part of the employer-employee relationship; the employer had agreed to arbitrate only with the union—thus leaving out the employees. The employee was further accorded no right of action against the union for breach of its duty of fair representation. Thus the employee was left remediless, even though the employer may have deprived him of his rights under the collective bargaining agreement, since he could not, in the face of the union's reluctance to process his claim, obey the mandate of *Republic Steel Corp. v. Maddox* to exhaust his grievance procedures before coming to court.⁸

In *Wagner Mfg., Inc. v. Culbertson*,⁹ there was discrimination against the employee on the face of the collective bargaining agreement. He asked the union to process his grievance; the union followed three steps in the grievance procedure but then decided that the employer had committed no discrimination. The court stated that if any employee remedy existed, it was against the union for breach of its duty of fair representation. But the court added that even if the employee's seniority rights had been adversely affected, he could not complain since the employer and union have the authority to bargain these rights away.¹⁰

In *Addeo v. Dairymen's League Co-op. Ass'n, Inc.*,¹¹ the employee succeeded in alleging that the union and the employer had conspired to deprive him of his rights by refusing to abide by the seniority provisions of the collective bargaining agreement. Here the only remedies the employee had were to proceed to the court or to use the grievance procedure against a hostile employer with an allegedly hostile union as his advocate. The court held that in such a situation the employee should not be forced to submit to futile arbitration or be deprived of his alleged seniority rights but could proceed to the court.

Finally, in *Kociuba v. Stubnitz Greene Corp.*,¹² the union had ceased to process the employee's complaint, with the mutual consent of the employer, after three steps of the grievance procedure had been completed. The court held that here the employee had the right to submit his grievance to arbitration despite the union's refusal to do so.¹³

⁸ 379 U.S. 650 (1965).

⁹ 206 N.E.2d 378 (Ind. Ct. App. 1965).

¹⁰ This statement appears erroneous. The court has cited various cases which show that seniority rights can be bargained away; however, it does not follow that outside of the bargaining process, as was the case here, the seniority rights can be abrogated. As shown in LMRA § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964) (see note 15 infra), the collective bargaining representative is the exclusive representative for bargaining purposes, but under the proviso, it is not the exclusive representative for an employee's grievances. What the union can do at the bargaining table and what it can do in settling grievances must be separated. The union may "bargain" away the employee's seniority rights, but it may not informally deprive him of these rights consistently with the concept of individual rights.

¹¹ 47 Misc. 2d 426, 262 N.Y.S.2d 771 (Sup. Ct. 1965).

¹² 60 L.R.R.M. 2267 (Pa. Ct. C.P. 1965).

¹³ In the court's decision it is not clear whether, under the collective bargaining agreement, arbitration was available for both the employee and the union or just for the union alone. The court pointed out that the grievance procedure was open to the employee but made no mention of the right to seek arbitration.

These four cases clearly show the confusion that exists in the protection of the employee's individual contract rights, where the union has refused to process his grievance. Two decisions leave the employee without remedy. Under the third decision, the employee skips the procedure by alleging futility. In the last decision, the employer, despite the union's decision that the claim was frivolous, is still required to arbitrate the claim.¹⁴

Since the employee has individual rights under the collective bargaining agreement, the union's refusal to process his grievance should not leave him without a remedy as in the *Woody* and *Culbertson* cases. However, the employer and the union should be able to dispose of various grievances without proceeding to arbitration. Bearing these two main considerations in mind, there are four alternatives open to an employee when a union will not process his grievance. First, he may approach his employer directly with his grievance, relying on section 9(a); however, the *Black-Clawson Co. v. International Ass'n of Machinists* and *Maddox* decisions place considerable doubt on the effectiveness of this approach.¹⁵ Second, he can proceed against the union for breach of its fiduciary obligation either in court or before the Board—again, a difficult task.¹⁶ Third, he may petition the court to order specific performance of the grievance procedure which is also

¹⁴ The following articles show the diverse opinions that exist in the courts: Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631 (1959); Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Hanslowe, Individual Rights in Collective Labor Relations, 45 Cornell L.Q. 25 (1959); Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U.L. Rev. 362 (1962).

¹⁵ LMRA § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964), states: Representatives . . . selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

¹⁶ The employee would come before the Board under § 8(b)(2) of the LMRA:

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). . . .

61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964).

Section 8(a)(3) of the LMRA prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment. . . ." 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1964). The ability of the Board to give relief to a union member for the union's breach of its fiduciary duty in representing him is in question. Courts have held that the Board has no jurisdiction in these circumstances. See *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1964); *NLRB v. Local 294, Teamsters Union*, 317 F.2d 746 (2d Cir. 1963). However, Justice Goldberg, concurring in *Humphrey v. Moore*, 375 U.S. 335, 351 (1964), suggested that the Board has jurisdiction, citing *Syres v. Oil Workers*, 350 U.S. 892 (1955), and *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952).

The employee, if he entered the courts against the union, would not be able to attain the remedy he sought. The court could only order the union to pay damages, and it would not be able to have the employee reinstated.

a questionable method.¹⁷ Finally, he may file a section 301 action for breach of the collective bargaining agreement against the employer; this appears to be the best approach.¹⁸

This latter approach was taken in a recent decision, *Serra v. Pepsi-Cola Gen. Bottlers, Inc.*¹⁹ Here the employee was discharged and the union refused to process his grievance. The employer also refused to process the grievance. The court first pointed out that the employee had individual

¹⁷ If the employee sought specific performance, he would first have to show that he attempted to use the grievance procedure as required in *Republic Steel Corp. v. Maddox*, supra note 8. Since the union would not process his grievance, he is now asking the court to order the employer to arbitrate his discharge with him in lieu of the union.

Such an order by the court would precipitate several difficulties. First, as stated in *Black-Clawson Co. v. International Ass'n of Machinists*, supra note 15, the arbitration clause is an incident of the employer-union relationship. The employee, as a result, has no individual right to have his grievance arbitrated. The right belongs to the union, unlike the right to bring a § 301 action to enforce his contract rights which are personal to him. The second difficulty is that the employer has not agreed to arbitrate with the employee but only with the union. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), held that there can be no arbitration unless a party has agreed to arbitrate. Thirdly, the order would undermine the collective bargaining agreement so that the employer's manner of settling grievances is no longer the sole method.

¹⁸ *Smith v. Evening News Ass'n*, supra note 3, established that § 301 does not foreclose the right of employees to bring suits under that section.

The word "between" [in § 301] it [respondent] suggests, refers to "suits," not "contracts," and therefore only suits between unions and employers are within the purview of § 301. According to this view, suits by employees . . . would not arise under § 301 and would be governed by state law, if not pre-empted by *Garmon*, as this one would be, whereas a suit by a union for the same breach of the same contract would be a § 301 suit ruled by federal law. Neither the language and structure of § 301 . . . supports this restrictive interpretation. . . . We conclude that petitioner's action arises under § 301 and is not pre-empted under the *Garmon* rule.

Id. at 200. Therefore, an employee has the right to bring suit if the contract between the employer and the union is violated and an individual right of his is affected. The Court left open the question of what clauses in a collective bargaining agreement would give rise to the right to bring a § 301 action.

The question arises whether the employee can bring a § 301 contract action when the conduct of the employer and the union is tortious, *i.e.*, either a conspiracy, or a breach by the union of its duty of fair representation. This was answered in *Humphrey v. Dealers Transp. Co.*, 59 L.R.R.M. 3020 (W.D. Ky. 1965), where the court stated that even though the union's or employer's conduct might be tortious, this does not prevent it from also constituting a breach of the implied covenant of good faith.

However, the Supreme Court, in 1963, held that where conduct is tortious the *Garmon* rule is applicable. In *Local 207, Int'l Ass'n of Bridge Workers v. Perko*, 373 U.S. 701 (1963), the employee sought damages from his union under state common law. He alleged a conspiracy by his union and the employer to deprive him of his work and interfere with his contract of employment. The Court made no reference to § 301, but held that the matter was within *Garmon*.

The basis under which a court can take jurisdiction of an employee's claim that his union and employer have conspired to deprive him of his contract rights is still in question. Is it a § 301 action under Local 174, *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962), where the Court stated that "suits of a kind covered by section 301" must be decided according to the precepts of federal labor policy, or is it purely a matter of local contract law? See *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958); *Sipes v. Vaca*, 61 L.R.R.M. 2054 (Mo. Sup. Ct. 1965).

¹⁹ 248 F. Supp. 684 (N.D. Ill. 1965).

rights under the collective bargaining agreement. Since he could not force the employer to arbitrate his grievance under section 9(a), he had two alternatives: a section 301 action or an action against the union for breach of its duty of fair representation. Since the latter would be unable to provide him with his most important remedy, reinstatement, his only means to vindicate his contract rights would be under section 301.

The court did not consider the type of action it would take when the employee brought his section 301 action. That is, would it stay the case and order arbitration or would it give the employee a hearing on the merits. As pointed out above, the first method would be undesirable. Therefore, it appears that the employee would be entitled to a hearing on the merits. In order to have the employee reinstated the court would have to find first that the employee's contract right was violated, and secondly, that if the union and employer had agreed to the discharge, that this agreement was arbitrary.

C. Union Violation of No-Strike Clauses

During the Survey year, the dispute has continued to rage as to whether a state court can enjoin a strike in violation of a no-strike clause and, as a corollary, whether a union can deprive the employer of this possible state remedy by removal to the federal courts. Since courts¹ and commentators² have adequately covered all aspects of this dispute in much detail, we shall only briefly note the latest decisions.

In *Publishers Ass'n v. New York Newspaper Pressman's Union*,³ the district court held that removal to a federal forum is available even though only an injunction is sought and the federal court cannot act upon the request. However, the district court in *Dixie Mach. Welding v. Marine Eng'rs Beneficial Ass'n*⁴ denied removal, finding no jurisdiction in the federal courts. The

¹ States have the right to enjoin breaches of a no-strike clause: *American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs*, 338 F.2d 837 (3d Cir. 1964), cert. denied, 380 U.S. 935 (1965); *Radio Corp. of America v. Local 780, Int'l Alliance of Theatrical Stage Employees*, 160 So. 2d 150 (Fla. App. 1964); *C. D. Perry & Sons, Inc. v. Robilotto*, 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1963). States do not have the right to enjoin breaches of a no-strike clause: *Independent Oil Workers v. Socony Mobil Oil Co.*, 85 N.J. Super. 453, 205 A.2d 78 (1964).

Federal courts lack removal jurisdiction: *Merchants Refrigerating Co. v. Local 6, Warehouse Union*, 213 F. Supp. 177 (N.D. Cal. 1963); see 1A Moore, *Federal Practice* ¶ 0.167[7] (1965) and cases cited therein. Federal courts have removal jurisdiction: *Tri-Boro Bagel Co. v. Local 802, Bakery Drivers*, 228 F. Supp. 720 (E.D.N.Y. 1963); *S. E. Overton Co. v. International Bhd. of Teamsters*, 115 F. Supp. 764 (W.D. Mich. 1953); *Pocahontas Terminal Corp. v. Portland Bldg. & Constr. Trade Council*, 93 F. Supp. 217 (D. Me. 1950).

² Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 Colum. L. Rev. 1027 (1963); Isaacson, *The Grand Equation: Labor Arbitration and the No-Strike Clause*, 48 A.B.A.J. 914, 920 (1962); Comment, *Quid Pro Quo in Federal Labor Law: Enforcement of the No-Strike Clause*, 1963 Wis. L. Rev. 626 (1963); 6 B.C. Ind. & Com. L. Rev. 957 (1965); 65 Colum. L. Rev. 907 (1965); 78 Harv. L. Rev. 1665 (1965).

³ 246 F. Supp. 293 (S.D.N.Y. 1965).

⁴ 243 F. Supp. 492 (E.D. La. 1965).

state courts have continued to uphold uniformly their right to issue the injunction.⁵

This hiatus will continue to exist until the Supreme Court decides the matter. As discussed *infra*, the Court may, in *International Union, UAW v. Hoosier Cardinal Corp.*,⁶ have laid the foundation for a decision on these questions.⁷

D. Timeliness of Section 301 Actions

The absence of any statute of limitations provision in section 301¹ has disturbed the courts because of the existence of two diverse lines of Supreme Court decisions.² While the Supreme Court has traditionally allowed federal courts to apply state statutes of limitations for federal causes of actions where the federal legislation is silent,³ there is, on the other hand, a Supreme Court mandate to develop a uniform body of law for section 301 actions.⁴ Notwithstanding its mandate, however, the Supreme Court held, in *International Union, UAW v. Hoosier Cardinal Corp.*,⁵ that state statutes of limitation will determine the timeliness of section 301 actions.

The Court, although recognizing the need for uniform law, held that the need for uniformity in the present situation was too insignificant for the "bald . . . form of judicial innovation"⁶ which would be needed to devise a uniform time limitation. Uniformity will be necessary, the Court said, when the lack of it would exert a disruptive influence upon both the negotiation and administration of collective agreements. The need for uniformity "is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreements and the private settlement of disputes under it."⁷ Since statutes of limitation come into play only after the above processes have broken down, "lack of uniformity in this area is . . . unlikely to frustrate in any important way the achievement of any significant goal of labor policy,"⁸ and there is hence no justification for judicial legislation.

⁵ *Dugdale Constr. Co. v. Local 538, Operative Plasterers*, 135 N.W.2d 656 (Iowa Sup. Ct. 1965); *Streicher-Traung Lithograph Corp. v. Local 11L, Lithographers Union*, 46 Misc. 2d 925, 260 N.Y.S.2d 1011 (Sup. Ct. 1965); *Shaw Elec. Co. v. Local 98, Int'l Bhd. of Elec. Workers*, 418 Pa. 1, 208 A.2d 769 (1965).

⁶ 86 Sup. Ct. 1107 (1966).

⁷ For a discussion supporting the right of state courts to enjoin strikes in violation of no-strike clauses, see Janofsky & Vaughn, *The Affirmative Role of State Courts to Enjoin Strikes in Breach of Collective Bargaining Agreements*, *supra* p. 869.

¹ LMRA § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).

² See, e.g., *International Union of Operating Eng'rs v. Fishbach & Moore, Inc.*, 350 F.2d 936 (9th Cir. 1965).

³ E.g., *Cope v. Anderson*, 331 U.S. 461 (1947); *McClaine v. Rankin*, 197 U.S. 154 (1905); *Campbell v. Haverhill*, 155 U.S. 610 (1895); *M'Cluney v. Silliman*, 28 U.S. (3 Pet.) 415 (1830).

⁴ *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); see *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

⁵ 86 Sup. Ct. 1107 (1966).

⁶ *Id.* at 4301.

⁷ *Ibid.*

⁸ *Ibid.*

Mr. Justice White, in a dissenting opinion in which Justices Douglas and Brennan joined, thought that state law should be resorted to only where it will effectuate the federal labor policy; fifty-plus different statutes of limitations would not further this policy, especially in light of the unity mandate. Relying on such authority as *Gaines v. Miller*,⁹ the dissent also disagreed that the Court has always considered the creation of a statute of limitations as excessive judicial legislating.

The *Hoosier Cardinal* decision, in addition to solving the immediate limitations question, has, more broadly, stated new criteria for the applicability of the uniformity rule. Rejecting the substantive-procedural dichotomy as inapplicable (section 301 had been construed to apply only to substantive law)¹⁰ the Court indicated that henceforth courts would have to examine the disruptive influence of non-uniformity upon both the negotiation and administration of collective agreements.

This new standard necessitates that courts reconsider the state's right to enjoin a strike in violation of a collective bargaining agreement. For example, if the states possess the right to enjoin strikers (in violation of their collective bargaining agreements) as the Third Circuit so held in *American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs*,¹¹ would this bring about the disruptive influence which is the basis of uniformity under section 301? Certainly the state's right to enjoin differs from the right to apply the state statute of limitations: In the former, the "consensual processes," to wit, the private settlement of disputes, have not broken down. Does this not bring about the need for "drastic . . . judicial legislation"?¹² In *Local 174, Teamsters Union v. Lucas Flour*, upon which the present Court relied heavily, the Court emphasized the parties' right to know with certainty "the rights which . . . [they] had obtained or conceded."¹³ But, under *American Dredging*, a union can never know with certitude whether it will be enjoined for breaching a no-strike agreement. Such uncertainty might well substantially impede its "willingness to agree to contract terms"¹⁴ providing for a no-strike clause. Therefore, judicial legislating might soon be in order to overturn the *American Dredging* doctrine, now that section 301 law can include Norris-La-Guardia's procedural as well as substantive terms.

E. Exemplary Damages Under Section 301

In *Sidney Wanzer & Son, Inc. v. Milk Drivers Union*,¹ the Federal District Court for the Northern District of Illinois awarded exemplary damages to an employer in a section 301 suit brought by the employer to compel arbitration and obtain damages on account of the union's constant work stoppages. Acting under the *Textile Workers v. Lincoln Mills*² mandate

⁹ 111 U.S. 395 (1884).

¹⁰ International Union, UAW v. Hoosier Cardinal Corp., supra note 5, at 4301 n.4.

¹¹ 338 F.2d 837 (3d Cir. 1964), cert. denied, 380 U.S. 935 (1965).

¹² International Union, UAW v. Hoosier Cardinal Corp., supra note 5, at 4301.

¹³ Supra note 4, at 103.

¹⁴ Id. at 104.

¹ 249 F. Supp. 664 (N.D. Ill. 1966).

² 353 U.S. 448 (1957).

to fashion remedies, the court reasoned that since the NLRA is silent on this question, the court could determine punitive damages to be the ideal remedy in the present case to prevent future strife.

In the first and apparently only prior federal case dealing with punitive damages, the district court, in *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*,³ had awarded employees punitive damages against a "runaway employer." The decision was, however, overturned on appeal by a divided court.⁴ The basis for the reversal was that courts cannot prescribe penalties under section 301 since the NLRA is only remedial; hence, punitive damages, not being remedial, are barred.

The *Wanzer* court distinguished *Brooks Shoe* on the ground that in *Wanzer* there is a continuing relationship which must be preserved, while in *Brooks Shoe* the relationship had been severed. The punitive damages in *Brooks Shoe* would thus be a deterrent only to future "runaway employers," hence taking on the aspect of a punishment, while in *Wanzer* the damages would be remedial.⁵

Whatever the force of the opposing legalistic arguments to section 301 exemplary damages,⁶ their prudent use can be a powerful tool in the prevention of industrial strife and the fulfillment of the purposes of the NLRA. Their legality should not be lightly denounced.⁷

³ 187 F. Supp. 509 (E.D. Pa. 1960).

⁴ *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir. 1962).

⁵ 249 F. Supp. at 670. The court stated that "an award . . . to deter potential future violators . . . is barred." Therefore, an award against a "runaway shop" which could not remedy the situation at hand would be barred.

The court continued: "Where the award is a uniquely effective device for changing a specific pattern of illegal conduct by a party before the court, it comes within the remedial purposes of labor law." The courts are precluded from imposing sanctions which are in excess of what is needed to pacify the particular labor-management dispute. However, since here the punitive damages propose to redress particular acts of misconduct, they do not exceed the remedial necessity.

⁶ There are several arguments against allowing punitive damages. The contractual theory would stress that punitive damages are not allowed for a breach of contract; however, the Supreme Court has constantly stated that traditional contract theory is no longer applicable to collective bargaining agreements. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964) ("a collective bargaining agreement is not an ordinary contract"); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960) (collective bargaining agreement "is more than a contract; it is a generalized code"); *Textile Workers v. Lincoln Mills*, supra note 2, at 456 (common law rule on specific performance of arbitration awards under a contract rejected). See also the circuit court's argument for punitive damages in *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, supra note 4, at 285 (bring in punitive damages under an exception to contract law).

A second argument against allowing punitive damages is the NLRA's emphasis on remedy, rather than punishment; but, according to the Supreme Court, "a remedy is the means employed to enforce a right or redress an injury," *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918). Compensatory damages, although sufficient to redress the employer's injury, would not sufficiently enforce his right to operate his business free from illegal work stoppages. This right could be protected only through punitive damages.

⁷ LMRA § 1(b), 61 Stat. 158 (1947), 29 U.S.C. § 141(b) (1964):

It is the purpose and policy of this Act, in order to promote the full flow of

IV. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITIES

A. Use of Authorization Cards to Compel Bargaining

One of the oldest methods of union organizing is to obtain employees' signatures on cards authorizing the union to represent the signers. Under the original Wagner Act, these authorization cards could be used by the NLRB for election purposes, as the act permitted the Board to hold secret ballot elections or to use "any other suitable method" of determining employee choice as to union representation.¹ In 1947, however, the Taft-Hartley amendments deleted the words "any other suitable method."² Thereafter, the Board could resolve representation cases only by secret ballot election.³

Today, the cards serve two important purposes. They are used in conjunction with a section 9(c)(1) representation petition to prove that a "substantial number of employees" wish to be represented, and with a section 8(a)(5) refusal-to-recognize charge to demonstrate the union's majority status at the time of the employer's refusal.⁴ It is with this latter use that we shall be concerned.⁵

The historic *Bernel Foam Prods. Co.* decision,⁶ and the subsequent cases upholding the doctrine expressed therein,⁷ have given added importance to the use of cards to prove majority status. Under the *Aiello Dairy Farms* rule,⁸ a union which lost an election could not later file a section 8(a)(5) refusal-to-recognize charge against the employer, since the Board deemed the union to have waived the charge when it proceeded to the election; rather, the union's remedy was a re-run election. In *Bernel*, the NLRB expressly overruled *Aiello*, allowing the union a choice of remedies: It could file a section 8(a)(5) charge before the election, or it could risk an election and, upon losing, file the section 8(a)(5) charge.⁹ The Board in *Bernel*,

commerce, . . . to provide orderly and peaceful procedure for preventing the interference by either with the legitimate rights of the other. . . .

¹ 49 Stat. 449 (1935).

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

³ *Ibid.*

⁴ LMRA § 8(a)(5), 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964).

⁵ It is submitted that the cards remain an alternative to a § 9 election, despite the 1947 amendments. Since the remedy for a refusal-to-recognize charge is a bargaining order, the employer must bargain with the union for a reasonable time. *NLRB v. Warren Co., Inc.*, 350 U.S. 107, 112 (1955). Board certification under § 9 does confer more benefits than a bargaining order.

Criticism of the use of cards in a § 8(a)(5) proceeding to establish a bargaining relationship can be understood when one compares the informal method of obtaining cards with the "laboratory conditions" standard for NLRB elections set down in *General Shoe Corp.*, 77 N.L.R.B. 124, 127, 21 L.R.R.M. 1337, 1341 (1948).

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

⁷ See, e.g., *NLRB v. Flomatic Corp.*, 347 F.2d 74 (2d Cir. 1965).

⁸ 110 N.L.R.B. 1365, 35 L.R.R.M. 1235 (1964).

⁹ In the later *Irving Air Chute Co.* decision, 149 N.L.R.B. No. 59, 57 L.R.R.M. 1330 (1964), the NLRB emphasized that it would not grant a bargaining order under § 8(a)(5) to a union which had lost an election unless sufficient unfair labor practices occurred *between the filing of the election petition and the election itself* to warrant setting aside the election. It is assumed that unions will stay any election and proceed with § 8(a)(5) charges where the refusal-to-recognize occurs before the election petition

noting the inadequacy of a re-run election,¹⁰ ordered the employer to bargain with the union, although it in fact had never won an election.¹¹

Thus, since a section 8(a)(5) violation can result in an order to bargain with the union, proof of majority status by the union at the time of the employer's refusal, a *sine qua non* for a section 8(a)(5) finding, has become crucial—and authorization cards have been held to be a proper determining factor of the majority status.¹²

One final point should be noted. The decisions on the problem of cards in the section 8(a)(5) context must be considered in the light of the serious and lingering effects of an employer's anti-union conduct. As the NLRB observed in *Bernel*, for example, once the employees have felt the anti-union wrath of the employer, the damage to the union in that unit is usually irreparable. The damaged union stands little, if any, chance of ever again commanding majority support. Thus, the only effective remedy is a bargaining order after a section 8(a)(5) violation has been found. If for some reason the Board decides that the union in fact never had an uncoerced majority, then there can be no section 8(a)(5) violation—and the union involved has been laid to rest, probably forever. In short, the Board and courts seem to feel obliged to listen with a sympathetic ear to the union's arguments in this vital area.

1. Card Language

In the vast majority of cases involving cards, there are no defects in the cards themselves.¹ The language clearly states that the signer is authorizing the union to represent him in collective bargaining. The cards contain no mention of an NLRB election. However, some ambiguously-phrased cards have been invalidated.

In *NLRB v. Peterson Bros., Inc.*,² the card was titled, in bold type, "AUTHORIZATION FOR REPRESENTATION." However, the body of the card contained the following language in ordinary type: "I, the undersigned employee, . . . hereby select the above named union as my collective bargaining agent." At the bottom of the card appeared this additional statement: "This is not an application for membership. This card is for use in

is filed and either the employer thereafter engages in no other unlawful conduct, or he commits § 8(a)(1) violations, for example, but ceases before the petition is filed.

¹⁰ "[E]xperience has demonstrated that a vast majority of the rerun elections' results favor the party which interfered with the original election." 146 N.L.R.B. at 1281, 56 L.R.R.M. at 1041.

¹¹ For a full discussion of Aiello, Bernel and Irving Air Chute, see 1965 Annual Survey of Labor Law, 6 B.C. Ind. & Com. L. Rev. 844-49 (1965).

¹² *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999, 1001, 32 L.R.R.M. 1580, 1582 (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." 50 L.R.R.M. 36 (1962).

¹ See, e.g., *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268, 54 L.R.R.M. 1233 (1963).

² 342 F.2d 221 (5th Cir. 1965).

support of the demand of this union for recognition from the company in your behalf, or for an N.L.R.B. election."³ The Fifth Circuit reversed the Board⁴ and held the cards invalid. Basing their decision partly on the ambiguous language of the cards and partly on misrepresentations by union solicitors as to an election purpose, the court held that, because of the ambiguity on the face of the cards, the NLRB should have considered the signers' intent. The court stressed the ease with which a union can prepare an unambiguous form authorizing union representation. It could find no excuse for the misunderstanding engendered by the language.

In a contemporaneously decided case, *NLRB v. Winn-Dixie Stores, Inc.*,⁵ the Sixth Circuit reached the opposite result on nearly identical card language. Although admitting the dual meanings possible from the wording of the cards, the court stressed the absence of any representations by solicitors about an election. The court stated a policy consideration in such cases: "The decisions of the Board as well as the opinions of the courts place more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards."⁶ In light of this statement, the reliance of the Fifth Circuit in *Peterson Bros.*, partly on the ambiguous language and partly on the misrepresentations, becomes more meaningful.

A more objectionable type of ambiguous card was involved in *S.N.C. Mfg. Co. v. NLRB*.⁷ There the heading consisted of the following language in bold type: "I WANT AN N.L.R.B. ELECTION NOW." Below, in ordinary type, appeared: "I authorize the IUE-AFL-CIO to act as my bargaining agent. . . ." There was evidence that solicitors had mentioned an election purpose to a few employees. The Board upheld the cards as valid, noting that representations were not made to a sufficient number of employees to destroy the union's majority. The Board neither discussed the card language nor specifically held that those cards secured by representations were invalid. The District of Columbia Circuit in a per curiam opinion upheld the NLRB.⁸ In an earlier decision, *Morris & Associates, Inc.*,⁹ involving card language nearly identical to that in *S.N.C. Mfg.*, the Board had ruled the cards invalid, relying on the presence of representations as to purpose.

Thus, absent representations as to an election purpose, the Board and courts have refused to invalidate even highly ambiguous cards, thereby acting consistently with the policy considerations mentioned at the outset, specifically with regard to the consequences to the union from such invalidation.

³ Id. at 222-23.

⁴ 144 N.L.R.B. 679, 54 L.R.R.M. 1113 (1963).

⁵ 341 F.2d 750 (6th Cir. 1965).

⁶ Id. at 754.

⁷ 147 N.L.R.B. 809, 56 L.R.R.M. 1313 (1964).

⁸ 352 F.2d 361 (D.C. Cir. 1965), cert. denied, 382 U.S. 902 (1966). Judge Burger, in a concurring opinion, echoed the argument of *NLRB v. Peterson Bros., Inc.*, supra note 2, that the cards were unnecessarily misleading.

⁹ 138 N.L.R.B. 1160, 51 L.R.R.M. 1183 (1962).

2. Representations as to Purpose

As the Sixth Circuit suggested in *Winn-Dixie Stores*,¹ the Board and courts look closer at oral representations than at the written card language. Representations of solicitors seem to deserve closer scrutiny, for in the ordinary organizing campaign the employees rely heavily, if not exclusively, on the statements of the solicitors.²

Despite the heavy reliance on the representations, and despite the crucial importance of the cards since *Bernel Foam* in establishing a bargaining relationship without an NLRB election, the Board and courts have taken a strict approach to the invalidation of cards for misrepresentations as to their purpose.

The representation cases can be divided according to how flagrant the misstatements are.³ In an early case, *NLRB v. Dadourian Export Corp.*,⁴ the Second Circuit invalidated cards obtained by means of representations made by the organizer that if employees did not sign the cards they would no longer be able to work. Judge Hand summarized the court's attitude toward such untrue statements:

We cannot agree that the statute . . . sanctions the selection of a bargaining representative by such means. Fraud—which this was—will vitiate consent as well as violence, and the Board itself implies that a vote procured by violence should not be counted. . . . § 7 confers the right on all employees freely to choose their bargaining representatives, and the invasion of that right is as much a wrong, when committed by a union organizer as by an employer.⁵

The *Dadourian* case presented a somewhat unique representation situation. The common situation today concerns statements that the cards are for election purposes when, in fact, the wording clearly provides that they are for representation purposes and will be so used by the union. One type of misrepresentation always invalidates the cards thereby obtained, namely, the "only purpose" representation. For example, the Board recently invalidated cards secured by solicitors' statements to employees that the cards were to be used *only* for the purpose of an NLRB election.⁶

¹ 341 F.2d 750, 754 (6th Cir. 1965).

² A dissenter in *NLRB v. Gotham Shoe Mfg. Co.*, 61 L.R.R.M. 2177 (2d Cir. 1966), remarked that a substantial number of employees, usually enough to destroy a union's majority, either do not read or do not understand the meaning of the cards.

³ For example, it would be flagrant to state that false consequences would result if cards were not signed. A non-flagrant misstatement would be stating that the cards would probably be used for an election, without mentioning the intended representation purpose.

⁴ 138 F.2d 891 (2d Cir. 1943).

⁵ *Id.* at 892. The court also pointed out that the "overriding consideration must always be the employees' untrammelled freedom of choice. . . ." *Id.* at 893.

⁶ *Engineers & Fabricators, Inc.*, 156 N.L.R.B. No. 86, 61 L.R.R.M. 1156 (1966). The NLRB usually insists that the magic words "only purpose" be uttered. However, some courts have acted under the *Dadourian* fraud rationale, *supra* note 4, and invalidated cards when different words were used yet conveyed the same false idea. See *NLRB v. Koehler*, 328 F.2d 770, 773 (7th Cir. 1964), where the court reversed the Board and invalidated cards obtained by statements that they were not to be used to select the union as the bargaining representative, but to obtain an election.

Where less flagrant misrepresentations are concerned, the cases do not turn on the nature of the statements, but rather on whether the employer has waged an anti-union campaign or committed any serious section 8(a)(1) violations, the Board being more concerned with the lasting harm of the employer's unfair labor practices than with the misstatements.⁷ In *Happach v. NLRB*,⁸ the bargaining unit was composed of fifteen employees in a retail grocery store. Cards were signed upon representations by solicitors that one purpose of the cards was to get an NLRB election. There was further evidence that the solicitors understood, and led the employees to believe, that the cards were for an election. Thereafter, on four occasions, the union informed the employer of its majority status, requested recognition, and offered to prove its majority by a card check. The employer never questioned the union's majority, asked it to produce the cards, gave any reason for his refusals-to-recognize other than advice of counsel, or furnished his attorney's name so the union could discuss the matter with him. Although the employer at no time engaged in any anti-union campaign or otherwise violated section 8(a)(1), he did discriminatorily discharge a strong union supporter.

The NLRB ruled the cards valid since the solicitors never said the "only purpose" was for an election, and found a section 8(a)(5) violation based upon the employer's "complete disregard of his bargaining obligation."⁹ The Seventh Circuit affirmed the Board's order and reasoning.¹⁰ However, Judge Castle partially dissented on the basis of the misunderstanding created by the representations. He would hold invalid cards which were secured by solicitors who misunderstood their purpose and signed by employees who were similarly confused.

Although the *Happach* decision, given the facts of the employer's deaf-and-dumb attitude and the discriminatory discharge in the small retail store, is probably justified, in a closer case Judge Castle's thinking would be the better view.¹¹ In the situation where the employer's conduct did not poison the air against unionism, what justification can there be in foisting on employees a union which they, without a full understanding, selected as their representative?¹²

The third type of misrepresentation case couples the kind of misrepresentations found in *Happach* with anti-union conduct by the employer.

⁷ In the flagrant misrepresentation cases already discussed, the outright fraud seems to outweigh the effects of the employer's unfair labor practices. In *Engineers and Fabricators, Inc.*, supra note 6, and in *NLRB v. Koehler*, supra note 6, there were serious § 8(a)(1) violations, yet the cards were ruled invalid in both cases.

⁸ 353 F.2d 624 (7th Cir. 1965).

⁹ 151 N.L.R.B. No. 68, 58 L.R.R.M. 1448, 1449 (1965).

¹⁰ The court distinguished the case factually from *NLRB v. Koehler*, supra note 6, and stressed the lack of any "only purpose" statements.

¹¹ For example, consider the case where the union obtains cards through confused solicitors from misled employees, and the employer refuses recognition, demands an election, yet commits no serious §§ 8(a)(1)(3) violations.

¹² The union, which has not been irreparably damaged, does not need such a remedy. The employees, who have not truly expressed preference for the union, do not want such a remedy.

The two recent circuit court cases in this area involved the same basic facts: cards were signed on representations either that one purpose was to get an election, or that there probably would have to be an election eventually; recognition was requested and refused; the employer then undertook an anti-union campaign and committed section 8(a)(1) violations; both courts held the cards valid. The majority of the Second Circuit in *NLRB v. Gotham Shoe Mfg. Co.*,¹³ relied on the "only purpose" rule and did not squarely face the misrepresentation issue. However, the Sixth Circuit, in *NLRB v. Cumberland Shoe Corp.*,¹⁴ treated the problem fully. After distinguishing the case from cases of "outright misrepresentation" such as *Koehler*,¹⁵ the court listed the factors favoring acceptance of the cards:

The authorization cards were themselves wholly unambiguous and they related solely to authorization of union representation as collective bargaining representative. . . . [T]he signing of authorization cards was an essential preliminary to a union petition for an election. In no instance did any employee testify that he was told that the election was the only purpose of the card. And the union did indeed seek an election, withdrawing that request only after it had become convinced that the company's Section 8(a)(1) violations had coerced a sufficient number of employees so as to eliminate the union's majority support.¹⁶

The court understandably failed to find any trace of fraud in the mention of an election purpose, since in fact the cards can be used only for an election until they are signed by a majority of employees. In *Gotham Shoe*, Judge Timbers filed a lengthy and convincing partial dissent in support of invalidating cards similarly obtained.¹⁷ Criticizing the practice of the Board and courts of permitting a certain degree of fraud, he stated:

In my opinion, it [the present case] furnishes a striking demonstration of the utterly irrational basis for the Board's rule distinguishing between fraud in obtaining authorization cards by misrepresenting that an election is the *sole* purpose of the cards and fraud in misrepresenting that an election is *one* purpose of the cards.¹⁸

Judge Timbers was basically concerned with the rights of the employees:

After all, it is the employees' rights under Section 7 with which we are concerned. . . . [T]o permit the vice of such solicitations to turn upon whether an election or a vote was said to be the *sole* purpose or *a* purpose of signing the cards, is wholly to ignore *whose* rights

¹³ Supra note 2.

¹⁴ 351 F.2d 917 (6th Cir. 1965).

¹⁵ Supra note 6.

¹⁶ Supra note 14, at 920.

¹⁷ He cited the present case as a "glaring illustration" of the unreliability of cards, since enough cards to destroy the union's majority were signed by employees who did not read or understand the cards, and/or under misrepresentations as to their use for an election. *NLRB v. Gotham Shoe Mfg. Co.*, supra note 2, at 2184.

¹⁸ Id. at 2185-86.

are intended to be guaranteed by Section 7. Upholding the Board's rule here, based on this irrational distinction, may pull the *union's* chestnuts out of the fire; but it surely will open the door to future organizational sharp dealing, to the detriment of the very *employees'* rights we seek to safeguard.¹⁹

The answer to Judge Timbers' arguments may be that the act does provide remedies for employees who are represented by a union which no longer enjoys majority support, while it is helpless to aid a union whose chestnuts are *not* pulled out of the fire.

3. *Good Faith Doubt*

When can an employer refuse to recognize a union which requests bargaining, claiming to represent a majority of the employees as evidenced by signed cards?¹ The landmark *Joy Silk Mills, Inc. v. NLRB* decision held that an employer could refuse recognition and insist upon an election "when motivated by a good faith doubt as to the union's majority status."² The court there stated the test of good faith doubt:

[T]he question of whether an employer is acting in good or bad faith at the time of the refusal is, of course, one which of necessity must be determined in the light of all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct.³

In general, the Board has found a refusal in bad faith when the employer subsequently waged an anti-union campaign, regardless of how strong the reasons for the original refusal.⁴ Recently, in *Engineers & Fabricators, Inc.*,⁵ the employer alleged a good faith doubt because the union had repeatedly and falsely claimed majority status in the past, as recently as one year prior. The Board found a section 8(a)(5) violation, pointing to the employer's subsequent series of section 8(a)(1) violations.⁶

¹⁹ *Id.* at 2188.

¹ In general, the employer has a duty to bargain as soon as the union presents convincing evidence of majority support. See *NLRB v. Dahlstrom Metallic Door Co.*, 112 F.2d 756, 757 (2d Cir. 1940). An employer cannot refuse to bargain solely because he would prefer an NLRB election. See *NLRB v. Decker*, 296 F.2d 338 (8th Cir. 1961).

² 185 F.2d 732, 741 (D.C. Cir. 1950).

³ *Id.* at 742. For a discussion of the method of determining good faith doubt, see Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401 (1958).

⁴ See, e.g., *NLRB v. Gotham Shoe Mfg. Co.*, 61 L.R.R.M. 2177 (2d Cir. 1966). However, in *NLRB v. Dan River Mills, Inc.*, 274 F.2d 381 (5th Cir. 1960), there were serious § 8(a)(1) violations, yet the court found a "good faith" doubt, basing its decision partly on the "razor thin majority" which the union claimed—167 cards from 332 employees. *Id.* at 387. The case suggests that where the reason for doubt is *extremely* convincing, even later § 8(a)(1) violations will not render incredible the claim of good faith doubt.

⁵ 156 N.L.R.B. No. 86, 61 L.R.R.M. 1156 (1966).

⁶ The Board reasoned:

The question of the employer's good or bad faith . . . must, of course, be

Conversely, the Board and courts have upheld an allegation of good faith doubt when the employer does not subsequently engage in any unfair labor practices. In *John P. Serpa, Inc.*,⁷ an employer was asked to recognize the union and was confronted with cards from five of his seven employees. He asked for time to consult his attorneys and did so, but never responded to the union's request. The employer committed no later unfair labor practices.⁸ In finding a good faith doubt, the Board held that the General Counsel had not met his burden of proof since there was no evidence introduced showing "that respondent has completely rejected the collective-bargaining principle or seeks merely to gain time within which to undermine the union and dissipate its majority."⁹ Likewise, where the employer later commits merely an isolated or minor section 8(a)(1) violation, the Board generally has found no bad faith. In *NLRB v. Great Atl. & Pac. Tea Co.*,¹⁰ the Fifth Circuit found a section 8(a)(1) violation when the employer asked an employee her reasons for signing an authorization card, yet found no section 8(a)(5) violation, stating:

While this incident may well have constituted a technical transgression of section 8(a)(1), it must be placed in its proper context in the whole record for the purpose of determining whether it constitutes substantial evidence of an improper refusal to bargain. We think that, standing alone, the incident is too isolated to warrant an inference of lack of good faith.¹¹

There is, however, a controversial line of cases in which the Board and courts have found a bad faith refusal despite the absence of subsequent unfair labor practices.¹² One group of such cases is represented by *Snow v. NLRB*,¹³ where the Ninth Circuit affirmed the Board's finding of a refusal-

assessed in the light of the facts of each case, including any reasons he may offer to justify the refusal and any conduct violative of the Act for which he may be held accountable.

Id., 61 L.R.R.M. at 1159.

⁷ 155 N.L.R.B. No. 12, 60 L.R.R.M. 1235 (1965). Accord, *Ben Duthler, Inc.*, 157 N.L.R.B. No. 3, 61 L.R.R.M. 1305 (1966). See *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617 (8th Cir. 1965), where the court listed the factors showing good faith doubt: the union one year earlier had obtained cards from 55 of 68 employees, yet received only 27 of 68 votes in the election; there was a prompt filing of an election petition by the employer; and there was a lack of later unfair labor practices.

⁸ In the vast majority of cases the employer merely seeks delay in order to conduct an anti-union campaign.

⁹ *John P. Serpa, Inc.*, supra note 7.

¹⁰ 346 F.2d 936 (5th Cir. 1965). Accord, *Reilly Tar & Chem. Corp. v. NLRB*, 352 F.2d 913 (7th Cir. 1965), where the court found non-flagrant § 8(a)(1) violations but refused to enforce a § 8(a)(5) violation. See *Strydel Inc.*, 156 N.L.R.B. No. 114, 61 L.R.R.M. 1230 (1966), where the Board held that an employer's coercive statements violated § 8(a)(1) but were not serious enough to show intent to dissipate the union's majority.

¹¹ 346 F.2d at 941.

¹² These cases involve an employer's rejection either of the results of a card check or of the principle of bargaining with a union.

¹³ 308 F.2d 687 (9th Cir. 1962); see *Kellogg Mills, Inc.*, 147 N.L.R.B. 342, 56 L.R.R.M. 1223 (1964), enforced, 347 F.2d 219 (9th Cir. 1965), where the employer not

to-recognize. There the parties consented to a card check by a minister, who reported that a majority of employees had applied for union membership.¹⁴ The company continued to withhold recognition until an election was held, but committed no later unfair labor practices. The court held: "The manner in which an employer receives reliable information of union representation . . . is of no consequence. Once he has received such information from a reliable source, insistence upon a Board election can no longer be defended on the ground of a genuine doubt as to majority representation."¹⁵ Moreover, the court stated that proof of anti-union motivation through unfair labor practices is not needed to find bad faith doubt "if lack of a reasonable doubt is established in some other way."¹⁶

The second group of cases is illustrated by *George Groh & Sons*,¹⁷ where the NLRB found a bad faith refusal by the employer. After being notified by the union of its majority status, the employer agreed to a meeting with the union representatives. At the meeting, Groh refused a neutral card-check saying it was unnecessary since "he was satisfied we represented these people."¹⁸ The union attorney informed Groh of his duty to bargain but Groh stated they "were wasting . . . [their] time, that he wasn't interested in the union." When the union later asked for another meeting, Groh said he "didn't want any part to do with the Union again."¹⁹ The NLRB concluded that Groh's "refusal to recognize . . . was motivated not by a good-faith

only refused the results of a card check but held 3 bargaining meetings before questioning the union's majority; *Jem Mfg., Inc.*, 156 N.L.R.B. No. 62, 61 L.R.R.M. 1074 (1966), where the employer copied the names on the cards, admitted the union's majority, met in negotiations with the union, and then questioned the union's status.

¹⁴ Compare *Snow v. NLRB*, supra note 13, with *John P. Serpa, Inc.*, supra note 7, where the Board held the situation "clearly distinguishable" and found no bad faith when the union spread the cards on the employer's desk, giving him the opportunity to examine them. *Ibid.* It has been suggested that the Serpa decision leaves the Snow holding in doubt. Note, *Refusal-To-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. Chi. L. Rev. 387 (1966).

¹⁵ 308 F.2d at 692.

¹⁶ *Id.* at 693.

¹⁷ 141 N.L.R.B. 931, 52 L.R.R.M. 1424 (1963), enforced, 329 F.2d 265 (10th Cir. 1964); see *Happach v. NLRB*, 353 F.2d 624 (7th Cir. 1965), where a bad faith finding was based on a § 8(a)(3) discriminatory discharge and the employer's complete lack of response to repeated union requests for recognition.

¹⁸ The offer to prove status will rarely support a § 8(a)(5) charge against an employer who refuses it. *NLRB v. Dahlstrom Metallic Door Co.*, supra note 1, is cited for the opposite holding, but it should be noted that the court there also pointed to § 8(a)(1) violations as evidence of bad faith. Four recent decisions support the general rule. In *Superex Drugs, Inc.*, 150 N.L.R.B. No. 97, 58 L.R.R.M. 1178 (1965), the Board found no bad faith when the employer refused the offer of proof but committed no later unfair labor practices. Three circuit courts found bad faith based on both the refusal of offers of proof and § 8(a)(1) violations: *Matthews & Co. v. NLRB*, 354 F.2d 432 (8th Cir. 1966); *Irving Air Chute Co. v. NLRB*, 350 F.2d 176 (2d Cir. 1965); *NLRB v. Elliott-Williams Co.*, 345 F.2d 460 (7th Cir. 1965). A refusal of a card check offer should not be entitled to much weight in determining good or bad faith, since the result of such proof is merely confirmation that a majority signed cards. The signature on the card does not necessarily represent a vote for the union in an election, but often merely means that the employee desires an election in order to cast a secret ballot against unionism without incurring the displeasure of his pro-union co-workers.

¹⁹ 141 N.L.R.B. at 940, 52 L.R.R.M. at 1424.

doubt of the union's majority status but by a rejection of the collective-bargaining principle.²⁰

Snow and *Groh* stand as support for the proposition that an employer can be guilty of a refusal-to-recognize charge without committing later unfair labor practices. However, these cases represent extreme situations—refusing the results of a card check, and completely rejecting the concept of bargaining. Despite belief to the contrary, the Board has not found section 8(a)(5) violations without subsequent unfair labor practices or extreme expressions of bad faith by the employer. The employer who refuses recognition because he doubts the reliability of cards probably will not find himself faced with a section 8(a)(5) charge²¹ unless he (1) commits unfair labor practices,²² or (2) rejects the results of an agreed-upon card check and insists upon an election,²³ or (3) examines the cards himself and rejects them,²⁴ or (4) completely ignores or dismisses the union's requests.²⁵

4. Remedies

Section 10(c) of the act empowers the Board "to take such affirmative action . . . as will effectuate the policies of this Act . . ." in remedying unfair labor practices.¹ The Supreme Court early recognized that the Board could, under this section, issue an affirmative order to bargain as a remedy for an employer's unfair labor practices.² Under *Bernel Foam*,³ the Board was given authority to issue a bargaining order for an unfair labor practice which destroyed the union's opportunity for a fair election, even if the union actually proceeded to and lost the election.⁴

²⁰ The Board added:

The absence of good faith, then, may be manifested as well by attitudes and conduct demonstrating a rejection of the collective-bargaining concept as by more overt, readily discernible Section 8(a)(1) and 8(a)(3) conduct potentially more immediately destructive of the Union's majority status.

Id. at 940.

²¹ A sophisticated employer should at least be able to secure an NLRB election. When confronted with a bargaining request based on a card majority, he could refuse, expressing doubts that the union represents a majority of employees. He could explain his disbelief in the reliability of cards and stress the fairness to all parties of an NLRB election. He could refuse either to examine the cards himself or to submit them to a card check, explaining his feeling that a signed card does not necessarily prove that its signer is pro-union. Such an employer can cite language and statistics from the Board and courts in defense of his positions.

²² *Engineers & Fabricators, Inc.*, *supra* note 5.

²³ *Snow v. NLRB*, *supra* note 13.

²⁴ *Jem Mfg., Inc.*, *supra* note 13.

²⁵ *George Groh & Sons*, *supra* note 17. *Contra*, *John P. Serpa, Inc.*, *supra* note 7.

¹ LMRA § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

² The Court stated in *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 82 (1940): "Where as a result of unfair labor practices a union cannot be said to represent an uncoerced majority, the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated." See also *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944), where the Court discusses the particular appropriateness of a bargaining order remedy.

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

⁴ The Board there rejected a re-run election as a meaningful remedy. See Pollitt,

The past year has seen at least one circuit court attempt to limit the application of *Bernel Foam*. In *NLRB v. Flomatic Corp.*,⁵ decided by the Second Circuit, after securing cards from a majority of employees the union wrote a letter to the employer advising him of its majority status and requesting recognition. The letter requested a reply within five days; otherwise the union would assume a refusal and file an election petition. Two days after the letter was received by the employer, the union mailed a petition to the Board. The union representative then met with the employer and explained that the letter requesting recognition was required as a prelude to an election. A consent election was held on May 2 and the union lost. On June 10, the union filed unfair labor practice charges based on a letter which the employer distributed to the employees on May 1 and 2, containing promises of benefits.

The NLRB found the employer justified in not regarding the union's letter as a specific request to bargain, and thus held there was no section 8(a)(5) violation.⁶ However, the Board found a section 8(a)(1) violation and, since it further found the pre-election letter distributed by the employer destroyed the conditions for a fair election, it ordered the employer to bargain.⁷

The Second Circuit, however, refused to enforce the bargaining order, and held the proper remedy to be a cease-and-desist order followed by a new election.⁸ The court stressed that a bargaining order is "strong medicine" and, since it dispenses with the need for a secret election, it jeopardizes the employees' rights to refrain from, and to vote secretly against, unionism.⁹ The court could not justify such an extreme remedy on the facts before it—a single unaggravated section 8(a)(1) violation, an absence of any accurate indicia of employee desires regarding unionism, a risk that the employees were being saddled with a union they never in fact chose, and the lack of any precedent for a bargaining order in a similar situation. The underlying concern of the court was that, in view of *Bernel Foam*, the Board

NLRB Re-Run Elections: A Study, 41 N.C.L. Rev. 209 (1963). The study revealed that in 267 re-run elections held between 1960-1962, a different result was reached in 84 (31%) of them. However, the author observes that unions will not seek new elections without a substantial possibility of success.

⁵ 347 F.2d 74 (2d Cir. 1965).

⁶ 147 N.L.R.B. 1304, 1305, 56 L.R.R.M. 1391, 1392 (1964).

⁷ It stated: "[O]nly a bargaining order could restore as nearly as possible the situation which would have obtained but for the respondent's unfair labor practices." *Id.* at 1307. 56 L.R.R.M. at 1393.

⁸ The court found no precedent for the Board's issuance of a bargaining order based on a single § 8(a)(1) violation. Neither of the two cases which the Board cited as authority involved only a § 8(a)(1) violation. *Bannon Mills, Inc.*, 146 N.L.R.B. 611, 55 L.R.R.M. 1370 (1964), and *Western Aluminum, Inc.*, 144 N.L.R.B. 1191, 54 L.R.R.M. 1217 (1963), both involved § 8(a)(1) and § 8(a)(3) violations. The case which comes closest to the Board's proposition is *D. H. Holmes Co. v. NLRB*, 179 F.2d 876 (5th Cir. 1950), where the court enforced a bargaining order based on a series of § 8(a)(1) violations. However, in the Board decision in *D. H. Holmes Co.*, 81 N.L.R.B. 753, 23 L.R.R.M. 1431 (1949), the Board found §§ 8(a)(1), (3) and (5) violations. It appears that the Board's *Flomatic* decision represents a new extension of the use of the bargaining order.

⁹ Unlike the Board, the court was not convinced that cards from 20 of 28 employees necessarily meant that the union would have won the election but for the § 8(a)(1) violation.

would be issuing increasing numbers of bargaining orders for "minimal" violations.¹⁰ The court limited *Bernel Foam* as follows:

We do not hold that the Board can never issue a bargain order in an 8(a)(1) case but where there is at most a *moderate unbalancing* of an election by an employer such as there was in this case, there is no adequate justification for putting the union in a position to unbalance it the other way to an extreme degree.¹¹ (Emphasis supplied.)

Judge Hays, dissenting, would regard the issue of whether the employer's acts "moderately" or "immoderately" unbalanced the election as particularly within the Board's expertise. Here, since the Board had determined that the employer's practices in fact dissipated the union's majority and destroyed the conditions for a fair election, any discussion by the majority of "degrees of interference" was improper. Although neither the majority nor dissenting opinion mentioned the NLRB's *Irving Air Chute Co.* decision,¹² the latter seems more consistent with it. In *Irving*, the Board qualified the *Bernel Foam* bargaining order remedy by requiring the election to have been set aside before bargaining relief would be granted. The majority in *Flomatic*, however, would insist that the section 8(a)(1) violation which sets the election aside be an aggravated one before it would enforce an order to bargain.

The Second Circuit has addressed itself to the remedy issue in two further cases since *Flomatic*. In *Irving Air Chute Co. v. NLRB*,¹³ the union notified the employer of its majority status and demanded recognition. After the employer asked for time because of a family death, the union filed an election petition. The union requested recognition again and offered to prove its majority, but the employer never responded. Before the election was held, the employer made threats and promoted a company union. The union lost the election. The Board found that the employer had violated sections 8(a)(1),(2) and (5), and issued a bargaining order. The Second Circuit enforced the order, distinguishing *Flomatic*:

In that case, however, there was only a minimal § 8(a)(1) violation and no demand and refusal to bargain. The appropriate remedy must be fashioned to meet the situation presented in each particular case and often depends on factual differences seemingly slight but sufficient to tip the scales in favor of the Board's conclusion. Here an election at this time would be manifestly unfair to the Union since it would allow the Company to reap the benefits of its anti-union acts. . . .¹⁴

¹⁰ The court cautioned that "the effect, on future similar cases, of the application of *Bernel Foam* in conjunction with an affirmative order to bargain should be contemplated." *NLRB v. Flomatic Corp.*, *supra* note 5, at 79. It added that a union will henceforth raise unfair labor practice charges, however trivial, along with its election petition and, if it loses the election, it will press the charge and the Board will follow its *Flomatic* decision and order bargaining.

¹¹ *Ibid.*

¹² 149 N.L.R.B. 627, 57 L.R.R.M. 1330 (1964), enforced, 350 F.2d 176 (2d Cir. 1965).

¹³ 350 F.2d 176 (2d Cir. 1965).

¹⁴ *Id.* at 182.

In *NLRB v. Gotham Shoe Mfg. Co.*,¹⁵ the union had made a demand for recognition based on cards. When the employer refused recognition because of doubts as to the union's status, the union petitioned for an election. During the pre-election period, the employer committed a series of section 8(a)(1) violations. The election was stayed when the union filed unfair labor practice charges. The Board then found section 8(a)(1) and (5) violations, and ordered bargaining.¹⁶ The Second Circuit again upheld the order, distinguishing *Flomatic* in the same fashion as it had done in *Irving Air Chute*. Judge Timbers dissented. Although agreeing with the majority's finding of section 8(a)(1) violations, he dissented on the section 8(a)(5) finding and on the bargaining order remedy.¹⁷ Timbers adopted the *Flomatic* rationale and would have ordered a new election to remedy the section 8(a)(1) violations. He cited reasons why the case at hand presented even a stronger argument for a new election than did *Flomatic*.¹⁸ Judge Timbers' opinion may, however, go even further than *Flomatic*; given his previously discussed suspicion of authorization cards and concern for section 7 rights, his view may be that a bargaining order should *never* be issued when based on an alleged prior majority as evidenced only by cards.

The *Flomatic* decision and Timbers' dissent in *Gotham Shoe* indicate growing concern over the implications of *Bernel Foam*. Particularly, the concern centers around the reliance placed solely on cards to prove majority status, in the context of the NLRB's oft-repeated warnings of the notorious unreliability of these cards as an indicia of union sentiment. Whether circuits other than the second will follow *Flomatic* remains to be seen.¹⁹

B. Union Communication with Employees

Excelsior Rule.—Union organizing efforts in large units have traditionally been handicapped by inability to contact all the employees. One major cause of this failure to communicate has been the lack of knowledge of the

¹⁵ 61 L.R.R.M. 2177 (2d Cir. 1966).

¹⁶ 149 N.L.R.B. 862, 57 L.R.R.M. 1385 (1964).

¹⁷ See earlier discussion of Judge Timbers' dissent pp. 937-38 *supra*.

¹⁸ He listed the employer's doubt as to the union's card majority, the confusion as to why large numbers of employees signed, the good faith efforts of the employer to investigate the union's claimed status, and the prompt filing of the election petition by the union. However, he overlooked the crucial difference between the two cases—the series of flagrant anti-union acts committed. The court in *Flomatic* specifically stated that its decision did not extend to situations where the employer's flagrant anti-union acts ruined the chances for a fair election. *NLRB v. Flomatic Corp.*, *supra* note 5, at 78.

¹⁹ It can be argued in opposition to the Second Circuit that the bargaining order remedy based on cards does not greatly affect employees' rights. Although the remedy in effect makes the union the representative of the employees, they need not be so represented forever—the employees need not join the union or pay dues, and can always decertify the union after one year. See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 134-36 (1964). Moreover, the remedy can be viewed as merely giving the union what it deserved, namely, a fair chance to win the support of a majority of employees. Since the employer's conduct ruined any opportunity for a fair election, the bargaining order merely gives the union initial bargaining rights. If the union never in fact represented a majority, it can be decertified.

employees' names and addresses.¹ The consequential inability to reach employees at home has confined unions to communicating in and around the plant, where employer rules prohibiting some or all solicitation have further restricted their efforts. As a result, unions have been forced to resort to more expensive and burdensome, yet less personal and effective, methods of informing the employees of their position.²

In February 1966 the NLRB concluded that the lack of effective union communication with employees prevented a free and reasoned choice in an election, and took a long step toward achieving a well-informed electorate. In *Excelsior Underwear, Inc.*, the Board announced a new rule designed to "maximize the likelihood that all voters will be exposed to the arguments for, as well as against, union representation."³ The *Excelsior* rule requires that whenever an election has been scheduled,⁴ the employer must file with the Regional Director within seven days a list containing the names and addresses of all eligible voters.⁵ In turn, the Regional Director "shall make this information available to all parties in the case."⁶ Failure to supply the list will be grounds to set aside the election.⁷ The Board gave two reasons for requiring the disclosure of the information:

[1] [N]ot only does knowledge of employee names and addresses increase the likelihood of an informed employee choice . . . but, in the absence of employer disclosure, a list of names and addresses is extremely difficult if not impossible to obtain. . . .⁸

[2] . . . [T]he requirement of prompt disclosure . . . will further

¹ See, e.g., *May Dept. Stores Co.*, 136 N.L.R.B. 797, 49 L.R.R.M. 1862 (1962), where, after 20 months of campaigning, the union had obtained names and addresses of 1250 of approximately 3000 voters.

² In *NLRB v. United Aircraft Corp.*, 324 F.2d 128, 130 (2d Cir. 1963), the Second Circuit stated:

Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to wastebasket. Television and radio appeals, where not precluded entirely by cost, would suffer from competition with the family's favorite programs and at best would not compare with personal solicitation. Newspaper advertisements are subject to similar objections. Sidewalks and street corners are subject to the vicissitudes of climate and often force solicitation at awkward times, as when employees are hurrying to or from work.

³ 156 N.L.R.B. No. 111, 61 L.R.R.M. 1217, 1218 (1966).

⁴ The only exception is the expedited § 8(b)(7)(C) election, where the Board felt that the short time between the scheduling and the election prevented sufficiently meaningful use of the list to justify disclosure. *Id.*, 61 L.R.R.M. at 1219 n.14.

⁵ The rule is prospective only, and applies to elections scheduled after March 6.

⁶ *Excelsior Underwear Inc.*, supra note 3. It is assumed that the Regional Office will copy the list and send it to the union involved.

⁷ Likewise, there would seem to be grounds for setting aside an election when, for example, the employer supplied only names, or when it furnished the list ten days after an election was directed.

The Board in *Excelsior* would not comment on whether the employer's noncompliance would be a § 8(a)(1) violation. *Id.*, 61 L.R.R.M. at 1221.

⁸ *Id.*, 61 L.R.R.M. at 1219.

the public interest in the speedy resolution of questions of representation.⁹

The Board rejected the following arguments against the rule. First, it could find no significant employer interest in keeping the information secret. Whatever interest in secrecy the employer may possibly have had was "plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a fair and free election."¹⁰ Second, the Board could not agree that the rule compelled an employer to interfere with an employee's right to refrain from union activities by giving the information without the employee's permission, since the employee could exercise this right by voting against the union in the election. Third, although conceding the possibility of resulting harassment and coercion of employees in their homes, the Board did not regard this possibility as sufficient reason to deny the union opportunity to communicate. Fourth, the Board rejected an argument based on an *NLRB v. Babcock & Wilcox Co.*¹¹ and *NLRB v. United Steelworkers (Nutone)*¹² analogy that an employer should not be required to disclose the information unless the union would otherwise be unable to reach the employees. The Board distinguished *Excelsior* as follows: (1) The employer here has no significant interest, such as a right to control the use of his property, which must be overcome by a showing of lack of alternative means; (2) an election has been scheduled here, and thus the protection of the employees' rights to organize justifies subordinating any interest which the employer may have in nondisclosure; and (3) the *Excelsior* rule does not deal with an unfair labor practice but only with conduct which will set aside an election. The Board further stated that even the existence of alternative methods of communication would not "insure the opportunity of all employees to be reached. . . ."¹³

The NLRB also rejected suggested limits to the rule. One approach was not to apply the rule unless the employer himself had mailed literature to homes. The Board stated that the union's access to the voter lists was essential to a fair election and should not be qualified by employer conduct. Another suggestion was to furnish the information to a mailing service, on the theory that, since the employer was forbidden to visit employees' homes,¹⁴ the union should not be allowed to do so. The Board rejected the idea "because this would create difficult practical problems and because we do not

⁹ Id., 61 L.R.R.M. at 1220. The Board believed the rule would eliminate substantially all unnecessary challenges and allow time to settle eligibility disputes.

¹⁰ Ibid.

¹¹ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). The Supreme Court held that an employer could exclude nonemployee union organizers from company property in the absence of a showing that it was unreasonably difficult to communicate with employees elsewhere.

¹² *NLRB v. United Steelworkers (Nutone)*, 357 U.S. 357 (1958). The Court held that an employer could enforce his no-solicitation rule against his employees and at the same time engage in anti-union solicitation without giving the union equal time. There was no showing that the no-solicitation rules diminished the ability of the union to carry its message to the employees.

¹³ *Excelsior Underwear Inc.*, supra note 3, 61 L.R.R.M. at 1220.

¹⁴ See, e.g., *Peoria Plastic Co.*, 117 N.L.R.B. 545, 39 L.R.R.M. 1281 (1957).

believe that the union should be limited to the use of the mails in its efforts to communicate with the entire electorate."¹⁵

It seems certain that employers will refuse to supply the lists until the validity of the rule is upheld by a court.¹⁶ Among the arguments likely to be advanced by employers is that the Board has exceeded its statutory authority, since neither the act nor decisional law empowers the Board to insure a fully-informed electorate.¹⁷ Although section 6 does authorize the Board to make "such rules . . . as may be necessary to carry out the provisions of this Act,"¹⁸ the act itself, it may be argued, only directs the Board to conduct elections and certify the results;¹⁹ nowhere does it require the Board to judge the voters' level of information. Prior decisions which seem to support the Board's power dealt with prohibitions on conduct which interfered with a "fair and free" choice, not with a "fully informed and reasoned" choice.²⁰ Rules governing the mechanics of an election and actual electioneering, such as pre-election speeches and handbilling, are clearly distinguishable from a rule governing the amount of campaign propaganda to which an employee must be subjected.

On the other hand, the Board, starting from its broad rule-making power under section 6,²¹ might argue that section 9(c), in requiring the

¹⁵ *Excelsior Underwear Inc.*, supra note 3, 61 L.R.R.M. at 1221.

¹⁶ A circuit court may be asked to enforce an NLRB bargaining order based on an employer's refusal to bargain after he supplied the list and lost the election. Or, a district court may be asked to enforce a Board subpoena against an employer who refused to comply with the rule. The latter method offers the greater chance for employer success since it allows use of the numerous arguments against the rule and permits arguments against what might be viewed as an unwarranted extension of the Board's subpoena power.

¹⁷ Other arguments are suggested in § 10(e) of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1964), which provides that the reviewing court shall set aside agency action found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, (2) contrary to constitutional right, such as the rights to due process and privacy, or (3) without observance of procedure required by law.

¹⁸ 61 Stat. 140 (1947), 29 U.S.C. § 156 (1964).

¹⁹ LMRA § 9(c)(1), 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1) (1964).

²⁰ The five decisions cited to justify the rule are distinguishable. The Board, in *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429, 33 L.R.R.M. 1151, 1152 (1953), prohibited last-day election speeches on company time, since they destroyed the employees' "free and untrammelled" choice. In *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 69, 50 L.R.R.M. 1532, 1533 (1962), and *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 50 L.R.R.M. 1152 (1962), the Board set aside coercive speeches which ruined the "reasoned, untrammelled" choice. And, in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224, 51 L.R.R.M. 1600, 1601 (1962), and *Gummed Prods. Co.*, 112 N.L.R.B. 1092, 1094, 36 L.R.R.M. 1156, 1157 (1955), the NLRB set aside elections after false handbills impaired the "free and untrammelled expression of choice," and the "full and complete freedom of choice," respectively.

²¹ A commentator in 1961 observed that "the NLRB has issued no formal rules other than those governing the practice and procedure to be followed in cases brought before the agency." Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 Yale L.J. 729, 732 (1961). In criticizing the Board's failure to use its formal rule-making power, Professor Peck cited the legislative history of the Taft-Hartley Act and statements of Board members to show that § 6 authorizes the Board to make formal rules. It should be noted that decisions such as *Peerless Plywood Co.*, supra

Board to conduct elections, entrusted to it alone the responsibility for conducting fair and free elections.²² As the most qualified tribunal, the Board could properly conclude that voter eligibility lists are essential for a fair and free election, and that employers interfere with employees' rights to organize when they refuse to supply such lists.

Equal Time.—A companion case to *Excelsior, General Elec. Co. (Somerset)*,²³ considered another communication issue—equal time. Here the union requested equal time to respond to a campaign speech which the employer made on company time and property. In suggesting that *Livingston Shirt Corp.*²⁴ be overruled and *Bonwit Teller, Inc.*²⁵ be revived and expanded, the union proposed a new equal time rule: Unions should be allowed to campaign on company premises whenever an election is directed, or, at least, whenever the employer uses the premises to campaign. The Board, however, noted that the employer's communication advantage had been considerably lessened by *Excelsior*. Thus the Board concluded:

In light of the increased opportunities for employees' access to communications which should flow from *Excelsior*, but with which we have, as yet, no experience, and because we are not persuaded on the basis of our current experience that other fundamental changes in Board policy are necessary to make possible that free and reasoned choice for or against unionization which the . . . Act contemplates and which it is our function to insure, we prefer to defer any recon-

note 20, espoused interpretative rules which were neither made in compliance with the APA nor thereafter published in the Code of Federal Regulations. Likewise, the *Excelsior* rule was not made in compliance with certain APA requirements such as publication in the Federal Register of the time and place of the proceedings, the authority under which the rule was proposed, and the substance of the proposal. However, there was opportunity for interested persons to file briefs and the rule was published 30 days before its effective date. The Board's compliance with the two most important provisions of the APA may indicate that the Board is reacting to the growing criticism of its failure to make formal rules. See, e.g., *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 859-60 (2d Cir. 1966); *International Union of Eng'rs v. NLRB*, 353 F.2d 852, 856 (D.C. Cir. 1965).

²² The Board might also cite other policy sections, e.g., LMRA § 1(b), 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1964), which declares that "it is the purpose and policy of this Act . . . to provide orderly and peaceful procedures for preventing the interference by either [employees or employers] with the legitimate rights of the other"; or LMRA § 101(1), 61 Stat. 137 (1947), 29 U.S.C. § 151 (1964), which states the policy of the United States to be to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."

²³ 156 N.L.R.B. No. 112, 61 L.R.R.M. 1222 (1966).

²⁴ 107 N.L.R.B. 400, 33 L.R.R.M. 1156 (1953). The Board held that an employer does not commit an unfair labor practice if he makes a pre-election speech on company time and premises to his employees and denies the union equal time unless there is either an unlawful broad no-solicitation or a privileged broad no-solicitation rule. See *S. & H. Grossinger's, Inc.*, 156 N.L.R.B. No. 20, 61 L.R.R.M. 1025 (1965) (unfair labor practice where coercive speeches plus no-access rule).

²⁵ *Bonwit Teller, Inc.*, 96 N.L.R.B. 608, 28 L.R.R.M. 1547 (1951), enforcement denied, 197 F.2d 640 (2d Cir. 1952), which held that an employer who made a privileged speech was guilty of an unfair labor practice if he denied a request by the union to reply on the employer's time and property, was overruled in *Livingston Shirt Corp.*, supra note 24.

sideration of current Board doctrine in the area of plant access until after the effects of *Excelsior* become known.²⁶

The *Excelsior* rule will very likely increase the level of knowledge of employees, and substantially reduce the employer's communication advantage by virtue of the increased union personal contact with employees at their homes. Yet *Excelsior* is not the panacea for all equal time problems: it does not effectively aid the union in overcoming the effects of employer speeches made during the last few days before an election. Limitations of time may preclude effective use of names and addresses.

Perhaps time will convince the Board that requests for voter lists and for equal time reflect very distinct desires. In fact, although voter lists and equal time decidedly assist unions in their organizing efforts, it is submitted that the communication advantage problem would have been better solved if the Board had announced an equal time rule rather than a voter list rule.²⁷ In-plant communications would substantially preclude all need for names and addresses, while names and addresses are an ineffective device with which to combat last-minute employer speeches.

C. *Appropriate Bargaining Unit*

Section 9(b) of the LMRA¹ directs the Board to decide the appropriate bargaining unit in each case,² yet provides no standard by which to decide such questions.³ The Board is given broad discretion, guided only by the express legislative intent "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act. . . ." The sole limitation on this discretion appears in section 9(c)(5), which prohibits the Board from giving controlling weight to "the extent to which the employees have organized."⁴

²⁶ General Elec. Co. (Somerset), *supra* note 23, 61 L.R.R.M. at 1223.

²⁷ Professor Bok, in *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 101-02 (1964), suggested two solutions to the problem of union access to employees. One was to give the union a voter eligibility list. The other was that in units of 75 or more employees, the employer should not be allowed to make a speech on company time within 7 days of the election, unless he gives equal time to the union.

¹ Section 9(b) states:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .

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

² The act does not require the most appropriate or only appropriate unit. See, e.g., *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418, 26 L.R.R.M. 1501, 1506 (1950); *accord*, *Parsons Inv. Co.*, 152 N.L.R.B. No. 14, 59 L.R.R.M. 1027 (1965).

³ A growing number of commentators have analyzed the inconsistent and often mysterious standards used by the Board in this area. See, e.g., Daykin, *Determination of Appropriate Bargaining Unit by the NLRB: Principles, Rules, and Policies*, 27 Fordham L. Rev. 218 (1958); Grooms, *The NLRB and Determination of the Appropriate Unit: Need for a Workable Standard*, 6 William & Mary L. Rev. 13 (1965); Note, *The Board and Section 9(c)(5): Multilocation and Single-Location Units in the Insurance and Retail Industries*, 79 Harv. L. Rev. 811 (1966).

⁴ Section 9(c)(5) states: "In determining whether a unit is appropriate . . . the

On the other hand, in recent years the NLRB has held that the act does not require unions to seek the most comprehensive grouping of employees, recognizing that to require comprehensive units in effect deprives the employees of their right to self-organization.⁵ Although the Board has traditionally used slightly different rules regarding unit determinations in various industries, the trend is toward applying uniform rules for all industries.

Insurance District Offices.—The Metropolitan Life Insurance Company has eight district offices in greater Providence. In 1963, the NLRB determined that one of these district offices, located at Woonsocket, was an appropriate bargaining unit.⁶ In a later enforcement proceeding, the First Circuit refused to enforce the Board's bargaining order against the company.⁷ After examining prior unit determinations in the insurance industry and failing to find any consistency therein, and taking into account the union's success in obtaining the less-than-comprehensive unit whenever sought, the court stated it could only conclude that the Board was regarding extent of organization as controlling.⁸ The Supreme Court reversed, and remanded the case to the Board.⁹ Although it agreed that the Board had failed to state the reasons for its unit determination, it could not agree that the "only possible conclusion" was a section 9(c)(5) violation. The Court further stated that the Board could consider extent of organization as a factor, albeit not the controlling one.

In February 1966 the Board announced its *Metropolitan Life Ins. Co.* decision.¹⁰ It herein reaffirmed its unit determinations in *Metropolitan Life* and other related cases,¹¹ and stated the factors to which it looks in determining unit questions. They included

the community of interest among the employees sought to be represented; whether they comprise a homogeneous, identifiable, and distinct group; whether they are interchanged with other employees; the extent of common supervision; the previous history of bargaining; and the geographic proximity of various parts of the employer's operation.¹²

extent to which the employees have organized shall not be controlling." 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(5) (1964).

⁵ See, e.g., *Bagdad Copper Co.*, 144 N.L.R.B. 1496, 54 L.R.R.M. 1264 (1963). See also *Merner Lumber & Hardware Co.*, 145 N.L.R.B. 1024, 55 L.R.R.M. 1114 (1964).

⁶ *Metropolitan Life Ins. Co. (Woonsocket)*, 142 N.L.R.B. 491, 53 L.R.R.M. 1096 (1963).

⁷ *Metropolitan* deliberately refused to bargain in order to obtain judicial review of the unit determination. *Metropolitan Life Ins. Co. v. NLRB*, 327 F.2d 906 (1st Cir. 1964).

⁸ *Id.* at 911. The Board's decision in *Quaker City Life Ins. Co.*, 134 N.L.R.B. 960, 49 L.R.R.M. 1281 (1961), marked a change in its insurance industry policy. Since the anticipated statewide organization in the industry had failed to materialize, the Board majority stated it would no longer preclude less than employerwide or statewide units. *Id.* at 962, 49 L.R.R.M. at 1282. In *Metropolitan Life*, the First Circuit noted that in no instance since *Quaker City* had the Board refused the smaller units sought by unions. *Metropolitan Life Ins. Co. v. NLRB*, *supra* note 7, at 910.

⁹ *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442 (1965).

¹⁰ 156 N.L.R.B. No. 113, 61 L.R.R.M. 1249 (1966).

¹¹ *Id.*, 61 L.R.R.M. at 1253.

¹² *Id.*, 61 L.R.R.M. at 1251.

The Board admitted that it considers different factors in varying degrees in each case. Yet it pointed out that it recognizes the limitation of section 9(c)(5) and denied giving controlling weight to extent of organization.¹³ The Board further stated:

In short, the district office is the insurance industry's analogue of the single manufacturing plant, or the single store of a retail chain. Accordingly, if petitioned for, we will ordinarily find a single district office to be an appropriate bargaining unit for insurance agents, and will direct an election in that unit, just as we normally do for a manufacturing plant or a retail store.¹⁴

Thus, the Board has explicitly extended a presumption of appropriateness to the single insurance district office.

Retail Chainstores.—Prior to 1962, Board policy in retail chainstore cases had been that the appropriate unit should include employees of all stores located within the employer's *administrative division* or *geographic area*.¹⁵ In its *Sav-On Drugs, Inc.* decision,¹⁶ the Board modified that policy and stated it would henceforth apply to retail chainstores "the same unit policy which we apply to multiplant enterprises in general," that is, a determination based on all the factors in each case.¹⁷ As the Board stated, the effect of its holding was simply to add the *possibility* that a single store could be an appropriate unit even though not including all employees within the administrative division.¹⁸ Within a year, in *Weis Markets, Inc.*,¹⁹ the Board reaffirmed that the existence of an administrative division is a factor to be considered: "The fact that the unit sought would include all employees within such an area has been and continues to be one of the criteria to which the Board looks as part of its general unit policy."²⁰

¹³ The Board listed these factors in the present case which justified its determination: Each office is largely autonomous and serves a defined area; each manager exercises control over the agents in that office; each office's agents enjoy common working conditions and benefits; there is minimal inter-office transfer of employees; there is no bargaining history at the Woonsocket office; there is no union seeking to represent the Woonsocket agents as part of a larger unit. Id., 61 L.R.R.M. at 1252.

¹⁴ Ibid. Moreover, it stated that when two or more groupings are possible, it would consider the union's request for "there is no reason to compel a labor organization to seek representation in a larger unit than the one requested unless the smaller unit is itself inappropriate." Id., 61 L.R.R.M. at 1252-53.

¹⁵ See, e.g., *Daw Drug Co.*, 127 N.L.R.B. 1316, 46 L.R.R.M. 1218 (1960).

¹⁶ 138 N.L.R.B. 1032, 51 L.R.R.M. 1152 (1962). Dissenting member Rodgers preferred the old rule since it recognized the integrated nature of retail chain operations and the community of interests of employees in such multistore groups.

¹⁷ Id. at 1033, 51 L.R.R.M. at 1153. The Board felt that employees in retail chainstores were being impeded in their rights to self-organization by the overemphasis of "administrative grouping" of stores.

¹⁸ In *Sav-On*, even though the employer's administrative division consisted of nine stores, one store was found to be an appropriate unit based on: authority of the manager; minimal inter-store employee interchange; geographic separation; no prior bargaining history; no union seeking a larger unit.

¹⁹ 142 N.L.R.B. 708, 53 L.R.R.M. 1141 (1963). Here, the union was granted a separate citywide unit despite the administrative area being statewide.

²⁰ Id. at 710, 53 L.R.R.M. at 1142.

However, in a 1964 decision, *Frisch's Big Boy Ill-Mar, Inc.*,²¹ the Board interpreted *Sav-On* differently. Here the employer owned and operated, under franchises, ten restaurants in Indianapolis, and the union sought certification at one of these. The NLRB concluded that the single restaurant unit was appropriate.²² The Board pointed out that, since *Sav-On*, it was applying general unit criteria to retail chainstores. However, it then added:

Under such criteria, a single-plant unit is presumptively appropriate unless it be established that the single plant has been effectively merged into a more comprehensive unit so as to have lost its individual identity [citing *Dixie Belle Mills, Inc.*].²³ We find no compelling reasons to over-ride the presumption that the single-store unit sought is appropriate.²⁴

In matter-of-fact fashion, the Board had extended the presumptive appropriateness of a single *plant* unit to a single *retail chainstore* unit, neither discussing nor attempting to justify its significant extension of *Sav-On* and *Dixie Belle*. Dissenting members Leedom and Jenkins emphasized language from *Sav-On* and *Weis Markets* showing that administrative division was still to be considered. They concluded, upon the totality of the factors, that the single-store unit was inappropriate.²⁵ In a subsequent unfair labor practice proceeding the employer was found to have violated section 8(a)(5) and was ordered to bargain.²⁶

In its recent decision, *NLRB v. Frisch's Big Boy Ill-Mar, Inc.*,²⁷ the Seventh Circuit refused to enforce the Board's order. It observed that the Board had departed from its earlier holdings in not considering administrative division as a factor. The Court discussed the factors listed by the Board and held the unit inappropriate.²⁸

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

²² It admitted that the "optimum" unit was citywide, yet found the single restaurant appropriate because of: the autonomy of each restaurant; the control exercised by each manager; minimal employee interchange; no bargaining history; no union seeking larger unit. *Id.* at 553, 56 L.R.R.M. at 1247.

²³ In *Dixie Belle*, the Board found appropriate a single textile manufacturing plant unit although the employer had another plant twenty miles away. It stated:

A single plant unit, being one of the unit types listed in the statute as appropriate for bargaining purposes, is presumptively appropriate. Therefore, unless such plant unit has been so effectively merged into a more comprehensive unit by bargaining history, or is so integrated with another as to negate its identity, it is an appropriate unit even though another unit, if requested, might also be appropriate.

¹³⁹ N.L.R.B. 629, 631, 51 L.R.R.M. 1344, 1345 (1962).

²⁴ *Frisch's Big Boy Ill-Mar, Inc.*, *supra* note 21, at 551 n.1, 56 L.R.R.M. at 1247 n.1.

²⁵ The dissenters listed these factors: Close geographical proximity, centralized managerial policy, substantial employee interchange, identical prices, menus and conditions of employment at each restaurant. *Id.* at 553-54, 56 L.R.R.M. 1247-48.

²⁶ 151 N.L.R.B. No. 48, 58 L.R.R.M. 1438 (1965).

²⁷ 356 F.2d 895 (7th Cir. 1966).

²⁸ Two other circuits have recently upheld single-store units, where the NLRB did not use a "presumption of appropriateness." In *NLRB v. Merner Lumber & Hardware Co.*, 345 F.2d 770 (9th Cir. 1965), the court held a single-store unit appropriate even though the employer had another unorganized store four miles away. In *NLRB v.*

Retail Store Departments.—Prior to 1965, the NLRB traditionally had held that the optimum unit in a department store was a storewide grouping of all employees,²⁹ and had generally refused requests for separate units of selling and nonselling employees in the absence of a showing of homogeneity or a distinct community of interests.³⁰ In 1965, the Board, in three companion decisions, modified prior policy and allowed separate units of selling and nonselling employees.³¹ In *Allied Stores of New York, Inc. (Stearn's Paramus)*,³² the Board honored a union's request for three separate units of selling, nonselling and restaurant workers in the employer's department store. Although the Board conceded that it has regarded the "optimum" unit as storewide, it stated that such a grouping is not necessarily the only appropriate one. The Board concluded that it found sufficient differences in the conditions and interests of the three groups to justify separate units.³³

The *Allied Stores* decision represents a clear departure from prior Board policy. Although the "community of interest" test still controls, the Board has broken with prior practice in apparently dropping the presumption that the "community of interest" for department store employees is storewide.³⁴

Conclusion.—The obvious trend of the Board decisions is toward smaller units.³⁵ To this end, the Board has recently eliminated presumptions against

Primrose Super Mkt., Inc., 353 F.2d 675 (1st Cir. 1965), the court allowed a unit composed of one of the employer's five stores within Essex County. The Board had followed *Sav-On's* holding that general unit criteria would henceforth be applied to single-store units. *Primrose Super Mkt., Inc.*, 148 N.L.R.B. 610, 57 L.R.R.M. 1057 (1964).

²⁹ See, e.g., *Robertson Bros. Dept. Store, Inc.*, 95 N.L.R.B. 271, 28 L.R.R.M. 1335 (1951).

³⁰ In *May Dept. Stores Co.*, 97 N.L.R.B. 1007, 1008, 29 L.R.R.M. 1206 (1952), the Board stated it would only recognize smaller units "who had among themselves a mutuality of employment interests not shared by other department store employees, which existed by reason of their singularly different work and training skills." Here the union was granted a unit of hair stylists employed in the beauty salon department of one of the employer's stores.

³¹ The three cases raise identical issues. Only the *Allied Stores* case will be discussed herein. *Lord & Taylor*, 150 N.L.R.B. No. 81, 58 L.R.R.M. 1088 (1965); *Arnold Constable Corp.*, 150 N.L.R.B. No. 80, 58 L.R.R.M. 1086 (1965); *Allied Stores, Inc.*, 150 N.L.R.B. No. 79, 58 L.R.R.M. 1081 (1965).

³² *Id.*, 58 L.R.R.M. at 1082. The Board cited *May Dept. Stores Co.*, *supra* note 30, as an instance where it recognized a smaller unit when working conditions and interests of employees were distinct.

³³ The Board listed these differences among others: Location of work areas, supervision, job qualifications, dress, performance standards, wage scales, and the nature of the work force. *Id.*, 58 L.R.R.M. at 1083-84. Dissenting member Jenkins stressed the similarities among the groups: Integration of operations, overlapping of duties and supervision, lack of distinctive job skills, and uniform working conditions and benefits. *Id.*, 58 L.R.R.M. at 1084.

³⁴ A subsequent decision has cited *Allied Stores* as rejecting the policy that storewide units are exclusively appropriate in the retail industry. The Board stated it does not consider *Allied Stores* limited to its facts and treated it as authority for the proposition that less than storewide units may be appropriate. *J. L. Hudson Co.*, 155 N.L.R.B. No. 133, 60 L.R.R.M. 1516, 1517 (1965).

³⁵ Member Brown, in a speech delivered in January 1964, 55 L.R.R.M. 93, stated that the old rules hindered organizing efforts in the insurance and retail chainstore areas. Since the Board could find no compelling community of interests requiring broader units, its new rules gave employees in those industries the same rights as other employees.

smaller units and applied the single manufacturing plant unit presumption of appropriateness³⁶ to insurance offices³⁷ and retail chainstores.³⁸

Since extent of organization may be considered as a factor in making unit findings,³⁹ the Board seems to find it easier to justify smaller units.⁴⁰ For example, in the situation where a union seeks to organize only the smaller unit, the Board considers the union's ability to organize in the smaller group as evidence of homogeneity among those employees. As the act states, extent of organization cannot be controlling; but if other commonly found factors such as geographic separation and minimal employee interchange also exist, the Board has three strong factors to support the distinct nature of the smaller unit sought.

V. COLLECTIVE BARGAINING AGREEMENTS AND THE FEDERAL ANTITRUST LAWS

In June 1965 the Supreme Court handed down two cases, *UMW v. Pennington*¹ and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,² representing the latest attempt by the Court to harmonize the long-standing conflict between the nation's labor laws and the antitrust laws.

In *Loewe v. Lawlor (Danbury Hatters)*,³ the Supreme Court, unable to find a clear mandate in the Sherman Act,⁴ held that unions were subject to the antitrust law. Congress responded in 1914 with the Clayton Act, which states in section 6 that "the labor of a human being is not a commodity or article of commerce," and in section 20 that, "nor shall any of the acts specified [traditional union activities, strikes, picketing and boycotts] be considered violations of any law of the United States."⁵ The Supreme Court, again failing to find a clear congressional mandate,⁶ held in several cases⁷

³⁶ *Dixie Belle Mills, Inc.*, supra note 23.

³⁷ *Metropolitan Life Ins. Co.*, supra note 10.

³⁸ *Frisch's Big Boy Ill-Mar, Inc.*, supra note 21. In addition, the Board in *P. Ballantine & Sons*, 141 N.L.R.B. 1103, 52 L.R.R.M. 1453 (1963) treated a single branch liquor distributorship as equivalent to a single manufacturing plant, and ruled it presumptively appropriate.

³⁹ *NLRB v. Metropolitan Life Ins. Co.*, supra note 9.

⁴⁰ *Allied Stores, Inc.*, supra note 31, represents the most striking example of the new liberality. The Board found distinct homogeneity among (selling and nonselling) employees for reasons which it had never previously regarded as sufficient to justify separate units.

¹ 381 U.S. 657 (1965).

² 381 U.S. 676 (1965). These two cases have received much comment in the law reviews. See Handler, Recent Antitrust Developments—1965, 40 N.Y.U.L. Rev. 823 (1965); Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965); Summers, Labor Law in the Supreme Court: 1964 Term, 75 Yale L.J. 59 (1965); Comment, 34 Fordham L. Rev. 286 (1965); Note, 7 B.C. Ind. & Com. L. Rev. 158 (1965); 41 Notre Dame Law. 221 (1965).

³ 208 U.S. 274 (1908).

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

⁵ 38 Stat. 731, 738 (1914), as amended, 15 U.S.C. § 17, 29 U.S.C. § 52 (1964).

⁶ For a legislative history, see Berman, Labor and the Sherman Act 3-54 (1930); Frankfurter & Greene, The Labor Injunction (1930).

⁷ E.g., *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37

that the antitrust laws still applied to unions. In the early 1930's Congress, by enacting several labor relations acts, clearly stated that the national policy was one of encouragement of union activity.⁸

The Supreme Court, in *Apex Hosiery Co. v. Leader*,⁹ recognized the meaning of the policies enunciated by Congress and gave unions 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."¹⁰ Then, in *United States v. Hutcheson*,¹¹ the Supreme Court held that no union engaged in a valid labor dispute would be subject to the antitrust laws. As Mr. Justice Frankfurter expressed it:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.¹²

However, in *Allen Bradley Co. v. Local 3, IBEW*,¹³ the Court elaborated on combining with non-labor groups and held that, although unions acting in their own self-interest could legitimately pursue the activities in question, when they combined with the conspiring employers, they lost their immunity from the Sherman Act. Despite certain differences of opinion¹⁴ as to the true facts of *Allen Bradley*, it is clear that the Supreme Court treated the case as one in which the employers used the union as a shield against antitrust liability.¹⁵

This was the state of the law preceeding the instant decisions. If past law was cloudy, the *Pennington* and *Jewel Tea* decisions, due to the unusual split and proliferation of concurring and dissenting opinions,¹⁶ may only serve to further muddy the waters.

(1927); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1920). For an excellent discussion, see Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L.J. 14 (1963).

⁸ See Norris-LaGuardia Act, 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1964); NLRA, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-66 (1964).

⁹ 310 U.S. 469 (1940).

¹⁰ *Id.* at 504.

¹¹ 312 U.S. 219 (1941).

¹² *Id.* at 232.

¹³ 325 U.S. 797 (1945).

¹⁴ In the lower court, *Allen Bradley Co. v. Local 3, IBEW*, 41 F. Supp. 727, 732 (S.D.N.Y. 1941), it appears clear that the union was the motivating force behind the conspiracy. See generally Bernhardt, *The Allen Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 U. Pa. L. Rev. 1094 (1962).

¹⁵ See 325 U.S. at 811, where the Court stated, "A business monopoly is no less such because a union participates, and such participation is a violation of the Act."

¹⁶ The Court split into three identical groups in both cases. Mr. Justice White, speaking for Chief Justice Warren and Justice Brennan, wrote the opinion of the Court in *Pennington*, finding a violation of the antitrust laws; and, while there was no majority opinion in *Jewel Tea*, Mr. Justice White, speaking for the same Justices, would find no loss of exemption in this case. Mr. Justice Douglas, joined by Justices Black and Clark would find the union violated the Sherman Act in both cases. Justices Goldberg, Harlan

In *Pennington*, trustees of the United Mine Workers Welfare and Retirement Fund brought suit against Phillips Coal Company to recover royalty payments due the fund under a wage agreement between Phillips Coal and the UMW. Phillips Coal filed a cross-claim alleging that the UMW and the larger coal companies had concluded a wage agreement in 1950, the ultimate purpose of which was to eliminate the smaller companies and consequently leave a larger market for the surviving larger companies. Phillips specifically alleged that the union had initially promised to curtail its opposition to rapid mechanization and to impose the same wage scale on all the companies without regard to their degree of mechanization or their ability to pay. The larger companies had promised increased wages and greater royalty payments into the fund as productivity increased with automation; and the union, in turn, had further bound itself to impose these increases in wages and fund payments on all other companies. Phillips claimed that this agreement was in violation of the Sherman Act.¹⁷ The jury returned a verdict for Phillips, and the trial court awarded treble damages to Phillips against the union. The court of appeals affirmed,¹⁸ and the Supreme Court granted certiorari. In an opinion written by Mr. Justice White, the Court held that the union lost its exemption from the Sherman Act when it agreed with one set of employers to impose a certain wage scale on other bargaining units.¹⁹

In *Jewel Tea*, after prolonged negotiations, seven affiliate members of Amalgamated Butchers concluded an agreement with Associated, representing a substantial number of retail meat dealers in the Chicago area, which agreement prohibited the sale of fresh meat before nine A.M. and after six P.M. Threatened with a strike, Jewel Tea signed a contract containing the same restrictions and shortly thereafter brought suit against the union and Associated under the Sherman Act to invalidate this restrictive provision. The complaint alleged that Associated and the union had conspired to prevent the sale of fresh meat at retail after six P.M. and that the Jewel Tea markets were particularly restricted by the provision since they were primarily self-service stores that remained open evenings without butchers. The trial judge found no evidence of a conspiracy and no unreasonable restraint of trade. After the court of appeals reversed on the ground that a conspiracy could be inferred from the contract between the union and Associated,²⁰ the Supreme Court granted certiorari and, while there was no majority opinion, held that the union had not lost its exemption from the Sherman Act.

and Stewart, dissenting in *Pennington* and concurring in *Jewel Tea*, would find no violation in either case.

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

¹⁸ *Pennington v. UMW*, 325 F.2d 804 (6th Cir. 1963).

¹⁹ The Court actually reversed on two grounds. (1) Evidence was admitted to the effect that the conspiracy was accomplished by influencing public officials, and the Court, citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), stated: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670. (2) The trial court had erroneously instructed the jury to include in its award the amount of damages Phillips sustained as a result of the Secretary of Labor's action.

²⁰ *Jewel Tea Co. v. Associated Food Retailers*, 331 F.2d 547 (7th Cir. 1964).

Mr. Justice White, writing the opinion of the Court in *Pennington*, found that the conspiracy to impose wages upon another bargaining unit was not only not a protected agreement under the labor laws but was explicitly forbidden by the antitrust laws. In disposing of the labor law argument, Justice White argued that bargaining operates on a unit basis and hence it is inappropriate for one unit to impose standards on another unit. Also, the union's obligation to its members would be best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant without being strait-jacketed by prior agreements with a favored employer. Finally, Justice White cited the Board's condemnation of an employer conditioning his willingness to bargain upon the union's promise to organize the employer's competitors.²¹

In his examination of the antitrust laws, Justice White first analogized the present facts—*i.e.*, the agreement to set a wage level which marginal producers could not meet—to an agreement between an employer and union to impose a higher wage scale on a second employer. Justice White considered the latter as a clear violation of the antitrust laws, and the former as suffering from even a more basic defect, "without regard to predatory intention or effect in the particular case,"²² in that the union had surrendered its freedom of action with respect to its bargaining policy, contrary to antitrust policy.²³

Mr. Justice Douglas, in his dissent, reads the opinion of the Court as affirming the principles of *Allen Bradley* and

tells the trial judge: *First*. On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws. *Second*. An industry-wide agreement containing these features is *prima facie* evidence of a violation.²⁴

In a significant footnote, Justice Douglas points out that simultaneous action is not necessary and that successive negotiations could be a violation.²⁵

Mr. Justice Goldberg dissented on the grounds that mandatory collective bargaining subjects should be free of judicial scrutiny for antitrust violations and the national labor law policy supports uniform wage agreements. His major criticism centered on the fact that the effect of the Court's holding would be to place collective bargaining agreements under the scrutiny of juries and judges. It would leave to them to decide whether the union was pursuing a legitimate self-interest in imposing uniformity or was

²¹ The value of such Board decisions for the proposition that the labor law policy does not favor bargaining about other units appears doubtful for, as Justice Goldberg points out in *UMW v. Pennington*, *supra* note 1, at 725 n.25, there is nothing in those decisions precluding a voluntary agreement to do so.

²² *Id.* at 668.

²³ *Ibid.*

²⁴ *Id.* at 672-73.

²⁵ *Id.* at 673.

conspiring with an employer to force competitors out of business. In Justice Goldberg's view, Congress took this decision from the courts when it involves mandatory subjects of bargaining.

In regard to the labor law argument, Justice Goldberg felt that the opinion of the Court ignored the realities of the bargaining table as well as the sanction for such uniformity in the labor relation acts.²⁶ Since multi-employer agreements were clearly permissible, he felt that the Court was looking to form rather than substance. Moreover, the insidious conspiracy was a clearly announced union objective.²⁷

In *Jewel Tea*, Mr. Justice White announced the judgment of the Court and in an opinion in which Justices Warren and Brennan joined, made collective bargaining agreements between a single employer and a union subject to the scrutiny of the antitrust laws. Although noting that the lower court had found no conspiracy between the union and the employer association, as had been found in *Pennington*, Justice White continued,

The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement. We must consider the subject matter of the agreement in the light of the national labor policy.²⁸

Although Justice White agrees that "the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work,"²⁹ nevertheless, in balancing the interests involved, the union objective must be "intimately related"³⁰ to wages, hours and working conditions and of "immediate and direct"³¹ concern to the union. Although the fact that both parties must bargain about such matters weighs heavily in favor of antitrust exemption, Mr. Justice White evidently does not believe that all mandatory subjects are exempt from Sherman Act scrutiny.

Mr. Justice Goldberg, in his concurring opinion, proposes a broader test: "[U]nions and employers are exempt from the operations of the antitrust laws for activities involving subjects of mandatory bargaining. . . ."³² He did not join in Justice White's opinion because

[Mr. Justice White] apparently draws lines among mandatory subjects of bargaining, presumably based on a judicial determination

²⁶ In the preamble to the NLRA (Wagner Act), one of the objectives of labor is stated as being "the stabilization of competitive wage rates and working conditions within and between industries." 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

²⁷ See Baratz, *The Union and The Coal Industry* 62-74 (1955).

²⁸ 381 U.S. at 689. Prior to this, Justice White had held that primary jurisdiction in such cases did not rest with the Board since (1) courts themselves have experience in classifying bargaining subjects; (2) it is futile to send the case to an administrative agency when the case must ultimately be decided on a question of law; and (3) the Board has no available procedure for determining mandatory subjects unless connected with an unfair labor practice charge of a refusal to bargain. *Id.* at 686-87.

²⁹ *Id.* at 691.

³⁰ *Id.* at 689.

³¹ *Id.* at 691.

³² *Id.* at 735.

of their importance to the worker, and states that not all agreements resulting from collective bargaining based on mandatory subjects of bargaining are immune from the antitrust laws, even absent evidence of union abetment of an independent conspiracy of employers.³³

Justice Goldberg would consider union activity directed at its interest in preserving the job security of its over-all membership to be exempt from antitrust liability.

"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 American labor union history."³⁴ (Citation omitted.)

Mr. Justice Douglas, dissenting, would find a clear *Allen Bradley* violation, contrary to the finding of the trial court, since "in saying that there was no conspiracy, the District Court failed to give any weight to the collective agreement itself as evidence of a conspiracy and to the context in which it was written."³⁵ Thus, Justice Douglas did not reach the question of the balancing of interests raised by Justice White's opinion.

In both of these cases, the question before the Court was whether the activities in question were within the labor exemption to the Sherman Act, rather than the ultimate question of Sherman Act liability. Justice White does not enunciate this distinction as clearly in *Pennington* as he does in *Jewel Tea*. Nevertheless, in *Pennington*, he not only found a loss of exemption, but also a Sherman Act violation, since he ruled that the union motions for a directed verdict and a judgment notwithstanding the verdict were correctly denied.³⁶

Pennington is, on its facts, a clear *Allen Bradley* situation. But Justice White goes further than *Allen Bradley* in finding that the mere imposition of a wage rate on another bargaining unit is a per se Sherman Act violation "without regard to predatory intention or effect in the particular case."³⁷ This position has been criticized,³⁸ and one commentator has argued that since the concurring judges viewed the facts as a clear *Allen Bradley* situation, Justice White's position does not represent the majority view.³⁹ In addition, in the one case which has applied *Pennington*, *Republic Prods., Inc. v. American Fed'n of Musicians*,⁴⁰ the district court emphasized the facts involved in *Pennington*, including the intent to drive competitors out of business, stating:

[But its reason for so holding,] as I read the *Pennington* opinion, was the *Allen Bradley* principle, i.e., that the union had entered

³³ Id. at 727.

³⁴ Id. at 728.

³⁵ Id. at 737.

³⁶ 381 U.S. at 661.

³⁷ Id. at 668.

³⁸ Handler, *supra* note 2, at 836.

³⁹ Meltzer, *supra* note 2, at 721.

⁴⁰ 245 F. Supp. 475 (S.D.N.Y. 1965).

into a conspiracy with large employers to impose a high wage scale upon smaller employers who could not afford to pay it, for the purpose of putting the smaller employers out of business.⁴¹

The question also arises whether the loss of the exemption automatically means a Sherman Act violation. Although Justice White found a Sherman Act violation in *Pennington* on its facts, he implies in *Jewel Tea* that the answer is "no." In *Jewel Tea*, he states that, after loss of an exemption, "whether there would be a violation of §§ 1 and 2 would then depend on whether the elements of a conspiracy in restraint of trade or an attempt to monopolize had been proved," and in deciding this question, "the rule of reason would apply."⁴²

One of the chief difficulties engendered by the *Pennington* case is what evidence will be sufficient to withstand a union motion for a directed verdict.⁴³ On this question, Mr. Justice Douglas' concurring opinion assumes importance, for he states that a collective bargaining agreement itself can be prima facie evidence of a Sherman Act violation.⁴⁴ Justice White, in a footnote,⁴⁵ admits that indirect evidence of a conspiracy is sufficient to find a violation of the Sherman Act. Thus, although the Court acknowledges that unions may pursue uniform wage policies,⁴⁶ the union is submitting itself to the danger of having a judge or jury inferring from such uniformity a conspiracy to drive an employer's competitors out of business. This may result in more bellicose bargaining attitudes by unions, as Justice Goldberg suggests. At least a union will be forced to make public from the outset that it is imposing or seeking uniform wages from an industry or else forego its traditional aim of eliminating competition in the labor market.⁴⁷

The single employer situation, *Jewel Tea*, raises the problem of which mandatory subjects of bargaining will be exempted from the antitrust laws. Justice White makes clear in *Jewel Tea* that the extent of the exemption is not co-extensive with the area of mandatory bargaining,⁴⁸ the latter being but a factor to be considered in the balancing of interests. Professor Handler argues that the proper interpretation of *Jewel Tea* is that:

Agreements on all mandatory subjects are exempt and the test of whether an agreement falls within this exempted category is whether the subject is intimately related to the traditional union objectives and is of direct and immediate concern to the union.⁴⁹

Whether the Court will in the future adopt Justice Goldberg's view that unions have direct interests outside of the particular employees for

⁴¹ Id. at 480.

⁴² 381 U.S. at 693.

⁴³ Id. at 693 n.6.

⁴⁴ 381 U.S. at 673.

⁴⁵ Id. at 665 n.2.

⁴⁶ Ibid.

⁴⁷ Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 254 (1965).

⁴⁸ 381 U.S. at 689. See Meltzer, supra note 2, at 724.

⁴⁹ Handler, supra note 2, at 831.

whom the union is bargaining at the time (e.g., job security for other union members in different bargaining units), or the narrower limits set by Justice White, is unclear, since Justice Douglas never reached the problem.

The possible implications of these decisions are numerous. One of the chief effects will be at the bargaining table: Employers will no longer be able to discuss the union attitude toward imposing the same demands on their competitors, for a jury might infer a conspiracy from such a discussion. What of the position of non-formal employer associations seeking to impose uniform wages on the union?⁵⁰ Most favored nation clauses may be doomed. And, what may be disastrous to the process of collective bargaining, the threat of antitrust liability will preclude a dynamic collective bargaining, which, only so recently in *Fibreboard*,⁵¹ it appeared that the Supreme Court was seeking to encourage.

VI. UNFAIR LABOR PRACTICES

A. Board Procedure

Two recent decisions have introduced significant changes into unfair labor practice proceedings. The Supreme Court set the tempo in *Local 283, UAW v. Scofield*:¹ Confronted with the right of a successful party to intervene in an appeal from a Board decision, the Court unanimously upheld the right of both charging and charged parties to intervene. Dealing first with a successful charged party, the Court reasoned that, absent the right to intervene, the charged party would be hard pressed to obtain relief from an adverse decision rendered upon appeal.² Therefore, to insure the charged party an adequate opportunity to prevent an adverse decision, he should be allowed to intervene.³

With regard to the charging party, the Court rejected the Board's contention that the charging party has the same status as any other member of the public, and hence is adequately represented by the Board, as the custodian of public rights. The right to protect the public interest, the Court reasoned, does not preclude the rights of private parties. The LMRA gives rise to "private rights" after the issuance of a complaint,⁴ and the ability to intervene is a necessary prerequisite to the preservation of these private rights.

This decision paved the way for the Third Circuit decision in *Leeds & Northrup Co. v. NLRB*.⁵ In *Leeds & Northrup*, the employer filed an unfair

⁵⁰ See, e.g., *Detroit Newspaper Publishers Ass'n v. NLRB*, 346 F.2d 527 (6th Cir. 1965).

⁵¹ *Fibreboard Paper Prods. Co. v. NLRB*, 379 U.S. 203, 211 (1964).

¹ 382 U.S. 205 (1965).

² If the charged party had an order entered against him on the circuit level, an attempt to bring another action to obtain relief from the decision would run into the obstacles of stare decisis and comity. *Id.* at 213; see *Siegel Co. v. NLRB*, 340 F.2d 309 (2d Cir. 1965).

³ Another factor which the Court considered favorable to intervention by a charged party is the prevention of duplicate proceedings. Also, the Court stated that intervention would not bring about excessive delay nor be a complicating factor. 382 U.S. at 212, 215.

⁴ *Id.* at 220.

⁵ *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966).

labor practice charge and the Regional Director issued a complaint. While awaiting a hearing, the Regional Director and the union entered into an informal settlement agreement. The charging party objected to this settlement and sought an evidentiary hearing on his objections. The Regional Director denied this request and the General Counsel followed suit. For all practical purposes, under the former procedure, this would end the employer's right to redress, since the acceptance of the settlement agreement would mean a dismissal of the complaint, with no right to judicial review.⁶

The employer protested the denial of judicial review, contending that the General Counsel's action was final and therefore judicially reviewable. Otherwise, he argued, an anomalous situation would arise, whereby the choice of a procedural course by the Regional Director or General Counsel could foreclose review.⁷

The court denied the right of the Board, through delegation, to set up a system which denies the right to a hearing. The court pointed out that, even in cases which preclude judicial review, there is always a right to a hearing. Furthermore, the court stated, for all practical purposes, the action by the General Counsel was a final disposition by an administrative agency. Therefore, once the Regional Director issues a complaint, the statutory scheme con-

⁶ The usual Board procedure is as follows. The basic step in obtaining redress for an unfair labor practice is to file a charge with the Regional Director. 29 C.F.R. § 101.2 (1965). The Regional Director has complete discretion over whether a complaint will issue on the unfair labor practice charge. 29 C.F.R. § 101.4 (1965). While no court has ever overturned a Regional Director's decision not to issue a complaint, one court has stated that in a "most extreme situation" it might pierce the immunity. *Local 954, Retail Clerks Ass'n v. Rothman*, 298 F.2d 330 (D.C. Cir. 1962). If the Regional Director refuses to issue the charge, the only remedy from his action is an appeal to the General Counsel, whose decision is final and unappealable. 29 C.F.R. § 101.6 (1965); see, e.g., *Wellington Mill Div., West Point Mfg. Co. v. NLRB*, 330 F.2d 579, 590 (4th Cir. 1964); *NLRB v. Local 182, Teamsters Union*, 314 F.2d 53, 60 (2d Cir. 1963). Under prior procedure, once the complaint issued, the Regional Director was empowered to act in diverse ways. He could withdraw the complaint prior to the hearing before the trial examiner. 29 C.F.R. § 102.18 (1965). He could also enter into a settlement with the charged party and dismiss the complaint despite the charging party's objections. *Local 282, Teamsters Union v. NLRB*, 339 F.2d 795 (2d Cir. 1964). The settlement could be formal or informal. The former would be ratified by the Board, 29 C.F.R. § 101.9(b) (1965), the latter by the General Counsel. Only the formal settlement was subject to judicial review before the *Leeds & Northrup* decision. Once the proceeding entered into the adjudicatory phase, the Regional Director would lose authority over the complaint to the trial examiner. 29 C.F.R. § 102.9 (1965). The trial examiner would hold a hearing at which the charged party, the charging party, and the Regional Director would be accorded formal recognition as parties to the action with all the rights therein. See 29 C.F.R. § 102.8 (1965) (definition of "party"); 29 C.F.R. § 102.38 (1965) (rights of a party at the hearing). The trial examiner would forward his findings and recommendations to the Board at the conclusion of the hearing. 29 C.F.R. § 102.45 (1965). All the aforementioned parties would be afforded the same rights before a Board hearing as they had before the trial examiner. 29 C.F.R. § 102.46 (1965). Only an aggrieved party could appeal the Board's decision. *Scofield*, of course, has changed this by extending the right to intervene on appeal to successful parties.

⁷ The main contention of the charging party was that, were a formal settlement made under the same facts in this case, he would have been entitled to judicial review. Here, merely because the Regional Director decided to settle this informally, he has been deprived of this right.

templates Board action and the charging party is entitled to an evidentiary hearing upon his objection to the proposed settlement, be it an informal or a formal settlement. This, the court felt, would insure that a record would be created in order to protect private rights on review and to prevent their arbitrary eradication.⁸

These two decisions may have a significant impact on the application of the Administrative Procedure Act⁹ to NLRB proceedings. In *Local 282, Teamsters Union v. NLRB*,¹⁰ the Second Circuit rejected the union's argument that the APA gave it the right to a hearing:

Section 5(b) does not refer to all the "persons entitled to a notice of an agency hearing" . . . [but] refers only to "interested parties." In this context "interest" means a legally recognized private interest and not simply a possible pecuniary benefit. . . .¹¹

The court there further pointed out that the NLRA vindicates only a public interest and does not create private rights. The Supreme Court's rejection of this reasoning in *Scofield* suggests that the APA must be given great weight in determining the right to a hearing.

Concerning the type of hearing that must be given, the Third Circuit required that, in the *Leeds & Northrup* situation, it be "evidentiary."¹² Apparently this is the type of hearing that, minimally, will provide a record for review¹³ and provide the charging party the right to prove or amplify the charges which might enable his complaint to prevail before the Board or the reviewing forum.¹⁴ The precise form of the hearing will, however, likely depend upon the type of unfair labor practice charge.

Thus, there has been a basic shift in the position and power of the General Counsel. The onus is now upon him to undertake a more thorough investigation and screening before determining whether a charge will become a complaint. In addition, the ability of the Board to make settlements, especially informally, has been radically changed.

⁸ *Leeds & Northrup Co. v. NLRB*, supra note 5, at 533.

⁹ The Administrative Procedure Act requirements, 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1964), apply to all agencies unless expressly superseded by subsequent legislation respecting a particular agency, 60 Stat. 244 (1946), 5 U.S.C. § 1011 (1964), or unless expressly excluded from the APA definition of "agency," 60 Stat. 237 (1946), 5 U.S.C. § 1001(a) (1964).

¹⁰ 339 F.2d 795 (2d Cir. 1964).

¹¹ *Id.* at 800.

¹² "[O]nce a complaint has issued, the charging party is entitled to an evidentiary hearing upon its objections to the proposed settlement agreement." 357 F.2d at 533.

¹³ *Ibid.*; see NLRA § 10(c), 61 Stat. 146 (1947), 29 U.S.C. §§ 160(c), (f) (1964); APA §§ 7, 8, 60 Stat. 241 (1946), 5 U.S.C. §§ 1006(d), 1007(b) (1964).

¹⁴ The APA allows every party the right to present evidence, to rebut evidence, and to cross-examine whenever these are necessary for full disclosure of facts. APA § 7, 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1964). Under the rules of the NLRB, all parties at hearings must have the opportunity to present their respective position and evidence. 29 C.F.R. §§ 101.20, .31, .34 (1965).

B. Duty to Bargain

1. Employer's Decision to Subcontract

In *Fibreboard Paper Prods. Corp. v. NLRB*,¹ the Supreme Court held that "contracting out of . . . work previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform—is covered by the phrase 'terms and conditions of employment' within the meaning of § 8(d)."² Therefore, the employer violated section 8(a)(5)³ by unilaterally deciding to subcontract work without bargaining with the union.

The Board, however, has not read *Fibreboard* to require bargaining in all subcontracting cases. In rejecting a per se approach,⁴ the Board in *Westinghouse Elec. Corp. (Mansfield Plant)*⁵ set forth criteria by which it is to be decided whether the particular subcontracting involved is a subject of mandatory bargaining. If the following tests are met there is no need to bargain: (1) The contracting out is motivated solely by economic considerations; (2) the contracting out is a customary method by which the employer does business; (3) the particular subcontracting does not vary significantly in kind or degree from the subcontracting of work under the employer's past practice; (4) the union had an opportunity to bargain about changes in existing subcontracting practices at general negotiatory meetings; and (5) the subcontracting had no demonstrable adverse impact on employees in the unit.⁶ Since Westinghouse met these tests, there was no need to bargain about its subcontracting in these instances. The Board also listed those cases in which bargaining about subcontracting is required under *Fibreboard*: (1) The contracting out involves a departure from previously established operating practices; or, (2) it effects a change in conditions of employment; or, (3) it results in a significant impairment of job tenure, employment security or reasonably anticipated work opportunities for those in the bargaining unit.⁷

It is clear, however, that the Board did not intend that all five of the *Westinghouse* criteria be met in every case. Thus, in two *American Oil Co.* cases,⁸ *Central Soya Co.*,⁹ and *Fajnr Bearing Co.*,¹⁰ the Board relied on only two criteria, namely, the employer's past practice of subcontracting and no

¹ 379 U.S. 203 (1964).

² *Id.* at 210.

³ Section 8(a)(5) of the LMRA states:

It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees. . . .

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

⁴ The Board cited *Shell Oil Co.*, 149 N.L.R.B. 305, 57 L.R.R.M. 1279 (1964).

⁵ 150 N.L.R.B. No. 136, 58 L.R.R.M. 1257 (1965).

⁶ *Id.*, 58 L.R.R.M. at 1259.

⁷ *Id.*, 58 L.R.R.M. at 1258.

⁸ 152 N.L.R.B. No. 7, 59 L.R.R.M. 1007 (1965); 151 N.L.R.B. No. 45, 58 L.R.R.M. 1412 (1965). In a third *American Oil Co.* case, 155 N.L.R.B. No. 64, 60 L.R.R.M. 1369 (1965), it appears that all five criteria of *Westinghouse* were met.

⁹ 151 N.L.R.B. No. 161, 58 L.R.R.M. 1667 (1965).

¹⁰ 151 N.L.R.B. No. 40, 58 L.R.R.M. 1397 (1965).

significant detriment to unit employees. The Board may have gone a step further in *General Tube Co.*¹¹ where it relied on one factor alone, that of no substantial impact on the unit employees.

Where it has been the employer's past practice to subcontract, it appears that the Board assumes that the union has had an opportunity to bargain about such matters. The Board relied on this along with "no significant detriment" in *Westinghouse Elec. Corp. (Bettis Atomic Plant)*.¹²

In *American Oil Co.*,¹³ the Board held that bargaining with respect to subcontracting is not limited to those periods when the parties are engaged in negotiations for a new agreement but rather is a continuing duty throughout the life of the contract in the absence of a specific contract clause covering such a matter.¹⁴

Thus, insofar as subcontracting is concerned, it appears that the Board will not apply a per se rule,¹⁵ but will look at the circumstances involved, and, especially, whether the subcontract has caused a significant detriment to the unit employees involved.

The Board has, however, relied on the Supreme Court decision in *Fibreboard* in its treatment of partial termination cases. In the original Board decision in *Royal Plating & Polishing Co.*,¹⁶ the Board had found a section 8(a)(5) violation. An employer for strong economic reasons unilaterally decided to terminate operations in one of his two plants and hence gave an irrevocable ninety-day option on the plant to the Newark Housing Authority (which had eminent domain power). Although involved in contract negotiations with the union, he failed to notify it of his actions. The Authority picked up the option and the employer closed his plant. In a split decision,¹⁷ the Board found that by failing to discuss the decision to terminate (as well as the effects of the partial termination) the employer violated section 8(a)(5).

The Third Circuit remanded¹⁸ this holding to the Board for recon-

¹¹ 151 N.L.R.B. No. 89, 58 L.R.R.M. 1496 (1965). That past practices may not be crucial, see *Westinghouse Elec. Corp. (Bettis Atomic Plant)*, 153 N.L.R.B. No. 33, 59 L.R.R.M. 1355, 1358 n.15 (1965).

¹² 153 N.L.R.B. No. 33, 59 L.R.R.M. 1355 (1965). Chairman McCollough dissented, finding detriment in that the subcontracting meant that laid-off employees would not be recalled.

¹³ 151 N.L.R.B. No. 45, 58 L.R.R.M. 1412 (1965).

¹⁴ The Board has also allowed a waiver in this area. See *International Shoe Co.*, 151 N.L.R.B. No. 78, 58 L.R.R.M. 1483 (1965). The Board has also allowed subcontracting in the face of an economic strike if such an arrangement was temporary. See *Empire Terminal Warehouse Co.*, 151 N.L.R.B. No. 125, 58 L.R.R.M. 1589 (1965), aff'd sub nom. *Local 745, IBT v. NLRB*, 61 L.R.R.M. 2065 (D.C. Cir. 1966); *Shell Oil Co.*, 149 N.L.R.B. 283, 57 L.R.R.M. 1271 (1964).

¹⁵ See *Westinghouse Elec. Corp. (Mansfield Plant)*, supra note 5, 58 L.R.R.M. at 1258.

¹⁶ 148 N.L.R.B. 545, 57 L.R.R.M. 1006 (1964).

¹⁷ Id. at 546 n.2, 57 L.R.R.M. at 1006-07 n.2. Member Leedom based his concurrence solely on the employer's failure to discuss the effects of the shutdown. Member Jenkins found that the failure to disclose the facts constituted sham bargaining and hence would not reach the question of bargaining over the decision or the effects of the termination. Id. at 551, 57 L.R.R.M. at 1008.

¹⁸ See 152 N.L.R.B. No. 76, 59 L.R.R.M. at 1141.

sideration in light of the Supreme Court decision in *Textile Workers v. Darlington Mfg. Co.*¹⁹ Upon remand, the Board again found a section 8(a)(5) violation,²⁰ relying on the holding and rationale of *Fibreboard*. The Board indicated its awareness that the union may not always be able to propose a solution for the employer's economic difficulties; but, nevertheless, the Board determined that the national labor policy, as expressed in *Fibreboard*, reflects a congressional decision that chances of reaching a solution are good enough to warrant subjecting the issues to the process of collective bargaining.²¹

Addressing themselves to the Third Circuit remand, the Board felt²² that *Darlington* had no application to the case before them. Noting that *Darlington* concerned a section 8(a)(3) violation, the Board stated: "[W]e perceive no reasonable basis on which it can be said that the Court's decision [*Darlington*] requires a holding that a partial closing is not a subject for scrutiny under section 8(a)(5)."²³

Again, in *Carmichael Floor Covering Co.*,²⁴ an employer who had subcontracted carpet installation work argued that there was no motive of "chilling unionism" and hence no section 8(a)(5) violation, citing *Darlington*. The Board found the controlling principle in *Fibreboard*, stating,

In *Darlington* the Court was concerned with an issue of discriminatory motivation and its application, if any, to a complete or partial closing of a plant. The charge in the instant case, however, relates solely to Respondents' statutory duty to bargain. The alleged violation concerns the consequences of their failure to fulfill such duty regardless of the existence of any discriminatory motivation.²⁵

The Board has recognized, however, that unions may bargain away their right to discuss decisions to terminate various operations of the employer. Thus, in *Ador Corp.*²⁶ and *Druwhit Metal Prods. Co.*,²⁷ the Board held that under the management rights clause of the contract, the union had waived its right to bargain about employer decisions to terminate operations. The effect of a broad arbitration clause on such decisions is far from clear.²⁸

The circuit courts have been far from uniform in their understanding of *Fibreboard*. In *NLRB v. American Mfg. Co.*,²⁹ the Fifth Circuit supported the Board's view of *Fibreboard*. In this case an employer, who had been

¹⁹ 380 U.S. 263 (1965).

²⁰ 152 N.L.R.B. No. 76, 59 L.R.R.M. 1141 (1965).

²¹ Id., 59 L.R.R.M. at 1142.

²² Member Jenkins had grave doubts that the Board's position on the inapplicability of *Darlington* to partial termination cases is correct, but he did not reach that question, relying on his prior position, *supra* note 17. Id., 59 L.R.R.M. at 1143.

²³ Id., 59 L.R.R.M. at 1142.

²⁴ 155 N.L.R.B. No. 65, 60 L.R.R.M. 1364 (1965).

²⁵ Id., 60 L.R.R.M. at 1366.

²⁶ 150 N.L.R.B. No. 161, 58 L.R.R.M. 1280 (1965).

²⁷ 153 N.L.R.B. No. 35, 59 L.R.R.M. 1359 (1965).

²⁸ See p. 912 *supra*.

²⁹ 351 F.2d 74 (5th Cir. 1965).

delivering his own fuel product as part of his overall operation, unilaterally decided to contract this work out without notification to, or consultation with, the union with which it was negotiating a first contract. The Board found violations of sections 8(a)(3) and (1) by the employer, as well as a section 8(a)(5) violation.³⁰

Although disagreeing as to the appropriate remedy,³¹ the Fifth Circuit upheld the Board's findings. Speaking of the section 8(a)(5) violation, the court stated:

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 anti-union 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*. . . .³²

The court felt that the substitution of employees herein involved clearly fell within *Fibreboard*.

This decision is in conflict with the Eighth Circuit's decision in the much litigated *NLRB v. Adams Dairy, Inc.*³³ case. Again, as in *American Mfg. Co.*, in order to effectuate cost savings, the employer unilaterally decided to terminate his milk distribution system, and allow independent contractors to perform such distribution. He therefore discharged his driver-salesmen and sold the trucks to independent contractors. However, as had not been the case in *American Mfg. Co.*, here there was already a contract in existence and there was no section 8(a)(3) violation ruled on at the Board level.³⁴

The Board found that Adams had violated sections 8(a)(5) and (1) by his unilateral decision.³⁵ The Eighth Circuit reversed the Board.³⁶ After granting certiorari, the Supreme Court vacated the decision of the circuit court and remanded for reconsideration in light of *Fibreboard*.³⁷ In reaffirming its original holding, the Eighth Circuit distinguished its case from *Fibreboard* on the facts involved. The court stated:

[T]here 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

³⁰ *American Mfg. Co.*, 139 N.L.R.B. 815, 51 L.R.R.M. 1392 (1962). Member Leedom would find no § 8(a)(5) violation without the discriminatory § 8(a)(3) finding; and member Rodgers dissented, refusing to find either a § 8(a)(3) or (5) violation.

³¹ See p. 970 *infra*.

³² *NLRB v. American Mfg. Co.*, *supra* note 29, at 80.

³³ 137 N.L.R.B. 815, 50 L.R.R.M. 1281 (1962), enforcement denied, 322 F.2d 553 (8th Cir. 1963), vacated and remanded, 379 U.S. 644 (1964), modified, 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966).

³⁴ The trial examiner had found a § 8(a)(3) violation. 137 N.L.R.B. at 828, 50 L.R.R.M. at 1283.

³⁵ 137 N.L.R.B. at 815, 50 L.R.R.M. at 1281. Member Leedom concurred on the ground that the employer had to bargain about the effects of his decision.

³⁶ 322 F.2d at 553.

³⁷ 379 U.S. at 644.

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 Section 8(a)(5).³⁸

It is submitted that even if *Fibreboard* is to be limited to its facts, the essential facts in *Fibreboard*, substitution of employees to effectuate economic savings, are clearly present in *Adams Dairy*. The *Adams* court's argument that in its case there was a basic operational change and a change in the capital structure of the business in addition to the substitution of employees, has no crucial importance in the realm of national labor policy. Further, in *Adams Dairy*, the Eighth Circuit buttressed its opinion by using *Darlington*. Noting that there was no anti-union animus in the *Adams* case, the court held that there could therefore be no section 8(a)(5) violation, since *Darlington* requires, in a partial termination context, the finding of a motive to "chill unionism." Such a holding is due to the court's failure to distinguish between section 8(a)(5) and section 8(a)(3). As the Fifth Circuit in *American Mfg. Co.* noted, section 8(a)(5) violations are "quite apart from anti-union conduct. . . ."³⁹ In *Darlington*, the Supreme Court itself acknowledged that there was no section 8(a)(5) violation alleged or argued in the case.⁴⁰

The Eighth Circuit also rejected the Board's holding in a second partial termination case, *NLRB v. William J. Burns Int'l Detective Agency, Inc.*⁴¹ Here the employer, because of other contract terminations in the Omaha area, unilaterally decided to terminate its sole remaining contract with Creighton University for economic reasons. The Board found this to constitute a section 8(a)(5) violation in that the employer neither gave notice of such a decision to the union nor bargained about it.⁴² Dismissing the notice argument as not properly presented,⁴³ the court distinguished *Fibreboard* on the facts involved: "No form of contracting out or subcontracting is here involved. Burns for valid economic reasons has withdrawn completely. . . ."⁴⁴ Indeed, the Eighth Circuit seems on firm ground in distinguishing *Fibreboard*. There is, for example, no substitution of employees here. Once again, however, the court has improperly used the motive requirements of *Darlington* to support its holding: "Under *Darlington*, the finding of lack of antiunion motivation in closing the Omaha division for economic reasons precludes a

³⁸ 350 F.2d at 111.

³⁹ 351 F.2d at 80. The Board has also made this clear. See cases cited notes 23 & 24 *supra*.

⁴⁰ 380 U.S. at 267 n.5. As a further point the court, in *Adams Dairy*, argued that the decision to subcontract was made during negotiations for a new contract in *Fibreboard*, while, in the case before it, there was an existing contract and there had been prior discussions of the problem. Thus the court implied a waiver of the union's rights: "There is no evidence that collective bargaining, as traditionally understood, did not take place on the matters in dispute in this case." 350 F.2d at 114.

⁴¹ 346 F.2d 897 (8th Cir. 1965).

⁴² *William J. Burns Int'l Detective Agency, Inc.*, 148 N.L.R.B. 1267, 57 L.R.R.M. 1163 (1964).

⁴³ 346 F.2d at 902 n.2.

⁴⁴ *Id.* at 901.

finding of unfair labor practice in refusing to bargain with the union. . . ."⁴⁶

In another circuit case, *NLRB v. Royal Plating & Polishing Co.*,⁴⁶ discussed earlier in connection with the Board's approach to *Fibreboard*,⁴⁷ the Third Circuit refused to find a violation in a partial termination case. The court agreed with the Board that bargaining about the effects of the decision was mandatory under section 8(a)(5) but felt that the decision itself was not bargainable, distinguishing *Fibreboard* on the basis that, in *Royal Plating*, there was no substitution of employees, while there was a recommitment of capital and a change in economic direction.

In *Royal Plating*, however, it is apparent that the court was concerned with the economic plight of the employer, stating, "There was no room for union negotiations in these circumstances."⁴⁸ The court concluded: "[A]n employer faced with the economic necessity of either moving or consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down."⁴⁹ In line with this approach, the court noted the Board's own awareness of this problem in *New York Mirror*⁵⁰ where the Board, although finding a technical section 8(a)(5) violation, ordered no remedy due to the circumstances involved.

Thus, while the court can accurately point to the factual differences between partial terminations and the *Fibreboard* facts, still *Royal Plating* is at bottom grounded on the improbability of the union's being able to effectuate anything at the bargaining table.

That *Fibreboard* may limit union decisions, unilaterally made, was pointed out by the Ninth Circuit in *Associated Home Builders v. NLRB*.⁵¹ The union had set production quotas in the construction industry for its members. The Ninth Circuit, in remanding the case to the Board, noted that "a key issue presented by the evidence was the failure of the union to bargain collectively."⁵² Hence in some instances management, too, may find *Fibreboard* a valuable tool in forcing discussion of unilateral action.

Remedies.—In dealing with section 8(a)(5) violations, the Board has generally attempted to fashion workable and practical remedies.⁵³ In *New York Mirror*,⁵⁴ the Board found a technical violation of section 8(a)(5)⁵⁵

⁴⁶ Id. at 902.

⁴⁷ 350 F.2d 191 (3d Cir. 1965).

⁴⁸ See text accompanying note 20 supra.

⁴⁹ 350 F.2d at 195.

⁵⁰ Id. at 196.

⁵¹ 151 N.L.R.B. No. 110, 58 L.R.R.M. 1465 (1965).

⁵² 352 F.2d 745 (9th Cir. 1965). At the Board level the issue was the ability of the union to fine its members for exceeding production quotas. 145 N.L.R.B. 1775, 55 L.R.R.M. 1219 (1964).

⁵³ 352 F.2d at 752.

⁵⁴ See, e.g., *Winn-Dixie Stores, Inc.*, 147 N.L.R.B. 788, 56 L.R.R.M. 1266 (1964); *Renton News Record*, 136 N.L.R.B. 1294, 49 L.R.R.M. 1972 (1962).

⁵⁵ Supra note 50. In the case, the *New York Mirror*, after prolonged secret negotiations, executed a contract of sale for its name, goodwill and assets to the *New York Daily News*. The *Mirror* then notified by telegram its employees and also the union involved of its complete termination of operations.

⁵⁶ Since this case was decided prior to *Darlington*, and involves a complete termination of business, it is doubted that there is even a technical violation; still, the remedy aspect remains important as a reflection of Board thinking.

but refused to enter any remedial order, basing this refusal on a number of factors evidencing good faith on the part of the employer: (1) The decision was motivated solely by economic pressures; (2) there was no anti-union animus; (3) the acts of the employer permanently abolished all jobs in the unit and the union did not seek to reinstate them; (4) there was a past history of collective bargaining which had resulted in severance pay and termination rights under the contract; and (5) the employer negotiated concerning the effects after the shutdown.

The Board was, however, probably influenced by the realization that the union could not have affected the termination in any manner, since it had, in the language of *Hartman Luggage Co.*,⁵⁶ been handed a "fait accompli." It is nonetheless questionable whether this approach of recognizing the hopelessness of the situation in effecting remedies is consistent with the Board's *Town & Country Mfg. Co.* endorsement of collective bargaining: "Experience has shown, however, that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides."⁵⁷

In *NLRB v. American Mfg. Co.*,⁵⁸ the Fifth Circuit refused to enforce that part of a Board order which required the employer to resume trucking operations, unilaterally subcontracted in violation of section 8(a)(5), indicating that there was no support in the record for such a broad order. Noting that all the LMRA requires is bargaining about the decision to subcontract, the court stated, "When it [the employer] bargains it must do so in good faith; but on this major issue [subcontracting] it may bargain to the bitter end of an impasse."⁵⁹ Thus, to force the repurchase of the trucks when the employer could win the right to subcontract at the bargaining table, would give the union an unfair advantage at the negotiations.

The court was, however, careful to point out that it was not denying the Board's power to order reconstitution of a partially terminated business in the proper case.⁶⁰

On remand, the Board reconsidered its decision and order and deleted that portion requiring the employer to resume its unilaterally discontinued trucking operations.⁶¹

2. Special Remedies

The Board's power to fashion remedies for unfair labor practices is based on section 10(c) of the LMRA, which orders the Board "to take such

⁵⁶ 145 N.L.R.B. 1572, 55 L.R.R.M. 1206 (1964).

⁵⁷ *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1027, 49 L.R.R.M. 1918, 1920 (1962). That such an approach may, however, be used by the courts to support a finding of no violation at all in the partial termination area, is reflected in the Third Circuit's awareness of the Board rationale in *NLRB v. Royal Plating & Polishing Co.*, supra note 16.

⁵⁸ 351 F.2d 74 (5th Cir. 1965).

⁵⁹ *Id.* at 80.

⁶⁰ Note, however, that *American* also involved section 8(a)(3) and (1) violations; thus it appears that the Board will seldom be able to convince a court that a forced reinvestment is necessary to effectuate the policies of the Act.

⁶¹ *American Mfg. Co.*, 156 N.L.R.B. No. 109 (1966).

affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."¹ In *NLRB v. Seven-Up Bottling Co.*, Mr. Justice Frankfurter stated that the proper test of the legality of an order was whether it bears an "appropriate relation to the policies of the Act."²

This section briefly covers the progress of the Board and courts in areas where remedial problems have been especially troublesome.

Runaway Shop.—Perhaps the most important development at the Board level has been the new remedy in the runaway shop situation. In *Garwin Corp.*,³ the employer had abandoned his operation in New York and opened under a new corporate name in Florida without notifying or bargaining with the International Garment Worker's Union, in violation, the Board found, of sections 8(a)(1), (3) and (5) of the LMRA. In rejecting the trial examiner's traditional remedy,⁴ the Board, for the first time, ordered the employer to recognize and bargain with the union at the Florida plant, even though the union might not represent a majority of the employees there. The Board realized that this meant forcing a union representative on the new employees in Florida but justified its decision by stating:

In the circumstances, the interest of newly-hired employees whose very jobs, and hence statutory protection, exist by virtue of; (1) Respondents' unfair labor practices, (2) the Board's unwillingness to order the return of the plant to its original location, and (3) the failure of discriminatees to displace them by accepting reinstatement, should not be preferred at the expense of a bargaining order which will dissipate and remove the consequences of a deliberate violation of statutory obligations.⁵

The true effectiveness of this new remedy is open to question. Certainly the discriminatees in New York are not benefited. The rationale of preventing employer benefit is also of doubtful validity since all the employer is required to do under the new order is to bargain; and, considering that such runaway

¹ 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

² 344 U.S. 344, 348 (1953).

³ 153 N.L.R.B. No. 59, 59 L.R.R.M. 1405 (1965), 45 B.U.L. Rev. 582 (1965), 34 Geo. Wash. L. Rev. 367 (1965), 79 Harv. L. Rev. 855 (1966), 40 N.Y.U.L. Rev. 997 (1965), 41 Notre Dame Law. 267 (1965). The case is presently awaiting decision in the D.C. Circuit.

⁴ The trial examiner gave the employer the option to return to New York and obey a conventional order to bargain. However, if the employer decided to stay in Florida, then he was obligated to offer reinstatement to the discriminatees in Florida and to reimburse the moving expenses of any who accepted. See *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908 (8th Cir. 1954). If the discriminatees did not relocate, they would be entitled to back pay from the date of discharge to the date they secured substantially equivalent employment. See *Sidele Fashions, Inc.*, 133 N.L.R.B. 547, 48 L.R.R.M. 1679 (1961), enforced per curiam, 305 F.2d 825 (3d Cir. 1962). The trial examiner's bargaining order in Florida was, however, conditioned upon the union's acquiring an actual majority at the Florida plant.

⁵ *Garwin Corp.*, supra note 3, at 1409. The Board, conscious of the imposition of an unelected representative in Florida, reduced the normal contract bar of three years, *General Cable Corp.*, 139 N.L.R.B. 1123, 51 L.R.R.M. 1444 (1962), to one year.

shops are typical to areas of minimum union strength, the union will likely not be able to exert much pressure at the bargaining table.⁶ Irrespective of such doubts as to its true effectiveness, nevertheless, the new remedy does reflect a growing awareness by the Board of the need for new approaches to the runaway shop.⁷

Back Pay.—There has been significant circuit court action in the back pay area. In *NLRB v. Mastro Plastics Corp.*,⁸ a case which has been in the courts since 1953 in related proceedings, the Second Circuit spelled out the burdens of proof in back pay proceedings. In generally reaffirming *Brown & Root, Inc.*,⁹ the court held:

The Board properly placed on respondents the burden of alleging and proving that jobs were not available for all discriminatees during the back pay period. However, we conclude that the General Counsel had the burden of producing testimony by each available discriminatee that a willful loss of earnings was not incurred. Nevertheless, we find that the burden of persuasion as to willful loss should remain on the employer. . . .¹⁰

The court justified placing the burden of proof with respect to job availability on the employer on the ground that this is a burden of production; and since the lack of job availability is an affirmative defense, the employer necessarily has such a burden. More practically, the employer has the necessary records.

In requiring that the Board produce the discriminatees for testimony concerning their efforts in seeking employment,¹¹ the court relied chiefly on the fact that the Board had almost always done this in the past and, hence, such a burden was not oppressive and would not undermine the efficacy of the back pay remedy.¹² The court warned, however, that requiring the dis-

⁶ A further consideration is the effect of a jurisdictional dispute at the new area. A preference for the old union at this stage would seem to be a more serious infringement of the new employee's rights.

⁷ For an argument favoring more imaginative Board action in this area, see Note, *The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act*, 112 U. Pa. L. Rev. 69 (1963). It appears that the Board will limit this type of remedy to the runaway shop area. In *J.P. Stephens & Co.*, 157 N.L.R.B. No. 90, 61 L.R.R.M. 1437 (1966), the Board refused to follow *Garwin* in the § 8(a)(1) area. The General Counsel argued that due to the seriousness of the employer's unfair labor practices it was impossible for the union ever to achieve a majority. The Board, while granting a broad remedy, refused to order bargaining.

⁸ 354 F.2d 170 (2d Cir. 1965).

⁹ 132 N.L.R.B. 486, 48 L.R.R.M. 1391 (1961), enforced, 311 F.2d 447 (8th Cir. 1963).

¹⁰ *NLRB v. Mastro Plastics, Inc.*, supra note 8, at 175.

¹¹ The court pointed out that it is not always necessary to produce the discriminatee; e.g., when he is dead. *Id.* at 178.

¹² The court dealt with some further specifics concerning willful loss of earnings. It held that a discriminatee can quit substantially equivalent employment if justified and not relinquish his back pay rights. Back pay does not terminate automatically on the employee's obtaining substantially equivalent employment or self-employment. "It would be unjust to require him [discriminatee] to mitigate his damages to the greatest extent possible but then to penalize him for substantial but short-lived success." *Id.* at 178.

criminatee to testify before his award became final did not eliminate the employer's need to raise the defense of willful loss of earnings.¹³

In a second case involving back pay, *Burinskas v. NLRB*,¹⁴ the Court of Appeals for the District of Columbia remanded an order to the Board for an explanation of the criteria the Board used in tolling back pay. The court could find no standards in past Board proceedings and, in obvious reprimand, stated:

We think the Board should come to grips with this recurring problem, for the protection of the rights of the employee and for the protection of the employer acting in good faith. It would seem that the Board could, in the exercise of its expertise, develop appropriate policy considerations and outline at least minimal standards to govern the ascertainment of tolling of back pay practices.¹⁵

3. *Nondiscriminatory Hiring Halls and Section 14(b)*

In dealing with union security, Congress has been ambivalent. On the one hand, section 8(a)(3)¹ clearly gives unions the right to secure collective bargaining agreements protecting their status, while, on the other hand, section 14(b) gives each state the right to prohibit "agreements requiring membership in a labor organization as a condition of employment."² This legislative purpose has generated many problems,³ among which is the relationship of the two sections to each other: specifically, whether section 14(b) can prohibit only what the proviso to section 8(a)(3) allows. This appears to be the interpretation of the Supreme Court in *Retail Clerks Int'l Ass'n v. Schermerhorn I.*⁴ Thus, if a union arrangement does not depend upon the proviso to section 8(a)(3) for its validity, states are without jurisdiction under section 14(b) to prohibit it.

This is the result reached in two recent circuit court cases, *NLRB v. Houston Chapter, Associated Gen. Contractors*⁵ and *NLRB v. Tom Joyce Floors, Inc.*⁶ The question in both cases was whether an employer could refuse to bargain about a nondiscriminatory hiring hall, on the grounds that it was not a mandatory subject under *NLRB v. Wooster Div. of Borg-Warner*

¹³ *Id.* at 178.

¹⁴ 61 L.R.R.M. 2273 (D.C. Cir. 1966).

¹⁵ *Id.* at 2276.

¹ LMRA § 8(a)(3), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1964):
It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . .

² 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1964).

³ See Grodin & Beeson, *State Right-to-Work Laws and Federal Labor Policy*, 52 Cal. L. Rev. 95 (1964).

⁴ 373 U.S. 746, 756-57 (1963).

⁵ 349 F.2d 449 (5th Cir. 1965), cert. denied, 382 U.S. 1026 (1966).

⁶ 353 F.2d 768 (9th Cir. 1965).

*Corp.*⁷ and that it would violate the state right-to-work law.⁸ Since *Tom Joyce Floors* substantially adopts the holding and reasoning of *Associated*, we shall discuss only the latter in detail.

In *Associated*, at the Board level,⁹ the chief obstacle was whether such referral halls were mandatory subjects of bargaining under section 8(d). The Fifth Circuit upheld the majority view of the Board that such referral halls were mandatory subjects. The court analogized the pre-employment conditions imposed by the referral hall to tenure of employment, recognized as a mandatory subject in *Fibreboard Paper Prods. Corp. v. NLRB*.¹⁰ Construing *Borg Warner* as embracing any subject matter which would regulate the relations between the employer and employees as well as any term or condition of employment, the court viewed the referral hall as clearly affecting the relations in the construction industry between employer and employee.

In rejecting the employer's argument that such an agreement violates state right-to-work laws, the Fifth Circuit pointed out the relationship of section 14(b) to section 8(a)(3) stating: "[T]he long and short of this matter is that § 14(b) contemplates only those forms of union security which are the practical equivalent of compulsory unionism."¹¹ The court then cited the Supreme Court decision in *Local 357, Int'l Bhd. of Teamsters v. NLRB*,¹² which held that such referral halls did not constitute compulsory unionism. Thus, since they do not constitute compulsory unionism under the proviso to section 8(a)(3), nondiscriminatory referral halls do not come within the ambit of section 14(b), and states are without authority to proscribe them. Hence, the employer violated section 8(a)(5) by refusing to bargain about them.

4. *Per Se Violations*

Union Access to Information.—Under *NLRB v. Wooster Div. of Borg-Warner Corp.*,¹ an employer and a union must bargain "with respect to wages, hours, and other terms and conditions of employment."² Such bargaining, however, presupposes that the union has sufficient information to do so intelligently. Hence, the Board and courts have generally required the employer to divulge information within his control which relates to these manda-

⁷ 356 U.S. 342 (1958).

⁸ In *Associated*, the court cited the applicable state statute. 349 F.2d at 451 n.2. In *Tom Joyce Floors*, there was a lower court ruling, unreported, that such halls violated Nevada law. 353 F.2d at 770 n.3.

⁹ Houston Chapter, *Associated Gen. Contractors*, 143 N.L.R.B. 409, 53 L.R.R.M. 1299 (1963). Members Rogers and Leedom dissented on the basis that wages, hours, terms and conditions of employment did not apply to "obtaining" employment. *Id.* at 415, 53 L.R.R.M. at 1304. In *Tom Joyce Floors*, 149 N.L.R.B. 896, 57 L.R.R.M. 1390 (1964), the 3-member majority in *Associated* heard the case.

¹⁰ 379 U.S. 203 (1964).

¹¹ 349 F.2d at 453.

¹² 365 U.S. 667 (1961).

¹ *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

² LMRA § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

tory subjects,³ despite any claim of privilege.⁴ Thus, in *NLRB v. Truitt Mfg. Co.*,⁵ the Supreme Court held that an employer must substantiate with financial statements a claim of inability to pay.

In a recent case, *NLRB v. Western Wirebound Box Co.*,⁶ the employer expressly avoided claiming inability to pay but did claim that forcing him to pay increased wages put him at a competitive disadvantage. Nevertheless, the court still applied *Truitt*:

We see no reason why, under the same rationale, an employer who insistently asserts that competitive disadvantage precludes him from acquiescing in a union wage demand, does not have a like duty to come forward, on request, with some substantiation.⁷

The court emphasized, however, that they were not making such failure to provide financial information a per se section 8(a)(5) violation.⁸

At the Board level, in *Boulevard Storage & Moving Co.*,⁹ an employer claimed that, due to competition in the local moving business, it was necessary for all employees, including over-the-road workers, to receive a wage decrease.¹⁰ The union asked moving costs. To allow such fractionalization, said the Board,

would be to sanction Respondent's efforts to isolate their local moving from their total operations and to regard their dispute with

³ *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Whitin Mach. Works*, 108 N.L.R.B. 1537, 34 L.R.R.M. 1251, aff'd, 217 F.2d 593 (4th Cir. 1954), cert. denied, 349 U.S. 905 (1955).

⁴ In *Metropolitan Life Ins. Co.*, 150 N.L.R.B. No. 135, 58 L.R.R.M. 1298 (1965), the company was required to submit information, including names of the policyholders upon whose complaints the company had discharged certain employees, to enable the union to process grievances. The employer's claim that the names were privileged and confidential was unavailing.

⁵ *Supra* note 3. *Truitt* has been subsequently applied where the employer has taken the position that he is financially compelled to cut wages. *Celotex Corp.*, 146 N.L.R.B. 48, 55 L.R.R.M. 1238 (1963). It has also been applied where an employer has claimed that he cannot grant an increase and remain competitive, the Board finding such claim equivalent to a plea of inability to pay. *Peerless Distrib. Co.*, 144 N.L.R.B. 1510, 54 L.R.R.M. 1285 (1963); *Cincinnati Cordage & Paper Co.*, 144 N.L.R.B. 72, 52 L.R.R.M. 1277 (1962).

⁶ 356 F.2d 88 (9th Cir. 1966).

⁷ *Id.* at 91. The court acknowledged that there was precedent limiting *Truitt* to a claimed inability to pay, citing *Metlox Mfg. Co.*, 153 N.L.R.B. No. 124, 59 L.R.R.M. 1657 (1965), and *Taylor Foundry Co.*, 141 N.L.R.B. 765, 52 L.R.R.M. 1407 (1963), enforced per curiam, 338 F.2d 1003 (5th Cir. 1964). The court felt, however, that the Board had a right to change its position as long as it was not erroneous. The change in the Board's position is confusing, since the Board decision in *Western Wirebound Box*, 145 N.L.R.B. 1539, 55 L.R.R.M. 1193 (1964), appeared a year before the Board's opinion in *Metlox*, upon which the court relied. However, the broad Board language in *Metlox*, limiting *Truitt*, was not germane to the Board decision therein.

⁸ As Justice Frankfurter, concurring in *Truitt*, points out, the mere withholding of financial information is not a per se § 8(a)(5) violation. 351 U.S. at 157. The instant court felt that the findings of the trial examiner showed clearly that he had not taken a per se approach. 356 F.2d at 91.

⁹ 152 N.L.R.B. No. 51, 59 L.R.R.M. 1136 (1965) (dissent by member Jenkins).

¹⁰ "Manifestly, this was a plea of inability to take any action with respect to wages. . . ." *Id.*, 59 L.R.R.M. at 1137.

the Union, which related to the wage rates, of all employees, as confined to the local moving phase of their business. But this would be wholly unrealistic as local moving data alone would not permit of an intelligent evaluation of Respondent's declared necessity for an overall wage cut.¹¹

The Board did not attempt to find a per se violation in the company's limited disclosure, but rather stated that "upon the entire record, we find . . . Respondents . . . in violation of Section 8(a)(5) and (1) of the Act."¹²

The Seventh Circuit refused to enforce the Board's order.¹³ The court felt that the Board had drawn the wrong inferences regarding the claim of inability to pay, stating, "Where the evidence disclosed 'won't,' the Board found 'can't.'"¹⁴ Thus the court did not reach the important question raised by the Board decision, *i.e.*, whether an employer, in claiming an inability to pay, can satisfy his requirement to support his position by merely disclosing that part of his operation which is losing money.

The Third Circuit was more hospitable to the Board in *Curtiss-Wright Corp. v. NLRB*.¹⁵ The union sought information on job classifications, job descriptions, wages and certain administrative and confidential employees of the company, in connection with the union's analysis of its rapid decrease in membership.¹⁶ Although the data requested covered employees who were not members of the bargaining unit, the Board had found a section 8(a)(5) violation in the employer's failure to supply such information.¹⁷

The court of appeals affirmed, holding that the information sought was "relevant" to the proper representation of unit employees and to the policing of the collective bargaining agreement. In so doing the court approved the Board's rule concerning employer disclosure of wage and other related information:

[I]f the requested data is relevant and, therefore reasonably necessary, to a union's role as bargaining agent in the administration of a collective bargaining agreement, it is an unfair labor practice within the meaning of Section 8(a)(5) of the Act for an employer to refuse to furnish the requested data.¹⁸

Thus, once relevance is determined, an employer's refusal to honor the request for information is a per se violation of section 8(a)(5).¹⁹

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494 (7th Cir. 1966).

¹⁴ *Id.* at 498. In support of its interpretation, the court relies on the trial examiner's report and the dissent at the Board level. The court's holding would appear to go against the rationale of such cases as *Celotex Corp.*, *supra* note 5.

¹⁵ 347 F.2d 61 (3d Cir. 1965).

¹⁶ The union percentage had slipped in 5 years from approximately 70% to less than 50% of the employees. *Id.* at 64.

¹⁷ *Curtiss-Wright Corp.*, 145 N.L.R.B. 152, 54 L.R.R.M. 1320 (1963).

¹⁸ *Curtiss-Wright Corp. v. NLRB*, *supra* note 15, at 68.

¹⁹ The court cited other circuits holding the same view: *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746 (6th Cir. 1963), cert. denied, 376 U.S. 971 (1964); *J.I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958); *Taylor Forge & Pipe Works v. NLRB*,

The court distinguished *Truitt* on the ground that the financial information requested in that case was not "relevant" without a showing of other circumstances.²⁰ The information sought in the present case, however, was clearly "relevant," the Third Circuit said, since it was related to the search for better terms in a new contract and the effective presentation of grievances under the existing one. The fact that the information requested covered non-unit employees did not preclude relevancy, the court held, even though bargaining about such non-unit employees would not be mandatory.

In addition to the per se problem, the court also dealt with another difficult problem: whether the contract's grievance procedure is the proper channel for resolving the issue of relevancy of the requested data.²¹ The court rejected arbitration here, noting that only when the demand for information is itself contractually subject to the grievance procedure will arbitration be the exclusive remedy of the parties. Such a situation could exist, the court stated, only where the contract contains both a broad disclosure provision and a broad grievance and arbitration provision.²² The court argued that the case at bar fell within the dichotomy set up in *Timken Roller Bearing Co. v. NLRB*²³ in that the request for data was a statutory right under section 8(a)(5).

Presence of Stenographer.—A recurring problem for the Board and the courts is the ability of a party to condition future negotiations on the presence of a stenographer at the bargaining sessions. Although the majority of the Board views such a demand as mere evidence of bad faith to be evaluated as part of the total record of conduct,²⁴ some members have been willing to consider it a per se violation.²⁵

The circuit courts, however, have not agreed with the Board. In *NLRB v. Reed & Prince Mfg. Co.*,²⁶ the First Circuit refused to view such a bargaining condition as even evidence of bad faith, let alone as a per se violation. Similarly, the Eighth Circuit recently rendered a decision in *NLRB v. Southern Transp., Inc.*,²⁷ refusing to uphold a Board order²⁸ which had considered such conduct as evidence of bad faith. The court not only refused to declare such conditioning of negotiations indicative of bad faith, but went

234 F.2d 227 (7th Cir. 1956); *Boston Herald-Traveler Corp. v. NLRB*, 223 F.2d 58 (1st Cir. 1955).

²⁰ In determining "good faith" in *Truitt*, the concurring opinion of Justice Frankfurter states: "[T]he Board applied the wrong standard here, by ruling that *Truitt's* failure to supply financial information to the union constituted per se a refusal to bargain in good faith. . . ." 351 U.S. at 157. There is no discussion of relevance in *Truitt*, and hence it would appear that financial information would not be considered per se relevant by the Third Circuit, absent a showing of other circumstances.

²¹ For a discussion of the area, see p. 912 *supra*.

²² *Curtiss-Wright Corp. v. NLRB*, *supra* note 15, at 71.

²³ *Supra* note 19. In that case the Sixth Circuit made this distinction: If the information requested pertains to merely contractual rights of the union, then the Board must allow the arbitrator to decide whether the union is entitled to it; but if the information is relevant to the union's rights under the LMRA as statutory representative, then the Board may decide the union's right to the information.

²⁴ *St. Louis Typographical Union*, 149 N.L.R.B. 750, 57 L.R.R.M. 1370 (1964).

²⁵ See *id.* at 753, 57 L.R.R.M. at 1371 (members Brown & Fanning, concurring).

²⁶ 205 F.2d 131, 139 (1st Cir.), cert. denied, 346 U.S. 887 (1953).

²⁷ 355 F.2d 978 (8th Cir. 1966).

²⁸ 150 N.L.R.B. No. 20, 58 L.R.R.M. 1017 (1965).

on to assert the good effects of having a stenographer present at bargaining sessions. It is clear that, in this area, the Eighth Circuit is not content to defer such judgments to the expertise of the Board.

On a second important issue, the Eighth Circuit, in determining the employer's present motive in demanding that a stenographer be present at negotiations, refused to give any probative value to a past finding of bad faith on the part of the employer. The court feared that if such a past finding were able to be carried to a new proceeding, "the courts would be virtually removed from the scene and the party, deprived of judicial protection, would thereafter be at the mercy of an over-zealous Board."²⁰

C. Employer Discrimination—The Economic Lockout*

In *American Ship Bldg. Co. v. NLRB*¹ the Supreme Court held that, absent a showing of a discriminatory motive, an employer may temporarily lock out his employees in support of his bargaining position without violating sections 8(a)(1) or (3) of the LMRA. In *NLRB v. Brown*,² the Supreme Court held that members of a multi-employer bargaining unit might not only lock out their employees when one member was struck and had hired temporary replacements, but might also themselves continue to operate with temporary replacements without violating sections 8(a)(1) or (3), absent a specific showing of anti-union motive. Among the problems arising out of these two cases with which the courts and Board have struggled during the past Survey year are (1) the necessity of an impasse, and (2) what employer activity will constitute a showing of anti-union animus such as to render a lockout discriminatorily motivated and hence a section 8(a)(3) violation.³

The importance of the impasse is raised by *American Ship Bldg.* itself. In his concurring opinion, Mr. Justice White read the majority opinion as allowing an employer to "lock out long before an impasse is reached"⁴ since "a shutdown during or before negotiations advances an employer's bargaining position as much as a lockout after impasse."⁵ However, Mr. Justice Goldberg, concurring, felt that the majority did not reach this question:

[T]he Court itself seems to recognize that there is a difference between locking out before a bargaining impasse has been reached and locking out after collective bargaining has been exhausted, for it limits its holding to lockouts in the latter type of situation without

²⁰ *NLRB v. Southern Transp., Inc.*, supra note 27, at 982.

* For a more thorough development of this topic, see Ross, *Lockouts: A New Dimension in Collective Bargaining*, 7 B.C. Ind. & Com. L. Rev. 847 (1966).

¹ 380 U.S. 300 (1965).

² 380 U.S. 278 (1965).

³ For a good general discussion, see Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 Cornell L.Q. 193 (1966).

⁴ 380 U.S. at 324.

⁵ *Id.* at 325.

deciding the question of the legality of locking out before bargaining is exhausted.⁶

Both circuit courts which have dealt with the issue agree with Mr. Justice White. The Second Circuit, in *Body & Tank Corp. v. NLRB*,⁷ had aligned itself with a number of other circuits in enforcing Board orders premised on the illegality of lockouts in furtherance of bargaining positions.⁸ Since this case had been decided prior to *American Ship Bldg.*, however, the company was granted a rehearing. On the authority of *American Ship Bldg.*, the Second Circuit withdrew its previous decision and found the employer lockout permissible.⁹ The Board petitioned for a rehearing on the ground that there was no bargaining impasse reached before the lockout, but the Second Circuit denied the petition.

In *Detroit Newspaper Publishers Ass'n v. NLRB*,¹⁰ the Sixth Circuit clearly held that an impasse is not crucial. Two newspapers in Detroit, the *Free Press* and the *News*, were engaged in collective bargaining with the Teamsters union. Although both belonged to an association, there was no multi-employer bargaining "unit" such as had been present in *NLRB v. Truck Driver's Union (Buffalo Linen)*.¹¹ After failing to come to favorable terms with the *Free Press*, the Teamsters struck that paper. Pursuant to an agreement, the *News* ceased publication and locked out its employees. The Board found such conduct violated sections 8(a)(1) and (3).¹²

The Sixth Circuit, although admitting the existence of an impasse in *American Ship Bldg.*, refused to consider this necessary to legalize the lockout: "While in *American Ship Building* there was an impasse in the negotiations between the employer and the union, we do not think the teaching of that case merely adds another exception to the Board's category of permissible lockouts."¹³ Thus, so far as the section 8(a)(1) violation was concerned, the court found no hostility to the union in the company's past bargaining history; nor was there shown any interference with the union. Further, the court refused to find that the layoff was designed to discipline the workers for adhering to the union's position.¹⁴ With regard to the 8(a)(3) violation, the court, quoting from *American Ship Bldg.*, concluded that "where the intention proven is merely to bring about a settlement of a labor dispute on favorable terms, no violation of § 8(a)(3) is shown."¹⁵

⁶ Id. at 337.

⁷ 339 F.2d 76 (2d Cir. 1964).

⁸ Other circuits supporting this result were: *NLRB v. American Ship Bldg. Co.*, 331 F.2d 839 (D.C. Cir. 1964); *Utah Plumbing & Heating Contractors Ass'n v. NLRB*, 294 F.2d 165 (10th Cir. 1961); *Quaker State Oil Ref. Corp. v. NLRB*, 270 F.2d 40 (3d Cir. 1959), cert. denied, 361 U.S. 917 (1959). Contra, *NLRB v. Dalton Brick & Tile Corp.*, 301 F.2d 886 (5th Cir. 1962); *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576 (7th Cir. 1951). The presence of an impasse was not controlling in either of these latter two cases.

⁹ *Body & Tank Corp. v. NLRB*, 344 F.2d 330 (2d Cir. 1965).

¹⁰ 346 F.2d 527 (6th Cir. 1965).

¹¹ 353 U.S. 87 (1957).

¹² *Evening News Ass'n*, 145 N.L.R.B. 996, 55 L.R.R.M. 1091 (1964).

¹³ *Detroit Newspaper Publishers Ass'n v. NLRB*, supra note 10, at 530.

¹⁴ Id. at 531.

¹⁵ Ibid.

The position of the Sixth Circuit is, then, that under *American Ship Bldg.*, all lockouts will be considered legal, absent a showing of union animus, and that such animus is not shown by the mere absence of an impasse in bargaining negotiations. The Supreme Court, upon the petition of the Board, granted certiorari and remanded the case to the circuit court for further remand to the Board for reconsideration in light of *American Ship Bldg.*¹⁶

Hence, it appears that the Board will continue to insist on an impasse before an employer may legally lock out. The Board has not ruled directly on this issue, but in *Weyerhaeuser Co.*¹⁷ the Board stated:

[W]e find that the principles announced by the Supreme Court in *American Ship Building* and *Brown* apply to the situation where, as here, two or more employers bargain jointly with a union, [and] an impasse in negotiations is reached over a mandatory subject of bargaining. . . .¹⁸

In this case, however, an impasse had in fact been reached. When the Board is ultimately presented with a lockout taking place prior to a bargaining impasse over a mandatory subject and lacking any anti-union animus, it is questionable that the Board will legally be able to find such employer activity "inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of . . . anti-union animus is required."¹⁹ The remand by the Supreme Court in *Detroit Free Press* is equivocal and fails to give any indication of the Court's feeling on the matter.

While the Board may limit *American Ship Bldg.* strictly to its facts and require an impasse in negotiations in the single employer situation, the Board has regarded the fact of a formal bargaining unit as not being crucial in determining the validity of a lockout in a multi-employer bargaining situation. In *Weyerhaeuser Co.*,²⁰ among the issues facing the Board was whether the employer was truly in a multi-employer bargaining unit. The Board, however, felt that this was not crucial in determining the legality of the lockout. The test, under *American Ship Bldg.* and *Brown*, was whether the lockout was discriminatorily motivated and whether it served a legitimate employer business interest. The Board, not deciding the status of the employer as a member of a multi-employer unit, found that there was no showing of anti-union animus, and that the lockout served a legitimate business purpose.²¹

¹⁶ Local 372, Newspaper Drivers v. Detroit Newspaper Publishers Ass'n, 382 U.S. 374 (1966). The circuit courts have remanded several cases for like consideration. See *Topeka Grocers' Management Ass'n v. NLRB*, 59 L.R.R.M. 2736 (10th Cir. 1965), dismissed on remand, 155 N.L.R.B. No. 79, 60 L.R.R.M. 1428 (1965); *NLRB v. Tonkin Corp.*, 352 F.2d 509 (9th Cir. 1965), remanded by the court sua sponte.

¹⁷ 155 N.L.R.B. No. 82, 60 L.R.R.M. 1425 (1965).

¹⁸ *Id.*, 60 L.R.R.M. at 1426.

¹⁹ *American Ship Bldg. v. NLRB*, supra note 1, at 311; see *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

²⁰ Supra note 17.

²¹ *Id.*, 60 L.R.R.M. at 1426. Whether a Board finding of lack of significant employer interest is enough by itself to render an employer's action violative of § 8(a)(3) is an open question.

A second Board case failing to find that a lockout in a multi-employer situation violated the LMRA is *Acme Mkts., Inc.*²² In this case the employer, Acme, owned non-unit stores located in cities where unit stores, operated by other employers in the bargaining unit were located. The union called a strike against Acme's unit stores. The other employers in the unit then closed their stores in a defensive lockout. Thereupon, Acme shut down its non-unit stores in those cities in which the other unit employers had shut down their unit stores. The union alleged that the employers' actions in locking out employees who did not belong to the multi-employer bargaining unit involved in the labor dispute with the union violated sections 8(a)(1) and (3).

The Board, relying on *Brown*, found that the lockout of non-unit employers was in the legitimate interest of preserving the integrity of the multi-employer unit. The Board reasoned that if the employer could not close down his business where it competed with other association members, then "the economic advantage would have passed to the Respondent, the nonstruck employers would have been deterred from closing their stores as part of the multi-employer defensive lockout and, as in *Brown Food*, the whipsaw strike would have enjoyed an almost inescapable prospect of success."²³ The Board also found that the action did not discriminate against the non-unit employees, chiefly because they were being paid while locked out. With regard to the unit employees, the Board, in rejecting the General Counsel's argument that such employer activity restrained and coerced employees, found no specific anti-union animus presented by the evidence. "[I]t is difficult to discern a basis for finding that the lockout of non-unit employees, aimed at achieving the same purpose as the unit lockout, was unlawfully motivated *vis-à-vis* the unit employees."²⁴

The relevance of an intervening unfair labor practice to the specific evidence of anti-union animus required by *American Ship Bldg.* was considered by the Ninth Circuit in *NLRB v. Golden State Bottling Co.*²⁵ In the Board decision, handed down before *American Ship Bldg.*, the Board had found that the employer violated sections 8(a)(1) and (3) by locking out employees in support of his bargaining position, and had also violated section 8(a)(2) by attempting to interfere with the administration of the union.²⁶

The Ninth Circuit stated first that, under *American Ship Bldg.*,

[a] lockout by an employer used as a means of bringing pressure on his employees in support of his bargaining position does not violate section 8(a)(3) and (1) unless there exists a supportable finding of unlawful intent on the part of the employer to injure a labor organization or to evade his duty to bargain collectively, or to discourage union membership.

²² 156 N.L.R.B. No. 127, 61 L.R.R.M. 1281 (1966).

²³ Id., 61 L.R.R.M. at 1282.

²⁴ Id., 61 L.R.R.M. at 1283.

²⁵ 353 F.2d 667 (9th Cir. 1965).

²⁶ *Golden State Bottling Co.*, 147 N.L.R.B. 410, 56 L.R.R.M. 1229 (1964).

We do not think that the rationale of the American Ship Building case is inapplicable merely because of the charges here under Section 8(a)(2). . . . True, the effect of this lockout was to disrupt the orderly internal functioning of the union, but this result of an otherwise lawful act cannot make that act an unfair labor practice.²⁷

Thus, the court upheld the finding of a section 8(a)(2) violation but reversed the finding of a section 8(a)(3) violation since there was no unlawful motive.

In dictum in *Golden State*, the Ninth Circuit answers one of the questions raised but unanswered by *American Ship Bldg.* and *Brown*, i.e., whether a single employer, after legitimately locking out his employees, can temporarily or permanently replace such employees. In *Brown*, the Supreme Court allowed temporary replacement of locked-out employees since the struck employer in the multi-employer unit could do so, and, if other members of the unit were prevented from such replacement, the whipsaw strike would succeed in destroying the multi-employer bargaining unit. In *American Ship Bldg.*, the Court expressly reserved opinion on whether *Brown* would authorize replacements in single employer lockouts.²⁸

The Ninth Circuit's advice to the employer was that the "legal course . . . was to hire temporary replacements for the locked out employees."²⁹ However, we must wait for more definite litigation on this important question before concluding that temporary replacements in a single employer situation is permissible under section 8(a)(3).

In light of the ability of employers in a multi-employer bargaining unit to lock out employees in furtherance of their bargaining position and then to replace them with temporary replacements, it becomes important to determine on what grounds a union may withdraw from such multi-employer bargaining units.

The Board, in *Evening News Ass'n*,³⁰ has held that unions will be able to withdraw from such units on the same basis as employers. The criteria are: (1) The request must be made before the date set by the contract for modification, or before the agreed upon date to begin multi-employer negotiations, and (2) the withdrawal must be unequivocal.³¹

In finding the section 8(a)(5) violation, based on the employer's refusal to bargain except on a multi-employer basis, the Board could find no rationale for distinguishing between union withdrawal from such units and employer withdrawal. It found support for its position in two court cases.³² The Board, mindful of the reprimand it had received in *NLRB v. Insurance Agents' Union*,³³ felt that the bargaining power of the units was not a proper criterion for determining appropriateness of the withdrawal.

Member Brown dissented; he would require unions to have a good

²⁷ *NLRB v. Golden State Bottling Co.*, supra note 25, at 669.

²⁸ 380 U.S. at 308 n.8.

²⁹ *NLRB v. Golden State Bottling Co.*, supra note 25, at 670.

³⁰ 154 N.L.R.B. No. 121, 60 L.R.R.M. 1149 (1965).

³¹ *Ibid.*

³² *Truck Drivers' Local v. NLRB*, 231 F.2d 110, 116 (2d Cir. 1956); *Retail Clerks v. Leedom*, Civil No. 966-58, 42 L.R.R.M. 2031 (D.D.C. 1958).

³³ 361 U.S. 477, 490 (1960): "[Our labor policy does not] contain a charter for the

reason before fragmentizing the bargaining unit. He distinguished union withdrawal from employer withdrawal on the grounds that the union, in withdrawing, compels dissolution of the multi-employer unit and forces the employers to bargain individually.

Whether the Board rule will actually benefit unions attempting to avoid the lockout and replacement weapons in the multi-employer unit is questionable. In the decision itself, the Board was careful to point out that it was reserving opinion on the legality of employers engaging in a lockout, who were forced out of a formal multi-employer bargaining unit.³⁴ A clue to the Board's answer may be found in *Weyerhaeuser Co.*,³⁵ where the Board upheld an employer lockout even though there was no formal multi-employer unit proved, since there was no showing of anti-union animus and there was a legitimate business purpose.

D. Secondary Boycotts

The secondary boycott prohibitions of the LMRA¹ were aimed generally at the situation where the employees of employer A, with whom they have a dispute, bring pressure on employer B, a supplier or customer of A, to force B to terminate his dealings with A. However, one of the recurring problems, due to the broad language of the statute, is whether it is necessary to have a dispute with A (a "primary employer"), before a secondary boycott can be found. The Board² and some courts³ have held that a primary employer

National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union."

³⁴ Evening News Ass'n, *supra* note 30, at 1150.

³⁵ *Supra* note 17.

¹ Section 8(b)(4) states:

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

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

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(4)(i)(ii)(A), (B) (1964).

² Local 1355, Int'l Longshoremen's Ass'n, 146 N.L.R.B. 723, 55 L.R.R.M. 1389 (1964); Washington-Oregon Shingle Weavers, 101 N.L.R.B. 1159, 31 L.R.R.M. 1202 (1952).

³ NLRB v. Local 11, United Bhd. of Carpenters, 242 F.2d 932 (6th Cir. 1957); NLRB v. Washington-Oregon Shingle Weavers, 211 F.2d 149 (9th Cir. 1954).

is not a prerequisite to a violation.⁴

In two recent cases of the same name, *National Maritime Union of America v. NLRB*,⁵ the District of Columbia Court of Appeals and the Court of Appeals for the Second Circuit both held that the presence of a dispute with a primary employer was not necessary for a section 8(b)(4) violation.

Both cases arose from the same union activity, which took place in different ports. Since the rationale in both cases is similar, only the decision of the Court of Appeals for the District of Columbia is discussed herein. In that case, the ship *Maximus* was sold by the Grace Shipping Lines to Cambridge Carriers. Due to the existing collective bargaining agreement between Cambridge and the National Maritime Union (NMU), the new owner, Cambridge, employed NMU personnel, which resulted in the dismissal of the old crew—all members of the Marine Engineers Beneficial Association (MEBA). In an effort to regain their jobs, the MEBA members picketed the *Maximus*. In retaliation, the NMU began picketing ships in other ports employing MEBA members, ostensibly to have these members apply pressure on their brethren in Philadelphia to cease picketing the *Maximus*. This retaliatory picketing by the NMU resulted in local stevedores, repair concerns and general contractors refusing to cross the NMU picket line and hence ceasing to do business with the shipowners employing MEBA members. The Board, relying on this cessation of business, found that the NMU had violated section 8(b)(4)(i)(ii)B.⁶

The circuit court agreed. First holding that this inter-union dispute was a "labor dispute," the court then discounted the necessity of a primary employer. Conceding ambiguity in the area of requiring a primary employer, the court nevertheless found in the legislative history the intent, "to confine labor conflicts to the employer in whose labor relations the conflict had arisen, and to wall off the pressures generated by that conflict from unallied employers." . . . It is the victim's neutrality which we conceive to be the central element of Congressional concern in this area."⁷

With these two latest holdings it appears that any further argument that section 8(b)(4) requires a primary employer will be futile.

The importance of the primary-secondary dichotomy also arises when employees, in attempting to preserve available work which they have traditionally done, engage in activities aimed at their immediate employer but which result in the cessation of business between such employer and his suppliers or customers. Such activity falls within the prohibitory language of section 8(b)(4), but the Board⁸ and the Court of Appeals for the District of

⁴ For an excellent discussion of this area, see Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e), 113 U. Pa. L. Rev. 1000 (1965).

⁵ 346 F.2d 411 (D.C. Cir. 1965), cert. denied, 382 U.S. 840 (1965), 7 B.C. Ind. & Com. L. Rev. 752 (1966); 342 F.2d 538 (2d Cir. 1965), cert. denied, 382 U.S. 835 (1965).

⁶ *National Maritime Union (Delta)*, 147 N.L.R.B. 1328, 56 L.R.R.M. 1412 (1964) (D.C. case); *National Maritime Union (Houston)*, 147 N.L.R.B. 1243, 56 L.R.R.M. 1410 (1964) (2d Cir. case).

⁷ 346 F.2d at 417-18, quoting *Miami Newspaper Pressmen v. NLRB*, 322 F.2d 405, 410 (D.C. Cir. 1963).

⁸ *Service Employees*, 148 N.L.R.B. 1033, 57 L.R.R.M. 1099 (1964); *United Dairy Workers*, 146 N.L.R.B. 716, 55 L.R.R.M. 1393 (1964).

Columbia⁹ recognize that such activity is really aimed at the immediate employer, who is not a secondary employer but a primary employer.

In *National Woodwork Mfg. Ass'n v. NLRB*,¹⁰ however, the Seventh Circuit has refused to follow the Board's distinction. Several construction unions, bargaining through a council, had executed a collective bargaining agreement with the local contractors in which there was a clause permitting union members to refrain from handling precut or prefabricated work. The union struck several contractors who attempted to install prefabricated doors. The Board found that the clause in question was designed to protect unit work and thus did not violate section 8(e).¹¹ Since there was no section 8(e) violation in executing the contract, there was no section 8(b)(4)(i)(ii)B violation. However, the Board held that the union had violated section 8(b)(4) by attempting to enforce the clause against three contractors, since under the Board's test of control,¹² these contractors had no control over the type of doors, and hence the union must have been seeking to bring pressure on the manufacturers of such doors.¹³

The Seventh Circuit reversed the Board's finding that the clause was designed to protect available unit work and thus was not a violation of section 8(b)(4). It is unclear whether such reversal was based on a different interpretation of the facts involved or whether the court felt that section 8(e) of the LMRA does not provide for such a distinction.¹⁴

1. *Publicity Proviso*

In 1959 Congress amended section 8(b)(4) of the LMRA by adding, *inter alia*, a "publicity proviso," which states that nothing in section 8(b)(4)

shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . .¹

Although the proviso reads "other than picketing," the Supreme Court,

⁹ See, e.g., *Truck Drivers Union v. NLRB*, 334 F.2d 539 (D.C. Cir. 1964), cert. denied, 379 U.S. 916 (1964); *Orange Belt Dist. Council of Painters*, 328 F.2d 534 (D.C. Cir. 1964).

¹⁰ 354 F.2d 594 (7th Cir. 1965).

¹¹ *Metropolitan Dist. Council, United Bhd. of Carpenters (National Woodwork Mfg. Ass'n)*, 149 N.L.R.B. 646, 57 L.R.R.M. 1341 (1964).

¹² *Local 5, United Ass'n of Journeymen (Arthur Venneri Co.)*, 137 N.L.R.B. 828, 50 L.R.R.M. 1266 (1962), enforced, 321 F.2d 366 (D.C. Cir. 1963).

¹³ *Metropolitan Dist. Council, United Bhd. of Carpenters (National Woodwork Mfg. Ass'n)*, supra note 11, at 658, 57 L.R.R.M. at 1344. Member Brown dissented on the ground that the control test was not a valid one.

¹⁴ The Seventh Circuit relied on cases prior to the enactment of § 8(e) which involved the necessity of having a dispute with a primary employer, equating the facts in the case before it to the facts present in the cited cases. In regard to § 8(c) the court stated that since the goods in question, prefabricated doors, were not made at the job site, "We hold that § 8(e) unaffected by the proviso is controlling in this case." *National Woodwork Mfg. Ass'n v. NLRB*, supra note 10, at 599.

¹ 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4) (1964).

in *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*,² rejected the Board's interpretation³ that the 1959 amendments make consumer picketing illegal per se. The Court distinguished picketing aimed solely at persuading customers not to buy the struck product, which is permissible, from picketing aimed at persuading customers not to deal with the secondary employer, which is illegal.

In a recent decision, *Alton-Wood River Bldg. Trades Council*,⁴ the Board made it clear that it was going to read the *Tree Fruits* case very narrowly. In *Alton-Wood*, a union council was seeking to have a real estate developer cease dealing with non-union contractors. In line with this objective, the union picketed a development in which the primary employer was seeking to sell housing units. The signs merely named the primary employer (Storeyland).

The Board found that the mere naming of the primary employer with whom the union had a dispute was not sufficient to bring such picketing within *Tree Fruits*, since "[the union] did not make any effort to limit the appeal of the picketing by requesting customers not to buy the product of Storeyland."⁵ The Board thus appears to insist that the appeal by the union clearly reflect that its aim is the struck product itself and not the secondary employer.

In a second Board case dealing with picketing and the "publicity proviso," *Chicago Typographical Union*,⁶ the Board has interpreted "picketing" to require some sort of confrontation between the pickets and the workers, customers or suppliers of a picketed employer. The union was "picketing" at shopping centers and at the entrances to public buildings to advertise their dispute with the newspaper (secondary employer). The Board found no confrontation at these places and hence no "picketing" within the meaning of the publicity proviso, even though the union was patrolling with signs advertising a labor dispute.⁷

The publicity proviso also refers to a union having a primary dispute with an employer who has products that are "produced." In *NLRB v. Servette, Inc.*,⁸ the Supreme Court gave a broad interpretation to the meaning of the word "produced" in order to achieve the legislative intent of having the proviso be co-extensive with the prohibition to which it is an exception.

On the basis of this Supreme Court decision, the Ninth Circuit reversed its prior opinion in *Great Western Broadcasting Corp. v. NLRB*,⁹

² 377 U.S. 58 (1964).

³ *Fruit & Vegetable Packers*, 132 N.L.R.B. 1172, 48 L.R.R.M. 1496 (1961).

⁴ 154 N.L.R.B. No. 78, 60 L.R.R.M. 1067 (1965).

⁵ *Id.*, 60 L.R.R.M. at 1069.

⁶ 151 N.L.R.B. No. 152, 59 L.R.R.M. 1001 (1965). However, the Board found a § 8(b)(4) violation in that the union had also picketed the premises of the newspaper publisher with the illegal objective of having him cease doing business with the non-union printer with whom the union had a primary dispute.

⁷ The Board's reliance on *Alton-Wood River Bldg. Trades Council (Jerseyville Retail Merchants)*, 144 N.L.R.B. 526, 54 L.R.R.M. 1099 (1963), and *Service Employees Union*, 136 N.L.R.B. 431, 49 L.R.R.M. 1793 (1962), indicates that the Board is looking to the object of the picketing.

⁸ 377 U.S. 46 (1964).

⁹ 310 F.2d 591 (9th Cir. 1962).

and held that a television station which advertises products is a "producer" thereof for purposes of the publicity proviso.¹⁰ The court indicated that the same reasoning which applied to "products" applied also to "services," such as banking and dry cleaning.¹¹

2. Common-Situs Picketing

In *Local 761, Int'l Union of Elec. Workers v. NLRB (General Electric)*,¹ the Supreme Court held that picketing of a "reserved gate" at a struck manufacturing plant does not violate the secondary boycott prohibitions of the LMRA, if the work carried out by those workers using the "reserved gate" is related to the normal operations of the manufacturer. This case raised the question as to what the Board would do when faced with "reserved gate" picketing in the common-situs construction context: Would the Board incorporate the *General Electric* rule or would it continue to apply only the *Moore Dry Dock* standards?²

The Board has recently answered this question in *Building Trades Council*.³ In a three-to-two decision, the Board has ruled that only the *Moore Dry Dock* standards will apply. The reason given by the Board is simply that the construction industry differs sufficiently from the manufacturing industry so that the "reserved gate" picketing rules applied to the latter in *General Electric* should not apply to the former. The Board determined that the legislative history and judicial decisions dealing with common-situs picketing in the construction industry clearly reflect a purpose to protect neutrals, and this would be best accomplished by applying only the *Moore Dry Dock* standards. In applying these standards, the Board found a section 8(b)(4) violation since the union, in picketing the reserved gate, did not meet one of the standards, namely, that picketing take place reasonably close to the situs of the dispute.

The dissenting members of the Board could find no distinguishing aspects of the construction industry such as would justify nonapplication of the *General Electric* rules. Applying *General Electric*, the dissenters would hold that the subcontractor's work was related to the normal operations of the

¹⁰ 356 F.2d at 434 (9th Cir. 1966).

¹¹ "[N]othing has been called to our attention which indicates that Congress intended to differentiate between primary employers engaged in the production of tangible products and those involved in rendering services." *Id.* at 436.

¹ 366 U.S. 667 (1961).

² *Sailor's Union (Moore Dry Dock)*, 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950). The Board developed the *Moore Dry Dock* criteria to deal with the situation in which the employer with whom the union had a primary dispute did business only on the premises of a secondary employer—as for example a subcontractor on a construction project—to determine if picketing the secondary employer's place of business was violative of section 8(b)(4). There will be no violation of section 8(b)(4) where (a) the picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

³ 155 N.L.R.B. No. 42, 60 L.R.R.M. 1296 (1965).

general contractor; therefore, under *Moore Dry Dock*, the union would be picketing reasonably close to the situs of the dispute and hence would not be violating section 8(b)(4).

This decision will allow a general contractor to insulate much of his operations from the paralyzing effect of the labor troubles of his subcontractors. Whether non-striking union members will use a reserved gate set up by their employer to avoid a shutdown remains to be seen.

E. Hot Cargo Clauses

Section 8(e), passed in 1959, bans entrance into "hot cargo" clauses.¹ The construction industry was partially exempted, but the extent of this exemption has been the source of much litigation.²

The present state of the law is that the construction proviso applies only to work done at the job site.³ Strikes or picketing to obtain subcontracting provisions are valid.⁴ Economic force to enforce such restrictions is illegal,⁵ the proper means of enforcement being through judicial enforcement of the contract.⁶ But if the union objective is a dual one—to obtain a subcontracting clause in a contract and also to force an interruption between the neutral general contractor and the subcontractor—the Board has held it to be unlawful.⁷

In two recent cases, the Board has emphasized that the only means of enforcing "hot cargo" clauses in the construction industry, under the proviso, is through judicial action. Thus, in *Muskegon Bricklayer's Union*,⁸ the union insisted on a clause authorizing union members to refuse to work on any job on which other craftsmen are not being paid union wages and benefits. The Board first held that such a clause was not aimed at preserving the work standards of the union and therefore was "not the type of 'work standards' clause exempted from the provisions of section 8(e)."⁹ Next, the Board felt that the clause was illegal: "This proposal looks not to the courts for enforcement, but to strikes."¹⁰ The Board continued:

¹ 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (1964).

² Section 8(e) reads:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract . . . to cease or refrain from . . . dealing in any of the products of any other employer, or to cease doing business with any other person, . . . Provided, That nothing in this subsection 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. . . .

Ibid.

³ *International Bhd. of Teamsters (Local 294)*, 145 N.L.R.B. 484, 54 L.R.R.M. 1421 (1963).

⁴ *Orange Belt Dist. Council of Painters v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *Construction Laborers Union v. NLRB*, 323 F.2d 422 (9th Cir. 1963).

⁵ *Northeastern Ind. Bldg. Trades Council (Centlivere Village Apts.)*, 148 N.L.R.B. 854, 57 L.R.R.M. 1081 (1964).

⁶ *Local 48, Sheet Metal Workers v. Hardy*, 332 F.2d 682 (5th Cir. 1964).

⁷ *Northeastern Ind. Bldg. Trades Council (Centlivere Village Apts.)*, *supra* note 5.

⁸ 152 N.L.R.B. No. 38, 59 L.R.R.M. 1081 (1965).

⁹ *Id.*, 59 L.R.R.M. at 1082.

¹⁰ *Ibid.*

Accordingly, we hold that where, as in this case, a limitation upon contracting at a construction site is intertwined with a provision permitting such self-help as striking or otherwise refusing to perform services, *e.g.*, by permitting employees to refrain from working without suffering disciplinary action, in the event of a breach of the "hot cargo" clause, the clause exceeds the prescribed bounds of the first proviso to Section 8(e) and is therefore unlawful.¹¹

Member Fanning dissented on the ground that the clause was not illegal on its face, although if the union did refuse to work, then the clause would be no defense.¹²

In the second case, *Plumbers Union*,¹³ there were two clauses in question: one allowing unions to refuse to work on any construction project where any of the employees are not covered by the agreement, and a second requiring any signatory to the agreement to agree not to subcontract any work to any contractor who is not a signatory to the agreement. The Board declared the first clause illegal but upheld the second. In rejecting the validity of the first clause under the proviso to section 8(e), the Board relied on the fact that the clause on its face was intended to be enforced through economic action against the employer. In sustaining the second clause, the Board stated: "Moreover, unlike Clause 3, Clause 4 does not provide for its own enforcement by the use of economic force prohibited by Section 8(b)(4)B."¹⁴

It appears that the Board, which has reversed its position on the ability of unions in the construction industry to use economic force to secure "hot cargo" clauses,¹⁵ is going to be assiduous in assuring that unions do not seek to enforce such clauses by self-help: The only permissible forum is the courtroom.

F. Union Discipline of Members

Section 8(b)(1)(A) makes it an unfair labor practice for a union to restrain employees in exercising their guaranteed rights, including the right to refrain from engaging in concerted activity.¹ However, the proviso to that

¹¹ *Id.*, 59 L.R.R.M. at 1083.

¹² Member Fanning's reasoning is similar to that of the Supreme Court in *Local 1976, United Bhd. of Carpenters v. NLRB* (Sand Door Case), 357 U.S. 93 (1958) where the Court held, prior to the enactment of section 8(e), that a hot cargo clause was not illegal on its face but that it would be no defense to a secondary boycott violation.

¹³ 152 N.L.R.B. No. 45, 59 L.R.R.M. 1085 (1965).

¹⁴ *Id.*, 59 L.R.R.M. at 1088.

¹⁵ Initially, the Board had taken the position that under § 8(e) unions could not use economic force to have employers enter into such hot cargo clauses. *Construction Laborers (Colson & Stevens)*, 137 N.L.R.B. 1650, 50 L.R.R.M. 1444 (1962). It reversed its opinion only after several circuits had ruled against this position. *Northeastern Ind. Bldg. Trades Council (Centlivere Village Apts.)*, *supra* note 5; see *Orange Belt Dist. Council of Painters v. NLRB*, *supra* note 4; *Construction Laborers Union v. NLRB*, *supra* note 4.

¹ LMRA § 8(b)(1)(A), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964), states:

It shall be an unfair labor practice for a labor organization . . .

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

section specifies that it "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The scope and meaning of section 8(b)(1)(A) and the proviso thereto have been, and still remain, a source of substantial controversy and confusion.²

Access to Board Processes.—In the leading case of *Local 138, Int'l Union of Operating Eng'rs (Skura)*,³ the NLRB found that the union had violated section 8(b)(1)(A) by fining a member who filed unfair labor charges against it. The Board rejected the union's contentions that it had fined the member not for filing charges, but for failing to exhaust his internal union remedies, and that such fines were necessary for its control over its internal affairs. The proviso to section 8(b)(1)(A), the Board felt, could not immunize this violation because of the "overriding public interest" in maintaining free access to the Board's processes,⁴ especially in view of the Board's inability to initiate its own processes.⁵

Shortly thereafter, the Board was asked to decide a similar question: whether a union could expel a member for filing and actively supporting a decertification petition. In *Tawas Tube Prods. Inc.*,⁶ the NLRB ruled that such disciplinary action was within the proviso to section 8(b)(1)(A). It gave two major reasons for the decision: (1) The action only involved the member's union status and did not affect his employment status; and (2) a union can discipline those members who attack its very existence. The Board thus reaffirmed its policy not to interfere with internal union discipline which does not affect a member's status as an *employee*. It distinguished *Skura* as an exception to the general rule by reason of the public interest in free access to the Board's processes.

anteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

² See, e.g., Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 *Harv. L. Rev.* 1, 24-34 (1947).

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

⁴ The Board stated:

Considering the overriding public interest involved, it is our opinion that no private organization should be permitted to prevent or regulate access to the Board, and a rule requiring exhaustion of internal union remedies by means of which a union seeks to prevent or limit access to the Board's processes is beyond the lawful competency of a labor organization to enforce by coercive means.

Id. at 682, 57 L.R.R.M. at 1010-11.

⁵ The Board also rejected the contention that the proviso to § 101(a)(4) of the Reporting and Disclosure Act immunized the violation, stating that the intent of that section was to protect members from retaliation for suing unions. LMRDA § 101(a)(4), 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(4) (1964), states:

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action . . . : *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof. . . .

⁶ 151 N.L.R.B. No. 9, 58 L.R.R.M. 1330 (1965).

Decisions within the Survey year have strongly endorsed the holdings in both *Skura*⁷ and *Tawas Tube*.⁸

Crossing Picket Lines.—An early Board case, *Minneapolis Star & Tribune Co.*,⁹ upheld the right of a union to levy a fine of five hundred dollars on a member who refused to perform picketing duty during a strike. Although it regarded the fine as coercive, the Board pointed out that the section 8(b)(1)(A) proviso precludes Board interference with internal union affairs "except where the implementing of such rules is expressly prohibited, as in the case of affecting an employee's employment rights."¹⁰ In 1964, the NLRB, in *Local 248, UAW (Allis-Chalmers Mfg. Co.)*,¹¹ upheld the right of the union to fine employees up to one hundred dollars¹² for crossing lawful picket lines.¹³ Again, the Board stressed that the enforcement of the rule affected *membership* status only,¹⁴ and thus was protected by the proviso to section 8(b)(1)(A), since it was necessary to preserve the integrity of the union during time of crisis.

In *Allis-Chalmers Mfg. Co. v. NLRB*,¹⁵ the Seventh Circuit upheld the Board's finding. Rejecting the argument that a union could only discipline strikebreakers by expulsion, the court stated: "This contention rests upon a literal reading of Section 7. But a literal reading fails to take into account the history and purpose of the Section, which shows that it was not intended to immunize a union member from discipline for defiance of a decision of the majority to strike."¹⁶ The purpose of section 8(b)(1)(A), the court held, was not to affect union fines, but to eliminate physical coercion and violence, threats thereof, and economic reprisals against employers who would not comply with union commands to discriminatorily discharge employees. It concluded by stressing the union's need to be able to discipline members who

⁷ See *Roberts v. NLRB*, 350 F.2d 427 (D.C. Cir. 1965), and *Local 1510, Millwrights & Mach. Erectors*, 152 N.L.R.B. No. 132, 59 L.R.R.M. 1310 (1965), which followed *Skura* and found § 8(b)(1)(A) violations. *Local 238, Wood Lathers' Union (Bill C. Carroll Constr. Co.)*, 156 N.L.R.B. No. 93, 61 L.R.R.M. 1172 (1966), likewise followed *Skura* even though the union member involved was not an employee of any company in the case.

⁸ *Local 4028, United Steelworkers*, 154 N.L.R.B. No. 54, 60 L.R.R.M. 1008 (1965), presented a slight change from the facts of *Tawas Tube*. Here, an employee was suspended from membership for filing a petition seeking to withdraw authority from the union to execute a union shop agreement. The Board ruled that *Tawas Tube* controlled, and the suspension was proper, since it was aimed to protect the union from conduct designed to undermine its existence.

⁹ 109 N.L.R.B. 727, 34 L.R.R.M. 1431 (1954).

¹⁰ *Id.* at 738, 34 L.R.R.M. at 1432.

¹¹ 149 N.L.R.B. 67, 57 L.R.R.M. 1242 (1964).

¹² For each crossing a member could be fined \$100. Each offender involved here made approximately 50 crossings, yet the fines levied were from \$20 to \$100.

¹³ The picket lines were established in compliance with the union constitution, which required a majority vote to authorize a formal strike vote, notification to all members of the vote, a two-thirds majority strike vote by secret ballot, and approval of the International Executive Board.

¹⁴ The collective bargaining agreement required employees to join the union within 30 days and "remain members to the extent of paying dues."

¹⁵ *Allis-Chalmers Mfg. Co. v. NLRB*, 60 L.R.R.M. 2097 (7th Cir. 1965). Judges Knoch, Castle and Kiley heard the case.

¹⁶ *Id.* at 2098.

defy majority rule.¹⁷ On rehearing en banc, the seven-member Seventh Circuit withdrew its prior *Allis-Chalmers* decision and held that fines for crossing picket lines violated section 8(b)(1)(A).¹⁸ With a view toward maintaining "the historical liberty of the American workingman to remain free to work without coercion from employers or from unions,"¹⁹ the court called for a literal reading of sections 7 and 8(b)(1)(A).²⁰ Under such a reading, a substantial fine such as could have been levied here would be more burdensome (financially) to a member than threats to secure his discharge. The court felt constrained to preserve the "priceless American heritage" of the union member's freedom to work without coercion, especially where, as here, a union security clause results in a substantial number of involuntary members. Three dissenters strongly urged the correctness of the court's original decision.²¹ They argued that membership was voluntary since only membership to the extent of paying dues was required, that a member must obey the union's rules, that the fines could have been sizable but did not in fact exceed one hundred dollars, that fines are necessary to maintain union solidarity and bargaining strength and that the statutes involved were not unambiguous.²²

Recently, the NLRB has considered the collateral issue of whether an employer may give free legal assistance to employees who cross lawful picket lines and face union fines. In *Leeds & Northrup Co.*,²³ the union announced that members who had crossed the picket line faced union disciplinary action. The company immediately notified the nonstrikers that it would do everything legally possible to protect their rights, short of paying the fines. The company's attorney thus prepared a letter to the union, which most employees signed, alleging that the signatory employees would not appear for any union trial since the strike was illegal and their cases had been prejudged. The attorney also later represented the employees in court proceedings by the union to collect the fines; employees incurred no legal fees.

The NLRB found that the employer did not violate section 8(a)(1). But, the Board carefully limited its holding, emphasizing that the company *did not* (1) encourage or solicit employees to cross the picket line,²⁴ (2) induce them

¹⁷ The court cited LMRDA § 101(a)(2), 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(2) (1964), to show the members' responsibility toward the union. It also observed that without power to fine wildcat strikers or strikebreakers, unions could not enforce no-strike clauses.

¹⁸ 61 L.R.R.M. 2498 (7th Cir. 1966). Judges Knoch and Castle departed from their earlier opinion, while Judge Kiley adhered to it.

¹⁹ *Id.* at 2499.

²⁰ The court stated that the sections "present no ambiguities whatsoever, and therefore do not require recourse to legislative history for clarification." *Id.* at 2500.

²¹ Chief Judge Hastings stressed that an employee acquires burdens as well as benefits with union membership. *Id.* at 2503. Judge Kiley restated the reasoning of the court in the original hearing. *Id.* at 2505-09. Judge Swygert emphasized what he termed the "erroneous premises" of the majority opinion, that is, involuntary membership, unreasonable fines and unambiguous statutes. *Id.* at 2509.

²² Judge Swygert noted that the Supreme Court, in *NLRB v. Drivers' Union* (Curtis Bros.), 362 U.S. 274 (1960), found it necessary to consult the legislative history of § 8(b)(1)(A). *Id.* at 2510.

²³ 155 N.L.R.B. No. 125, 60 L.R.R.M. 1482 (1965).

²⁴ It distinguished *Scherer & Sons, Inc.*, 147 N.L.R.B. 1442, 56 L.R.R.M. 1408 (1964), where the NLRB found a § 8(a)(1) violation by an employer who inspired and directed

to resist the fines, (3) offer legal assistance until after the union threatened disciplinary action or (4) offer to pay fines. *Leeds & Northrup*, it should be noted, however, assumed under the first *Allis-Chalmers* decision the union's right to fine members for crossing a picket line, which the full court subsequently overturned. Unless the Supreme Court or other circuits reaffirm the right to fine for crossing a picket line, *Leeds & Northrup* will have merely historical significance.

Exceeding Union Production Quotas.—The right of the union to fine members for violating traditional union production quotas was first upheld by the Board in *Local 283, UAW (Wisconsin Motor Corp.)*.²⁵ The union had applied such a rule for twenty-five years,²⁶ and, although the quota rule was not in the collective bargaining agreement, it had been discussed in negotiations and was considered as an important element in the wage structure.²⁷ Although the company set no limits on the employee's daily earnings, it cooperated with the union in administering the rule. The Board emphasized that section 8(b)(1)(A) was not meant to restrain "internal union disciplines," especially where the member's status as an employee was not affected.²⁸ Member Leedom dissented, finding that section 8(b)(1)(A) prohibited such fines as a form of economic reprisal. Further disagreeing with the majority, he stated: "I am satisfied that the Union's attempt to control production and wages, which are subjects clearly related to *employment* and not to *membership*, is not merely an internal matter."²⁹

Shortly thereafter, in *Bay Counties Dist. Council of Carpenters (Associated Home Builders)*,³⁰ the Board upheld the union's right to fine members for exceeding its production quotas under *Wisconsin Motor*, but found a section 8(b)(1)(A) violation because the union applied dues payments of members to cover fines levied against them. Unlike *Wisconsin Motor*, here the collective bargaining agreement contained a union shop clause and, when members refused to pay the fines, the union sent warnings that they could lose their jobs. The Board thus saw the union action as affecting the employment status. Member Leedom, agreeing that the transfer of dues payments to cover fines violated section 8(b)(1)(A), would also find the mere imposition of fines an 8(b)(1)(A) violation.³¹ On appeal, the Ninth Circuit, in dictum, agreed with member Leedom that the fines themselves may have violated the

an employee petition to restrain a union's informational picketing. The attorney who represented the employees was under company retainer.

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

²⁶ The rule limited the amount of daily incentive pay a member could earn. When a member attained the ceiling rate for the day, he could continue working but could not report any further production. The excess production was "banked" for future payment.

²⁷ There was evidence that the company had unsuccessfully sought to induce the union to drop the ceilings on various occasions.

²⁸ It stated: "[T]he Board has not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee." 145 N.L.R.B. at 1104, 55 L.R.R.M. at 1088.

²⁹ *Id.* at 1111, 55 L.R.R.M. at 1091.

³⁰ 145 N.L.R.B. 1775, 55 L.R.R.M. 1219 (1964).

³¹ *Id.* at 1777, 55 L.R.R.M. at 1221.

act, but stressed sections 8(b)(3) and 8(d) rather than section 8(b)(1)(A).³² The court focused on other facts in the case, namely, that the rule imposing production quotas was not traditional but had been adopted by union resolution after a collective bargaining agreement had been signed which provided that "the wages, hours and working conditions of this Agreement are the wages, hours and working conditions in the area."³³ The court found that the fine constituted unilateral action by the union to fix terms and conditions of employment in violation of *Fibreboard Paper Prods. Co. v. NLRB*,³⁴ and since a collective bargaining agreement was in effect, the union was avoiding compliance with section 8(d).³⁵ The court thus remanded the case to the Board for findings with respect to the apparent failure of the union to bargain about the quotas.

The court, however, ultimately specifically declined to decide whether the fines themselves coerced the employees.³⁶ It did rule that unilateral action as to terms and conditions of employment was not within the proviso to section 8(b)(1)(A) since it was not purely an internal concern of the union. Finally, the court distinguished *Wisconsin Motor*³⁷ in that it involved a long-standing rule which had become a part of the wage structure and which had been discussed in negotiations.³⁸

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³² *Associated Home Builders v. NLRB*, 352 F.2d 745 (9th Cir. 1965).

³³ *Id.* at 747. There were no quotas in effect in the area.

³⁴ 379 U.S. 203 (1964). The Court held a company guilty of §§ 8(a)(5) and 8(d) violations in not bargaining before subcontracting work.

³⁵ LMRA § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1965), requires an employer and union to meet and confer regarding terms and conditions of employment. A proviso thereto requires also that whenever a collective agreement is in effect, no party shall modify such agreement unless specified procedures are followed.

³⁶ The court stated: "[W]e find it unnecessary to decide whether 8(b)(1)(A), apart from the proviso, requires a finding that this labor organization's conduct operated to restrain or coerce employees in the exercise of rights guaranteed in § 7 of the Act." *Associated Home Builders v. NLRB*, *supra* note 32, at 750.

³⁷ Local 283, UAW (*Wisconsin Motor Corp.*), *supra* note 25, has been presented to the Seventh Circuit for review.

³⁸ It should be remembered that neither *Fibreboard*, *supra* note 34, nor the act requires agreement, but merely good faith bargaining on the issue.