

STUDENT COMMENTS

RECENT DEVELOPMENTS IN LABOR LAW

INTRODUCTION

This article represents the third annual comment dealing with recent developments in the field of national labor law.* The objective of this comment is to explore and analyze in terms of their impact upon existing doctrines, what the writers believe to be the most significant decisions of the National Labor Relations Board and the United States courts. The cases selected were those which were felt to most clearly represent significant departures in policy application of the Labor Management Relations Act. In emphasizing the doctrinal changes in the areas of principal concern under the LMRA, the article has been segmented into four primary categories: jurisdiction, enforcement of collective bargaining agreements under section 301, organizational and representational activities and unfair labor practices.

JURISDICTION

1. PREEMPTION OF EMPLOYEE-UNION DISPUTES BY NLRA

The United States Supreme Court decided *International Ass'n of Machinists v. Gonzales*¹ in 1957. The Court ruled that the NLRA did not preempt state jurisdiction to order reinstatement of an illegally expelled union member and to order consequential damages for loss of wages and suffering due to his resultant loss of employment. The Court, relying upon *United Constr. Workers v. Laburnum Constr. Corp.*,² held that whether the action sounded in tort or contract, state jurisdiction is not displaced simply because a coincidence of facts indicate that there may be a plausible proceeding before the NLRB, when the possibility of conflict with federal policy is remote. Subsequent decisions of the Supreme Court have severely limited application of the *Gonzales* "remote possibility" exception.

In the term following *Gonzales*, the Supreme Court decided *San Diego Bldg. Trades Council v. Garmon*.³ Unlike *Gonzales*, *Garmon* involved a suit by a nonunion employer against a union for damages resulting from picketing proscribed by state law. The Court announced that when conduct is "arguably" protected by section 7 or prohibited by section 8 of the Act, due regard for federal policy requires that state jurisdiction yield. The Court further stated that a different result is not required because the

* For an extensive discussion of the 1961 developments, see Comment, Labor Law's New Frontier: The End of the Per Se Rules, 3 B.C. Ind. & Com. L. Rev. 487 (1962); for an extensive discussion of the 1962 developments, see Comment, Recent Developments in Labor Law, 4 B.C. Ind. & Com. L. Rev. 661 (1963).

¹ 356 U.S. 617 (1958).

² 347 U.S. 656 (1954). The employer sued three labor organizations in tort for damages. The Court held that although the "conduct" in question constituted an unfair labor practice, state jurisdiction was not precluded since Congress had not prescribed procedure to remedy consequences of tortious conduct already committed. The rationale of this case was overruled by *Garmon*, *infra* note 3.

³ 359 U.S. 236 (1958).

relief sought is damages, since the concern of the Court is in "*delimiting areas of conduct* which must be free from state regulation if national policy is to be left unhampered."⁴ (Emphasis supplied.) The Court distinguished *Gonzales* as involving conduct of "merely peripheral concern" to the national act.⁵

In June 1963, the Supreme Court handed down two decisions which further defined the extent to which the federal act has preempted state jurisdiction. Both *Local 100, United Ass'n of Journeymen of Plumbers v. Borden*⁶ and *Local 207, Int'l Ass'n of Bridge Workers v. Perko*⁷ dealt with the principles laid down in *Gonzales* and *Garmon*. Both cases involved interference by a union with an expelled member's *employment rights*, conduct arguably prohibited by the NLRA. The injured workers in both cases sued the union in a state court for damages for tortious interference with their right to contract and to pursue their lawful occupation. In addition, the plaintiff in *Borden* alleged a breach of an implied promise not to discriminate unfairly or to deny any member the right to work. In upholding the unions' contentions that the national act preempted state jurisdiction, the Court distinguished *Gonzales* as involving equitable relief directed at reinstatement in the union of an illegally expelled member and not, as here, involving an interference with the individual's employment opportunity. The Court noted that unlike *Gonzales*, "no specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action (*Gonzales* . . .) concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction."⁸

It would appear from the decisions in *Garmon*, *Perko* and *Borden*, that *Gonzales* must be limited strictly to its facts. State jurisdiction to provide relief is not foreclosed provided the "conduct" involved is solely of an internal union nature. If the "conduct" involves interferences with the aggrieved party's employment rights, exclusive jurisdiction must reside in the National Labor Relations Board. This conclusion is warranted if one considers that the national act is designed to regulate employer-union relations and not internal union affairs.

2. PREEMPTION OF PUBLIC UTILITY ANTI-STRIKE LAW BY NLRA

The Supreme Court recently had occasion to rule upon the validity of the Missouri Public Utility Anti-Strike Law (King-Thompson Act).⁹ The Court in deciding *Street Elec. Ry. and Motor Coach Employees v. Missouri*,¹⁰ held that the Missouri statute authorizing state seizure of privately owned public utilities where the "public interest" so requires,¹¹ and au-

⁴ Id. at 246.

⁵ Id. at 243.

⁶ 373 U.S. 690 (1963).

⁷ 373 U.S. 701 (1963).

⁸ Supra note 6, at 697.

⁹ Mo. Rev. Stat. § 295.10-.210 (1959).

¹⁰ 374 U.S. 74 (1963); Note, 5 B.C. Ind. & Com. L. Rev. 196 (1963).

¹¹ Mo. Rev. Stat. § 295.180(1) (1959) authorizes the Governor, where a strike "... threatens to impair the operation of the utility so as to interfere with the public

thorizing the issuance of injunctions against strikes after seizure¹² conflicts with the federally guaranteed right to strike.¹³ Of critical importance was the proclamation by the Governor that all rules and regulations governing the internal management and organization of the company and its duties and responsibilities were to remain in force and effect during the period of state operation.¹⁴

In declaring the measure unconstitutional, the Court relied upon its 1951 decision in *Street Employees v. Wisconsin Employment Relations Bd.*¹⁵ despite several distinguishing points between the two cases. While the statute involved in the *Wisconsin Board* case was a "comprehensive code" for resolving labor disputes, the Missouri statute was of more limited application, being invoked only in the case of a local emergency. However, the Court in the *Wisconsin Board* case had made it clear that whether of wide or limited application, the statute is invalid since "Congress has closed to state regulation the field of peaceful strikes in industries affecting interstate commerce."¹⁶

A second distinguishing feature of the *Missouri* case was the seizure of the utility by the Governor of Missouri. If the seizure had the effect of transforming the utility into a state instrumentality, the federal act would not protect the workers' right to strike from infringement. This is true because provisions of the federal act do not apply to state owned instrumentalities. The Court dismissed the form of the conversion for substance and determined that such a mere paper transfer where the employees did not become employees of the State, where the State did not pay their wages or supervise their duties, where no property was transferred, and where the State did not participate in the actual management of the company "fell far short of creating a state-owned and operated utility."¹⁷

This decision should close the door on state legislation curtailing the right of peaceful strikes for legitimate labor objectives in the area of *privately* owned public utilities.¹⁸

interest, health and welfare . . . to take immediate possession of the plant, equipment or facility for use and operation by the state of Missouri in the public interest."

¹² Mo. Rev. Stat. § 295.200(6) (1959).

¹³ The Court relied upon Sections 7 and 13 of the NLRA as guaranteeing the right to strike.

Section 7 provides that "employees shall have the right to self-organization . . . to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

Section 13 provides that except as otherwise provided in the Act, nothing "shall be construed so as either to interfere . . . or to affect the limitations or qualifications on that right."

¹⁴ Mo. Rev. Stat. § 295.190 (1959) provides that "the governor is authorized to prescribe the necessary rules and regulations to carry out the provisions of this chapter."

¹⁵ 340 U.S. 383 (1951). The Wisconsin statute made it a misdemeanor for public utility employees to strike where to do so would cause an interruption of an essential public utility service. Wis. Stat. §§ 111.50 et seq. (1949).

¹⁶ Id. at 394.

¹⁷ Supra note 10, at 81.

¹⁸ At present, some fourteen states have statutory provisions dealing with strikes and arbitration of disputes involving public utilities: Florida, Hawaii, Indiana, Maine,

3. AGENCY SHOP

The United States Supreme Court upheld¹⁹ the Board's position²⁰ that the "agency shop" was a permissible form of union security, not violative of 8(a)(3) of the NLRA.²¹ The Board's view was that if Congress permitted the union shop, it must have intended to permit union security provisions which required only minimal adherence to unions. The Board rejected the notion that the language of the statute should be read strictly to permit only union security provisions which require membership in a union. Payment of an amount equal to dues and initiation fees would not be "membership" under this view.

The Supreme Court found that the 1947 amendments to the NLRA altered the meaning of "membership" as it relates to union security provisions:

Under the second proviso to 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "*Membership as a condition of employment is whittled down to its financial core.*"²² (Emphasis supplied.)

Therefore, the provision involved in *General Motors* was found to come within the terms of 8(a)(3), and the employer violated 8(a)(5) in refusing to bargain with the union over the agency shop proposal.

Even though an agency shop may be permissible under federal law, the Supreme Court, in upholding the Florida Supreme Court in *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*,²³ held that a state could declare such provisions void under the state's right-to-work laws. Such action by

Maryland, Massachusetts, Missouri, Nebraska, New Jersey, North Dakota, Pennsylvania, Texas, Virginia and Wisconsin.

¹⁹ NLRB v. General Motors Corp., 373 U.S. 734 (1963).

²⁰ General Motors Corp., 133 N.L.R.B. 451, 48 L.R.R.M. 1659 (1961). This was the decision on rehearing by the new Board which reversed the old Board. 130 N.L.R.B. 481, 47 L.R.R.M. 1306 (1961).

²¹ Section 8(a)(3) provides that it shall be an unfair labor practice for an employer:

by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement . . . : *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of an employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . .

²² *Supra* note 19, at 742.

²³ 373 U.S. 746 (1963).

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the state is permitted by Section 14(b) of the NLRA,²⁴ the phrase "agreements requiring membership in a labor organization," being given the same meaning under 14(b) as determined under section 8(a)(3).²⁵

In its holding, the Supreme Court rejected the argument that a particular agency shop provision may be arguably an unfair labor practice and that, therefore, the Board should have exclusive jurisdiction. The basis of the Court's rejection was the Board's determination, as stated in its *General Motors* brief, that the agency shop clause came within 8(a)(3) and 14(b), and was therefore, subject to invalidation by the state.²⁶

In *Schermerhorn II*,²⁷ the Court dealt with a second preemption issue: whether a state court, rather than the NLRB alone, has jurisdiction to enforce the state's prohibition of an agency shop agreement. It was held that a state could enforce its own laws "restricting execution and enforcement of union-security provisions. Since it is plain that Congress left the States free to legislate in that field, we can only assume that it intended to leave unaffected the power to enforce those laws."²⁸ The Court was clear, however, in pointing out that the states' jurisdiction "begins only with actual negotiation and execution of the type of agreement described by § 14(b)."²⁹

Left for further determination by the Supreme Court is the question of whether the NLRB has any jurisdiction to enforce a state's prohibition of union security provisions. This question is precipitated by the manner in which the issue was framed in *Schermerhorn II*: "Whether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce the State's prohibition. . . ."³⁰ (Emphasis supplied.) The specific result of the *Schermerhorn* cases is to permit a state to declare void union security agreements and to enforce its prohibition of them. The enforcement power, however, is limited to the actual negotiation and execution of the union-security agreement, while the Board retains exclusive jurisdiction of union picketing to require an employer to enter into such agreements or to hire only union men without regard to the agreement then in existence between the union and employer.^{30a}

²⁴ Section 14(b) provides:

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

²⁵ Supra note 23, at 751. The Court stated that: "At the very least, the agreements requiring 'membership' in a labor union which are expressly permitted by the proviso [in § (a)(3)] are the same 'membership' agreements expressly placed within the reach of state law by § 14(b)."

²⁶ Id. at 756.

²⁷ Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96 (1963).

²⁸ Id. at 102.

²⁹ Id. at 105.

³⁰ Id. at 97. For a more complete discussion of the *General Motors* and *Schermerhorn* cases and other questions raised, see Note, 5 B.C. Ind. & Com. L. Rev. 440 (1964).

^{30a} Subsequent to submission of this article to the printer, the United States Supreme Court decided *Boire v. Greyhound Corp.*, 84 Sup. Ct. 894 (1964), a significant decision involving the jurisdiction of a federal district court to set aside NLRB's fact-findings in representation proceedings and to enjoin a pending election. The federal district court had concluded, on the basis of *Leedom v. Kyne*, 358 U.S. 184 (1958), that the Board's

ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS UNDER SECTION 301

Since the Supreme Court's decision in *Lincoln Mills*,³¹ state and federal courts have been applying federal law to suits instituted under section 301. These courts have, in effect, been fashioning a body of procedural and substantive law to govern section 301 actions.³²

Many of the cases brought under section 301 have dealt with petitions

findings were insufficient as a matter of law to establish a joint employer status for representation election purposes and that as such the Board violated the NLRA in attempting to conduct an election where no employment relation existed. The Supreme Court concluded, however, that *Boire* did not fall within the narrow limits of the *Kyne* exception. The Supreme Court in *Kyne* had upheld a lower federal court order restraining the Board's holding of an election upon the ground that the Board had conceded that it had acted in excess of its statutory power. The Court there made it clear, however, that the district court was "not one to 'review' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction." 358 U.S. at 188. The Supreme Court in *Boire* found that the determination of whether a joint employer status existed was essentially a factual one. The Court concluded:

The *Kyne* exception is a narrow one, not to be extended to permit plenary District Court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the Court of Appeals, and then only under the conditions explicitly laid down in § 9(d) of the Act.

84 Sup. Ct. at 899.

³¹ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) in which the Court held that courts must apply federal law in section 301 suits, the law to be fashioned by the courts from the policy of the national labor laws.

³² Some of the more recent pronouncements by the Supreme Court include *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) (Section 301 authorizes suit for breach of a collective bargaining agreement and the court's jurisdiction is not preempted because the conduct involved also constitutes an unfair labor practice); *Drake Bakeries, Inc. v. Bakery Workers, Local 50*, 370 U.S. 254 (1962) (An employer must arbitrate claims for damages for breach of a no-strike clause where the language of the contract is sufficiently broad to cover this); *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962) (An employer can bring a damage action under section 301 for breach of a no-strike clause without being required to arbitrate where the terms of the arbitration clause limit arbitrable controversies to employee grievances); *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962) (The fact that an employer can sue under section 301 does not repeal, either expressly or impliedly, the anti-injunctive provisions of the Norris-La Guardia Act and thus does not make available injunctive relief for breach of a no-strike clause); *Teamsters, Local 174 v. Lucas Flower Co.*, 369 U.S. 95 (1962) (A state court must apply federal law to actions brought under section 301. A no-strike clause is implied with respect to grievances, which under the contract, the employer is under a duty to arbitrate); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (State courts have concurrent jurisdiction with federal courts for suits brought for violation of contract under section 301); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (The question of interpretation of the collective bargaining agreement is for the arbitrator and not the courts); *United Steelworkers of Am. v. Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960) (Apart from matters which the parties specifically exclude, all questions on which the parties disagree must come within the scope of the grievance and arbitration procedure of the collective bargaining agreement); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960) (Where the parties have agreed to submit all questions of interpretation to arbitration, the court's function is confined to determining whether the party seeking arbitration is making a claim which on its face is governed by the contract.)

for enforcement of arbitration provisions contained in collective bargaining contracts. In dealing with such cases, the courts have been guided by the principle that it is the federal policy to promote industrial peace and stability and that voluntary arbitration serves to effectuate that policy.⁸³

The Supreme Court recently decided another section 301 case, *Carey v. Westinghouse Elec. Corp.*⁸⁴ The petitioning union, IUE, and Westinghouse were parties to a collective bargaining agreement under which the IUE was the certified representative of "all production and maintenance employees, . . . but excluding all salaried technical . . . employees" who were represented by Federation. IUE filed a grievance under the grievance procedure which provided for arbitration of unresolved disputes alleging that certain production and maintenance work was being performed by workers represented by Federation. Upon Westinghouse's refusal to arbitrate the dispute on the ground that it involved a representation matter within the exclusive jurisdiction of the Board, the IUE petitioned the Supreme Court of New York to compel arbitration. The Supreme Court refused to compel arbitration and that court was affirmed by the New York Court of Appeals on the ground that the dispute involved a definition of bargaining units which was within the exclusive jurisdiction of the Board.⁸⁵

The Supreme Court of the United States recognized that this jurisdictional dispute could be one of two types: a controversy over which union should perform certain work; or a controversy over which union should represent certain workers. The Court held that whether the case was a work-assignment dispute or a representation dispute, in light of federal policy favoring arbitration, the arbitration procedure outlined in this collective bargaining agreement should apply to resolve the dispute. Assuming the controversy involved a work-assignment, the Court reasoned that the union should not have to resort to a strike before it would have a means of resolving the dispute.⁸⁶ Such would not be consonant with federal labor policy which seeks stability and favors private settlement of disputes to government intervention. If on the other hand, it was a representation dispute, the Court asserted that the fact that the Board may later be called upon to decide the matter does not preclude application of the arbitration procedure since in such event the Board will have the benefit of the arbiter's decision.⁸⁷

The Court concluded that:

If it is a work assignment dispute, arbitration conveniently fills a gap and avoids the necessity of a strike to bring the matter to the Board. If it is a representation matter, resort to arbitration

⁸³ *United Steelworkers of Am. v. Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960), *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

⁸⁴ 375 U.S. 261 (1964). For an extensive discussion of this case, see Note, *infra* at 821.

⁸⁵ 230 N.Y.S.2d 703, 184 N.E.2d 298 (1962).

⁸⁶ Section 8(b)(4)(d) and Section 10(k) of the NLRA would have to be invoked before a remedy could be afforded by the Board.

⁸⁷ Either the IUE or Westinghouse could have petitioned the Board for clarification of the union's certificate if the union alleged that certain employees should be in that union in light of the jobs which they perform.

may have a pervasive, curative effect even though one union is not a party.

By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to "industrial peace" . . . and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area.³⁸

Mr. Justice Black in dissent³⁹ could not see the wisdom in permitting the dispute to go to arbitration when only one of the two unions is a party to the proceeding thus precluding final disposition of the controversy. The majority clearly recognized this possibility but regarded it as a lesser evil than a strike to compel Board resolution.⁴⁰ Mr. Justice Black also felt that permitting suit against an employer by a union for refusal to bargain when the employer is caught in the middle of a jurisdictional dispute is unjust. If he guesses wrong as to which union's members will be awarded the disputed jobs, he is open to a suit for damages. Mr. Justice Black concluded:

. . . the Court's recently announced leanings to treat arbitration as an almost sure and certain solvent of all labor troubles has been carried so far in this case as unnecessarily to bring about great confusion and to delay final and binding settlements to jurisdictional disputes by the Labor Board, the agency which I think Congress intended to do that very job.⁴¹

It is apparent that adoption of Mr. Justice Black's view would cut deeply into the holding of the Supreme Court in *Smith v. Evening News Ass'n*.⁴²

Does a strike in violation of a no-strike clause automatically relieve an employer of his responsibility to arbitrate that grievance under the arbitration clause of the collective bargaining agreement? This question was presented to the Supreme Court in *United Packinghouse, Food and Allied Workers, Local 721 v. Needham Packing Co.*⁴³ Mr. Justice Harlan, writing for a unanimous court, found that the Court's decision in *Drake Bakeries, Inc. v. Bakery Workers, Local 50*⁴⁴ was directly applicable. The Court held that the mere existence of a no-strike clause does not ipso facto imply that disputes involving or following an alleged breach of the no-strike clause are excepted from the company's duty to arbitrate.

³⁸ Supra note 34, at 272.

³⁹ It is important to note that Mr. Justice Black regarded the dispute as one involving work assignment only.

⁴⁰ Supra note 34, at 265.

⁴¹ Id. at 276.

⁴² It is important to note that Mr. Justice Black was the lone dissenter in *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

⁴³ 84 Sup. Ct. 733 (1964).

⁴⁴ 370 U.S. 254 (1962).

Whether a union waives its right to arbitrate by committing such a breach would seem to depend upon specific language to that effect in the contract.

In *Humphrey v. Moore*,⁴⁵ decided the same day as *Carey*, the Supreme Court held that a union member can sue his union under section 301 for breach of the duty of fair representation. The Court held that the fact that such action may also give rise to an unfair labor practice charge⁴⁶ would not, under the doctrine announced in *Smith v. Evening News Ass'n*,⁴⁷ preclude such a suit under section 301. The Court concluded, however, that the facts were not sufficient to sustain the allegations.

Mr. Justice Goldberg concurred in the result, but disagreed that the cause of action stems from a breach of the collective bargaining agreement. It was his opinion that the union's duty of fair representation stems not from the collective bargaining agreement but from the national act itself;⁴⁸ and that the collective bargaining agreement should not be open to collateral attack where there has been only a failure on the part of the union in its duty to represent fairly and not willful participation by the employer in the alleged breach. He concluded:

We should not, and, indeed, we need not strain, therefore, as the Court does, to convert a breach of the union's duty to individual employees into a breach of the collective bargaining agreement between the employer and the union.⁴⁹

The majority and Mr. Justice Goldberg in his concurring opinion agreed that the dovetailing of seniority by the union under these circumstances did not constitute a breach of the union's duty of fair representation.

It would appear that an employee would have an easier time proving a cause of action under the majority's view than under that set forth by Mr. Justice Goldberg. To prove a cause of action for breach of the duty of fair representation under the Goldberg approach, it must be shown that there was both a breach of such duty and invidious classification. To set forth a cause of action under section 301, on the other hand, the latter element does not have to be proven.

REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITIES

1. APPROPRIATE BARGAINING UNIT

The facility of organizing employees in large businesses has been given continued impetus by the present Board, especially in the retail chain

⁴⁵ 375 U.S. 335 (1964). For an extensive discussion of this case, see Note, *infra* at 848.

⁴⁶ The question of whether the breach of duty of fair representation constitutes an unfair labor practice is widely debated. Cf. *NLRB v. Local 294, Int'l Bhd. of Teamsters*, 317 F.2d 746 (2d Cir. 1963), with *Miranda Fuel Co.*, 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962) cited for comparison by the Court. See generally Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957).

⁴⁷ *Supra* note 42.

⁴⁸ Mr. Justice Goldberg views the case as within the principles announced in *Syres v. Oil Workers Int'l Union*, 350 U.S. 892 (1955) and *Steele v. Louisville & N.R.*, 323 U.S. 192 (1944).

⁴⁹ *Supra* note 45, at 357.

and insurance agent field. In both areas the tendency of the old Board (Eisenhower Board) was to recognize only larger units—industry, state or nation-wide—as appropriate, placing emphasis on the integrated nature of the employer's business operations and the difficulties inherent in the employer's dealing with fragmented units.

In reversing this policy, the new Board (Kennedy Board) has considered the organizational difficulties in unionizing large, dispersed operations. In *Metropolitan Life Ins. Co.*,⁵⁰ the union petitioned for a bargaining unit of insurance agents of all the district offices of Metropolitan Life located within the city limits of Chicago. Several of these offices had territories extending beyond the city limits, while three suburban offices had territories extending into the city. In a prior case the Board had found⁵¹ that an individual district office could be an appropriate unit for collective bargaining and that this did not "preclude the grouping of such offices where such grouping is justified by cogent geographic considerations."⁵² The Board found that this previous case governed the situation and determined that the unit was appropriate. The fact that the territories may have extended beyond the city limits was not considered crucial because the territories of the various district offices were subject to frequent change.

The new Board's policy has been generally approved by the courts of appeal. In *NLRB v. Quaker City Life Ins. Co.*,⁵³ the court granted enforcement of the Board's order requiring the company to cease and desist from refusing to recognize and bargain with the unit of insurance agents certified by the Board as appropriate. The union in 1953, had failed to organize employees on a state-wide basis, and in 1961 the Board approved a unit limited to one city. The court of appeals held that the Board did not abuse its discretion in approving the smaller unit since the job specifications were highly standardized, working conditions were similar and each office was a separate entity.⁵⁴

The principal point raised by the old Board members in their dissents in these cases is that the decisions of the majority have been based on the extent of organization by the union, contrary to the mandate of Congress.⁵⁵ Just what "extent of organization" means has never been clearly explained. In *Texas Pipe Line Co. v. NLRB*,⁵⁶ the Court of Appeals for the Fifth Circuit rejected the contention that the Board must disregard the extent

⁵⁰ 144 N.L.R.B. No. 15; 54 L.R.R.M. 1005 (1963).

⁵¹ *Metropolitan Life Ins. Co.*, 138 N.L.R.B. 512, 51 L.R.R.M. 1077 (1962).

⁵² *Id.* at 515, 51 L.R.R.M. at 1078. The grouping found appropriate there was a geographic area in the city of Cleveland. Since it is found separate and distinct, "and as there is no recent history of collective bargaining and no union seeks a broader unit, we find that such a unit may be appropriate for purposes of collective bargaining." *Ibid.*

⁵³ 319 F.2d 690 (4th Cir. 1963). This decision upheld the Board's original determination to depart from its 1944 holding in *Metropolitan Life Ins. Co.*, 56 N.L.R.B. 1635, 14 L.R.R.M. 187 (1944).

⁵⁴ *Id.* at 693.

⁵⁵ Section 9(c)(5) provides: "In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."

⁵⁶ 296 F.2d 208 (5th Cir. 1961).

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of union organization in all cases of representation. Although conceding that the language of the statute was ambiguous, the court held that this was "one instance when a literal construction agrees with sound policy. Giving the statutory language a literal reading, one would have to say that the extent of organization, although not 'controlling,' is not ruled out as a factor to be given weight."⁵⁷ Thus, the court held that although a factor is not controlling, it may be entitled to weight. "By definition such a factor, in a close case, may be determinative; otherwise the factor is deprived of all significance."⁵⁸

The Court of Appeals for the Fourth Circuit in *Quaker City* went along with the Fifth Circuit in finding that "extent of organization" may be considered by the Board as a factor. Originally, the Board felt that in view of the nature of the insurance industry, insurance agents would be organized on a state-wide level, and that therefore, it would not certify as appropriate, any smaller unit. However, since the unions did not organize on the basis of the larger unit, the Board found that such a policy was not feasible and that the policy prejudiced the collective bargaining rights of employees. Therefore, the Board proposed to apply "normal unit principles" in the insurance field. In this regard, the court stated that: "the only effect given to the extent of organization was in the policy decision to overrule the Metropolitan case and permit appropriate smaller than state-wide units."⁵⁹ Thus, the Board's certification of the smaller unit took into consideration the factor of the extent of organization, but, using normal unit principles, other factors were controlling.

The First Circuit, in *Metropolitan Life Ins. Co. v. NLRB*,⁶⁰ held with the dissenting Board members, that the Board had certified a bargaining unit, on the basis of the extent of union organization. In the case before them, the

⁵⁷ Id. at 213. Cf. *NLRB v. Glen Raven Knitting Mills*, 235 F.2d 413 (4th Cir. 1956), where the court found that there was no doubt, based upon the record as a whole, that the Board's decision was controlled by the extent of organization. The facts showed that the union sought to organize the whole plant, but failing to win a consent election, subsequently sought to organize a smaller unit—the production workers—and again lost. The union finally was able to secure a majority of the knitters and the Board certified them as an appropriate unit, on the grounds that the knitters were "the most highly skilled and most thoroughly trained of all the workers in the plant and that they operate, under their own supervisors more complicated and costly machines than the other employees and, therefore, they constitute an appropriate unit." The court found, however, that the interests of the knitters were not separate and distinct from the other workers since they were all entitled to the same benefits, were subjected to the same policies of management, and were all under a single plant superintendent.

⁵⁸ Ibid.

⁵⁹ Supra note 53, at 693. The dissenting members stated:

It is quite clear that the reason for the Board's decision to change the policy . . . is that it is easier to organize small local district offices one at a time . . . than it is to organize the state-wide or company-wide group as a single unit. This appears to me to be nothing less than a return to the heretofore unacceptable and outlawed practice of establishing provisional units which were admittedly based on the extent of organization and a circumvention of the express prohibition of the statute under the guise of a policy change. Id. at 696.

⁶⁰ 55 L.R.R.M. 2444 (1st Cir. 1964). This was the first of many cases involving Metropolitan Life that has reached a court of appeals.

court found that the Board had certified as an appropriate unit, only the district office in Woonsocket, Rhode Island, although the company had eight district offices and two detached offices in the state. The court determined, not so much on the basis of the facts in the case, but on the basis of other cases involving certification of insurance agents' bargaining units that the extent of organization had been controlling. These cases involved a variety of diverse units⁶¹ which led the court to believe that the Board would grant any unit which the union sought. In this regard, the court stated: "the Board majority's actions . . . speak more clearly than its words. . . . In the absence . . . of any other rational basis for its varying unit determinations, we can only conclude . . . that the majority has indeed reverted to its pre-1944 policy of regarding the extent of union organization as controlling in violation of § 9(c)(5) of the Act."⁶²

The day following the First Circuit's opinion, the Court of Appeals for the Third Circuit rendered its decision in *Metropolitan Life Ins. Co. v. NLRB*,⁶³ enforcing the Board's order. This court agreed with the *Quaker City* court in upholding the Board's view that a change of policy in the insurance field was necessary to eliminate the unfair prejudice to the collective bargaining rights of employees which existed under the prior rule. The court pointed out: "There is a vast difference between taking away an obstacle to wider union organization and collective bargaining which is the explicit legislative purpose and mandate of the Act, and determining appropriate units on the basis of employee organization."⁶⁴

The Third Circuit appeared to have met the objections of the First Circuit as to the diverse units approved by the Board. The court determined that several different kinds of appropriate units could be found for a given group of employees. In addition, the Board considers, as with other industries and retail establishments, many different factors in determining the appropriate unit. This being so, the Board need only consider the factors which would indicate whether the *proposed unit* was appropriate. As a result, the court found that:

⁶¹ The court seemed disturbed by the fact that the Board had certified a unit consisting of six offices in the city of Cleveland and three suburban offices; a unit consisting of all offices in the city of Chicago, excluding suburban offices whose territories extended into the city; a unit consisting of two offices within a three district office area in Delaware; a unit consisting of a single office in Sioux City, Iowa and two offices under its administrative control, over 120 miles away.

⁶² *Supra* note 60, at 2447. The First Circuit felt handicapped by the Board's failure to discuss the weight given to the extent of organization in its determination. In addition, the court did not feel that the Board's determination that each district office in Rhode Island was a separate administrative entity, that there was no recent bargaining history, that the Woonsocket office was located in a separate and distinct geographical area and that no union sought a larger unit, was sufficient independent evidence to substantiate the unit found appropriate by the Board. These are indications that the court believed that these findings were a facade for the Board's actual determination: "Why should there be a community of interest among Metropolitan's agents working from both city and suburban offices in Cleveland but no community of interest among its agents working in both city and suburban offices in Chicago. . . ." *Ibid*.

⁶³ 55 L.R.R.M. 2448 (3d Cir. 1964).

⁶⁴ *Id.* at 2454.

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The criteria or factors considered for a single district office unit and for a unit comprising several district offices will differ in the same way as they differ somewhat in single plant and multi-plant determinations. Thus while a single district office may be an appropriate unit, a grouping of two may not be in the same general area where there are three district offices.⁶⁵

Approval was then given by the court to the various factors used by the Board: whether the proposed unit is homogenous, identifiable and distinct; previous bargaining history; community of interest among the employees; geographical proximity; similarity of jobs and functions, and the relationship between the proposed unit and the structure of the employer's business. Along with these criteria, the Board may consider the extent of organization as evidence in determining the appropriate unit.⁶⁶

The Board's policy of considering smaller units appropriate for collective bargaining was extended to retail store operations in *F. W. Woolworth Co.*⁶⁷ The Board granted the union's petition for a unit to include employees who worked primarily at lunch and bakery counters, the snack bar and in the kitchen. The Board found that all the store employees were hired under the same procedure, were on a store-wide payroll and received the same starting hourly wage, vacation, sick leave, holiday, pension, Christmas bonus and discount benefits. However, the following factors were considered sufficient to permit the establishment of the smaller bargaining unit: there was little interchange among the unit sought and the rest of the employees; this was the only department under separate supervision; there was a "mutuality of interest" among the desired unit—in the type of work performed, their training skills—and no other labor organization was seeking a broader unit.

The Fourth Circuit expanded these principles in *General Instrument Corp. v. NLRB*.⁶⁸ The employees involved there were classified into two groups: engineers and laboratory workers. The two groups continually worked together but there were significant areas where there was no common interest: engineers were professional people, were college graduates and were working on a salary basis without overtime pay, while the laboratory workers were not college trained, were non-professional employees and were paid on an hourly basis with overtime pay. The union sought to represent only the laboratory workers but the Regional Director included both groups in the appropriate unit. In reversing and directing an election among the laboratory workers only, the Board's decision was in part based on the fact that the union sought to represent only the laboratory workers and that

⁶⁵ Ibid.

⁶⁶ In considering the extent of organization, however, the court stated that: The extent to which the Union *failed* to organize should not determine the appropriateness of the group it did organize. To hold, that because the Union *failed* to organize on a broader basis, the smaller unit petitioned for is inappropriate, would be to penalize the Union for failing in an attempt to organize, which right is fundamental to the Act. (Emphasis supplied.)

Id. at 2452.

⁶⁷ 144 N.L.R.B. No. 35, 54 L.R.R.M. 1043 (1963).

⁶⁸ 319 F.2d 420 (4th Cir. 1963), cert. denied, 375 U.S. 966 (1964).

there was no showing of interest among the professional employees to join the union. The court of appeals, in affirming the Board's position, indicated that if the *sole basis* of the Board's decision was the union's unwillingness to represent the professional employees and the showing of a lack of interest among them in joining a union, the situation may have been controlled by the *Glen Raven* case,⁶⁹ on the ground that the Board gave controlling effect to the extent of union organization. The court stated, however, that:

When a union files a petition limited to a certain group, presumably either the union lacks interest in those excluded, or the extent of organization has not extended far enough to include them. Since these may be factors (although not controlling), and since professional employees generally have interests separate from other employees, it is reasonable for the Board to require a showing of interest among professionals when it is contended that they be included in the unit.⁷⁰

The trend has been continued by recent Board decisions, and has received impetus from at least two courts of appeal, favoring union petitions for smaller bargaining units. This trend has been away from emphasizing the integrated operations of the employer, and toward giving a more presumptive effect to the literal language of Section 9(b)⁷¹ of the NLRA.⁷² On this basis the Board has reversed its policy decisions in regard to insurance agents and retail stores, reverting to the application of the unit principles used in other multi-plant or multi-office enterprises.⁷³ This policy does away with

⁶⁹ Supra note 57.

⁷⁰ Supra note 68, at 423.

⁷¹ Section 9(b) provides: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . ."

⁷² In *Dixie Belle Mills, Inc.*, 139 N.L.R.B. 629, 51 L.R.R.M. 1344 (1962),* the Board 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.

Id. at 631, 51 L.R.R.M. at 1345.

⁷³ In regard to retail chain operations, the Board indicated its shifting position in *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032, 51 L.R.R.M. 1152 (1962), where it was stated:

. . . we believe that too frequently it [prior policy] has operated to impede the exercise by employees in retail chain operations of their rights to self-organization guaranteed in Section 7 of the Act. In our opinion that policy has over emphasized the administrative grouping of merchandising outlets at the expense of factors such as geographic separation of the several outlets and the local managerial autonomy of the separate outlets; and it has ignored completely as a factor the extent to which the claiming labor organization had sought to organize the employees of the retail chain. We have decided to modify this policy and to apply to retail chain operations the same unit policy which we apply to multiplant enterprises in general.

Id. at 1033, 51 L.R.R.M. at 1153.

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exceptions to the general rules and regulations, thereby facilitating organizational activities of unions and assuring employees "the fullest freedom in exercising the rights guaranteed by this Act. . . ."

2. CONTRACT BAR

In *Gary Steel Supply Co.*⁷⁴ the Board has finally done away with the *Keystone*⁷⁵ decision as it effects the contract bar rule in relation to union-security clauses and check-off provisions.⁷⁶ In *Gary Steel*, several months after a collective bargaining agreement was entered into by the Company and the Teamsters Union, it was discovered that there was an error as to the anniversary date of the agreement. The agreement was redrafted to conform to the previous understanding of the parties. The petitioning union contended that both agreements contained an illegal check-off provision by failing to conform to the language of Section 302(c)(4)⁷⁷ of the LMRA and that the later agreement resulted in an illegal retroactive union-security clause. The Board held that the corrected agreement did not result in a new agreement to be applied retroactively, but was merely a reformation. The contention as to the check-off clause also was found to be without merit in that such a provision need not expressly use, or conform to the language of the statute.

In so holding, the Board found, as it had in *Paragon Prods. Corp.*,⁷⁸ that the policy of the Act will best be effectuated by finding the agreement a bar to an election petition where the provision may be ambiguous but not unlawful since: "A contract will not be considered defective as a bar . . . simply because it contains a checkoff provision which fails to spell out the requirements of the proviso . . . , unless the checkoff provision is either unlawful on its face or has otherwise been determined to be illegal in an unfair labor practice proceeding. . . ."⁷⁹

Thus, the presumption is in favor of check-off provisions which are not unlawful on their face, requiring a showing of an in fact violation of the statute by the challenging union or employer. It would seem that it is merely necessary to make provision in the agreement for check-off, leaving the terms of the provision to be provided by the statute.

⁷⁴ 144 N.L.R.B. No. 45, 54 L.R.R.M. 1082 (1963).

⁷⁵ *Keystone Coat, Apron & Towel Supply Co.*, 121 N.L.R.B. 880, 42 L.R.R.M. 1456 (1958).

⁷⁶ The Board still adheres to its position that a "hot-cargo" provision in an agreement will not bar an election. See Comment, 4 B.C. Ind. & Com. L. Rev. 661, 665 (1963).

⁷⁷ Section 302(c)(4) exempts from proscription the receipt of moneys from the employer to the union "(4) with respect to money deducted from the wages of employees in payment of membership dues . . . : *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner. . . ."

⁷⁸ 134 N.L.R.B. 662, 49 L.R.R.M. 1160 (1961).

⁷⁹ *Supra* note 74, at 1083.

3. NO-SOLICITATION AND NO-DISTRIBUTION RULES

The Board recently obtained its first review⁸⁰ of its rules pertaining to no-solicitation and no-distribution laid down in *Stoddard-Quirk Mfg. Co.*⁸¹ In *Stoddard-Quirk* the Board added an "area" test to its previous "working time" test. The basis for the addition was the different legal effects resulting from the distinction between oral solicitation and the distribution of literature.⁸²

From a review of the precedents of past Board policy and Supreme Court decisions,⁸³ the Board established the following rules: (1) a rule prohibiting oral solicitation by employees during their nonworking time will be presumptively invalid, regardless of where the solicitation takes place; (2) a rule prohibiting oral solicitation during working time, regardless of the place of solicitation, will be presumptively valid; (3) a no-distribution rule prohibiting employees from distributing literature in working areas, regardless of whether it applies to working or nonworking time, will be presumptively valid; and (4) a no-distribution rule applying to nonworking areas and nonworking time, will be presumptively invalid.

The Board in *Stoddard-Quirk* split, Chairman McCulloch joining the old Board members, Leedom and Rodgers, while the new Board members, Fanning and Brown, dissented only as to the rules which would give pre-

⁸⁰ *NLRB v. United Aircraft Corp.*, 324 F.2d 128 (2d Cir. 1963), cert. denied, 32 U.S.L. Week 3326 (U.S. March 24, 1964) (No. 807).

⁸¹ 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962).

⁸² Part of the Board's explanation is as follows:

The distinction is not fortuitous. It springs from the fact that solicitation and distribution of literature are *different* organizational techniques and their implementation poses *different* problems both for the employer and for the employees. . . . Thus, it has been noted that solicitation, being oral in nature, impinges upon the employer's interests only to the extent that it occurs on working time, whereas distribution of literature, because it carries the potential of littering the employer's premises, raises a hazard to production whether it occurs on working time or nonworking time.

Id. at 619, 51 L.R.R.M. at 1112-13.

To sum up, we believe that to effectuate organizational rights through the medium of oral solicitation, the right of employees to solicit on plant premises must be afforded subject only to the restriction that it be on nonworking time. However, because distribution of literature is a different technique and poses different problems both from the point of view of the employees and from the point of view of management, we believe organizational rights in that regard require only that employees have access to nonworking areas of the plant premises.

Id. at 621, 51 L.R.R.M. at 1113-14.

⁸³ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), which upheld the Board's decisions in *Republic Aviation Corp.*, 51 N.L.R.B. 1186, 12 L.R.R.M. 320 (1943), and *LeTourneau Co.*, 54 N.L.R.B. 1253, 13 L.R.R.M. 227 (1944); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), which reversed the Board, 109 N.L.R.B. 485, 34 L.R.R.M. 1373 (1954), *Ranco, Inc.*, 109 N.L.R.B. 998, 34 L.R.R.M. 1486 (1954), and *Seamprufe, Inc.*, 109 N.L.R.B. 24, 34 L.R.R.M. 1293 (1954); *NLRB v. United Steelworkers (Nutmeg, Inc.)*, 357 U.S. 357 (1958), which upheld the Board, 112 N.L.R.B. 1153, 36 L.R.R.M. 1165 (1955), and reversed the Board in *Avondale Mills*, 115 N.L.R.B. 840, 37 L.R.R.M. 1423 (1956).

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sumptive validity to the prohibition against employees distributing literature in working areas of the plant while on their own time.

Within a month after promulgation of these rules, the Board decided the *United Aircraft Corp.* case.⁸⁴ In this case the Board was only faced with those rules which both the majority and the dissenters agreed upon in *Stoddard-Quirk*. The employer had instituted a rule prohibiting employees from distributing union literature on company property, including in non-working areas, on the employees own time. The company tried to justify the rule on the grounds that there was littering of its property, that there were cafeteria disturbances and that there was abusive language used by distributors. The Board held that the rule violated section 8(a)(1), citing *Stoddard-Quirk*.

The Court of Appeals for the Second Circuit upheld the Board,⁸⁵ not only as to its no-distribution rules but also as to the Board's determination that it was not required to consider evidence of alternative methods by which the union could have reasonably communicated with the employees. As to the former, the court had no problem in sustaining the Board's presumption, as long as it was "... rationally justifiable; there must be a logical nexus between what is proved and what is presumed."⁸⁶ The major issue, therefore, was whether it was necessary to consider alternative methods of communication to give rationality to the presumption.

The Board had originally affirmed the ruling of the Trial Examiner, who stated:

With respect to other avenues of communication, the Supreme Court and the Board have made it unequivocally clear that their availability to the Union has no relevance where an *employee's* right to distribute union literature is involved as distinguished from a *nonemployee's* right which depends on the lack of other effective means of reaching employees. For this reason, I find it unnecessary to determine whether the Union had other reasonable alternatives for communicating with employees.⁸⁷ (Emphasis in original.)

The court agreed, stating that employees cannot be prohibited from "soliciting" on their own time unless the employer can show special circumstances which would make the rule necessary to maintain discipline or production.⁸⁸ The court, however, due to the way it phrased the issue in the case, reached the same result as did the Board, but by a different route. The court's conclusion was based on an independent investigation, which indicated that the Board's presumption was "rationally justifiable." The court did not use the Board's approach of relying on past precedent. Their conclusion was based on the ground that the existence of alternative methods was remote, but even

⁸⁴ 139 N.L.R.B. 39, 51 L.R.R.M. 1259 (1962).

⁸⁵ Supra note 80.

⁸⁶ Id. at 130.

⁸⁷ Supra note 84, at 45-46.

⁸⁸ The court seems to use the word "solicitation" in such a way as to include "distribution." This appears to obliterate the attempt of the Board in *Stoddard-Quirk* to point out that there was a distinction between the two terms and the resulting legal effects.

apart from the remoteness, "clearly the existence of available alternatives would not mitigate this deleterious effect [management limitation on use of worker's own time] or insure the employee the organizational freedom which the Act seeks to give him."⁸⁹

The result of the *United Aircraft* case is to cause a split in the circuits. In 1959, the Court of Appeals for the Third Circuit, in *NLRB v. Rockwell Mfg. Co.*,⁹⁰ held that it was error for the Board not to consider available alternatives for the union to communicate with employees, even when the distribution was done by the employees and not outsiders. In *Rockwell*, the employer had a no-distribution rule in effect for about six years prior to the unfair labor practice charge which was precipitated by the employer's denial of permission to his employees to distribute union literature in the company parking lot.

The court read the trilogy of Supreme Court cases as requiring the company to justify its presumptively invalid no-distribution rule. But since the burden of proving an unfair labor practice is on the Board, the Board *must* also, it concluded, consider evidence as to alternative means open to the union. Only in this way could an adjustment be made between the employee's right to organize and the employer's right to maintain production and discipline.⁹¹ The result of the court's insistence upon the Board's consideration of all the evidence is that:

... if the employees have virtually no alternative opportunities to distribute literature ... then the respondent must show strong justification for its prohibition. Conversely, when ... the employees have readily available alternative means of distribution, the employer's duty to show exceptional justifying circumstances is lessened.⁹²

The Third Circuit impliedly found this additional burden placed on the Board in prior Supreme Court decisions, whereas the Second Circuit indicated that its decision was based more on the rationality of the Board's presumption and the policy of the Act. It would appear that this area of organizational activity is ripe for Supreme Court clarification, especially in view of the fact that this area presents the major source of work for the Board.

The rules adopted in *Stoddard-Quirk* make specific reference to solicitation and distribution by employees. When non-employee solicitation is involved, the Supreme Court⁹³ has required the Board to distinguish between

⁸⁹ Supra note 80, at 131.

⁹⁰ 271 F.2d 109 (3d Cir. 1959).

⁹¹ The court stated:

... the Board was bound to consider not only the evidence that was offered as to the impact that the distribution of literature would have on plant discipline, cleanliness, order, etc., but also the effect that the bar against distribution would have on the ability of the employees to organize. ...

The court added: "The Board also should have considered the fact that if *employees* were permitted to distribute literature, *non-employees* could no longer be barred under the holding of *Babcock & Wilcox*. . . ." (Emphasis in original.) Id. at 115.

⁹² Ibid.

⁹³ *NLRB v. Babcock & Wilcox*, supra note 83.

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the obligation owed by the employer to employees and that owed to non-employees. In its previous interpretation of Supreme Court cases, the Board had held that no-solicitation and no-distribution rules which prohibit activity by non-employees at any time on company property were presumptively valid, absent evidence that the union could not reasonably reach the employees with their message by other means, or evidence that the company discriminates against the union by permitting other solicitation or distribution.⁹⁴

The Board was faced with non-employee organizers in *May Dept. Stores*,⁹⁵ where the company had in force a no-solicitation rule which prohibited employees from soliciting on company time in working areas and which prohibited solicitation by non-employees anywhere on company property. The rule was held presumptively valid, but the employer was found to have violated 8(a)(1) in application of his no-solicitation rule by denying a union request for "equal time" on company property following an anti-union speech by the employer. Since the most effective place for reaching all the employees was the employer's premises, the employer's foreclosure of this forum to the union and his use of the premises irretrievably diminished the effectiveness of the union's appeal to the employees. Since the employer had the most advantageous forum, it automatically relegated other avenues of communication to "catch-as-catch-can" methods. In so holding, the Board attempted to resurrect *Bonwit Teller*,⁹⁶ by holding that a denial of equal time, where retail store operations are involved, was a violation of 8(a)(1).

The court of appeals recently reversed⁹⁷ the Board, basing its decision on the absence of any showing of the existence of alternative means of communication, and their effectiveness, in view of the employer's conduct, in getting the union's message to the employees. The failure to show a true diminution in the ability of the union to communicate with employees was error by the Board. It was held that whether there was an imbalance in opportunities is dependent upon the existence of alternatives, and the foreclosing of one of these means does not automatically diminish the other alternatives to the point of ineffectiveness.

Thus, whereas the Board in *Stoddard-Quirk* specified certain rules in regard to employees, the Board has not clarified no-solicitation and no-distribution rules as related to non-employees, other than its statement in the *Walton* case.⁹⁸ The Board did however, recognize an exception to the general rule in the case of retail store operations concerning the presumption against validity of a no-solicitation or no-distribution rule as it prohibits solicitation by employees on their own time. In this instance, the company could promulgate its rule without a specific showing of "special circumstances." But no exception need be made where the rules preclude non-employees from gaining access to company property. This refers to the validity of establishing the rules, not as to the enforcement of them. The Board seems to require less

⁹⁴ *Walton Mfg. Co.*, 126 N.L.R.B. 697, 698, 45 L.R.R.M. 1370, 1371 (1960).

⁹⁵ 136 N.L.R.B. 797, 49 L.R.R.M. 1862 (1962).

⁹⁶ 96 N.L.R.B. 608, 28 L.R.R.M. 1547 (1951).

⁹⁷ *May Dep't Stores Co. v. NLRB*, 316 F.2d 797 (6th Cir. 1963).

⁹⁸ *Supra* note 94.

showing of ineffectiveness of alternative methods where a valid rule is applied, than where the validity of the rule itself is in question. The Court of Appeals for the Sixth Circuit indicates that when dealing with retail stores, and non-employees, as distinguished from employees, the burden of showing an imbalance is not diminished.

4. EMPLOYER INTERFERENCE WITH ELECTIONS

A. Interrogation by Employer's Counsel

The Board's attempt to hold counsel individually liable on an 8(a)(1) charge was reversed by the Court of Appeals for the Fifth Circuit in *NLRB v. Guild Industries Mfg. Corp.*⁹⁹ The facts here indicated that counsel, Saad, interrogated twelve employees to obtain proof to challenge a pending representation election. In addition, Saad had asked questions of the employees in relation to a pending unfair labor practice charge against Guild, most of the witnesses being sworn and testifying before a court reporter.

The court found that the Board's order relating to Saad was unprecedented, but did not feel precluded from holding him liable separately as a respondent. For the Board to do so, however, ". . . it must appear that the lawyer was purposely aiding the employer in contravening the statute, rather than restricting his activity to matters within the scope of and relevant to rights of the employer by way of proceedings pending or imminent."¹⁰⁰ There was no substantial evidence to show that Saad had gone beyond proper bounds where the questioning was relevant to the pending election and unfair labor practice proceedings. In addition, the court was constrained to point out the need to balance the right of the employer and employees, and that to charge counsel and put him on trial along with the employer "is tantamount to a restraint, intimidatory and coercive in nature."¹⁰¹

The balance between employer and employees rights shifted with the use of a court reporter to take sworn testimony. It was decided in *NLRB v. Lindsay Newspapers, Inc.*,¹⁰² a case of first impression, that the use of a court reporter to take sworn testimony was unlawful under 8(a)(1) as being coercive since the situation could create a strong impression in the minds of laymen that there would be legal sanctions which in fact do not exist.¹⁰³ The *Guild* court upheld its decision in the *Lindsay* case, but refused to apply it to Saad because the *Lindsay* case was not decided until after the interrogation involved here.

B. Pre-Election Conduct of Employer

The majority of the NLRB has attempted to make clear the distinction between the rules applicable to statements of the employer in pre-election campaigns, which may be classified as misrepresentations, from those which constitute improper threats and promises of benefit. In *Oak Mfg. Co.*,¹⁰⁴

⁹⁹ 321 F.2d 108 (5th Cir. 1963).

¹⁰⁰ *Id.* at 112.

¹⁰¹ *Ibid.*

¹⁰² 315 F.2d 709 (5th Cir. 1963).

¹⁰³ *Id.* at 711.

¹⁰⁴ 141 N.L.R.B. No. 121, 52 L.R.R.M. 1502 (1963).

the Board indicated that where there were misrepresentations, the factors of the timing of the employers' letters, their truthfulness and the opportunity of the union to dissipate the effects of these misrepresentations are crucial. But where threats or promises of benefit are made by the employer, rebuttal statements of the union are irrelevant. In the latter situation, which was here involved, the letters, taken as a whole, clearly demonstrated the employer's intent to coerce the employees to vote against the union.¹⁰⁵

The entire tone of the two letters is one of emphasizing the Employer's control of their economic status, and the futility and economic hazards of selecting the Union. . . . For while purporting to discuss possibilities, it was the Employer alone who could translate these possibilities into realities. In this context, we find the Employer's statements to be a threat to the economic welfare of the employees.¹⁰⁶

The Board's view was emphasized in *Lord Baltimore Press*¹⁰⁷ and *Carl T. Mason Co.*¹⁰⁸ In the former case, the letters set out the possibilities that might result from the employees' choice of the union.¹⁰⁹ The Board, looking to the entire context of the letters, set aside the subsequent election stating: "To read the letter herein as a whole, as we must, is to realize that its entire thrust, achieved by the careful juxtaposition of foreboding possibilities, is to impress upon the employees the futility of choosing the Petitioner."¹¹⁰ Whether the employer's legal position has merit or whether the coercive effects could be dissipated by the union is immaterial and does not protect the employer's threatening conduct.

In *Carl T. Mason*, in addition to the pre-election letter expressing the hope that any "ill-considered" action of the employees will not force the employer out of business, the employer showed "And Women Must Weep," a film previously condemned as coercive. Again, the Board stated that the employer's conduct must be viewed in its total context. The Board here found that the employer's threatening intent was made all the more clear by the exhibition of the film.

These cases indicate that the Board's experience in election cases necessitates careful scrutiny of the employer's pre-election statements in order to insure the maintenance of the proper laboratory conditions. Where

¹⁰⁵ In the first of two letters the employer stated that the union "cannot and will not obtain any wage increase for you." He stated that his fringe benefits were better than most in the area and that they would be improved whether or not the union got in, and that the union's seniority program "will be worse." In the second letter the employer stated that the union could not improve wages or other benefits and that "You have everything to gain and nothing to lose by voting No." *Id.* at 1502.

¹⁰⁶ *Id.* at 1503.

¹⁰⁷ 142 N.L.R.B. No. 40, 53 L.R.R.M. 1019 (1963).

¹⁰⁸ 142 N.L.R.B. No. 56, 53 L.R.R.M. 1063 (1963).

¹⁰⁹ The employer indicated that he might be forced out of business with the resultant loss of jobs; that the union's demands would be so unreasonable that he would have to resist, which would result in a strike; that the unit certified would not be appropriate and therefore he would refuse to bargain with it. *Supra* note 95, at 1020.

¹¹⁰ *Ibid.*

these conditions "... have been jeopardized by material misrepresentations, threats, or promises of benefit, either express or implied, the Board has not hesitated to set elections aside."¹¹¹

An employer has been found to have interfered with an election, committing an unfair labor practice under 8(a)(1), by conferring unconditional benefits on his employees two weeks before an election. In *NLRB v. Exchange Parts*,¹¹² the employer, after announcing new benefits, sent a letter to his employees stating that it was the Company that "puts things in your envelope," that only the Company could do that and that it "didn't take a Union to get any of those things and ... it won't take a Union to get additional improvements in the future."¹¹³ The Board found this conduct to have unlawfully affected the outcome of the election and that the employer so intended that result. In reversing the court of appeals, the Supreme Court agreed, stating that: "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove."¹¹⁴ The Court found that the fact that such benefits are unconditional and permanent does not give the employer the absolute right to confer benefits, and will not be a defense to an 8(a)(1) violation. While the inference of coercion by promise of benefits is diminished by making the grant unconditional and permanent, "... the absence of conditions or threats pertaining to particular benefits conferred would be of controlling significance only if it could be presumed that no question of additional benefits or renegotiation of existing benefits would arise in the future; and, of course, no such presumption is tenable."¹¹⁵

The result of the *Exchange Parts* decision appears to be that the unconditional and permanent grant of a benefit is not per se unlawful, but it is incumbent upon the employer to refrain from "calculated good will" when conferring benefits during the pre-election period. Nevertheless, while the absence of conditions or threats will not be of controlling effect where there are grants of unconditional and permanent benefits, they will be a factor to be considered, and other unlawful conduct can be sought to find an unfair labor practice. Once it is found, however, that the employer's purpose was to affect the outcome of an election, there is no need to find other unlawful conduct.

UNFAIR LABOR PRACTICES

1. MANDATORY SUBJECTS OF BARGAINING

A. Employer's Decision to Subcontract

In view of several recent circuit court opinions reaching different conclusions, the Supreme Court has accepted *Fibreboard Paper Prods. Corp. v. NLRB*¹¹⁶ for certiorari on the issue: Whether an employer violates section 8(a)(5) by making an economic decision in the exercise of his business

¹¹¹ Supra note 108, at 1064.

¹¹² 375 U.S. 405 (1964).

¹¹³ Id. at 407.

¹¹⁴ Id. at 409.

¹¹⁵ Id. at 410.

¹¹⁶ 375 U.S. 963 (1964).

judgment to subcontract work previously performed by union employees without first bargaining with the union? In other words: Is such a decision under those circumstances a mandatory subject of bargaining?

The pre-1961 Board did not regard such a decision as within the mandatory subjects outlined in the national act. The old Board in *Fibreboard Paper Prods. Corp.*¹¹⁷ indicated that the employer's *motivation* for such a decision was the determining factor in finding a refusal to bargain in good faith. Shortly after the Board's initial decision in *Fibreboard*, the appointment of two new members altered the composition and philosophy of that tribunal. The new Board accepted a petition in *Fibreboard* for rehearing. Before the rehearing, however, the Board decided *Town & Country Mfg. Co.*¹¹⁸ and overruled the old Board's position in *Fibreboard*, finding that an employer's unilateral decision to subcontract work previously performed by union employees violates section 8(a)(5), notwithstanding a failure to find anti-union animus. Thus, the Board ruled that an employer is under a duty to bargain over an economic decision to subcontract. Subsequently, the Board reversed *Fibreboard*¹¹⁹ on the basis of its decision in *Town & Country*.

During the past year, both *Fibreboard* and *Town & Country* reached the circuit court level. The Fifth Circuit affirmed the Board in *Town & Country v. NLRB*,¹²⁰ holding that the employer violated sections 8(a)(3), (5) & (1) by terminating its trailer hauling operations and contracting out that phase of its work without first bargaining with the union. The basis of the court's holding, however, was the finding that the employer's decision was motivated at least in part by a desire to rid himself of the union and thus, not by a mere refusal to bargain over an economic decision.

The Board position was affirmed in toto by the District of Columbia Circuit in *Fibreboard Paper Prods. Corp. v. NLRB*,¹²¹ which found that the employer's unilateral decision to subcontract was an illegal refusal to bargain, though not based upon anti-union animus. The court rejected the employer's contention that such an economic decision came within the management prerogative. The court noted that Congress imposed the duty to bargain upon the parties to a collective bargaining agreement in order to establish a structure of self-government for a particular plant. It was felt that this would "create an environment conducive to industrial harmony and eliminate costly industrial strife which interrupts commerce."¹²² The court reasoned that Congress purposely specified the mandatory subjects of bargaining in the broadest terms—wages, hours and conditions of employment—to leave it "... to the Board in the first instance, to give content to the statutory language, subject to review by the courts."¹²³ The court stated that it was

¹¹⁷ 130 N.L.R.B. 1558, 47 L.R.R.M. 1547 (1961).

¹¹⁸ 136 N.L.R.B. 1022, 49 L.R.R.M. 1918 (1962). The Board relied heavily upon the Supreme Court's decision in *Order of R.R. Telegraphers v. Chicago and Nw R.R. Co.*, 362 U.S. 330 (1960), which held that an employer commits an 8(a)(5) violation when he unilaterally abolishes jobs though for economic reasons.

¹¹⁹ 138 N.L.R.B. 550, 51 L.R.R.M. 1101 (1962).

¹²⁰ 316 F.2d 846 (5th Cir. 1963).

¹²¹ 322 F.2d 411 (D.C. Cir. 1963).

¹²² *Id.* at 414.

¹²³ *Ibid.*

"... not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that [maintenance of hired employees] was unduly costly."¹²⁴

The Eighth Circuit recently arrived at an opposite conclusion to that of the D.C. Circuit on the precise question presented in *Fibreboard*. The court in *NLRB v. Adams Dairy Inc.*¹²⁵ held that an employer does not commit a section 8(a)(5) violation by refusing to bargain over an economic decision, not motivated by anti-union animus, to subcontract work previously performed by members of a bargaining unit. The court started with the proposition that an economic decision to subcontract or to cease operations completely is within the management prerogative¹²⁶ so long as it is neither predicated upon an illegal intent nor produces discriminatory results. Since the petition for enforcement was not based upon the employer's subjective illegal intent (*Town & Country*), the court proceeded to examine whether, as in *NLRB v. Erie Resistor Corp.*,¹²⁷ the "conduct by its very nature contained the implications of the required intent."¹²⁸ The court concluded that although the decision to subcontract would oust employees from their jobs, such a consequence cannot be said to naturally tend to discourage union membership. Furthermore, "Union membership is not a guarantee against legitimate or justifiable discharge or discharge motivated by economic necessity."¹²⁹ Finding no subjective illegal intent or objective illegal result, the court concluded that the employer had not committed an unfair labor practice by unilaterally replacing union employees with independent contractors. The court determined, however, that *after* the decision to subcontract had been made, section 8(a)(5) required the employer to negotiate with respect to the treatment of discharged employees on such matters as severance pay.

Whether an employer is required to bargain as to the *decision* (*Fibreboard*) to subcontract as distinguished from the *effects* (*Adams Dairy*) of such a decision will be answered by the Supreme Court in *Fibreboard*.

A distinguishable factual situation from those previously discussed arose in a recent decision, *Hawaii Meat Co. v. NLRB*.¹³⁰ The Board had taken the position that an employer violates section 8(a)(5) if he unilaterally decides

¹²⁴ *Ibid.*

¹²⁵ 322 F.2d 553 (8th Cir. 1963). The court distinguished *Town & Country* as involving anti-union animus.

¹²⁶ The court quoted from *NLRB v. New England Web, Inc.*, 309 F.2d 696 (1st Cir. 1962) among others, wherein the employer's decision to close its plant was solely for business reasons free from anti-union animus. The court in *New England Web* stated:

We start with the proposition that a businessman still retains the untrammelled prerogative to close his enterprise when in the exercise of a legitimate and justified business judgment he concludes that such a step is either economically desirable or economically necessary.

Id. at 700.

¹²⁷ 373 U.S. 221 (1963).

¹²⁸ *Id.* at 227.

¹²⁹ *Supra* note 125, at 557.

¹³⁰ 321 F.2d 397 (9th Cir. 1963).

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to subcontract work previously performed by employees then engaged in an economic strike.¹³¹ It was the court's opinion, however, that the existence of an economic strike removed the case from the *Fibreboard* and *Town & Country* classification. The holding in *NLRB v. Mackay Radio & Tel. Co.*¹³² to the effect that an employer is not under a duty to bargain over a decision to permanently replace economic strikers was held applicable to this fact situation. The court, in reversing the Board, held that it is no more proper for the Board to intrude upon the employer's decision to subcontract to keep going than to intrude upon a decision to permanently replace individual strikers.¹³³ To conclude otherwise, determined the court, would be to permit the Board to sit in judgment upon every economic weapon of the parties.¹³⁴

While the court found no distinction between replacing economic strikers permanently and subcontracting out their work permanently, query whether the comparative effect upon unionism of the two courses of action warrants that distinction be drawn. The subcontracting out of work results in the total abolition of the bargaining unit. Permanently replacing economic strikers does not have as harsh results since the union remains the certified exclusive bargaining representative. The company has not rid itself of the union as it has where economic strikers are replaced with independent contractors.

B. Employer's Decision to Discontinue Operations

The controversial issue presented in *Darlington Mfg. Co.*¹³⁵ moved one step closer to possible resolution by the Supreme Court with the refusal by the Fourth Circuit to enforce the Board's order. The Board had refused to accept the employer's assertion that it had an absolute right to go out of business, holding that an employer violates section 8(a)(3) where his decision to discontinue operations is based in part upon anti-union motivation. This element was considered sufficient to constitute "discrimination in regard to hire or tenure of employment."¹³⁶

Stimulating almost as much comment by its order, as by its decision, the Board ordered Darlington Company to pay the discharged employees back pay until they were able to obtain substantially equivalent employment or until they were put on a preferential hiring list of Deering Milliken, Inc., a company found to occupy a single employer status with Darlington. In addition, the Board made Deering Milliken, Inc., and its affiliates liable for

¹³¹ 139 N.L.R.B. 966, 51 L.R.R.M. 1430 (1962).

¹³² 304 U.S. 333 (1938).

¹³³ The court found that the practical effect of requiring the employer to bargain over a decision to subcontract would be to eliminate that method of meeting the strike since the resultant delay from an obligation to bargain would render this means valueless to the struck employer.

¹³⁴ *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960) was cited by the court as authority for the proposition enunciated.

¹³⁵ 139 N.L.R.B. 241, 51 L.R.R.M. 1278 (1962). For an extensive discussion of the *Darlington* decision at the Board level, see Segal and Teagan, Some Comments on the Right of an Employer to Go Out of Business: The *Darlington* Case, 4 B.C. Ind. & Com. L. Rev. 581 (1963).

¹³⁶ *Id.* at 247, 51 L.R.R.M. at 1280.

back pay to the same extent as *Darlington*. Finally, Milliken was ordered to offer employment to discharged workers in its other plants without prejudice to their seniority and other privileges, and to pay the expenses of moving the workers and their families to those locations.

Darlington and Milliken petitioned to vacate the Board's order, while the union petitioned to expand it to require *Darlington* to resume operations and reinstate the employees. The court, on appeals, in a three to two opinion,¹³⁷ held that it was *Darlington's* absolute prerogative to permanently close its business in whole or in part, provided that the discontinuance is "actual, unfeigned and permanent," not a mere removal, nor subcontract, nor a change merely in the form of ownership or identity."¹³⁸ The court reasoned that:

The fundamental principle of the National Labor Relations Act is to preserve the balance of power between both industry and labor so long as the balance of power is maintained between employer and employee. But the statute does not intend to interfere with that province. It does not compel a person to become an employee. It does not compel one to become an employer. Either may withdraw from that relationship as long as the obligations of any employment contract are satisfied. Such withdrawal . . . itself does not create a new relationship between the employer, or the employee to the other. . . . If a cessation of business is adopted to avoid the price of it: permanent discontinuance of this business in whole or in part.¹³⁹ (Emphasis supplied.)

The court concluded that "Power to command an employer to stay in business indefinitely, or assess him with damages for permanently going out of business, is not a National Labor Relations Board prerogative."¹⁴⁰

Admitting that there was no decision directly in point, the court cited several cases as supporting an employer's right to go out of business for economic reasons, but the court noted that those cases did not declare the existence of such reason as indispensable to the validity of the closing.¹⁴¹ It was the court's opinion that those cases could stand as authority for the proposition that if termination were permanent, the power to close, though based in part upon anti-union motivation, is *not precluded* by the Act.

There is no question that there is no case directly in point. The cases relied upon by the majority and minority have distinguishing features from *Darlington*. *New England Web*¹⁴² was based upon a finding by the court that the employer's decision to close was predicated upon *economic factors*, one

¹³⁷ 325 F.2d 682 (4th Cir. 1963).

¹³⁸ *Id.* at 685.

¹³⁹ *Ibid.*

¹⁴⁰ *Supra* note 137, at 687.

¹⁴¹ *NLRB v. Preston Feed Corp.*, 309 F.2d 346 (4th Cir. 1962); *NLRB v. New England Web, Inc.*, 309 F.2d 696 (1st Cir. 1962); *NLRB v. Rapid Bindery Inc.*, 293 F.2d 170 (2d Cir. 1961); *Union Drawn Steel Co. v. NLRB*, 109 F.2d 587 (3d Cir. 1940).

¹⁴² *Supra* note 141.

of which could be the advent of the union, *Preston Feed Corp.*¹⁴³ and *Missouri Transit Co.*¹⁴⁴ did not involve a closedown, but merely the discontinuance of a segment of the business.

In another recent circuit court opinion, *NLRB v. Savoy Laundry, Inc.*,¹⁴⁵ the Second Circuit agreed with the Board that an employer's decision to discontinue a division of its operation when based upon a desire to rid itself of the union violated the NLRA. This would appear to conflict with the Fourth Circuit's *Darling* decision which found it within the management prerogative to discontinue operations in whole or in part for any reason.

The court, however, refused to enforce the Board's order relating to reopening the closed department and the awarding of back pay to discharged employees. It was the court's opinion that since three years had passed since the closing, it would be unduly harsh to now require resumption of operations. Further, since the back pay order was intertwined with the resumption of activities, this part of the order was remanded for further consideration.

The discontinuance of operations cases raise important questions:

- (1) Does an employer have an absolute right to go out of business even when his decision is based upon anti-union motivation? This may be answered by the Supreme Court.
- (2) Does an employer have an absolute right to close down where his decision is based solely upon economic reasons?
- (3) Is the advent of the union a proper consideration in an economic decision to discontinue operations?
- (4) Is there a distinction between closure of the entire plant and the discontinuance of only a segment thereof?

The Board's order in the discontinuance of operations cases (*Darlington*) does not appear to be consistent with some of its orders in the subcontract cases (*Town & Country*). In the former cases, the Board has refused to order the employer to resume operations, ordering a less harsh sanction, despite the fact that the employer was guilty of anti-union motivation. In some of the latter cases, on the other hand, the Board has, in endeavoring to mold the order to the equities of the situation, ordered a harsher remedy—resumption of operations—despite the fact that the employer may not be guilty of anti-union animus.

C. Nondiscriminatory Hiring Hall Provision

Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain over mandatory subjects of bargaining which are set forth in section 8(d). Amongst those mandatory subjects are "terms and conditions of employment." The Supreme Court in *NLRB v. Wooster Div. of Borg-Warner Corp.*¹⁴⁶ established the tests to determine whether a subject falls within that broad classification.

¹⁴³ Ibid.

¹⁴⁴ 250 F.2d 261 (8th Cir. 1957).

¹⁴⁵ 55 L.R.R.M. 2285 (2d Cir. 1964).

¹⁴⁶ 356 U.S. 342 (1958). The Court laid down the following tests:

The NLRB recently determined in *Associated Gen. Contractors*¹⁴⁷ that a nondiscriminatory hiring hall fell within that category of mandatory subjects of bargaining. Applying the tests laid down in *Borg-Warner*, the Board found that the subject settled a term or condition of employment since "employment" connotes "... the initial act of employing as well as the consequent state of being employed. . . ."¹⁴⁸ The Board determined that the subject satisfied the second test since the standards for regulating priorities for employment necessarily regulate the relations between an employer and his employees. In so concluding, the Board determined that the term "employee" embraced *prospective* as well as actual employees.¹⁴⁹ Further, the Board placed substantial emphasis upon the fact that in the industry involved, employees enjoyed only intermittent employment, shuttling from employer to employer. This situation made such employees concerned not only with retaining present jobs, but also with job opportunities for continued employment elsewhere when they were laid off and thus directly affected by priority standards established by the hiring hall.

The employer's assertion that the hiring hall provision was a form of union security and thus prohibited by the state's right-to-work-law, was rejected by the Board on the basis that it in no way required union membership or other union-oriented condition as a condition of employment.

Members Rodgers and Leedom disagreed with the majority decision that the hiring hall met the tests established in *Borg-Warner* for mandatory subjects of bargaining. They reasoned that the hiring hall provision settled "... no term or condition of employment because the *obtaining* of employment is not a term or condition of employment."¹⁵⁰ (Emphasis supplied.) Further, the dissent felt that the provision did not deal with the employer-employee relationship since applicants for employment are not employees under section 8(d) and not employees within the bargaining unit. By way of summation, they reasoned that: "We see no warrant in the Act for compelling an employer to bargain with a union as to nonemployees and as to matters which antedate the entry of a nonemployee into the bargaining unit."¹⁵¹

In concluding that the hiring hall provision is a mandatory subject of bargaining, the Board has determined that a provision relating to the *obtaining* of employment falls within "terms or conditions of employment." The dissent asserts that such a conclusion logically will require an employer

(1) Does the subject matter settle any term or condition of employment?

and

(2) Does the subject to be bargained about regulate the relations between the employer and his employees?

¹⁴⁷ 143 N.L.R.B. No. 43, 53 L.R.R.M. 1299 (1963).

¹⁴⁸ *Id.* at 1301.

¹⁴⁹ The majority's conclusion that the term "employee" encompassed prospective employees was based upon *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). The dissent distinguished the present situation involving "wages, hours and condition of employment" under section 8(d) from *Phelps Dodge* which concerned "hire or tenure of employment or any other condition of employment" appearing in section 8(a)(3).

¹⁵⁰ *Supra* note 147, at 1304.

¹⁵¹ *Ibid.*

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to bargain over such matters as the size of the labor force and the extent and timing of the expansion thereof, as well as the per diem allowance for job applicants summoned for interviews. How far outside the immediate employment relation mandatory subjects of bargaining extend can only be answered by future decisions.

2. LOSS OF STATUS FOR FAILURE TO GIVE TIMELY NOTICE UNDER SECTION 8(d)

Mr. Chief Justice Warren, speaking for the majority in *NLRB v. Lion Oil Co.*,¹⁵² stated that section 8(d)¹⁵³ "is susceptible of various interpretations."¹⁵⁴ Mr. Justice Frankfurter, in a concurring opinion, enunciated the task of the judiciary in interpreting that section when he stated:

It has . . . become a judicial responsibility to find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.¹⁵⁵

These pronouncements in *Lion Oil* foreshadowed the extreme difficulty and disagreement which that section has engendered among the members of the Board when that body has been called upon to shed light upon the meaning of section 8(d).

In *Retail Clerks Union (J. C. Penny)*,¹⁵⁶ the Board had to determine the application of the sixty-day strike prohibition provided in subsection 8(d)(4) to the notice provision of subsection 8(d)(3). The Board therein held that subsection 8(d)(3) imposed an affirmative duty upon a party who desires to terminate or modify a collective bargaining agreement to notify the Federal Mediation and Conciliation Service to that effect. The Board concluded that the strike prohibition in subsection 8(d)(4) applies to the thirty-day notice provision of subsection 8(d)(3) as well as to the sixty-day notice provision of subsection 8(d)(1). Thus, if the union strikes prior to

¹⁵² 352 U.S. 282 (1957).*

¹⁵³ Section 8(d) requires in part:

. . . that no party to [a collective bargaining contract] shall terminate or modify such contract, unless the party desiring such termination or modification—

1. serves a written notice upon the other party to the contract of the proposed termination or modification *sixty days* prior to the expiration date thereof . . . ;

3. notifies the Federal Mediation and Conciliation Service within *thirty days* after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

4. continues in full force and effect, without resorting to strike or lock-out, all terms and conditions of the existing contract for a period of *sixty days* after such notice is given or until the expiration date of such contract, whichever occurs later. . . . (Emphasis supplied.)

¹⁵⁴ Supra note 152, at 288.

¹⁵⁵ Id. at 297.

¹⁵⁶ 109 N.L.R.B. 754, 34 L.R.R.M. 1420 (1954). Member Murdock dissented.

giving proper notice under *both* subsections, the strike violates subsection 8(d)(4).

J. C. Penny involved a total failure to give notice under subsection 8(d)(3). In a subsequent decision, *Retail Clerks Int'l Ass'n*,¹⁵⁷ the Board held that where a delayed notice had been given under subsection 8(d)(3), the employees violated the no-strike provision of subsection 8(d)(4) by striking *within thirty days* after notice had been given even though the required sixty-day notice under subsection 8(d)(1) had been given and sixty days had elapsed.

Section 8(d) imposes an extremely severe sanction upon an employee who strikes in violation of subsection 8(d)(4).¹⁵⁸ The employee loses his status as an employee. He thus loses his rights under the Act and can be discharged with impunity. No other section imposes as harsh a sanction for violation of its provisions as does section 8(d). The severity of the "loss-of-status" provision demonstrates a congressional purpose to insure that the notice provisions and waiting periods of section 8(d) are complied with.

In June 1963, the Board in *Fort Smith Chair Co.*¹⁵⁹ held that the "loss-of-status" provision in section 8(d) applies to a strike which is called before the notice provisions of subsection 8(d)(3) have been complied with. Thus, an employee who engages in a strike which is unlawful under subsection 8(d)(4) because he fails to comply with the notice provisions of both subsections 8(d)(1) and (3) loses his status as an employee under the Act. In *Fort Smith*, notice had been given as required by subsection 8(d)(1) and sixty days had elapsed, but the notice provision of subsection 8(d)(3) had not been complied with.

Prior to this decision, there was no question that the "loss-of-status" provision applied to a strike either prior to notice being given under subsection 8(d)(1) or within sixty days of such notice. The illegally striking employees lost their status as employees and could be discharged. Such was clearly discernable from the language of section 8(d). The Board in *Fort Smith* split, however, on whether the "loss-of-status" provision also applied to a strike subsequent to compliance with subsection 8(d)(1) and the running of sixty days *but* prior to the fulfilling of the thirty-day notice provision of subsection 8(d)(3).

The majority concluded that the "loss-of-status" provision applies where a strike occurs prior to compliance with both subsections 8(d)(1) and (3) and the elapsing of sixty and thirty days respectively. In so concluding, the majority read section 8(d) as a whole, in light of its purposes as well as the purposes of the Act, which indicated that the "loss-of-status" provision is designed to ensure the maximum effectiveness of the mediation device for the full thirty-day period. It was the Board's conclusion that since *J. C.*

¹⁵⁷ 120 N.L.R.B. 272, 41 L.R.R.M. 1479 (1958), en'd, *Retail Clerks Ass'n v. NLRB*, 265 F.2d 814 (D.C. Cir. 1959).

¹⁵⁸ The "loss-of-status" provision states that:

Any employee who engages in a strike within the *sixty-day* period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this [Act]. . . . (Emphasis supplied.)

¹⁵⁹ 143 N.L.R.B. No. 28, 53 L.R.R.M. 1313 (1963).

Penny required that a full thirty days elapse before employees can strike where late notice is given under subsection 8(d)(3), even though subsection 8(d)(1) has been complied with and sixty days have elapsed, a parity of reasoning requires that the sixty-day period specified in the "loss-of-status" provision be subject to the same interpretation to protect that period for mediation. In so reasoning, the Board determined that "... the loss-of-status provision is applicable not only to strikes within the initial sixty-day period, but also to those strikes beginning less than thirty days after service of the 8(d)(3) notices, or, with respect to the present case, to those occurring absent the filing of such notices."¹⁶⁰

Chairman McCulloch concurred, finding the existence of the unprotected activity sufficient to permit the discharge of the striking employees. Member Fanning dissented on the basis that the "loss-of-status" provision is restricted to strikes prior to compliance with subsection 8(d)(1) or the running of sixty days.

The majority's opinion in *Fort Smith* would appear to be consistent with the Board's decision in *J. C. Penny*. The Board has apparently followed the reasoning, set forth in its brief and approved by the circuit court in *Retail Clerks Ass'n v. NLRB*,¹⁶¹ as to why Congress did not expressly prohibit strikes within thirty days of notice under subsection 8(d)(3) when it explicitly prohibited strikes within sixty days of notice under subsection 8(d)(1). The Board therein concluded that Congress did not expressly prohibit strikes within thirty days of notice under subsection 8(d)(3) because it assumed that the thirty-day period fell within the sixty-day period of subsection 8(d)(1) and that there was thus no need to do so.¹⁶² Using a parity of reasoning, it would appear that although the "loss-of-status" provision does not specifically refer to the thirty-day period Congress assumed that it also was automatically covered by the sixty-day period and thus it was unnecessary for the "loss-of-status" provision to contain any specific reference to the thirty-day period.

The *Fort Smith* decision demonstrates the severe consequences which can result if an employee strikes before all the applicable notice provisions of section 8(d) are complied with. The employee loses his rights under the Act and is subject to discharge by his employer. It is clear that Congress intended to reserve the periods specified in section 8(d), during which employees are not to strike, for consultation and settlement of disputes relating to termination and modification of collective bargaining agreements. While the sanctions are severe, Congress considered them justified in light of the policy of the national act to maintain a free and unimpeded flow of commerce.

3. LIMITATION ON RIGHT TO TAKE UNILATERAL ACTION AFTER IMPASSE

An employer commits an unlawful refusal to bargain under section 8(a)(5) by unilaterally changing matters which are subjects of mandatory

¹⁶⁰ Supra note 159, at 1315-16.

¹⁶¹ Supra note 157.

¹⁶² Id. at 279.

bargaining under section 8(d).¹⁶³ This is true although the employer's conduct in toto does not evince subjective bad faith bargaining.¹⁶⁴ The Supreme Court in *NLRB v. American Nat'l Ins. Co.*,¹⁶⁵ recognized an important exception to the foregoing principles. Where the parties have reached a bona fide impasse in their negotiations, the employer may lawfully institute unilateral changes previously rejected by the union, even though they involve mandatory subjects of bargaining.¹⁶⁶

The Third Circuit in *Marine & Shipbuilding Workers v. NLRB*,¹⁶⁷ recently engrafted an important limitation upon the employer's right to unilaterally institute changes after an impasse has been reached. The court held that the deadlock in bargaining does not constitute an impasse justifying the employer taking unilateral action, where that deadlock is the result of the employer's refusal to bargain. In so concluding, the court found that the Board, in ruling that the existence of an impasse permitted unilateral action without regard to the cause of the impasse, had not given proper consideration to the employer's unfair labor practices.

The court upheld the Board's finding that the employer had committed a per se violation of section 8(a)(5), similar to that found by the Supreme Court in *NLRB v. Wooster Div. of Borg-Warner Corp.*,¹⁶⁸ by insisting upon a change in the grievance procedure which would require all grievances to be signed by the individual employee. The proposal was not considered a mandatory subject within section 8(d) since it had the effect not of conditioning employment, but of limiting the union's representation as did the "ballot clause" in *Borg-Warner*.

The court ruled that the employer did not violate the act by unilaterally discontinuing the union shop and check-off provisions in the expired contract, since these provisions were dependent upon the existence of a valid contract. It was determined, however, that the employer did violate section 8(a)(5) in unilaterally terminating the preferential seniority accorded union representatives and the grievance procedure provided in the old contract. These provisions did not require the existence of a collective bargaining agreement.

This decision places an important limitation upon an employer's right to take unilateral action after a bargaining impasse has been reached. Such unilateral action will be illegal if that impasse stems from the employer's violation of section 8(a)(5). While the decision dealt with a per se violation resulting from the employer's bargaining to the point of insistence upon a non-mandatory subject, it is evident that its rationale will cover a violation of section 8(a)(5) resulting from the employer's subjective bad faith.

¹⁶³ *NLRB v. Katz*, 369 U.S. 736 (1962).

¹⁶⁴ *Ibid.*

¹⁶⁵ 343 U.S. 395 (1952).

¹⁶⁶ Compare *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949), where the Supreme Court found unlawful the employer's unilateral institution of a wage increase substantially greater than that offered the union during negotiations.

¹⁶⁷ 53 L.R.R.M. 2878 (3d Cir. 1963) (otherwise known as *Bethlehem Steel Co.*).

¹⁶⁸ 356 U.S. 342 (1958). But see, dissenting opinion by Mr. Justice Harlan, where he concluded that the majority's statement that an employer can "propose" a permissive subject of bargaining, but not "insist" upon it as a condition to agreement, has the effect of limiting effective bargaining to "wages, hours and conditions of employment." *Id.* at 352.

4. DISCRIMINATORY INITIATION FEE

While several prior decisions had been handed down by the Board,¹⁶⁰ the recent Third Circuit opinion in *NLRB v. Television Employees*¹⁷⁰ appears to be the first court decision interpreting section 8(b)(5).¹⁷¹ The court sustained the Board's finding that "under all the circumstances" an increase in the union's initiation fee from fifty to five hundred dollars was excessive and discriminatory. The Board had found that the increase was motivated by a desire on the part of the union to restrain the employer from hiring part-time employees, which practice the union regarded as a threat to the job security of regular full-time union employees.

The Board had rejected the union's assertion that section 8(b)(5) was only intended to prohibit maintenance of a closed shop by an excessive or discriminatory fee, finding that it also was designed to proscribe the conduct of the union here involved.

The court expressly approved the criteria utilized by the Board in examining whether the fee falls within the proscriptions of section 8(b)(5). The initiation fee under examination was compared with those charged by other unions in the same field, together with the wages earned by the respective members of those unions. In addition, the size of the increase and the circumstances surrounding its institution were analyzed.

Of particular interest was the Board's order requiring reimbursement of all fees in excess of fifty dollars to the affected employees. The court refused to upset the order, finding that the Board did not abuse its discretion in using fifty dollars as the basis for its order, although a higher fee may not have been excessive or discriminatory.

The case is important because it is the initial court approval of the Board's interpretation of section 8(b)(5) and of the Board's criteria for determining whether a given initiation fee is "excessive or discriminatory under all the circumstances."

5. EMPLOYER'S RIGHT TO LOCKOUT

What action can members of a multi-employer bargaining group take when a union which bargains with the group suddenly calls a strike against one of its members (whipsaw strike)? In 1957, the Supreme Court upheld

¹⁶⁰ *Television & Radio Broadcasting Studio Employees*, 135 N.L.R.B. 632, 49 L.R.R.M. 1541 (1962); *Motion Picture Screen Cartoonists*, 121 N.L.R.B. 1196, 42 L.R.R.M. 1540 (1958); *Ferro Stamping & Mfg. Co.*, 93 N.L.R.B. 1459, 27 L.R.R.M. 1593 (1951).

¹⁷⁰ 52 L.R.R.M. 2774 (3d Cir. 1963).

¹⁷¹ Section 8(b)(5) provides:

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

5. to require of employees, covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected. . . .

the right of non-struck members to lockout their employees as a defensive measure to protect their common interest in group bargaining.¹⁷²

Recently, the Tenth Circuit in *NLRB v. Brown*¹⁷³ reversed the Board,¹⁷⁴ holding that it is not per se illegal for non-struck members of a multi-employer bargaining group to hire temporary replacements following a group-wide lockout.

The Board had ruled that while *Buffalo Linen* authorizes non-struck members of the group to take defensive measures by way of locking out their employees to protect the integrity of a multi-employer bargaining unit, the hiring of replacements for locked out employees was not defensive but retaliatory and designed to inhibit a lawful strike in violation of section 8(a)(3). The Board reasoned that "If the struck member operates through replacements, no economic necessity exists for the other members' shutting down."¹⁷⁵

In reversing, the court concluded that the Board, by prohibiting non-struck members from hiring temporary replacements, had misconstrued and misapplied *Buffalo Linen*. The court reasoned that the Supreme Court went no further than to permit non-struck members to lockout in *Buffalo Linen* because the fact situation went no further.

The court noted that under *Mackay*,¹⁷⁶ a struck employer has the right to hire replacements to keep his business in operation and that the lockout right given the group in *Buffalo Linen* would be rendered largely illusory if non-struck members of the group were prohibited from also hiring replacements. This conclusion followed, said the court, because if the entire group remained closed down, the struck employer would be denied his rights under *Mackay* to hire replacements and the "whipsaw" would enjoy a privileged advantage. On the other hand, if the struck member should decide to hire replacements and the other members of the bargaining group could not, the non-struck members would be deterred from exercising the lockout and the "whipsaw" would win again. It was the court's opinion that this was not the intent of *Buffalo Linen*, which held that a lockout is justified to preserve the integrity of a multi-employer bargaining unit.

There is little question that the decision in *Brown* accords the employer group much greater ability to combat a "whipsaw" strike than was sustained by the Supreme Court in *Buffalo Linen*. Not only are the members of the group permitted to lockout non-striking employees, but they are authorized to replace them. This appears to be more than defensive action designed to neutralize the effect of the "whipsaw." The employer enjoys a substantial advantage by being able to continue operating. While there is no specific prohibition on the use of the lockout by an employer under the national act, it does not enjoy the favored status and protection accorded the right to strike. The court, in reversing the Board, appears to be primarily concerned with preserving the effectiveness of the lockout at the expense of

¹⁷² *NLRB v. Truck Drivers Local 449 (Buffalo Linen)*, 353 U.S. 87 (1957).

¹⁷³ 319 F.2d 7 (10th Cir. 1963). The court split two to one.

¹⁷⁴ 137 N.L.R.B. 73, 50 L.R.R.M. 1046 (1962).

¹⁷⁵ *Id.* at 76, 50 L.R.R.M. at 1048.

¹⁷⁶ 304 U.S. 333 (1938).

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the strike. While striving to prevent the right to lockout from being rendered nugatory, query whether the court has rendered the right to strike illusory under the circumstances presented. Whether the members of a multi-employer bargaining unit enjoy such a prerogative will be answered shortly by the Supreme Court.¹⁷⁷

In *New York Mailers' Union v. NLRB*,¹⁷⁸ the Second Circuit recently upheld the Board, holding that an association of newspaper publishers did not violate sections 8(a)(1) or (3) by maintaining and implementing an association-wide agreement whereby all members agreed to suspend publication in the event that one or more members were struck over a grievance dispute. The court read the binding arbitration provision in the collective bargaining agreements as a commitment *not* to strike over grievances, and reasoned that a violation of this commitment involved an attack upon the contract provisions designed to prevent work stoppages and a threat to the common interest of all publishers in bargaining on a multi-employer basis.

Both the Board and the court felt that *Buffalo Linen* required the conclusion that the defensive action taken by the association to protect the integrity of association-wide bargaining was permissible. Though there were distinguishing aspects between the *Buffalo Linen* and the *Mailers'* cases, the important point is that in both cases, the strike was used to threaten "... the destruction of the employers' interest in bargaining on a group-wide basis."¹⁷⁹

6. DISCRIMINATION "PER SE"

A. Super-seniority

The Supreme Court in *NLRB v. Erie Resistor Corp.*¹⁸⁰ held that it is a violation of sections 8(a)(1), (3) and (5) for an employer to grant super-seniority to strike replacements and to strikers who abandon the strike and return to work, notwithstanding the fact that the employer's motivation was not subjectively discriminatory.¹⁸¹ Where the conduct involved, by its very nature, contains the required illegal intent, specific evidence of subjective intent is unnecessary.¹⁸² This is true even though the employer's subjective motivation was to further legitimate business ends.

... [H]is conduct *does* speak for itself—it is discriminatory and it *does* discourage union membership and whatever the claimed

¹⁷⁷ 375 U.S. 962 (1964). In a recent decision, the Board, while recognizing the right of a non-struck member of a multi-employer bargaining unit to lockout for defensive purposes, held that a non-struck employer violates section 8(a)(3) by resuming operations with supervisory or clerical personnel. *Kroger Co.*, 145 N.L.R.B. No. 26, 54 L.R.R.M. 1361 (1963).

¹⁷⁸ 55 L.R.R.M. 2287 (2d Cir. 1964).

¹⁷⁹ *Id.* at 2291.

¹⁸⁰ Cert. granted, 373 U.S. 221 (1963).

¹⁸¹ The Sixth Circuit had agreed with the Board that super-seniority was per se discriminatory in *Swarco, Inc. v. NLRB*, 303 F.2d 668 (6th Cir. 1962). The Third Circuit in *Erie Resistor Corp. v. NLRB*, 303 F.2d 359 (3d Cir. 1962) and the Ninth Circuit in *NLRB v. Potlatch Forest, Inc.*, 189 F.2d 82 (9th Cir. 1951) felt that super-seniority was not illegal absent a showing of an illegal motive.

¹⁸² *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.¹⁸³

The Court examined and compared the damage wrought by super-seniority¹⁸⁴ to the union with the business purpose of the employer in using such a device and concluded that:

[I]n view of the deference paid the strike weapon by the federal labor laws and the devastating consequences upon it which the Board found was and would be precipitated by respondent's inherently discriminatory super-seniority plan, we cannot say that the Board erred in the balance which it struck here.¹⁸⁵

The Court was careful to announce that it was not questioning the validity of the *Mackay* rule, but that that rule should not be extended to include the granting of super-seniority.

The Board in *Laclede Metal Prods. Co.*¹⁸⁶ recently held that since employees have a statutory right to strike, it is an unfair labor practice under the rationale of *Erie Resistor* for an employer and a union to agree to a super-seniority plan. They cannot agree to such a discrimination regardless

¹⁸³ Supra note 180, at 228.

¹⁸⁴ The characteristics of super-seniority as set forth by the Board were:

(1) Super-seniority affects the tenure of all strikers whereas permanent replacement proper, under *Mackay*, affects only those who are, in actuality, replaced. It is one thing to say that a striker is subject to loss of his job at the strike's end but quite another to hold that in addition to the threat of replacement, all strikers will at best return to their jobs with seniority inferior to that of the replacements and of those who left the strike.

(2) A super-seniority award necessarily operates to the detriment of those who participated in the strike as compared to nonstrikers.

(3) Super-seniority made available to striking bargaining unit employees as well as to new employees is in effect offering individual benefits to the strikers to induce them to abandon the strike.

(4) Extending the benefits of super-seniority to striking bargaining unit employees as well as to new replacements deals a crippling blow to the strike effort. At one stroke, those with low seniority have the opportunity to obtain the job security which ordinarily only long years of service can bring, while conversely, the accumulated seniority of older employees is seriously diluted. This combination of threat and promise could be expected to undermine the strikers' mutual interest and place the entire strike effort in jeopardy. . . .

(5) Super-seniority renders future bargaining difficult, if not impossible, for the collective bargaining representative. Unlike the replacements granted in *Mackay* which ceases to be an issue once the strike is over, the plan here creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.

Id. at 230-31.

¹⁸⁵ Id. at 235-36.

¹⁸⁶ 144 N.L.R.B. No. 7, 53 L.R.R.M. 1514 (1963).

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of whether the agreement resulted from the insistence of the employer or the voluntary acceptance by the union.

Upon a careful reading of *Erie Resistor*, the question arises: How broad is the Supreme Court's decision? Upon close scrutiny of the characteristics of super-seniority as viewed by the Board and approved by the Court,¹⁸⁷ it is clear that the fact that super-seniority was offered to strikers who would abandon the strike as well as to replacements was of critical importance. Query whether the Court would have reached the same result if the super-seniority had been offered to *only* the replacements as an incentive to fill the jobs vacated by the strikers and not to the strikers. Consider also the possibility that unlike the employer in *Erie Resistor*, an employer located in an area of high employment, must offer an incentive such as super-seniority if he is to attract replacements. If these two factors are thus changed, it is questioned whether the holding in *Erie Resistor* would require a conclusion that super-seniority in such circumstances is discriminatory per se.

B. Limitation on Finding of "Per Se" Discrimination

It is well-settled that a finding of unlawful discrimination under section 8(a)(3) requires proof of the employer's intent to encourage or discourage union membership.¹⁸⁸ As shown in *Erie Resistor*,¹⁸⁹ however, there are instances where it is unnecessary to prove a specific illegal intent. Where the actions complained of are so discriminatory on their face and the natural and probable consequences of such discrimination so clear, the actions themselves have been found to contain the required indicia of unlawful motivation.¹⁹⁰

The Sixth Circuit in *Quality Castings Co. v. NLRB*¹⁹¹ recently drew an important distinction regarding a finding of per se discrimination. The court noted that each case which has dispensed with specific proof of an illegal intent has involved action blatantly discriminatory on its face. "That is, it has been openly and avowedly directed *solely* at a group of people who have participated, in one manner or another, in certain actions which are specifically protected, concerted activities within the meaning of the Act."¹⁹² (Emphasis supplied.) The court, in refusing to find a per se discrimination unless the group so affected is composed *solely* of those persons engaged in protected conduct, adhered to the rationale of the Ninth Circuit in *Pittsburgh-Des Moines Steel Co. v. NLRB*.¹⁹³ Finding that the

¹⁸⁷ Supra note 184.

¹⁸⁸ *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954). This is the landmark case on proof of intent necessary to prove a section 8(a)(3) violation.

¹⁸⁹ 373 U.S. 221 (1963).

¹⁹⁰ Supra note 188, at 45.

¹⁹¹ 54 L.R.R.M. 2674 (6th Cir. 1963). The Board with two members dissenting, had found that new rules promulgated by the employer which excluded sixty-four workers, who were not taken back after a strike, from sharing in the company's profit-sharing plan for the striking year constituted a per se discrimination under section 8(a)(3). 139 N.L.R.B. 66, 51 L.R.R.M. 1422 (1962).

¹⁹² 54 L.R.R.M. at 2677.

¹⁹³ 284 F.2d 74 (9th Cir. 1960). The court held that to establish a conclusive pre-

actions were not specifically and solely directed at persons engaged in protected conduct, "... but ... at a group defined by other than union membership or activity criteria, and which clearly includes others who did not engage in the protected, concerted activities ...,"¹⁹⁴ the court required specific proof of an unlawful intent to discriminate.

It is important to note that the *Quality Castings* decision does not preclude a finding that the employer violated section 8(a)(3). It merely demands specific proof of his unlawful motivation.

7. SECONDARY BOYCOTTS

A. Common Situs Picketing

Since 1950, when the Board decided the *Moore Dry Dock* case,¹⁹⁵ the standards established by the Board for distinguishing between lawful primary and unlawful secondary picketing at a common situs have been widely accepted. But while the "formula" remains the same, the Board has held that it should and would not be applied on a per se basis,¹⁹⁶ and that failure to follow any of the criteria strictly would not thereby create unlawful picketing. Compliance need only be substantial.

Having firmly established the standards for lawful common situs picketing, the Board is now in the process of filling out what it considers to be "substantial compliance." Two recent cases have dealt with what will be sufficient to establish whether the primary employer is engaged in his normal business operations at the situs.

In *New Power Wire & Elec. Corp.*,¹⁹⁷ the International Brotherhood of Electrical Workers sought to organize fifty-eight new electricians of the company, which was then engaged in rewiring work in several apartment buildings. Thirty-two of the nonunion employees went out on strike, picketing

sumption of intent within the meaning of section 8(a)(3) as interpreted in *Radio Officers*, supra note 182, two factors must be shown:

(1) "... the encouragement or discouragement of union membership must be a natural and foreseeable consequence of the employer's discrimination." [And,]

(2) "... the discrimination itself must be based solely upon the criterion of union membership."

The court regarded this second factor of the utmost importance since "... if every discriminatory action taken by an employer which could foreseeably result in the encouragement or discouragement of union membership were proscribed by the Act, very few of the legitimate prerogatives of management could survive the flood of unfair labor practice charges." *Id.* at 82-83.

¹⁹⁴ Supra note 191, at 2678. The new rules for sharing in the profit-sharing plan for the previous year not only excluded the sixty-four strikers who were not taken back, but seven others who were taken back after the strike.

¹⁹⁵ *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950). To be lawful primary activity, the following conditions must be met: (1) picketing must occur only when the situs of the dispute is located on the neutral premises; (2) picketing must be limited to times when the primary employer is engaged in his normal business at the situs; (3) the picketing must take place reasonably close to the situs; and (4) clear notice must be given to indicate that the dispute is with the primary employer.

¹⁹⁶ *Plauche Elec., Inc.*, 135 N.L.R.B. 250, 49 L.R.R.M. 1446 (1962).

¹⁹⁷ 144 N.L.R.B. No. 100, 54 L.R.R.M. 1178 (1963).

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the company headquarters and several of the apartment houses. The picketing continued during periods when no primary employees were working at the situs, although those employees not on strike would return at various times. In addition, the company had left materials at the various projects and supervisors made frequent appearances. As soon as the employer's operations were completed at a particular site, the pickets left. The Trial Examiner found an unlawful secondary boycott since picketing occurred when primary employees were absent for substantial periods of time. The Board, in reversing the mechanical approach of the Trial Examiner, held that the picketing substantially complied with the *Moore Dry Dock* tests; the absence of the primary employees constituting one factor in considering whether the dispute was located at the common situs and whether the employer was engaged in normal business at that situs.

In making this determination, the Board found it necessary to evaluate the absence of the primary employees on the following points:

(a) the company's contractual obligation to perform the rewiring work at each of the picketed apartment houses; (b) the fact that the company was engaged in performance of its contracts at each of the sites and company employees were working at the sites when the picketing started; (c) the visits to the sites by company supervisors, made almost daily; (d) the fact that work was intermittently resumed at each of the sites; (e) the company's efforts to recruit new employees for work at the sites; (f) the cessation of picketing when the company completed its contracts at a particular apartment building; (g) the fact that the picketing occurred during a normal workday; (h) the further fact that the picketing was not conducted at a construction site where substantial complements of other employers' employees were working.¹⁹⁸

The culmination of these factors and the fact that the absence of primary employees was largely due to the picketing, was more than sufficient to indicate that the primary employer was engaged in normal business at the situs, in spite of the absence of the primary employees at various times.

Much the same set of facts was present in *Brownfield Elec., Inc.*,¹⁹⁹ where the General Counsel contended that because the union picketed when the primary employees were absent on four days, the picketing did not comply with the requirement that the picketing occur at a time when the primary employer is engaged in its normal business at the situs of the dispute. The Board, again held that substantial compliance depended in significant part upon the reasons for the absence of the primary employees, and pointed out: "Picketing which is lawful primary picketing is not turned into unlawful secondary picketing because the picketing is effective against the primary employer and its employees. . . ."²⁰⁰ The Board noted the temporary duration of the absences, in addition to the facts that the primary employer continued to store tools and materials at the situs and that work

¹⁹⁸ Id. at 1181.

¹⁹⁹ 145 N.L.R.B. No. 113, 55 L.R.R.M. 1113 (1964).

²⁰⁰ Id. at 1114.

had not been completed at the time of picketing, and concluded that the primary employer was engaged in normal operations during the picketing at the situs, within the standards enunciated by *Moore Dry Dock*.

These cases dealing with the absence of primary employees from a common situs during picketing expand upon the time element discussed in *Plauche Elec.*²⁰¹ In the latter case, the primary employees were absent for short periods of time during lunch and coffee breaks. In such a situation the Board found that it would be absurd to impose such a strict requirement. "Otherwise every common situs picket line, however otherwise observant of *Moore Dry Dock* standards, would be mechanically converted from lawful to unlawful picketing by picketing unsynchronized with lunch, coffee, or other temporary work interruption occasioned by personal need."²⁰² In *New Power Wire & Elec.* and *Brownfield*, the Board carried this reasoning beyond the "personal need" stage to cover all temporary absences from the situs where there is no unlawful objective behind the picketing.²⁰³ But perhaps the most significant part of these recent cases is the listing of the various factors considered by the Board as crucial in determining the lawfulness of picketing at a common situs in the absence of primary employees.^{203a}

B. The "Ally Doctrine"

An important extension of the "ally doctrine" as an exception to the secondary boycott provisions of the NLRA was enunciated in *Madden v.*

²⁰¹ Supra note 196.

²⁰² Id. at 255, 49 L.R.R.M. at 1449-50.

²⁰³ In this regard, Leedom, in his dissenting opinion in *Brownfield*, supra note 199, at 1114, stated:

To hold . . . that *Brownfield* was engaged in its normal business at the picketed situs during these four days . . . comes dangerously close to holding that the mere existence of a subcontract gives a union the unalloyed right to picket a construction project in support of its primary dispute with the subcontractor at any and all times until the subcontract has been fulfilled. This I am unwilling to do.

^{203a} The Supreme Court recently decided a significant case dealing peripherally with the *Moore Dry Dock* rules in determining whether picketing is primary or secondary. In *United Steelworkers v. NLRB (Carrier Corp.)*, 32 U.S.L. Week 4219 (U.S. March 23, 1964), the question presented was whether it was an 8(b)(4) violation for a union to picket an entrance to a railroad spur track located on a railroad right-of-way adjacent to the primary employer's premises, which entrance was used exclusively by railroad employees. The spur track was used by the railroad to service the primary employer, as well as several other companies located along the spur line. The Board had found the picketing to be primary, but the Second Circuit reversed. In upholding the Board's decision, the Supreme Court agreed with the Board that *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667 (1961) was controlling. In the latter case, it was held that picketing at a separate gate was protected primary activity where the operations of the secondary employer were connected with the normal activities of the struck employer. This construction of 8(b)(4) was affirmed in the *Steelworkers* case: ". . . we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of the neutral delivery men furnishing day-to-day service essential to the employer's regular operations." 32 U.S.L. Week at 4221. The test, therefore, in separate gate cases, is not upon whose property the gate is located, but rather the connection of the work of the secondary employer with the primary employer's daily operations. For a discussion of this case at the circuit court stage, see Note, 5 B.C. Ind. & Com. L. Rev. 200 (1963).

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Steel Fabricators, Local 810.²⁰⁴ Prior to this case, a secondary employer, who did work which would have been done by employees of the struck primary employer, would not be protected against picketing by striking employees of the primary employer.

In *Madden*, the primary employer, Ideal Roller and Mfg. Co. (Ideal), had plants in Chicago and Long Island, New York. Teamsters Local 810, representing employees at the Long Island plant, went on strike upon failing to reach agreement on contract terms. Subsequently Local 810 picketed Ideal's Chicago plant, although none of the Chicago employees went on strike or joined the picketing. A month later the Chicago plant contracted with Silver Star Storage, Inc., operators of commercial warehouses, to handle loading, unloading and shipping work previously done by employees of the Chicago plant. Silver Star was requested by Local 810 to refuse to handle Ideal's goods and when Silver Star refused, it was approached by Local 810 and Local 743, the Teamsters local operating in Chicago. A second refusal was followed by picketing of Silver Star's warehouse, with the result that on several occasions various employees of motor carriers refused to deliver or pick up goods coming from or going to Ideal. When an 8(b)(4) charge was filed with the Board, an injunction was sought. The District Court for the District of Illinois denied the injunction on the ground that Silver Star was an ally of Ideal, in spite of the fact that Ideal's Chicago plant was not on strike.

The court, in effect, held that a strike at the Long Island plant was a strike against the same company in Chicago, and that therefore the picketing in Chicago was lawful primary picketing. On this basis Silver Star was doing "'struck work,' work transferred to it because the lawful picketing of Ideal's Chicago plant resulted in Ideal's own employees being unable to perform some of their customary duties."²⁰⁵ As soon as work done by

²⁰⁴ 222 F. Supp. 635 (D. Ill. 1963). The doctrine was first raised in *Douds v. Metropolitan Fed. of Architects, Local 231*, 75 F. Supp. 672 (S.D.N.Y. 1948), where Ebasco, the primary employer, contracted work out to Project, the secondary employer, some work being contracted for before the strike at Ebasco, but a larger amount once the strike began. Supervisory personnel of Ebasco supervised work at Project and the visits and working hours at Project increased after the strike. The court stated, 75 F. Supp. at 677:

The evidence is abundant that Project's employees did work, which, but for the strike of Ebasco's employees, would have been done by Ebasco. The economic effect upon Ebasco's employees was precisely that which would flow from Ebasco's hiring strikebreakers to work on its own premises. The conduct of the union in inducing Project's employees to strike is not different in kind from its conduct in inducing Ebasco's employees to strike. . . . In encouraging a strike at Project the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it.

In *NLRB v. Business Machine, Local 459*, 228 F.2d 553 (2d Cir. 1955), cert. denied, 351 U.S. 962 (1956), it was held, 228 F.2d at 559, that an employer is an "ally" and is not within the protection of § 8(b)(4)(A) when he knowingly does work which would otherwise be done by the striking employees of the primary employer and where this work is paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations.

²⁰⁵ *Id.* at 638.

primary employees is transferred to the secondary employer because of the picketing of the primary employer's premises, the secondary employer becomes an "ally." The court justifies its position by the words of Senator Taft: "The spirit of the Act is not intended to protect a man who . . . is cooperating with a primary employer and taking his work and doing the work which he is unable to do because of the strike."²⁰⁶

Thus, the rule announced in the *Madden* case is that a secondary employer will be considered an ally of the primary employer and engaged in "struck work," regardless of which of the primary employer's plants is actually struck, when it performs services or other work which had been previously performed by employees of the primary employer, who, because of lawful primary picketing, were prevented from performing such services or other work. This is true, even though the primary employees of the non-struck plants have not joined the picket line, and are not represented by the picketing union. The adoption of this rule, expanding the "struck work" exception to a secondary boycott violation, appears to give unions a broader opportunity to make its force felt in larger industries which have plants and facilities in various areas throughout the country. It of course assumes that the multi-plant employer is the common employer and can be picketed wherever his facilities can be found. By bringing pressure on secondary employers dealing with the common employer at various sites, even though there is no apparent interchange or dealings between the various plants of the common employer, the union's bargaining power is greatly enhanced.

C. Hot Cargo

Is it unlawful under subsection 8(b)(4)(A) or (B) for a union to picket an employer engaged in the construction industry where the union's purpose is to secure an agreement which would require the employer to cease doing business with other persons? The Ninth Circuit in *Construction, Prod. & Maintenance Union v. NLRB*²⁰⁷ recently reached a conclusion opposite that of the Board²⁰⁸ on this issue. The question presented involves application of the construction industry proviso contained in 8(e) to the secondary boycott provisions of 8(b)(4)(A) and (B).²⁰⁹

²⁰⁶ Ibid.

²⁰⁷ 323 F.2d 422 (9th Cir. 1963), otherwise known as *Colson & Stevens*. Picketing at the construction site was designed to require the employer to sign a contract which included the following subcontractor clause: "That if the Contractors, parties hereto shall subcontract construction work . . . the terms of said Agreement shall extend to and bind such construction subcontract work, and provisions shall be made in such subcontract for the observance by said subcontractor of the terms of this Agreement." Id. at 423.

²⁰⁸ 137 N.L.R.B. 1650, 50 L.R.R.M. 1444 (1962). The Board in *Hod Carriers Union (Swimming Pool Gunite Contractors)*, 144 N.L.R.B. No. 93, 54 L.R.R.M. 1165 (1963) recently adhered to its position in *Colson & Stevens*, holding that a union violated 8(b)(4)(A) by threatening to strike for the purpose of compelling a construction industry employer to sign a contract containing hot-cargo and subcontractor clauses.

²⁰⁹ Subsection 8(b)(4)(A) and (B) provide that it shall be an unfair labor practice for a union to coerce (picket) where an object thereof is "(A) forcing or re-

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The Board had interpreted the construction industry proviso in 8(e) as only sanctioning agreements *voluntarily entered into* and that while such voluntary agreements would not violate 8(b)(4)(A), it would be unlawful under that subsection for a union to take *coercive measures* (picketing) to *secure* them. The court of appeals, on the other hand, determined that Congress intended 8(e) and 8(b)(4)(A) to be read together, and that so reading them requires a conclusion that "... if such an agreement may voluntarily be reached, picketing to secure it is not made unlawful."²¹⁰ The interpretation adopted by the Board was based upon the distinction between the construction and the garment industry provisos. The fact that the latter proviso exempts the garment industry from application of both 8(b)(4)(B) and 8(e), while the former proviso exempts the construction industry only from 8(e), indicated, according to the Board, that picketing to secure a hot-cargo agreement is permissible only in the garment industry. It was the court's opinion, however, that the distinction between the provisos concerned picketing to *enforce* such agreements and not picketing to secure the agreement itself. The court drew the following conclusions relative to the permissibility of picketing for securing and enforcing hot-cargo or subcontractor clauses:

(1) Picketing to secure or enforce such an agreement is permissible in the garment industry;

(2) Picketing to secure an agreement is permissible but not picketing to secure enforcement thereof in the construction industry;

(3) Picketing whether to secure or enforce an agreement is unlawful in all other industries.

The court also disagreed with the Board on whether picketing to *secure* an agreement which would require an employer in the construction industry to cease doing business with another violated 8(b)(4)(B). The Board had concluded that such an agreement would be tantamount to an actual severance of the business relationship. Subsection 8(b)(4)(A) was determined by the court to be the only subsection dealing with picketing to *secure* an agreement. If that provision did not make it unlawful, it was not proscribed by 8(b)(4)(B).

Assuming that an agreement exists between a union and a construction industry contractor, under either the Board or the court view, coercive measures could not be employed to compel *enforcement* of the agreement. The question arises whether the union could resort to judicial processes

quiring any employer . . . to enter into any agreement which is prohibited by section 8(e) . . . (B) forcing or requiring any person to . . . cease doing business with any other person"

Subsection (e) makes it unlawful for a union to enter into an agreement which requires an employer to cease doing business with another [hot-cargo or subcontractor clauses]. The section contains a proviso which states: "Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the *construction industry* relating to the contracting or subcontracting of work to be done at the site of the construction" (Emphasis supplied.)

²¹⁰ Supra note 207, at 424.

to compel compliance or to seek other relief although self-help is unavailable. The United States District Court for the Northern District of Alabama recently held that judicial relief by way of injunction or damages would coerce the contractor in deciding whether to sever relations with another, and thus violate the purpose of 8(b)(4)(ii)(B).²¹¹

The United States District Court, in *Cuneo v. Operating Eng'rs, Local 825*,²¹² adhered to the same interpretation of the applicability of 8(e) to 8(b)(4) as the circuit court in *Colson & Stevens*. It refused to enjoin work stoppages staged for the purpose of securing a subcontractor clause from a construction industry contractor. The court also declined to accept the Board's interpretation of the construction industry proviso, finding that the proviso does not proscribe coercive action to secure the employer's agreement to a subcontractor clause.

The District of Columbia Circuit, however, drew an important distinction concerning subcontractor clauses in *Orange Belt Dist. Council v. NLRB*.²¹³ The court, finding that all such clauses are not designed to blacklist nonunion subcontractors, refused to apply a blanket prohibition on such clauses. The only subcontractor clauses proscribed by the Act are those addressed to the labor relations of the subcontractor since these are secondary as to the general contractor. Clauses addressed to the labor relations of the general contractor, on the other hand, are considered primary and thus not illegal.

The court enunciated the tests which it had formulated in previous cases to determine whether a clause is "primary" or "secondary" in nature: Will the clause "directly benefit employees" of the general contractor;²¹⁴ Are the clauses "germane to the economic integrity of the principal work unit";²¹⁵ Do the clauses seek "to protect and preserve the work and standards [the union] has bargained for";²¹⁶ or instead "extend beyond the [contracting] employer and are aimed really at the union's difference with another employer."²¹⁷

Subcontractor clauses which are designed "to limit the work to employees who maintain labor standards commensurate with those required by the union" were declared valid by the court. The court, in a companion case,²¹⁸ concluded, however, that a clause which limits the em-

²¹¹ Local 48, Sheet Metal Workers v. Hardy Corp., 218 F. Supp. 556 (D. Ala. 1963). Cf. *Benner v. Westman*, 53 L.R.R.M. 2551 (Cal. Super. Ct. 1963) where the court indicated that injunctive relief to enforce a subcontractor clause would be available.

²¹² 52 L.R.R.M. 2927 (D.N.J. 1963).

²¹³ 55 L.R.R.M. 2293 (D.C. Cir. 1964). The Board had found that the union, by making threats against a general contractor in the construction industry to enforce a subcontractor clause, had violated 8(b)(4)(ii)(B).

²¹⁴ *Id.* at 2296.

²¹⁵ *District 9, Int'l Ass'n of Machinists v. NLRB*, 315 F.2d 33, 36 (D.C. Cir. 1962).

²¹⁶ *Retail Clerks Union, Local 770 v. NLRB*, 296 F.2d 368, 374 (D.C. Cir. 1961).

²¹⁷ *Local 636, United Ass'n of Journeymen v. NLRB*, 278 F.2d 858, 864 (D.C. Cir. 1960).

²¹⁸ *Building & Constr. Trades Council v. NLRB*, 55 L.R.R.M. 2297 (D.C. Cir. 1964). The union had threatened to picket a general contractor in the construction

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employer's right to subcontract to those who meet the "terms of the appropriate labor agreement" was unlawful. It was the court's opinion that such a clause implicitly blacklisted all nonunion subcontractors and required a subcontractor to agree to a full union contract, including union recognition, on penalty of a boycott of the general contractor.

D. Consumer Picketing

The union's ability to pressure a primary employer to accede to the demands of the union by means of consumer picketing has been put in jeopardy by the Fifth Circuit's decision in *Perfection Mattress & Spring Co. v. NLRB*.²¹⁹ The court upheld the Board's view that consumer picketing is a per se violation of 8(b)(4)(i) and (ii)(B),²²⁰ on the basis that the union's purpose in picketing the neutral employer in furtherance of the union's dispute with the primary employer was an object clearly within the proscription of subsection (B). Finding that the object was proscribed, the court went on to determine whether the means used by the union were prohibited.

Relying upon the legislative history, the court concluded that where the object of consumer picketing "is to force the neutral to cease doing business with another, this action is 'to threaten, coerce, or restrain . . . the neutral contrary to § (ii).'"²²¹ This view was emphasized by reference to the "publicity proviso,"²²² which specifically excluded all picketing from the publicity exemption. Under this court's interpretation, it is unnecessary to show that the picketing actually had a coercive effect on the neutral employer [8(b)(4)(ii)] or on the secondary employees [8(b)(4)(i)]. The coercion is presumed from the mere existence of the pickets.

This view is in direct conflict with that of the Court of Appeals for the District of Columbia in *Fruit & Vegetable Packers v. NLRB*.²²³ It was

industry because of the failure of a subcontractor to adhere to the required terms in the contract between the union and the general contractor.

²¹⁹ 321 F.2d 612 (5th Cir. 1963).

²²⁰ The statute provides that it shall be an unfair labor practice for a labor organization:

(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 refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods . . . or to perform any services; or

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—

. . .

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

²²¹ Supra note 219, at 617.

²²² The proviso states "That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers . . ." that products are being distributed by an employer with whom the union has a primary dispute.

²²³ 308 F.2d 311 (D.C. Cir. 1962), aff'd, — U.S. —, 32 U.S.L. Week 4350 (Apr. 20, 1964).

there held that consumer picketing was not per se unlawful, but that there must be a showing that the picketing was in fact coercive. In spite of the legislative history of 8(b)(4)(i) and (ii), the court there found that the most "plausible" interpretation of the section would be that it "outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation 'publicity other than picketing' even though it threatens, coerces or restrains an employer."²²⁴

The practical effect of *Fruit Packers* is that a union can engage in consumer picketing at the premises of the secondary employer who handles the primary employer's products, while the effect of *Perfection Mattress* is to restrict a union to means other than picketing. Whether or not the union's arsenal of economic weapons will be so reduced will be answered by the Supreme Court.

8. UNION DISCIPLINE

In *Local 283, United Auto Workers* (Wisconsin Motor Corp.),²²⁵ the Board held that the union did not violate 8(b)(1)(A)²²⁶ of the Act by imposing fines on union members for refusing to abide by a union rule in regard to production earning ceilings. The union, which had represented the employees since 1937, had a contract containing an "agency shop" clause.²²⁷ During this period, the union had in effect a rule, adopted pursuant to a by-law, which limited the amount of incentive pay that a union member might earn over the minimum contract rate for a particular job classification. The rate in effect at the time of the alleged violation was set at between forty-five and fifty cents per hour over the machine rate. When the ceiling rate had been reached for a particular day, the member could continue working, but was required to report the excess for future

²²⁴ Id. at 315. The *Fruit Packers* court recognized that the Board's view could be "squared" with the statutory language, but that the Board's interpretation was not a "plausible" one. This was so, because the Board's construction would raise constitutional questions as to the First Amendment's protection of picketing as speech. For a full discussion of the constitutional issue as raised and discussed by both *Fruit Packers* and *Perfection Mattress*, see Note, *infra* at 806.

²²⁵ 145 N.L.R.B. No. 109, 55 L.R.R.M. 1085 (1964).

²²⁶ This section provides:

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

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title: *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. . . .

Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an [8(a)(3)] agreement. . . .

²²⁷ The employees had the option to join the union or to reject it, in which latter case a service fee was required. As to the recent Supreme Court decisions on the validity of such union-security provisions, see Note, 5 B.C. Ind. & Com. L. Rev. 440 (1964).

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payment, in order to comply with the rule. By reporting the excess, the member could draw on this "bank" account when he, for some reason such as illness, was unable to reach his normal production quota. The normal fine for violation of the rule was one dollar, but persistent violation could lead to a charge of conduct unbecoming a union member which would subject the violator to a maximum fine of one hundred dollars. Although a member could be required to pay a fine and could also be expelled from the union, these sanctions could not be extended to impair his employment status.²²⁸

In this case, a certain member had persistently violated the rule and was fined accordingly. To collect these fines, the union instituted proceedings in the state court. Thereupon, an 8(b)(1)(A) charge was filed with the Board.

The Board narrowly construed the section, feeling so constrained by an analysis of congressional intent and prior decisions of the Supreme Court in *Curtis Bros.*²²⁹ and *Bernhard Altman*.²³⁰ The Board found that although those decisions restricted employer and union conduct with respect to interference with employee rights, section 8(b)(1)(A) was limited in its objective to violation of employee rights by the use of union organizational tactics. Congress, in the Board's opinion, had not indicated its intent to include within the purview of that section matters of internal union affairs.²³¹

The Board pointed out that during the twelve years that followed the Taft-Hartley amendments, 8(b)(1)(A) had been consistently interpreted by the Board so as not to interfere with a union's internal matters, and that Congress had not at any time indicated that the section should be broadened in any way. If anything, the 1959 amendments gave support to

²²⁸ There was additional evidence that although the union rule was not incorporated into the collective bargaining agreement, the company had accepted the ceilings as forming a significant element in the negotiated wage structure, and computed wages and evaluated jobs by using the ceilings. Also, the company cooperated with the union in administering the rule, by keeping the necessary books for members' production reports, which books were readily available to members and union officials.

²²⁹ *NLRB v. Drivers, Chauffeurs, Helpers, Local 639*, 362 U.S. 274 (1960). In this case, the Court reversed the Board's finding that a union which only represented a majority violated 8(b)(1)(A) when it peacefully picketed an employer with the purpose of compelling him to recognize the union as exclusive representative. The Court held this was not conduct to "restrain or coerce" employees in the exercise of section 7 rights. The Court further stated that the Board, under 8(b)(1)(A), was merely given "a grant of power . . . limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes." *Id.* at 290.

²³⁰ *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961). The Court upheld the Board's finding of an 8(b)(1)(A) violation where the union, not representative of a majority, nevertheless accepted exclusive representation and entered into a collective bargaining agreement.

²³¹ The Supreme Court in *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958); *Local 100, United Ass'n of Journeymen & Apprentices v. Borden*, 373 U.S. 690 (1963); and *Local 207, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers Union v. Perko*, 373 U.S. 701 (1963), although dealing with preemption, indicated that matters dealing with the employment relationship are within the exclusive jurisdiction of the NLRB, while questions dealing with internal union affairs are excepted from the Board's jurisdiction.

the Board's conclusion, since a fairly complete "code" dealing with the internal affairs of the union was then enacted. Supervision of this subject matter, however, was given, not to the Board, but to the courts. The Board felt that such was a significant departure in federal labor relations policy.

In addition, the Board found that the coverage of the Landrum-Griffin amendments was itself limited and had not attempted to venture "to the outermost limits in regulating internal union affairs. Some subjects still remain unregulated under existing Federal law."²³² On the basis of all these factors, the Board concluded that Congress could not have enacted under Taft-Hartley, and especially under 8(b)(1)(A), the broad restrictions on the power of unions to prescribe rules affecting the conduct of union members as contended by the General Counsel in *Local 283*.

In upholding the particular union rule in this case, the Board rejected the "dual status" argument of member Leedom who, in his dissent, contended that employees who are union members have both the status of *employees* and the status of *union members*. Those matters which affected employees as union members were matters relating to internal union affairs, while matters which affected employees as employees are not internal union matters. The extent to which the matters affect the latter cannot be controlled by union rules, and since the union has here attempted to control production and wages—matters affecting not employment, but membership in unions—it has exceeded its powers. If the majority allowed this to control such matters in this case, contended Leedom, then,

It would appear that the Union can turn any employment matter or Section 7 right into an internal union affair simply by adopting a union rule or bylaw dealing with the subject and disciplining employees thereunder.²³³

In rejecting this argument, the Board did not feel that the distinction between "employee" and "union member" necessarily required Member Leedom's conclusion. It was pointed out by the majority that unions exist for the purpose of bargaining with respect to wages, hours and working conditions, and that these objectives would naturally be reflected in their constitutions and by-laws. Thus, virtually all union rules affect employment matters. Also, the conclusion of the dissent would require the policing of a union's decision as to the standing of its members and the rules promulgated to determine good standing, a power not given the Board by Congress. The Board concluded: "It is sufficient, in our view, that the Union deliberately restricted the enforcement of its rule to an area involving the status of a member as a *member* rather than as an *employee*."²³⁴

The issue in *Local 283* would appear destined for Supreme Court review since it is a significant departure from the subject matter held to be within 8(b)(1)(A) by previous Supreme Court decisions. The General Counsel relied upon language in *International Ladies' Garment Workers* (Bernhard-Altman), the Court's latest pronouncement on the section, which

²³² Supra note 225, at 1088.

²³³ Id. at 1091.

²³⁴ Id. at 1088.

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it felt indicated a congressional intent to give that section a broader coverage of union tactics than violence, reprisals and duress in organizational and recognitional activity. The Board's approach was restricted by the precise holdings of the previous cases exempting internal union affairs.

9. ORGANIZATIONAL AND RECOGNITIONAL PICKETING-PUBLICITY PROVISO

The policy being evolved by the new Board under the 8(b)(7)(C)²⁸⁵ amendment to the NLRA has received strong support from two courts of appeal. In *Smitley v. NLRB*,²⁸⁶ when Crown Cafeteria refused the union's request that it hire through the union hiring hall and that it sign the standard union contract, the union picketed the public entrance to the cafeteria. The picket signs addressed "to members of organized labor and their friends," stated that Crown employed nonunion help and asked that Crown not be patronized. The union subsequently reduced the time of picketing to the hours between 11 A.M. and 7 P.M., allowing the employer to receive deliveries before the daily picketing began. This picketing occurred for more than thirty days.

The old Board had held such picketing to be a violation of 8(b)(7)(C),²⁸⁷ its interpretation being that "Clearly . . . the intention of the Congress to outlaw recognitional and organizational picketing is best effectuated by confining the second proviso . . . to picketing when the sole object is the dissemination of information divorced from a present object of recognition."²⁸⁸ In other words, the proviso would only protect picketing that was *solely* for the purpose of truthfully informing the public that the employer did not hire union workers or have a contract with the union.

The new Board, on rehearing of *Crown Cafeteria*,²⁸⁹ adopted the dissenting opinion of the first decision:

. . . it seems clear that Congress intended to permit a kind of

²⁸⁵ This section provides that it shall be an unfair labor practice for a labor organization:

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

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days . . . :
Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

²⁸⁶ 55 L.R.R.M. 2302 (9th Cir. 1964).

²⁸⁷ 130 N.L.R.B. 570, 47 L.R.R.M. 1321 (1961).

²⁸⁸ *Id.* at 572-73, 47 L.R.R.M. at 1323.

²⁸⁹ 135 N.L.R.B. 1183, 49 L.R.R.M. 1648 (1962).

picketing which, but for the proviso, would have come within the prohibition of the section. It logically follows that the intent was to exclude from the ban picketing which, while it embraced the proscribed object . . . was nonetheless permitted because it met two specific conditions. The first condition was . . . "of truthfully advising the public . . . that an employer does not employ members of, or have a contract with, a labor organization." The second condition was . . . "unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment not to pick up, deliver or transport any goods or not to perform any services."²⁴⁰

The Board, in addition, accepted the view of the court in *Getreu v. Bartenders and Hotel, Local 58*,²⁴¹ that although the "object of picketing," as used in 8(b)(7), may be the proscribed activity of recognition and organizational picketing, it would be protected under subparagraph (C), if the "purpose" of the picketing met the conditions of the proviso.

The Court of Appeals for the Ninth Circuit,²⁴² in upholding the new Board policy found that it necessarily had to reject the old Board's view, as put forth by *Crown*, since to do otherwise would outlaw all recognition picketing beyond the reasonable time period, thereby rendering the effect of the provisos nugatory. This would result because of the virtual impossibility of finding any picketing within the terms of the proviso which did not have as an "object" the obtaining of a contract, if not at present, at least in the future.

In this regard, the court quoted, with approval, the recent decision of the Court of Appeals for the Second Circuit.²⁴³ The latter court, in addition to making the same interpretation as made by the Ninth Circuit, pointed out what it considered to be the intended distinctions made by Congress in the publicity proviso. First, in its use of the phrase "truthfully advising the public," Congress did not intend to construe the proviso so narrowly as to exclude consumers; recognizing however, that the whole context of the proviso indicates that it should not be interpreted so broadly as to include organized labor groups which "at a word or signal from the picketeers, would impose economic sanctions upon the employer. . . ."²⁴⁴

²⁴⁰ Supra note 237, at 575, 47 L.R.R.M. at 1324.

²⁴¹ 181 F. Supp. 738 (N.D.Ind. 1960).

²⁴² Supra note 236.

²⁴³ NLRB v. Local 3, Int'l Bhd. of Elec. Workers, 317 F.2d 193 (2d Cir. 1963). In this case, when the employer, Picoult, refused to recognize Local 3, the union picketed front entrances used by the public, and delivery areas located at the rear and side, which were not frequented by the public. The picket signs initially indicated that Picoult did not employ union workers, but subsequently, reworded signs stated that employees of Picoult received substandard wages and working conditions. On at least two occasions, employees of secondary employers did not cross the picket lines. The Board held that since an election petition was not filed within a reasonable time, the union violated 8(b)(7)(C), based on the principles of its recent decision in *Crown Cafeteria*, supra note 239. The court of appeals remanded the case to the Board, apparently because it was in doubt as to the new Board's position which had just recently been stated in *Crown Cafeteria*.

²⁴⁴ Id. at 198. As to the "signal" effect, the court stated:

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Second, Congress intended a distinction between the use of the words "object" in paragraph (7) of 8(b), and "purpose" in subparagraph (C): the mere fact that a union *objective* may be recognition or organization, does not prohibit such picketing where the *purpose* is to appeal for support from the unorganized public. Only where the *purpose* is to invoke pressure by organized labor groups or individual members, is such picketing prohibited. This latter point is the essence of the "unless" clause at the end of the second proviso.²⁴⁵ The court concludes:

The permissible picketing is, therefore, that which through dissemination of certain allowed representations, is designed to influence members of the unorganized public, as individuals, because the impact upon the employer by way of such individuals is weaker, more indirect and less coercive.²⁴⁶

The application of this policy in the *Smitley* case resulting in the failure of the Board to find an 8(b)(7)(C) violation was affirmed. In this case, although the union clearly indicated that it sought recognition, its purpose was not to seek pressure from organized labor, but to seek aid from the public at large. The facts that picketing occurred only at public entrances and occurred at times which permitted the employer to get supplies and deliveries without interruption, were strong support for this conclusion.

On remand of *Local 3*, however, the Board,²⁴⁷ was able to find a clear violation of 8(b)(7)(C). The picket signs, even though subsequently changed, indicated an organizational or recognitional objective. This was especially so in light of the several demands made by the union for recognition and the failure of the union to notify the employer that recognition was no longer sought when the picket signs were changed. In view of the fact that pickets were posted at entrances not frequented by the public, and the fact that at least one incident occurred where a secondary employee was prevented from making a delivery, the "tactical purpose" was found

Under the second proviso it is the difference in purpose which determines which is permissible picketing and which is not. In its context the second proviso means in terms of "signal" and "publicity" picketing that while most picketing with a "signaling" purpose is proscribed, most picketing for publicity is protected; the exceptions are that signal picketing is permissible when an object thereof is not forcing or requiring an employer to recognize or bargain, and publicity picketing is proscribed when it communicates more than the limited information expressly permitted by the second proviso or when it is apparently the purpose to advise organized labor groups or their members as shown by signal effects, unless there is persuasive proof that those effects are inspired by the employer who is seeking thereby to prevent legitimate second-proviso picketing by the union.

Id. at 199-200.

²⁴⁵ Supra note 235.

²⁴⁶ Supra note 243, at 198.

²⁴⁷ 144 N.L.R.B. No. 8, 53 L.R.R.M. 1508 (1963). In *Barker Bros. Corp.*, 138 N.L.R.B. 478, 51 L.R.R.M. 1053 (1962), there were three instances when deliveries were prevented and several instances of delay caused by 8(b)(7) picketing. The Board held that this was not a sufficient "effect" of interference with deliveries to come within the meaning of 8(b)(7)(C). See Comment, 4 B.C. Ind. & Com. L. Rev. 661, 673 (1963).

by the Board to be "precisely that 'signal' to organized labor which Congress sought to curtail."²⁴⁸

From these Board and court decisions, a unanimous agreement has been reached as to the proper handling of 8(b)(7)(C) cases. An initial determination must be made as to whether the picketing is for the object of organization or recognition. If neither is the object, the picketing is outside the terms of 8(b)(7).²⁴⁹ If the object is recognition or organization, and it is determined that the picketing has continued for more than a reasonable time, not to exceed thirty days, the picketing is unlawful, unless the conditions of the provisos are met. Whether such conditions are met depends on the immediate purpose of the picketing: whether it is an appeal to the unorganized public or a signal to organized labor. If the former, the picketing as in *Smitley* would be permitted. If found to be a "signal" as in *Local 3*, it is a violation of Section 8(b)(7)(C) of the Act.

10. THE DUTY OF FAIR REPRESENTATION

The Second Circuit recently became the first court of appeals to review the Board's newly announced theory that a union commits an unfair labor practice if it fails to represent fairly a member-employee.²⁵⁰ The Board had, in a three to two decision, concluded in *Miranda Fuel Co.*,²⁵¹ that section 8(b)(1)(A) "prohibits labor organizations when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."²⁵² In addition, the Board had found that the union violated section 8(b)(2) and the employer 8(a)(3) when the union, with the employer's acquiescence, caused the employee's employment status to be derogated on the basis of an unfair classification.

The three judges on the circuit court wrote separate opinions, with only Judge Medina taking a position on the 8(b)(1)(A) issue. In adopting the view of the dissenting members of the Board, Judge Medina (majority) concluded:

... discrimination for reasons wholly unrelated to "union membership, loyalty, the acknowledgement of union authority, or the performance of union obligations" is not sufficient to support findings of violations of Sections 8(a)(3), 8(a)(2) and 8(b)(1)(A) of the Act.²⁵³

It was Judge Medina's opinion that a breach of the union's duty of fair representation did not constitute an 8(b)(1)(A) violation since Congress did not intend that duty, implicit in section 9, to be read into sections

²⁴⁸ Id. at 1510.

²⁴⁹ The fact that the picketing is outside the scope of 8(b)(7) does not preclude a finding of another unfair labor practice. The final sentence of 8(b)(7) provides: "Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b)."

²⁵⁰ NLRB v. *Miranda Fuel Co.*, 326 F.2d 172 (1963).

²⁵¹ 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962).

²⁵² Id. at 184, 51 L.R.R.M. at 1587.

²⁵³ *Supra* note 250, at 175.

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7 and 8 of the Act. On the basis that the discrimination charged was not designed to "encourage or discourage union membership," Judge Medina also found against the Board on the 8(b)(2) and 8(a)(3) violations.²⁵⁴

He concluded that:

The machinery of the Board and the remedies applied in the enforcement of findings of unfair labor practices, as defined in the Act, are not suited to the task of deciding general questions of private wrongs, unrelated to union activities, suffered by employees as a result of tortious conduct by either employees or labor unions.²⁵⁵

Chief Judge Lumbard (concurring) agreed with Judge Medina as to the latter issue only, finding it unnecessary to take a position on the controversial 8(b)(1)(A) question.

Judge Friendly (dissent) found that the evidence was sufficient to establish an 8(b)(2) and an 8(a)(3) violation. He also took no position on the breach of duty of fair representation question.

It is inevitable that the Board's position, if sustained, would leave tremendous consequences in view of the racial problems existing in the field of labor relations.²⁵⁶ Judge Medina realized the impact of his decision upon the role of the NLRB when he paused to note that the Board would be inundated with charges of racial as well as other discriminations were the Board's theory sustained. Whether a federal fair employment practices act is enacted may have a great bearing upon the Board's approach in the future.

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²⁵⁴ Id. at 180. Cf. *NLRB v. Shear's Pharmacy*, 55 L.R.R.M. 2258 (2d Cir. 1964). The Board, on the basis of its opinion in *Miranda* had found that the union's arbitrary insistence that an employee not be reinstated after an excused absence, and employer's acquiescence violated 8(b)(2) and 8(a)(3). The court, with Judge Friendly as spokesman, agreed, finding that there was sufficient evidence under the view taken by the majority in the circuit court's *Miranda* decision to sustain the Board's position.

²⁵⁵ Supra note 250, at 180.

²⁵⁶ J. M. Albert discusses five possible devices the Board might use in dealing with unfair employment practices: (1) decertification of unions which discriminate; (2) the setting aside of representation elections where an employer or a union makes "exacerbated" appeals to racial bias; (3) the removal of discriminatory collective bargaining contracts as bars to representation petitions by strange unions; (4) the prevention of a union, acting in its "statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair," and the prevention of employer participation in such conduct; (5) the making it an unfair labor practice for an employer or a union to make such exacerbated appeals to racial bias in a representation campaign as would support the setting aside of a representation election. *NLRB-FEPC?*, 16 Vand. L. Rev. 547, 549, 558-93 (1963).