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STRIKE VIOLENCE: THE NLRB'S RELUCTANCE TO WIELD ITS BROAD REMEDIAL POWER

*"This is Union Nacional and we kill people. So leave."**

INTRODUCTION

In the early days of the American labor movement, numerous bloody confrontations between labor and management marred the workers' struggle for higher wages, shorter hours and safer working conditions.¹ The passage of the National Labor Relations Act (NLRA or Act)² in 1935 manifested the federal government's concern for labor peace and the concomitant reduction of industrial strife.³ The original Act, popularly known as the Wagner Act,⁴ placed restrictions on employers' efforts to resist union attempts to organize employees; unions were, however, as yet unrestricted in their exertion of pressure

* Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.), 219 N.L.R.B. 414, 417 (1975) (Member Kennedy, dissenting in part) (proclamation of union president Arturo Grant to an employee seeking to cross a picket line), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

1. Labor history is replete with instances of violence and its resultant death and destruction. During the Great Upheaval of 1877, federal and state militias dispersed mobs of striking railroad workers, wounding and killing many, with fire damage to the Pennsylvania Railroad resulting in losses exceeding \$5 million. T. Brooks, *Toil and Trouble: A History of American Labor* 50-54 (rev. 2d ed. 1971). During the Haymarket Square Riot of 1886, a bomb exploded amidst a crowd of workers and police, killing 7 and wounding 59. Police gunfire accounted for several deaths and 200 injuries. *Id.* at 68-70. In the Homestead Strike of 1892, at least 10 persons were killed and scores wounded in a clash between steelworkers and Pinkerton detectives hired by the Carnegie Steel Corp. *Id.* at 86-92; H. Pelling, *American Labor* 97-98 (1960). The dynamiting of the Los Angeles Times building in 1910 by the McNamara brothers, leaders of the Ironworkers Union, destroyed the entire building and left 20 persons dead. G. Adams, *Age of Industrial Violence 1910-15: The Activities and Findings of the United States Commission on Industrial Relations* 1, 7-17 (1966); T. Brooks, *supra*, at 111-12; H. Pelling, *supra*, at 108-09. During the Ludlow Massacre of 1914, a miners' tent colony was set afire, killing women and children. An exchange of gunfire between the miners and state militiamen left several dead. G. Adams, *supra*, at 156-61; T. Brooks, *supra*, at 128-30. At the Memorial Day Massacre of 1937, an unprovoked volley of police gunfire upon striking steelworkers killed 10 and wounded 30. Another 28 were beaten. *Id.* at 190-91.

2. 29 U.S.C. §§ 141-187 (1976). The original version of the Act is contained in 29 U.S.C. §§ 151-169 (1976).

3. 79 Cong. Rec. 2371-72 (1935) (statement of Sen. Wagner); *id.* at 6183-84 (address by Sen. Wagner); A. Fried, *Except to Walk Free: Documents and Notes in the History of American Labor* 216 (1974); see S. Cohen, *Labor in the United States* 81-82, 361 (4th ed. 1975) [hereinafter cited as S. Cohen I]; C. Gregory & H. Katz, *Labor and the Law* 224, 230 (3d ed. 1979).

4. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 141-187 (1976)).

in organizational campaigns.⁵ The balance of power in the labor-management structure was altered by the 1947 Taft-Hartley Act⁶ which amended the NLRA by imposing restrictions upon unions.⁷ These included a prohibition against the use of violence by unions to coerce or interfere with the rights of employees.⁸

Although no clashes on the scale of earlier confrontations have taken place in recent years, violence occurs in many modern-day strikes and picket-line situations.⁹ Labor violence victimizes employers,¹⁰ employees¹¹ and innocent third parties,¹² and can result in

5. S. Cohen I, *supra* note 3, at 81-82; C. Gregory & H. Katz, *supra* note 3, at 224; see 29 U.S.C. § 158(a) (1976).

6. Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1976)).

7. S. Cohen I, *supra* note 3, at 381-82; A. Fried, *supra* note 3, at 264; C. Gregory & H. Katz, *supra* note 3, at 342-43; see 29 U.S.C. § 158(b) (1976).

8. C. Gregory & H. Katz, *supra* note 3, at 360-61; see 29 U.S.C. § 158(b)(1)(A) (1976).

9. In District 1199, Nat'l Union of Hosp. & Health Care Employees, 245 N.L.R.B. 800 (1979), picketers had bombarded vehicles carrying nursing home employees with rocks, cans and bottles. The vehicles were dented, windows were broken and several passengers were injured by shattered glass. *Id.* at 802-03. In Hotel & Restaurant Employees & Bartenders Union, Local 2, 240 N.L.R.B. 757 (1979), picketers had entered Zim's Restaurant, assaulted the assistant manager and created a disturbance in the kitchen area. *Id.* at 773-74. In Maywood Plant of Grede Plastics, 235 N.L.R.B. 363 (1978), *modified on other grounds*, 628 F.2d 1 (D.C. Cir. 1980), employees seeking to enter the plant had been shoved and threatened by picketers, and the personnel manager was grabbed around the neck and similarly threatened. One employee was pushed into her car, sustaining an injury; several other employees were forcibly removed from their vehicles, and car windows were smashed. *Id.* at 367-68. In Local 248, Meat & Allied Food Workers, 222 N.L.R.B. 1023 (1976), *enforced mem.*, 84 Lab. Cas. (CCH) ¶ 10,826 (7th Cir. 1978), picketers had threatened employees and supervisors with bodily harm and property damage. Employees were assaulted and injured, and cars attempting to cross the picket line were damaged by picketers who scratched, dented, and hit the cars with picket signs and other objects. *Id.* at 1026-34. In *Scott v. Moore*, 640 F.2d 708, *reh'g en banc granted*, 656 F.2d 108 (5th Cir. 1981), a mob of union supporters had savagely attacked a nonunion employer and his employees with iron rods and wooden boards. The construction site office was set on fire, and cars, trucks and company equipment were vandalized. *Id.* at 712.

10. *E.g.*, Hotel & Restaurant Employees & Bartenders Union, Local 2, 240 N.L.R.B. 757, 773-74 (1979); Maywood Plant of Grede Plastics, 235 N.L.R.B. 363, 367 (1978) (Member Murphy, dissenting in part), *modified on other grounds*, 628 F.2d 1 (D.C. Cir. 1980); Union Nacional de Trabajadores (Jacobs Constructors Co.), 219 N.L.R.B. 405, 409 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

11. *E.g.*, UAW, Local 552, 239 N.L.R.B. 312, 314 (1978); Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.), 219 N.L.R.B. 414, 423-25 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); Union de Tronquistas, Local 901 (Hotel La Concha), 193 N.L.R.B. 591, 594-96 (1971); Lithographers & Photoengravers Int'l Union, Local 223, 193 N.L.R.B. 11, 18-19 (1971).

12. *E.g.*, Jericol Mining, Inc. v. Louisville & N.R.R., 88 Lab. Cas. (CCH) ¶ 11,904, at 23,678 (E.D. Ky. 1980); Union Nacional de Trabajadores (Jacobs Con-

personal injury,¹³ property damage,¹⁴ economic harm such as lost wages¹⁵ or lost business,¹⁶ and interference with rights granted under the NLRA.¹⁷

When such harm results from violence, the injured party may seek relief from either the National Labor Relations Board (NLRB or Board), state courts or federal courts. Choice of forum is influenced by the availability of remedies, and is limited by the doctrine of preemption. The general rule regarding preemption was established by the Supreme Court in 1959 in *San Diego Building Trades Council v. Garmon*.¹⁸ Under *Garmon*, state and federal courts must yield exclusive jurisdiction to the NLRB whenever the conduct to be regulated is subject to NLRB jurisdiction¹⁹ and is arguably protected by section 7 or arguably prohibited by section 8 of the Act.²⁰

structors Co.), 219 N.L.R.B. 405, 407 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); Union de Tronquistas, Local 901 (Hotel La Concha), 193 N.L.R.B. 591, 594-96 (1971).

13. *E.g.*, UAW, Local 552, 239 N.L.R.B. 312, 315 (1978); Union Nacional de Trabajadores (Macal Container Corp.), 219 N.L.R.B. 429, 429-30 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); Union de Tronquistas, Local 901 (Hotel La Concha), 193 N.L.R.B. 591, 594-96 (1971); Lithographers & Photoengravers Int'l Union, Local 223, 193 N.L.R.B. 11, 18-19 (1971).

14. *E.g.*, UAW, Local 552, 239 N.L.R.B. 312, 315 (1978); Maywood Plant of Grede Plastics, 235 N.L.R.B. 363, 367-68 (1978) (Member Murphy, dissenting in part), *modified on other grounds*, 628 F.2d 1 (D.C. Cir. 1980); Union de Tronquistas, Local 901 (Hotel La Concha), 193 N.L.R.B. 591, 594-96 (1971); Lithographers & Photoengravers Int'l Union, Local 223, 193 N.L.R.B. 11, 18-19 (1971).

15. *E.g.*, *UMW v. Gibbs*, 383 U.S. 715, 720 (1966); *UAW v. Russell*, 356 U.S. 634, 636-37 (1958); Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.), 219 N.L.R.B. 414, 417 (1975) (Member Kennedy, dissenting in part), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

16. *E.g.*, *UMW v. Gibbs*, 383 U.S. 715, 720 (1966); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 658 (1954); *Ritchie v. UMW*, 410 F.2d 827, 830 (6th Cir. 1969).

17. *E.g.*, Union Nacional de Trabajadores (Jacobs Constructors Co.), 219 N.L.R.B. 405, 410 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); Union de Tronquistas, Local 901 (Hotel La Concha), 193 N.L.R.B. 591, 598 (1971); Lithographers & Photoengravers Int'l Union, Local 223, 193 N.L.R.B. 11, 19 (1971).

18. 359 U.S. 236 (1959). For commentary on the *Garmon* preemption rule, see Cox, *Recent Developments In Federal Labor Law Preemption*, 41 Ohio St. L.J. 277 (1980); Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337 (1972); Note, *Labor Law: The "Compelling State Interest" Exception to the Federal Preemption Doctrine*, 51 Marq. L. Rev. 89 (1967); Note, *Preemption in Labor Law Adjudications: A Case Where the Exceptions are Swallowing the Rule*, 24 S.D. L. Rev. 466 (1979).

19. For a description of the NLRB's jurisdictional standards, see NLRB, *A Guide to Basic Law and Procedures Under the National Labor Relations Act* 46-49 (rev. ed. 1978).

20. 359 U.S. at 245-46; *accord* Local 100, *United Ass'n of Journeymen & Apprentices v. Borden*, 373 U.S. 690, 693-94 (1963); *Stites v. Local 367*, 430 P.2d 153, 154-55 (Alaska 1967).

Section 7 of the Act gives employees the right to engage in concerted activities for their mutual aid and protection or to refrain from such activities.²¹ Section 8(b)(1)(A) of the NLRA makes it an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of their section 7 rights.²² Thus, a union commits an unfair labor practice and impedes the policies of the Act when it engages in violent misconduct that has the effect of restraining or coercing employees.²³

The Supreme Court has often recognized the special competence of the NLRB to deal with unfair labor practices and thus to promote the policies of the Act.²⁴ In this regard, the NLRB has a variety of remedies by which it provides relief to victims of strike violence. These remedies include the issuance and posting of cease and desist orders,²⁵ withholding of a bargaining order when a bargaining order would otherwise be appropriate,²⁶ and decertification of a union as the exclusive collective bargaining representative of the employees.²⁷ In addition, the NLRB may seek court enforcement of its orders²⁸ or injunctions from the federal courts.²⁹

The NLRB, however, has no power to award punitive damages and only limited power to make compensatory awards.³⁰ In exercise of this power, the NLRB may issue backpay awards against a union for

21. 29 U.S.C. § 157 (1976).

22. *Id.* § 158(b)(1)(A).

23. *See, e.g.*, *Local Lodge No. 5, Int'l Bhd. of Boilermakers*, 249 N.L.R.B. 840, 851 (1980); *International Ass'n of Machinists*, 189 N.L.R.B. 50, 58 (1971); *United Furniture Workers*, 139 N.L.R.B. 1279, 1284 (1962).

24. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192-94 (1941); D. McDowell & K. Huhn, *NLRB Remedies for Unfair Labor Practices 6-7* (Indus. Research Unit, Labor Relations and Public Policy Series, Rep. No. 12, 1976); *see NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953).

25. *E.g.*, *Local Lodge No. 5, Int'l Bhd. of Boilermakers*, 249 N.L.R.B. 840, 851-52 (1980); *International Printing Pressmen & Assistant's Union No. 284*, 230 N.L.R.B. 1104, 1106-07 (1977); *Local 248, Meat & Allied Food Workers*, 222 N.L.R.B. 1023, 1036 (1976), *enforced mem.*, 84 Lab. Cas. (CCH) ¶ 10,826 (7th Cir. 1978).

26. *E.g.*, *Allou Distribs., Inc.*, 201 N.L.R.B. 47, 48 (1973); *Bliss (Artercraft Mantel & Fireplace Co.)*, 174 N.L.R.B. 737, 743-45 (1969); *Bernstein (Laura Modes Co.)*, 144 N.L.R.B. 1592, 1594-96 (1963).

27. *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 13-15 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

28. 29 U.S.C. § 160(e) (1976).

29. *Id.* §§ 160(j), (l).

30. *UAW v. Russell*, 356 U.S. 634, 646 (1958); *see United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-66 (1954). The Board may issue backpay awards, 29 U.S.C. § 160(c) (1976), and compensate union members when a union wrongfully collects dues. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539-41 (1943).

wages lost by employees because of violence during a strike.³¹ To date, however, the Board has refused to use this remedy.³²

NLRB jurisdiction is not exclusive; exceptions to the *Garmon* preemption rule exist. The power of the state courts to award compensatory and punitive damages for losses inflicted by mass picketing or other violence in a labor dispute is well-established.³³ Federal courts are also a proper forum for damage actions in limited situations.³⁴ In addition, violent misconduct may be enjoined by state³⁵ and federal³⁶ courts. Furthermore, state and local authorities may prosecute those engaging in violent misconduct under appropriate criminal laws,³⁷ and in a recent Ninth Circuit case,³⁸ federal criminal statutes—the Hobbs Act,³⁹ the Racketeer Influenced and Corrupt Organizations Act,⁴⁰ and the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprise Act⁴¹—were applied to labor violence.⁴²

31. 29 U.S.C. § 160(c) (1976).

32. *Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.)*, 219 N.L.R.B. 414, 414 (1975), *enforced on other grounds*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399, 399-400 (1973); *see Drobona v. NLRB*, 612 F.2d 1095, 1096-97 (8th Cir.), *cert. denied*, 449 U.S. 821 (1980).

33. *UAW v. Russell*, 356 U.S. 634, 645-46 (1958); *United Constr. Workers v. Laburnum Constr. Corp.* 347 U.S. 656, 663-66 (1954); *United Aircraft Corp. v. International Ass'n of Machinists*, 161 Conn. 79, 83-84, 285 A.2d 330, 335 (1971), *cert. denied*, 404 U.S. 1016 (1972); *Cliff House Bldg. Corp. v. Plumbers Union Local 690*, 232 Pa. Super. 533, 536, 336 A.2d 339, 340-41 (1975).

34. *See infra* pt. II(A).

35. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 138-39 (1957); *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 272-75 (1956); *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 748-49 (1942); *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292-93 (1941).

36. The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976), prohibits the issuance of an injunction against legitimate labor activities. *Id.* § 104. Acts of violence, however, can be restrained. *Id.* § 107; *Scott v. Moore*, 640 F.2d 708, 713-14, *reh'g en banc granted*, 656 F.2d 108 (5th Cir. 1981).

37. *People v. LoPresto*, 9 Mich. App. 318, 332, 156 N.W.2d 586, 594 (1967); *Newsday, Inc. v. Feldman*, 8 A.D.2d 978, 978-79, 191 N.Y.S.2d 10, 12-13, *motion for leave to appeal denied*, 9 A.D.2d 629, 191 N.Y.S.2d 547 (1959); *see Russell v. UAW*, 258 Ala. 615, 620, 64 So. 2d 384, 388 (1953), *aff'd on rehearing*, 264 Ala. 456, 88 So. 2d 175 (1956), *aff'd*, 356 U.S. 634 (1958).

38. *United States v. Thordarson*, 646 F.2d 1323 (9th Cir.), *cert. denied*, 102 S. Ct. 601 (1981).

39. 18 U.S.C. § 1951 (1976).

40. 18 U.S.C. §§ 1961-1968 (1976).

41. 18 U.S.C. § 1952 (1976).

42. *United States v. Thordarson*, 646 F.2d 1323, 1326-31 (9th Cir.), *cert. denied*, 102 S. Ct. 601 (1981). *But see United States v. Enmons*, 410 U.S. 396, 401 (1973) (minor picket-line violence held immune from prosecution under Hobbs Act).

This Note emphasizes that remedies for injuries resulting from labor violence should be aimed at compensating injured parties for harm suffered as a result of the violence, deterring violence and promoting industrial peace by effectuating the policies of the Act. Part I discusses the NLRB's failure to attain these goals. Part II analyzes the extent to which state and federal courts have succeeded where the NLRB has failed. The Note concludes that because of the NLRB's special competence in the labor area, it should make greater use of its most powerful sanctions in order to remedy and deter strike violence more effectively.

I. THE SCOPE OF THE NLRB'S REMEDIAL POWER

If the Board determines that an unfair labor practice has been committed, it is empowered by section 10(c) of the Act to serve an order requiring the violator "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act]."⁴³ The policies of the NLRA that the Board seeks to implement through its remedial powers are the promotion of free collective bargaining and the protection of the freedom of workers to organize, to form unions, to select their bargaining representatives and to engage in, or to refrain from, concerted activities for their mutual aid and protection.⁴⁴ A Board remedy will be invalid if it conflicts with any of these statutory policies⁴⁵ or if it is formulated to accomplish an objective outside of the statutory grant.⁴⁶

A Board order must be remedial, not punitive.⁴⁷ An order is remedial if it restores the status quo by removing any advantage

43. 29 U.S.C. § 160(c) (1976).

44. *Id.* § 151. The overriding purpose of the NLRA is to promote industrial peace. *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 13 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *see Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

45. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 238 (1938); *National Cash Register Co. v. NLRB*, 466 F.2d 945, 967 (6th Cir. 1972); *see Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-11 (1940); *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 498-99 (5th Cir. 1972).

46. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *see H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12-13 (1940).

47. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938); *see Local 60, Carpenters v. NLRB*, 365 U.S. 651, 655 (1961); *UAW v. Russell*, 356 U.S. 634, 643 (1958). The Supreme Court has stated that it does not believe that "Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940).

gained by a violator of the Act⁴⁸ or if it places an injured party in the position he occupied prior to the commission of the unfair labor practice.⁴⁹ Because Board remedies are designed to restore the status quo, the Board may not levy penalties unrelated to actual injury.⁵⁰ Thus, a remedy may not be formulated solely to effect deterrence.⁵¹ A Board order, however, may act indirectly as a deterrent if its primary aim is to effectuate the policies of the Act.⁵²

Although the Board's remedies are limited in that they cannot be punitive, or be designed solely to act as deterrents, the NLRA grants to the NLRB broad discretion in remedying unfair labor practices.⁵³ There is an infinite variety of specific situations that the Board may have to remedy, and each remedy must be tailored to meet the situation at hand.⁵⁴ That a particular remedy has not previously been applied does not preclude its use in the appropriate circumstances.⁵⁵

A. Non-Monetary Remedies

I. Cease and Desist Orders

The traditional Board remedy for a violation of section 8(b)(1)(A) is the issuance of an order that directs the violator to cease and desist

48. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540-41 (1943); *D. McDowell & K. Huhn*, *supra* note 24, at 13; *see NLRB v. Townhouse TV & Appliances, Inc.*, 531 F.2d 826, 830 (7th Cir. 1976).

49. *NLRB v. Florida Medical Center, Inc.*, 576 F.2d 667, 673 (5th Cir. 1978); *see Nathanson v. NLRB*, 344 U.S. 25, 27 (1952); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *NLRB v. Townhouse TV & Appliances, Inc.*, 531 F.2d 826, 830 (7th Cir. 1976).

50. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940); *NLRB v. Rubatex Corp.*, 601 F.2d 147, 153 (4th Cir. 1979) (Harvey, J., concurring in part and dissenting in part); *see Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 498-99 (5th Cir. 1972).

51. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940); *Bell & Howell Co. v. NLRB*, 598 F.2d 136, 147 n.36 (D.C. Cir.), *cert. denied*, 442 U.S. 942 (1979); *National Cash Register Co. v. NLRB*, 466 F.2d 945, 968 (6th Cir. 1972); *NLRB v. Coats & Clark, Inc.*, 241 F.2d 556, 560 (5th Cir. 1957).

52. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940); *see Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 499 (5th Cir. 1972); *D. McDowell & K. Huhn*, *supra* note 24, at 14.

53. *Local 60, United Bhd. of Carpenters & Joiners v. NLRB*, 365 U.S. 651, 655 (1961); *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 412 (1960); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see 29 U.S.C. § 160(c)* (1976). The statutory grant of authority by Congress, *see supra* text accompanying note 43, recognizes the special competence of the NLRB to handle unfair labor practices. Therefore, Board remedial orders are subject to judicial review solely on questions of law, not on matters of policy. *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 & n.28 (1957); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

54. *Local 60, United Bhd. of Carpenters & Joiners v. NLRB*, 365 U.S. 651, 655 (1961); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

55. *See Local 60, United Bhd. of Carpenters & Joiners v. NLRB*, 365 U.S. 651, 655 (1961); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

from the specific conduct that violated the Act.⁵⁶ Cease and desist orders generally require the violator to post a notice that sets forth the terms and conditions of the order.⁵⁷ When the acts of violence are repeated or particularly egregious, extraordinary notification requirements—mailing of copies of the order to all employees⁵⁸ or publica-

56. R. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 287 (1976); D. McDowell & K. Huhn, *supra* note 24, at 19. Section 10(c) empowers the NLRB to issue cease and desist orders. 29 U.S.C. § 160(c) (1976). In fashioning a cease and desist order, the Board must consider the nature and seriousness of the unfair labor practices, the offender's past history of violations and the likelihood of recurrence. *NLRB v. Express Publishing Co.*, 312 U.S. 426, 436-37 (1941). The order is typically framed in terms of a promise that the violator will refrain from such conduct. For example, a cease and desist order issued against Union de Empleados read as follows: "WE WILL NOT threaten to inflict bodily harm nor shall we inflict bodily harm upon any of our members or any employee of National Packing Company or any member of their families nor damage their property because any of our members or the employees of National Packing Company exercise their rights not to join or assist this Union in strike activities." Union de Empleados, 192 N.L.R.B. 700, 700 (1971). A cease and desist order may be either narrow, prohibiting specific acts of misconduct, or broad. Broad orders have been found to be appropriate when there is an extensive pattern of serious strike-associated misconduct and when the union fails to take any consequential steps to stop or curtail such activity by its members, *Local 248, Meat & Allied Food Workers*, 222 N.L.R.B. 1023, 1023 (1976), *enforced mem.*, 84 Lab. Cas. (CCH) ¶ 10,826 (7th Cir. 1978), or when the union has a proclivity to violate the Act by engaging in widespread misconduct that demonstrates a general disregard for employees' statutory rights. *Hickmott Foods, Inc.*, 242 N.L.R.B. 1357, 1357 (1979); *Union Nacional de Trabajadores (Jacobs Constructors Co.)*, 219 N.L.R.B. 405, 411-12 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). Broad orders typically require the violator to cease and desist from both specific acts of misconduct and from restraining or coercing employees "in any other manner" in their exercise of § 7 rights. *E.g.*, *Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399, 407 (1973); *International Ass'n of Machinists*, 189 N.L.R.B. 50, 58 (1971); *Local 115, Int'l Bhd. of Teamsters*, 186 N.L.R.B. 56, 62 (1970). They may forbid violence not only against employees of a particular employer, but also against employees of any other employer engaged in commerce, *District 1199, Nat'l Union of Hosp. & Health Care Employees*, 245 N.L.R.B. 800, 806 (1979), or within a certain geographic area. *Union de Tronquistas, Local 901 (Hotel La Concha)*, 193 N.L.R.B. 591, 598 (1971).

57. R. Gorman, *supra* note 56, at 287; D. McDowell & K. Huhn, *supra* note 24, at 73; *see, e.g.*, *Local Lodge No. 5, Int'l Bhd. of Boilermakers*, 249 N.L.R.B. 840, 852 (1980); *Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399, 407 (1977); *Lithographers & Photoengravers Int'l Union, Local 223*, 193 N.L.R.B. 11, 22 (1971). To comply with such an order, the violator will be required to maintain the notice in a conspicuous location for a period of sixty days. *E.g.*, *Local Lodge No. 5, Int'l Bhd. of Boilermakers*, 249 N.L.R.B. 840, 852 (1980); *Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399, 407 (1977); *Lithographers & Photoengravers Int'l Union, Local 223*, 193 N.L.R.B. 11, 22 (1971).

58. *See NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 11-12 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Union de Tronquistas, Local 901 (Hotel La Concha)*, 193 N.L.R.B. 591, 599 (1971).

tion of the order in a local newspaper⁵⁹ — are warranted to neutralize the effects of such conduct. These strong measures demonstrate to all affected employees that the Board has taken steps to alleviate the coercive effects of the unfair labor practices.⁶⁰

Board orders, however, are not self-enforcing. Instead, the Board must petition the federal courts of appeal for enforcement.⁶¹ Although a Board decision cannot be overturned if it is supported by “evidence [that] appear[s] substantial when viewed on the record as a whole,”⁶² the appellate courts need not “stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.”⁶³ Thus, in some cases, the courts have either modified⁶⁴ or denied enforcement⁶⁵ of Board orders.

Once a court of appeals enforces a Board order, however, it becomes a lawful decree of that court.⁶⁶ If a violator refuses to comply with the enforced order or commits another violation similar to that prohibited by the cease and desist order, the Board may request the court to impose civil or criminal contempt sanctions to encourage compliance.⁶⁷ Although imposition of these powerful sanctions po-

59. See *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 401 (D.C. Cir.), cert. denied, 102 S. Ct. 119 (1981); *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 11-12 (1st Cir. 1976), cert. denied, 429 U.S. 1039 (1977). In one case in which the union's conduct was flagrant, the Board required the union president to sign the notice and read it aloud at assemblies of all union members. *Fruin-Colnon Corp.*, 227 N.L.R.B. 59, 59 (1976).

60. *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 11-12 (1st Cir. 1976), cert. denied, 429 U.S. 1039 (1977).

61. 29 U.S.C. § 160(e) (1976).

62. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951); accord *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *NLRB v. Max Factor & Co.*, 640 F.2d 197, 204 (9th Cir. 1980), cert. denied, 451 U.S. 983 (1981); *NLRB v. Atkins Saw Div. of Nicholson File Co.*, 399 F.2d 907, 910 (5th Cir. 1968).

63. *NLRB v. Brown*, 380 U.S. 278, 291 (1965); accord *NLRB v. Atkins Saw Div. of Nicholson File Co.*, 399 F.2d 907, 910 (5th Cir. 1968) (quoting *NLRB v. Brown*, 380 U.S. 278, 291 (1965)); see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

64. E.g., *NLRB v. Maywood Plant of Grede Plastics*, 628 F.2d 1, 8 (D.C. Cir. 1980); *NLRB v. Teamsters Local Union 327*, 432 F.2d 933, 935 (6th Cir. 1970); *Retail Clerks Union Local 770 v. NLRB*, 296 F.2d 368, 375 (D.C. Cir. 1961); *NLRB v. Atlanta Coca-Cola Bottling Co.*, 293 F.2d 300, 310 (5th Cir. 1961).

65. E.g., *Firestone Tire & Rubber Co. v. NLRB*, 539 F.2d 1335, 1339 (4th Cir. 1976); *NLRB v. Keller-Crescent Co.*, 538 F.2d 1291, 1301 (7th Cir. 1976); *Great Lakes Screw Corp. v. NLRB*, 409 F.2d 375, 382 (7th Cir. 1969); *NLRB v. Atkins Saw Div. of Nicholson File Co.*, 399 F.2d 907, 912 (5th Cir. 1968); *NLRB v. Brown*, 319 F.2d 7, 11 (10th Cir. 1963), aff'd, 380 U.S. 278 (1965); *NLRB v. Latex Indus., Inc.*, 307 F.2d 737, 740 (6th Cir. 1962).

66. *D. McDowell & K. Huhn*, supra note 24, at 246; see *A. Goldman, Labor Law and Industrial Relations in the United States of America* ¶ 730, at 283 (1979).

67. *NLRB v. Express Publishing Co.*, 312 U.S. 426, 433 (1941); see *NLRB v. Teamsters, Local No. 327*, 592 F.2d 921, 922 (6th Cir. 1979). The sanctions available

tentially strengthens the Board's remedial power and assists it in effectuating the policies of the Act, the burden of proof with respect to the propriety of the sanctions rests with the Board.⁶⁸ The Board must demonstrate with clear and convincing evidence, not merely by a preponderance of the evidence, that the contemnor violated the court-enforced Board order.⁶⁹ The effectiveness of cease and desist orders coupled with posting requirements is thus limited to the extent to which the Board is able to obtain enforcement in the courts and to meet the strict burden of proof requirements in contempt proceedings.

The effectiveness of cease and desist orders, however, is more fundamentally limited by the delay inherent in the Board's procedures. Many months often pass between the occurrence of an unfair labor practice that results in harm and the issuance of a Board order.⁷⁰ These limitations may explain the disregard some parties hold for orders of the Board.⁷¹ Nonetheless, cease and desist orders remain the

to the court for civil contempt are those "necessary under the circumstances to grant full remedial relief, to coerce the contemnor into compliance . . . and to fully compensate the complainant for losses sustained." *NLRB v. Vander Wal*, 316 F.2d 631, 634 (9th Cir. 1963) (per curiam) (footnote omitted); *accord* *United States v. UMW*, 330 U.S. 258, 303-04 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 448 (1911). If the court's decree is "knowingly, willfully and intentionally" violated, the Board may petition the court to hold the violator in criminal contempt, thereby subjecting him to fines and imprisonment. *In re Winn-Dixie Stores, Inc.*, 386 F.2d 309, 316 (5th Cir. 1967); *accord* *United States v. UMW*, 330 U.S. 258, 303-04 (1947); *NLRB v. Star Metal Mfg. Co.*, 187 F.2d 856, 857 (3d Cir. 1951).

68. *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1160 (5th Cir. 1976); *NLRB v. Southwire Co.*, 429 F.2d 1050, 1053 (5th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); *NLRB v. Laney & Duke Storage Warehouse Co.*, 424 F.2d 109, 112 (5th Cir. 1970); *see* *NLRB v. John Zink Co.*, 551 F.2d 799, 801 (10th Cir. 1977).

69. *NLRB v. John Zink Co.*, 551 F.2d 799, 801 (10th Cir. 1977); *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1160 (5th Cir. 1976); *NLRB v. Southwire Co.*, 429 F.2d 1050, 1053 (5th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); *NLRB v. Laney & Duke Storage Warehouse Co.*, 424 F.2d 109, 112 (5th Cir. 1970).

70. S. Rep. No. 105, 80th Cong., 1st Sess. 8 (1947), *reprinted in* 1 *NLRB, Legislative History of the Labor Management Relations Act, 1947*, at 407, 414 (1948); A. Cox, D. Bok & R. Gorman, *Cases and Materials on Labor Law* 258 (9th ed. 1981); Note, *NLRB Power To Award Damages In Unfair Labor Practice Cases*, 84 *Harv. L. Rev.* 1670, 1671 (1971) [hereinafter cited as *NLRB Power*].

71. *E.g.*, *Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.)*, 219 N.L.R.B. 414, 419 & n.19 (1975) (Member Kennedy, dissenting in part), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Union Nacional de Trabajadores (Jacobs Constructors Co.)*, 219 N.L.R.B. 405, 411-12 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399, 407 (1973). The disrespect certain parties hold for the NLRB is epitomized by the testimony of a union agent at the administrative hearing in *Jacobs Constructors Co.*, during which he stated that he "[did] not recognize the authority of the law or of

primary Board remedy,⁷² although they are effective only when applied to unions that exhibit a preference to abide by the law. Although the Board has broad discretion in formulating remedies,⁷³ it has limited its use of section 10(j) injunctions and other remedies that could deal with strike violence more effectively than cease and desist orders.

2. Section 10(j) Injunctions

Board remedial power is bolstered by section 10(j) of the Act, which grants the NLRB the power to seek a temporary injunction from a federal district court immediately upon the Board's issuance of an unfair labor practice complaint.⁷⁴ The use of this remedy would be more effective than the issuance of a cease and desist order because the delay inherent in cease and desist orders is not present when an injunction is sought.⁷⁵ Section 10(j) injunctions, however, are infrequently used weapons in the Board's arsenal of remedies.⁷⁶ The Board has "exercis[ed] its power 'not as a broad sword, but as a scalpel, ever mindful of the dangers inherent in conducting labor management relations by way of injunction.'"⁷⁷

The concerns expressed by the passage of the Norris-LaGuardia Act in 1932⁷⁸ may explain the Board's reluctance to seek injunctions.⁷⁹

the Board that administers the law.' " 219 N.L.R.B. at 412. He further testified that "the laws that are in effect in this country [should] be applied in a manner favorable to the workers and when they cannot be they should be violated." *Id.*

72. See sources cited *supra* note 56.

73. See *supra* notes 53-55 and accompanying text.

74. 29 U.S.C. § 160(j) (1976).

75. Note, *Temporary Injunctions Under Section 10(j) of the Taft-Hartley Act*, 44 N.Y.U. L. Rev. 181, 188 (1969) [hereinafter cited as *Temporary Injunctions*]; Note, *Section 10(j) of the National Labor Relations Act: A Legislative, Administrative and Judicial Look at a Potentially Effective (But Seldom Used) Remedy*, 18 Santa Clara L. Rev. 1021, 1023-24 (1978) [hereinafter cited as *Section 10(j)*]; see S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947), reprinted in 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 407, 414, 433 (1948).

76. Siegel, *Section 10(j) of the National Labor Relations Act: Suggested Reforms for an Expanded Use*, 13 B.C. Indus. & Com. L. Rev. 457, 457 (1972); *Temporary Injunctions*, *supra* note 75, at 182; *Section 10(j)*, *supra* note 75, at 1022; Recent Development, *The 10(j) Labor Injunction: An Exercise in Statutory Construction*, 42 Wash. L. Rev. 1117, 1128 (1967).

77. *McLeod v. General Elec. Co.*, 366 F.2d 847, 849-50 (2d Cir. 1966) (quoting Address by Frank W. McCulloch, Chairman of the NLRB, *The NLRB in Action*, before the Eighth Annual Joint Industrial Relations Conference, Michigan State University (Apr. 19, 1962)), *judgment set aside on other grounds per curiam*, 385 U.S. 533 (1967).

78. Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (1976)).

79. *Section 10(j)*, *supra* note 75, at 1032-33; see *McLeod v. General Elec. Co.*, 366 F.2d 847, 849-50 (2d Cir. 1966), *judgment set aside on other grounds per curiam*, 385 U.S. 533 (1967).

Prior to its passage, labor injunctions were readily obtained by employers and were used to counter the economic weapons used by labor unions: strikes, boycotts and picketing.⁸⁰ The widespread use of labor injunctions, however, impeded workers' participation in concerted activities.⁸¹ To counter these dangers, Congress passed the Norris-LaGuardia Act,⁸² thereby severely limiting the power of federal courts to issue labor injunctions.⁸³

Section 10(j) is an exception to Norris-LaGuardia's prohibition against injunctive relief.⁸⁴ Section 10(h) of the NLRA states that "[w]hen granting appropriate temporary relief or a restraining order, . . . the jurisdiction of courts sitting in equity shall not be limited by [the Norris-LaGuardia Act]."⁸⁵ Congress sought to provide the NLRB with the power to act in the public interest by seeking injunctive relief in all types of unfair labor practice cases in order to eliminate obstructions to free collective bargaining promptly.⁸⁶

A prerequisite to the granting of a section 10(j) injunction is that the Board has correctly determined that there is reasonable cause to believe that the unlawful conduct constitutes an unfair labor practice.⁸⁷

80. *Scott v. Moore*, 640 F.2d 708, 713, *reh'g en banc granted*, 656 F.2d 108 (5th Cir. 1981); *S. Cohen*, Labor Law 104-05 (1964) [hereinafter cited as *S. Cohen II*]; *A. Goldman*, *supra* note 66, at 50; *C. Gregory & H. Katz*, *supra* note 3, at 99-104.

81. *Scott v. Moore*, 640 F.2d 708, 713, *reh'g en banc granted*, 656 F.2d 108 (5th Cir. 1981); *C. Gregory & H. Katz*, *supra* note 3, at 99-104; *see S. Cohen II*, *supra* note 80, at 104-05.

82. *Scott v. Moore*, 640 F.2d 708, 713, *reh'g en banc granted*, 656 F.2d 108 (5th Cir. 1981); *A. Goldman*, *supra* note 66, at 51; *see McLeod v. General Elec. Co.*, 366 F.2d 847, 849-50 (2d Cir. 1966), *judgment set aside on other grounds per curiam*, 385 U.S. 533 (1967).

83. *Scott v. Moore*, 640 F.2d 708, 713-14, *reh'g en banc granted*, 656 F.2d 108 (5th Cir. 1981); *McLeod v. General Elec. Co.*, 366 F.2d 847, 849 (2d Cir. 1966), *judgment set aside on other grounds per curiam*, 385 U.S. 533 (1967); *W. Connolly & M. Connolly*, *Work Stoppages and Union Responsibility* 172 (1977); *A. Goldman*, *supra* note 66, at 51; *Stewart & Townsend*, *Strike Violence: The Need For Federal Injunctions*, 114 U. Pa. L. Rev. 459, 462 (1966); *Note*, *A Survey of Labor Remedies*, 54 Va. L. Rev. 38, 120 (1968).

84. *McLeod v. General Elec. Co.*, 366 F.2d 847, 849 (2d Cir. 1966), *judgment set aside on other grounds per curiam*, 385 U.S. 533 (1967); *Douds v. Local 294, Int'l Bhd. of Teamsters*, 75 F. Supp. 414, 418 (N.D.N.Y. 1947); 29 U.S.C. § 160(h) (1976); *W. Connolly & M. Connolly*, *supra* note 83, at 197; *Siegel*, *supra* note 76, at 457; *Section 10(j)*, *supra* note 75, at 1025-26.

85. 29 U.S.C. § 160(h) (1976).

86. S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 407, 414, 433 (1948).

87. *Johnston v. Evans*, 223 F. Supp. 766, 769 (E.D.N.C. 1963); *see Minnesota Mining & Mfg. Co. v. Meter*, 385 F.2d 265, 269 (8th Cir. 1967); *Angle v. Sacks*, 382 F.2d 655, 658 (10th Cir. 1967); *McLeod v. Compressed Air Workers*, 292 F.2d 358, 361 (2d Cir. 1961); *Douds v. International Longshoremen's Ass'n*, 241 F.2d 278, 285 (2d Cir. 1957).

The Act requires that an injunction be issued only when it is "just and proper."⁸⁸ The vagueness of the "just and proper" standard of section 10(j) has led to various interpretations by the federal courts. In *Angle v. Sacks*,⁸⁹ the Tenth Circuit stated that it would not grant temporary relief under section 10(j) unless the circumstances demonstrated "a probability that the purposes of the Act [would] be frustrated."⁹⁰ The Second Circuit, in *McLeod v. General Electric Co.*,⁹¹ applied a different standard: It refused to issue an injunction because the NLRB did not demonstrate the necessity of an injunction to preserve the status quo or to prevent irreparable harm.⁹² In *Minnesota Mining & Manufacturing Co. v. Meter*,⁹³ the Eighth Circuit, noting that reasonable cause alone was insufficient for the granting of a section 10(j) injunction, stated that "[s]ection 10(j) is reserved for a more serious and extraordinary set of circumstances where the unfair labor practices, unless contained, would have an adverse and deleterious effect on the rights of the aggrieved party which could not be remedied through the normal Board channels."⁹⁴

The unusually strict standard applied by the Eighth Circuit is unwarranted. Section 10(j) is an exception to the Norris-LaGuardia Act;⁹⁵ therefore, federal courts sitting in equity should apply traditional requirements, such as preservation of the status quo or irreparable harm, and should not require a "serious and extraordinary set of circumstances" before issuing a section 10(j) injunction. Because section 10(j) allows the NLRB to seek injunctions to eliminate obstructions to free collective bargaining promptly, and violence in the course of a labor dispute is a major obstacle to free collective bargaining, use of section 10(j) injunctions in labor violence cases is appropriate and should be encouraged in order to promote the policies of the Act.

3. Withholding of a Bargaining Order

Another seldom used remedy for dealing with strike violence is the withholding of a bargaining order.⁹⁶ When an employer has violated

88. 29 U.S.C. § 160(j) (1976); see *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138, 142 (3d Cir. 1975); *Minnesota Mining & Mfg. Co. v. Meter*, 385 F.2d 265, 269 (8th Cir. 1967).

89. 382 F.2d 655 (10th Cir. 1967).

90. *Id.* at 660.

91. 366 F.2d 847 (2d Cir. 1966), *judgment set aside on other grounds per curiam*, 385 U.S. 533 (1967).

92. *Id.* at 850.

93. 385 F.2d 265 (8th Cir. 1967).

94. *Id.* at 270.

95. See sources cited *supra* note 84.

96. Note, *Union Violence and Bargaining Orders: A New Approach to Laura Modes*, 127 U. Pa. L. Rev. 1640, 1640 (1979) [hereinafter cited as *New Approach*]; see D. McDowell & K. Huhn, *supra* note 24, at 197.

his statutory duty to bargain⁹⁷ by committing unfair labor practices that undermine the union's majority status and preclude the possibility of holding a fair representation election, the NLRB may issue a bargaining order against the employer.⁹⁸ Union violence, however, has been held to relieve the employer of its duty to comply with the bargaining order until the union can demonstrate majority support by winning an election supervised by the Board.⁹⁹ Freeing the employer from its duty to bargain is known as the *Laura Modes* defense.¹⁰⁰

The Board considers the denial of a bargaining order an extraordinary sanction¹⁰¹ in that use of this remedy would deprive a substantial group of employees of the advantages of collective bargaining on the basis of a few employees' misconduct.¹⁰² The Board has been reluctant to withhold an otherwise appropriate bargaining order, even when the violence has been rather extensive.¹⁰³ Most instances of

97. Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5) (1976). Section 8(d) defines the duty to bargain as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." *Id.* § 158(d).

98. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-14 (1969); *Donovan v. NLRB*, 520 F.2d 1316, 1322 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); *J.P. Stevens & Co. v. NLRB*, 441 F.2d 514, 519-21 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971); *NLRB v. Lou De Young's Market Basket, Inc.*, 430 F.2d 912, 914 (6th Cir. 1970).

99. *Allou Distribs., Inc.*, 201 N.L.R.B. 47, 48 (1973); *Bliss (Artercraft Mantel & Fireplace Co.)*, 174 N.L.R.B. 737, 743-45 (1969); *Bernstein (Laura Modes Co.)*, 144 N.L.R.B. 1592, 1594-96 (1963).

100. *Bernstein (Laura Modes Co.)*, 144 N.L.R.B. 1592 (1963), was the first case in which the Board relieved an employer of his duty to bargain because a union had engaged in violent misconduct. Since then, the "*Laura Modes* defense" has been raised frequently when an employer has incurred a bargaining order, and a union has engaged in violence. *See, e.g.*, *Maywood Plant of Grede Plastics*, 235 N.L.R.B. 363, 363 (1978), *modified on other grounds*, 628 F.2d 1 (D.C. Cir. 1980); *Allou Distribs., Inc.*, 201 N.L.R.B. 47, 47 (1973); *Quintree Distribs., Inc.*, 198 N.L.R.B. 390, 404-05 (1972).

101. *Donovan v. NLRB*, 520 F.2d 1316, 1321 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); *Highland Plastics, Inc.*, 256 N.L.R.B. No. 28, at 38 (Sept. 29, 1980); *Philadelphia Ambulance Serv., Inc.*, 238 N.L.R.B. 1070, 1079 (1978); *Maywood Plant of Grede Plastics*, 235 N.L.R.B. 363, 365-66 (1978), *modified on other grounds*, 628 F.2d 1 (D.C. Cir. 1980); *United Mineral & Chem. Corp.*, 155 N.L.R.B. 1390, 1396 (1965), *enforcement denied in part*, 391 F.2d 829 (2d Cir. 1968).

102. *Donovan v. NLRB*, 520 F.2d 1316, 1321 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); *Highland Plastics, Inc.*, 256 N.L.R.B. No. 28, at 39 (Sept. 29, 1980).

103. *E.g.*, *Maywood Plant of Grede Plastics*, 235 N.L.R.B. 363, 367-68 (1978) (Member Murphy, dissenting in part), *modified on other grounds*, 628 F.2d 1 (D.C.

union misconduct result in the issuance of a cease and desist order,¹⁰⁴ but before the Board will withhold a bargaining order, it requires evidence of deliberate attempts by the union to circumvent the procedures and policies of the Act through violence and coercion.¹⁰⁵

Five factors have been set forth by the NLRB to be considered in determining whether a bargaining order should be denied due to union misconduct: (1) the extent of the union's interest in pursuing legal remedies; (2) evidence of deliberate planning of the acts of violence and intimidation attributable to the union; (3) whether assaults by union advocates were provoked; (4) the duration of the union's misconduct; and (5) the relative gravity of the union's misconduct as opposed to that of the employer.¹⁰⁶

In *Maywood Plant of Grede Plastics*,¹⁰⁷ the Board refused to withhold a bargaining order despite flagrant union violence, in part, because the employer provoked the union by engaging in unfair labor practices.¹⁰⁸ The union misconduct included threats and physical assaults against employees and managers, the breaking of windows of automobiles entering the plant, forcibly removing employees from vehicles, spraying irritants at employees and pursuing cars driven by nonstriking employees in an attempt to cause accidents.¹⁰⁹ The union's violence was not found by the Board to be sufficiently deliberate as to warrant the denial of a bargaining order.¹¹⁰ Deliberate or not, the coercive effect of the violence on the bargaining process is the same. Furthermore, by weighing the union's violence against the employer's violations, the Board is ignoring the coercive effects of the union misconduct on the employees' right to choose their collective bargaining representative freely.¹¹¹

Cir. 1980); *Quintree Distributions, Inc.*, 198 N.L.R.B. 390, 404-05 (1972); *United Mineral & Chem. Corp.*, 155 N.L.R.B. 1390, 1395-96 (1965), *enforcement denied in part*, 391 F.2d 829 (2d Cir. 1968).

104. See *supra* note 56 and accompanying text.

105. *Maywood Plant of Grede Plastics*, 235 N.L.R.B. 363, 365 (1978), *modified on other grounds*, 628 F.2d 1 (D.C. Cir. 1980); *Allou Distributions, Inc.*, 201 N.L.R.B. 47, 48 (1973); *New Approach*, *supra* note 96, at 1650-52.

106. *Maywood Plant of Grede Plastics*, 235 N.L.R.B. 363, 365 (1978), *modified on other grounds*, 628 F.2d 1 (D.C. Cir. 1980).

107. 235 N.L.R.B. 363 (1978), *modified on other grounds*, 628 F.2d 1 (D.C. Cir. 1980).

108. *Id.* at 366. The employer's unlawful conduct consisted of a campaign to oust the union by threats and promises directed at its employees. *Id.* at 364. Employees were interrogated and subject to surveillance. *Id.* Furthermore, the employer refused to bargain with the union and sought to discontinue the union's dues checkoff procedure. *Id.* On one occasion, a company guard brandished a gun in a scuffle with several union adherents. *Id.* at 366 & n.9.

109. *Id.* at 367-68 (Member Murphy, dissenting in part).

110. *Id.* at 365-66.

111. *NLRB v. Triumph Curing Center*, 571 F.2d 462, 478-80 (9th Cir. 1978) (Hufstедler, J., concurring and dissenting); *New Approach*, *supra* note 96, at 1658-59.

The granting or withholding of a bargaining order should not be used by the Board to reward or punish employers and unions.¹¹² Instead, it should be used to promote the employees' right to bargain collectively through the representative of their choice. Greater use of this Board sanction could serve to encourage union officers and agents to police their picket lines in an effort to curb misconduct that may result in the withholding of a bargaining order. Because the coercive effects of the union violence may result in a diminution or loss of majority support, the Board should consider withholding the bargaining order until the union can once again demonstrate majority support in a representation election.¹¹³ Focusing on the effects of union violence on the bargaining process should result in more successful *Laura Modes* defenses because flagrant violence is likely to interfere with the employees' free choice of bargaining representative.¹¹⁴ The increased use of this remedy would therefore aid in deterring violence as well as promoting the purposes of the Act by furthering peaceful collective bargaining.

4. Decertification

The threat or actual use of cease and desist orders is ineffective in controlling labor violence when applied to certain parties.¹¹⁵ Even greater Board use of section 10(j) injunctions and more frequent denials of bargaining orders may not be sufficient to deter some unions from engaging in egregious violent misconduct. When a union has demonstrated utter disregard for the peaceful purposes of the Act, and has committed serious violence, the NLRB may decertify that union as the exclusive collective bargaining representative of the employees.¹¹⁶ The Board has done so, however, in only one strike violence case. In *NLRB v. Union Nacional de Trabajadores*,¹¹⁷ the Board revoked the certification of a union that had engaged in physical attacks and threatened further violence against employers and employees at various jobsites.¹¹⁸

112. See *NLRB v. Triumph Curing Center*, 571 F.2d 462, 479-80 (9th Cir. 1978) (Hufstedler, J., concurring and dissenting); *New Approach*, *supra* note 96, at 1658-59.

113. *NLRB v. Triumph Curing Center*, 571 F.2d 462, 479 (9th Cir. 1978) (Hufstedler, J., concurring and dissenting); *New Approach*, *supra* note 96, at 1659.

114. See *New Approach*, *supra* note 96, at 1664.

115. See *supra* pt. I(A)(1).

116. *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 13-15 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *cf.* *International Bhd. of Teamsters, Local No. 671*, 199 N.L.R.B. 994, 994 (1972) (decertification appropriate for breach of duty of fair representation); *Hughes Tool Co.*, 104 N.L.R.B. 318, 329 (1953) (same).

117. 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

118. *Id.* at 6-12.

The First Circuit Court of Appeals, although permitting decertification,¹¹⁹ cautioned against the use of this drastic remedy.¹²⁰ Noting that a certified union is presumed to enjoy the support of a majority of the employees it represents, the court argued that decertification would nullify the interests of the majority; before the Board undertakes such a serious step, it should be certain that no adequate alternative means are available to promote the policies of the Act. The court noted that alternative means of attempting to control violence exist: When the violence affects the bargaining process, withholding of a bargaining order is appropriate; when violence affects employee section 7 rights, section 8(b)(1)(A) remedies, such as a cease and desist order, are appropriate. In the court's view, it is only when these remedies would be ineffective in controlling the violence that the extreme remedy of decertification is appropriate to achieve the overriding purpose of the Act—promotion of industrial peace.¹²¹

It should be realized, however, that cease and desist orders are often ineffective, and that the denial of a bargaining order is an infrequently used remedy. When a union has an extensive record of serious violent misconduct that prevents constructive collective bargaining from taking place on behalf of the employees that selected it as their representative, the Board should consider decertification to be an appropriate remedy. Although decertification is a harsh remedy, it falls within the NLRB's scope of remedial authority.¹²² It serves to undo the effects of the unfair labor practices committed by removing the union, which has restrained the employees' free exercise of their bargaining rights. Even though the employees selected the union to be their bargaining representative, if constructive bargaining cannot take place because of the coercive effects of the union's violence, the employees' interest will be better served through another union that abides by the policies of the Act and attempts to promote peaceful collective bargaining.

119. The court determined that it lacked jurisdiction to review the Board's decertification order. *Id.* at 12-13. Nevertheless, the court proceeded to issue advisory statements concerning the use of decertification as a remedy against violence. *Id.* at 13-15.

120. *Id.* In providing guidance for future decertification cases, the court suggested that the Board consider certain factors: (1) the effect of the union's misconduct at the particular plant where the violence occurred, as opposed to unrelated jobsites, on the representational and collective bargaining processes; (2) whether the objectives of the Act could be promoted equally well by alternative remedies; and (3) the union's proclivity for unlawful conduct. *Id.* at 14-15.

121. *Id.* at 13-14.

122. *Id.*; *International Bhd. of Teamsters, Local 671*, 199 N.L.R.B. 994, 994 (1972); *see Catalytic Indus. Maintenance Co.*, 209 N.L.R.B. 641, 641 (1974); *Hughes Tool Co.*, 104 N.L.R.B. 318, 321-22 (1953).

B. Monetary Remedies

In remedying the effects of strike violence on the individual, the NLRB has the statutory authority to order reinstatement of a discharged employee¹²³ and to require the payment of money to compen-

123. 29 U.S.C. § 160(c) (1976). A striking employee's right to reinstatement is determined by whether the work stoppage engaged in was an economic strike or an unfair labor practice strike. *NLRB v. Thayer Co.*, 213 F.2d 748, 752-53 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954). An economic strike is a work stoppage by employees in support of bargaining demands regarding wages and working conditions, or requests for union recognition by the employer. R. Doherty & G. DeMarchi, *Industrial and Labor Relations Terms: A Glossary for Students and Teachers* 30 (3d ed. 1974); R. Gorman, *supra* note 56, at 339. An unfair labor practice strike is a work stoppage by employees provoked by an employer's unfair labor practice. *NLRB v. Thayer Co.*, 213 F.2d 748, 752-53 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954); R. Gorman, *supra* note 56, at 339. An economic strike may be converted into an unfair labor practice strike by the commission of an unfair labor practice by the employer that has the effect of prolonging the strike. *Id.*; *see, e.g.*, *NLRB v. Crosby Chem., Inc.*, 188 F.2d 91, 95 (5th Cir. 1951); *Grand Lodge of Free & Accepted Masons*, 215 N.L.R.B. 75, 86 (1974), *enforced*, 548 F.2d 1276 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977). Economic strikers' rights to reinstatement developed over a thirty-year period. Initially, emphasis was placed on the employer's economic situation. An employer was permitted to hire replacements for strikers and thereafter refuse to rehire the strikers. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938). Strikers' rights were further limited when the Seventh Circuit held that an employer need not hire a striker if his job is abolished or absorbed by other employees. *Chauffeurs "General" Local No. 200 v. NLRB*, 233 F.2d 233, 238 (7th Cir. 1956). Concern then shifted from the employer to the economic striker. The Supreme Court stated, in 1965, that an employer's refusal to reemploy strikers may not be based upon anti-union animus. *NLRB v. Brown*, 380 U.S. 278, 287-88 (1965) (dictum). Two years later, the Supreme Court held that an employer must rehire strikers as jobs become available. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-81 (1967). A year later, the Board established that strikers are entitled to be reinstated as vacancies occur unless they have obtained regular and substantially equivalent employment elsewhere, or the employer is able to establish legitimate and substantial business reasons to justify his failure to offer reinstatement. *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369-70 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). In contrast, an unfair labor practice striker's right to reinstatement is absolute, *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285-86 (1956); *NLRB v. Fotochrome, Inc.*, 343 F.2d 631, 633 (2d Cir.), *cert. denied*, 382 U.S. 833 (1965), provided that the employee has not engaged in any misconduct justifying his discharge. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 264 (1939) (Stone, J., concurring); *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385, 390 (4th Cir. 1967). Section 10(c) of the Act prohibits the NLRB from ordering the reinstatement of any employee discharged "for cause." 29 U.S.C. § 160(c) (1976). Strike misconduct constitutes sufficient cause for an employer's refusal to reinstate economic strikers. *Firestone Tire & Rubber Co. v. NLRB*, 449 F.2d 511, 513 (5th Cir. 1971); *W.J. Ruscoe Co. v. NLRB*, 406 F.2d 725, 727 (6th Cir. 1969); *Standard Lime & Stone Co. v. NLRB*, 97 F.2d 531, 536 (4th Cir. 1938). The Board must also consider the impact of an employer's unfair labor practice in determining whether the violent misconduct of unfair labor practice strikers should bar their reinstatement. *Local 883, UAW v. NLRB*, 300 F.2d 699, 702-03 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962); *NLRB v. Thayer Co.*, 213 F.2d 748, 757 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954); R.

sate an employee who has suffered lost wages as a result of another's unlawful conduct.¹²⁴ The purpose of these orders is to place the injured party in the same economic position he would have been in had the unlawful conduct not been committed.¹²⁵

Despite this statutory power, the NLRB has consistently held that it will not impose a backpay award against a union in favor of employees coerced by violence into joining a strike.¹²⁶ The NLRB has, however, imposed backpay awards against unions in other situations:

Gorman, *supra* note 56, at 349-50; Sahm, *Picket-Line Misconduct and Employee Reinstatement*, 56 A.B.A. J. 561, 563-64 (1970). Under this balancing approach, the employer's right to refuse to reinstate has been upheld where the employee caused property damage, *W.J. Ruscoe Co. v. NLRB*, 406 F.2d 725, 726-27 (6th Cir. 1969); *NLRB v. Mt. Clemens Pottery Co.*, 147 F.2d 262, 267-68 (6th Cir. 1945); *Standard Lime & Stone Co. v. NLRB*, 97 F.2d 531, 533-34, 536 (4th Cir. 1938), or engaged in physical violence. *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385, 392-93 (4th Cir. 1967); *Standard Lime & Stone Co. v. NLRB*, 97 F.2d 531, 534-36 (4th Cir. 1938). Not all violent misconduct, however, will preclude reinstatement. Courts have recognized a distinction between situations in which the employee engaged in protected concerted activity but entered the realm of unlawful conduct spontaneously, and cases in which the violent misconduct was so flagrant as to bar the right to reinstatement. *Compare NLRB v. Wallick*, 198 F.2d 477, 484-85 (3d Cir. 1952) (minor violence not a bar to reinstatement), and *Republic Steel Corp. v. NLRB*, 107 F.2d 472, 479 (3d Cir. 1939) (same), *modified on other grounds*, 311 U.S. 7 (1940), with *W.J. Ruscoe Co. v. NLRB*, 406 F.2d 725, 726-27 (6th Cir. 1969) (misconduct exceeding "reasonable limits" sufficient to justify refusal to reinstate), and *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385, 391-93 (4th Cir. 1967) (criminal and dangerous activities sufficient to justify refusal to reinstate) and *Standard Lime & Stone Co. v. NLRB*, 97 F.2d 531, 533-34 (4th Cir. 1938) (dynamiting company property sufficient to bar reinstatement). By permitting reinstatement in cases of minor picket-line violence, the courts recognize that picket lines and prolonged strikes are often emotionally-charged situations. *Republic Steel Corp. v. NLRB*, 107 F.2d 472, 479 (3d Cir. 1939), *modified on other grounds*, 311 U.S. 7 (1940); see *NLRB v. Thayer Co.*, 213 F.2d 748, 756-57 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954); Note, *Strike Misconduct: An Illusory Bar To Reinstatement*, 72 Yale L.J. 182, 185 (1962).

124. 29 U.S.C. § 160(c) (1976). Awards of backpay are not limited to lost earnings of employees who were reinstated following an unlawful discharge. Backpay, in the form of earnings for lost employment opportunities, has been imposed against unions whose hiring hall referrals discriminated against nonmember applicants in favor of union members. *International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 373*, 232 N.L.R.B. 504, 506 (1977), *enforced*, 108 L.R.R.M. 2278 (3d Cir. 1981); *Local 675, Int'l Bhd. of Elec. Workers*, 223 N.L.R.B. 1499, 1499-1500 (1976), *enforced*, 82 Lab. Cas. (CCH) ¶ 10,147 (3d Cir. 1977).

125. *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941).

126. *E.g.*, *Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.)*, 219 N.L.R.B. 414, 414 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399, 399-400 (1973); *International Union of Operating Eng'rs, Local 513*, 145 N.L.R.B. 554, 555 (1963); *Local 983, United Bhd. of Carpenters & Joiners*, 115 N.L.R.B. 1123, 1123 (1956).

when the union (1) caused the unlawful discharge of an employee;¹²⁷ (2) refused to process an employee's grievance with respect to his discharge;¹²⁸ or (3) otherwise breached its duty of fair representation.¹²⁹ One of the Board's rationales for refusing to apply this remedy in strike violence cases is that other adequate Board remedies exist that would not interfere with the right to strike,¹³⁰ such as a section 10(j) injunction or the withholding of a bargaining order.¹³¹ As discussed, however, these remedies are infrequently used.¹³² More importantly, they in no way compensate the employees.

Another reason advanced by the NLRB for not granting this remedy is that if all unions were required to provide backpay awards for all intimidated employees when only a few union members engaged in misconduct, few unions could afford to set up a picket line.¹³³ This argument, however, ignores the Board's duty to formulate remedies aimed at undoing the effects of the unfair labor practices committed. That the argument is specious is amply illustrated by the fact that the union can be found liable to employees in state court where not only backpay, but full compensatory and punitive damages are available.¹³⁴

A third reason given by the NLRB is that an order of backpay in these circumstances would be punitive, not remedial, and would therefore exceed the Board's statutory authority.¹³⁵ Awarding backpay to employees who lost wages due to strike violence, however, is remedial, not punitive, because it is directly related to remedying the

127. *E.g.*, Union Boiler Co., 245 N.L.R.B. 719, 719 n.3 (1979); Guadalupe Carrot Packers, 228 N.L.R.B. 369, 369-70 (1977); Rossini, 228 N.L.R.B. 308, 311-12 (1977).

128. *E.g.*, Groves-Granite, 232 N.L.R.B. 381, 381-82 (1977); Service Employees Int'l Union, Local No. 579, 229 N.L.R.B. 692, 696 (1977).

129. *E.g.*, Amalgamated Clothing & Textile Workers Union, 246 N.L.R.B. 747, 748 (1979), *enforced per curiam*, 662 F.2d 1044 (4th Cir. 1981); Massachusetts Laborers' Dist. Council, 230 N.L.R.B. 640, 640-41, 644 (1977).

130. Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.), 219 N.L.R.B. 414, 414 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.), 202 N.L.R.B. 399, 399 (1973); International Union of Operating Eng'rs, Local 513, 145 N.L.R.B. 554, 555-56 (1963).

131. Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.), 202 N.L.R.B. 399, 399-400 (1973); *see* Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.), 219 N.L.R.B. 414, 414 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

132. *See supra* pts. I(A)(2)-(3).

133. Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.), 202 N.L.R.B. 399, 400 (1973).

134. *See infra* pt. II(A).

135. Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.), 219 N.L.R.B. 414, 414 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

effects of the unfair labor practice.¹³⁶ This was recognized by Chairman Miller and NLRB Member Kennedy in *Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.)*,¹³⁷ and by Member Kennedy in *Union Nacional de Trabajadores (Catalytic Industrial Maintenance Co.)*,¹³⁸ cases involving extensive violence and flagrant disregard for the law.¹³⁹ Member Kennedy vehemently dissented from the Board's decision in *Catalytic* not to award backpay, stating that "[i]t is difficult to conceive of a situation in which backpay orders could be more appropriate."¹⁴⁰ Simply because the NLRB has never previously applied this remedy does not preclude its application;¹⁴¹ the remedy is clearly within the NLRB's authority.¹⁴²

Some commentators even argue that the Board has the power to award full compensatory damages.¹⁴³ They contend that by compensating for injuries resulting from unfair labor practices, the Board would be acting within its statutory grant under section 10(c) to exercise broad discretion in formulating remedies to restore the parties to the status that existed prior to the unlawful conduct.¹⁴⁴ The Board's expertise, however, does not extend to assessing damages for medical expenses and pain and suffering.¹⁴⁵ Furthermore, the assumption of this task would burden the NLRB with what are primarily non-labor matters.

Two Supreme Court decisions acknowledging state court power to award damages have noted the Board's lack of power to award full compensatory damages.¹⁴⁶ In *United Construction Workers v. La-*

136. *Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399, 400 (1973) (Chairman Miller and Member Kennedy, dissenting in part); see *Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.)*, 219 N.L.R.B. 414, 417 (1975) (Member Kennedy, dissenting in part), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

137. 202 N.L.R.B. 399, 400 (1973) (Chairman Miller and Member Kennedy, dissenting in part).

138. 219 N.L.R.B. 414, 417 (1975) (Member Kennedy, dissenting in part), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

139. *Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.)*, 219 N.L.R.B. 414, 418-20 (1975) (Member Kennedy, dissenting in part), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399, 403-06 (1973).

140. 219 N.L.R.B. at 420 (Member Kennedy, dissenting in part), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

141. See *supra* notes 54-55 and accompanying text.

142. See *supra* note 124 and accompanying text.

143. Note, *NLRB Remedies—Moving Into The Jet Age*, 27 Baylor L. Rev. 292, 295-97 (1975) [hereinafter cited as *Jet Age*]; *NLRB Power*, *supra* note 70, at 1671.

144. *Jet Age*, *supra* note 143, at 296-97; *NLRB Power*, *supra* note 70, at 1683-84.

145. *International Union of Operating Eng'rs, Local 513*, 145 N.L.R.B. 554, 556 (1963); *International Hod Carriers*, 145 N.L.R.B. 565, 565 (1963); see *Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.)*, 219 N.L.R.B. 414, 414 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

146. See *supra* note 30 and accompanying text.

burnum Construction Corp.,¹⁴⁷ the union threatened and intimidated the employer and his nonunion employees with violence, causing the employer to abandon several construction projects.¹⁴⁸ In holding that state tort actions for compensatory and punitive damages are not preempted by the NLRA, the Court stated that the "Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with backpay."¹⁴⁹ In *UAW v. Russell*,¹⁵⁰ a nonunion employee sought compensatory and punitive damages from the union in state court for loss of earnings and mental anguish caused by the union's violence.¹⁵¹ In permitting the state tort claim, the Court declared that "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct."¹⁵² Because the NLRB lacks the power to award full compensatory damages and has even refused to award backpay in strike violence cases, victims of strike violence must resort to the courts.

II. STATE AND FEDERAL COURTS

A. *Compensatory and Punitive Damages*

The *Garmon* rule¹⁵³ does not preempt state courts from awarding both compensatory and punitive damages for violent tortious conduct even though that conduct is prohibited by the NLRA and thus falls within the NLRB's jurisdiction.¹⁵⁴ The Supreme Court has based its justification for this exception on the Board's inability to provide adequate relief for victims of violence¹⁵⁵ and on the overriding interest of the state in maintaining public order.¹⁵⁶

When jurisdictional requirements such as diversity are met, federal courts may also be an appropriate forum for labor-related tort claims.¹⁵⁷ Federal diversity jurisdiction in strike violence cases is, however, unlikely¹⁵⁸ because a union is considered to be a citizen of

147. 347 U.S. 656 (1954).

148. *Id.* at 657-58.

149. *Id.* at 665.

150. 356 U.S. 634 (1958).

151. *Id.* at 636-37.

152. *Id.* at 643.

153. See *supra* notes 18-20, 33-36 and accompanying text.

154. See *supra* note 33 and accompanying text.

155. *United Constr. Workers v. Laburnum Constr. Corp.* 347 U.S. 656, 663-66 (1954); see *UAW v. Russell*, 356 U.S. 634, 640-45 (1958).

156. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 272 (1956); Cox, *Recent Developments In Federal Labor Law Preemption*, 41 Ohio St. L.J. 277, 281 (1980).

157. See 28 U.S.C. § 1332 (1976).

158. Note, *Tort Liability of Labor Unions for Picket Line Assaults*, 10 U. Mich. J.L. Ref. 517, 519 (1977) [hereinafter cited as *Tort Liability*].

the state in which each of its members reside.¹⁵⁹ When a state tort claim arises out of the same nucleus of operative facts as a federal claim under section 303 of the Act for damages incurred as a result of an unlawful secondary boycott, federal courts may exercise pendent jurisdiction.¹⁶⁰ The exercise of pendent jurisdiction, however, is discretionary,¹⁶¹ leaving the possibility that a federal court may choose not to adjudicate a party's state claim. Another limitation on adjudicating state tort claims in federal court is that parties must, as required by section 6 of the Norris-LaGuardia Act, present "clear proof of actual participation" in unlawful acts by the union.¹⁶²

Civil damages have also been awarded under section 1985 of the Ku Klux Klan Act¹⁶³ when union violence has occurred in the course of a conspiracy to discriminate against nonunion employees.¹⁶⁴ In *Scott v. Moore*,¹⁶⁵ the Fifth Circuit applied section 1985(3) to allow redress to a nonunion employer and his employees¹⁶⁶ who were violently attacked by a group of union supporters seeking to force the nonunion employees out of the area.¹⁶⁷ In satisfying the five elements of a cause of action under section 1985(3),¹⁶⁸ the nonunion employees were

159. *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 147-50 (1965); *Lee v. Navarro Sav. Ass'n*, 597 F.2d 421, 428 (5th Cir. 1979) (Vance, J., dissenting), *aff'd*, 446 U.S. 458 (1980); *Cochrane v. Iowa Beef Processors, Inc.*, 596 F.2d 254, 263 (8th Cir.), *cert. denied*, 442 U.S. 921 (1979); *Tort Liability, supra* note 158, at 519.

160. *UMW v. Gibbs*, 383 U.S. 715, 728-29 (1966); *Ritchie v. UMW*, 410 F.2d 827, 831-32 (6th Cir. 1969); *Tort Liability, supra* note 158, at 519.

161. *UMW v. Gibbs*, 383 U.S. 715, 726 (1966); *Fields v. Fidelity General Ins. Co.*, 454 F.2d 682, 686 (7th Cir. 1971); *Lomax v. Armstrong Cork Co.*, 433 F.2d 1277, 1281 (5th Cir. 1970).

162. 29 U.S.C. § 106 (1976); *e.g.*, *UMW v. Gibbs*, 383 U.S. 715, 736-37 (1966); *Ritchie v. UMW*, 410 F.2d 827, 832-34 (6th Cir. 1969); *Riverside Coal Co. v. UMW*, 410 F.2d 267, 270-72 (6th Cir.), *cert. denied*, 396 U.S. 846 (1969).

163. 42 U.S.C. § 1985 (1976).

164. *Scott v. Moore*, 640 F.2d 708, 717-18, *reh'g en banc granted*, 656 F.2d 108 (5th Cir. 1981).

165. 640 F.2d 708, *reh'g en banc granted*, 656 F.2d 108 (5th Cir. 1981).

166. *Id.* at 724.

167. *Id.* at 711-12.

168. Four elements were set forth in *Griffin v. Breckenridge*, 403 U.S. 88 (1971): "that the defendants did (1) 'conspire or go in disguise on the highway or on the premises of another' (2) 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws' . . . that one or more of the conspirators (3) did, or caused to be done, 'any act in furtherance of the object of [the] conspiracy,' whereby another was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.'" *Id.* at 102-03. A fifth element was added in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977), namely, that the conspirators' conduct must be unlawful independent of the § 1985(3) violation. *Id.* at 925.

found to be a protected class entitled to freedom of association.¹⁶⁹ The court concluded that the statute was not restricted to victims of racial discrimination¹⁷⁰ and was thus applicable to the nonunion employees who were denied equal protection simply because they did not belong to a labor union.¹⁷¹

Of the three forums in which damages may be awarded, the state courts appear to be best suited for compensating parties injured by strike violence. States have an overriding interest in maintaining public order.¹⁷² Furthermore, state courts have expertise in assessing damages for medical expenses and pain and suffering.¹⁷³ Federal causes of action are limited by diversity requirements, the discretionary nature of the doctrine of pendent jurisdiction, a higher burden of proof and statutory requirements. The NLRB is likewise limited. Although granting backpay falls within the scope of the NLRB's remedial power, awarding full compensatory and punitive damages does not. Because of these limitations, victims of strike violence are best advised to seek relief in state court.

B. Injunctions

A state is not limited to redressing injuries resulting from strike violence, but may seek to prevent such injuries from occurring. States may exercise their police power through the issuance of injunctions against the violence.¹⁷⁴ In a picket line situation, the injunction must be directed at curbing the violence, not the picketing, so as not to infringe on the free speech rights of picketers.¹⁷⁵ When serious violence and picketing are inextricably intertwined, however, a state may ban all picketing because "fear generated by past violence would survive even though future picketing might be wholly peaceful."¹⁷⁶

169. 640 F.2d at 723.

170. *Id.* at 719-20.

171. *Id.* at 723-24.

172. See sources cited *supra* note 156.

173. International Union of Operating Eng'rs, Local 513, 145 N.L.R.B. 554, 556 (1963); see Union Nacional de Trabajadores (Catalytic Indus. Maintenance Co.), 219 N.L.R.B. 414, 414 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

174. Youngdahl v. Rainfair, Inc., 355 U.S. 131, 138-39 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266, 272-73 (1956); Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 748-49 (1942); Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 297-98 (1941).

175. Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139-40 (1957); see Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298 (1941); Comment, *Picketing and the Expanding Role of the State Labor Injunction*, 11 Tex. Tech L. Rev. 779, 786 (1980).

176. Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 294 (1941); *accord* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 180 (1968); UMW v. Gibbs, 383 U.S. 715, 731-32 (1966).

Federal injunctions are more difficult to obtain than state injunctions because the Norris-LaGuardia Act stripped federal courts of most of their power to issue labor injunctions.¹⁷⁷ The use of injunctive relief against legitimate labor union activities is prohibited.¹⁷⁸ Section 7(a) of the Norris-LaGuardia Act, however, permits the issuance of an injunction against "unlawful acts [that] have been threatened and will be committed unless restrained."¹⁷⁹ This section has been interpreted to permit federal courts to enjoin violence, breaches of the peace or criminal acts although such conduct was committed by persons participating in an otherwise legitimate labor dispute.¹⁸⁰

Although federal courts thus have jurisdiction to enjoin violence, sections 6 through 8 of the Norris-LaGuardia Act pose strict procedural requirements. Section 6 rejects ordinary tests of agency liability and sets a higher standard of proof: Union involvement must be demonstrated by "clear proof of actual participation."¹⁸¹ The standards set forth in section 7 are: (1) that unlawful conduct has been threatened and will ensue unless restrained; (2) that irreparable harm will occur in the absence of an injunction; (3) that the plaintiff's harm will be greater in the absence of an injunction than the defendant's harm in the presence of an injunction; (4) that there is no adequate remedy at law; and (5) that the public officers whose duty it is to protect the plaintiff's property cannot or will not furnish adequate protection.¹⁸² Section 8 provides further obstacles. No injunction will be issued if the plaintiff fails to comply with any obligation imposed by law that is relevant to the labor dispute, or if the plaintiff fails to make every reasonable effort to settle the dispute through negotiation, mediation or arbitration.¹⁸³ Taken together, these strict requirements make it extremely difficult for a party to obtain an injunction from a federal court.¹⁸⁴ Even though section 10(h) of the NLRA excepts

177. 29 U.S.C. §§ 101-115 (1976); see *supra* notes 82-83 and accompanying text.

178. 29 U.S.C. § 104 (1976); *Scott v. Moore*, 640 F.2d 708, 714, *reh'g en banc granted*, 656 F.2d 108 (5th Cir. 1981).

179. 29 U.S.C. § 107(a) (1976).

180. *Scott v. Moore*, 640 F.2d 708, 714, *reh'g en banc granted*, 656 F.2d 108 (5th Cir. 1981); *Westinghouse Broadcasting Co. v. Dukakis*, 412 F. Supp. 580, 583-84 (D. Mass. 1976); see *Potomac Elec. Power Co. v. Washington Chapter of the Congress of Racial Equality*, 209 F. Supp. 559, 560 (D.D.C. 1962).

181. 29 U.S.C. § 106 (1976).

182. *Id.* § 107.

183. *Id.* § 108.

184. *W. Connolly & M. Connolly*, *supra* note 83, at 173-76; see, e.g., *Cimarron Coal Corp. v. District No. 23, UMW*, 416 F.2d 844, 845-47 (6th Cir. 1969) (injunction vacated), *cert. denied*, 397 U.S. 919 (1970); *Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38, 40-42 (8th Cir. 1946) (denial of injunction affirmed); *Carter v. Herrin Motor Freight Lines*, 131 F.2d 557, 560-61 (5th Cir. 1942) (injunctive decree reversed).

Board injunctions from these requirements,¹⁸⁵ the Board has restricted its use of section 10(j) injunctions.¹⁸⁶ Thus, because of these limitations and the state's concern in maintaining public order,¹⁸⁷ a party seeking injunctive relief against labor violence is most likely to be successful in a state court.

C. Criminal Laws

The inability of the NLRB to punish those who engage in strike violence¹⁸⁸ leaves the task to state and federal courts. When a state criminal statute is violated in the course of a labor dispute, the violator will not be shielded from state prosecution.¹⁸⁹ In addition, several federal criminal statutes have been applied to situations involving strike violence.¹⁹⁰ The existence of these criminal statutes therefore acts as a deterrent to the commission of violence.¹⁹¹ One such statute is the Hobbs Act,¹⁹² which was designed to prevent the use of violence to extort higher wages and other benefits from employers.¹⁹³ Its reach, however, was limited by *United States v. Enmons*,¹⁹⁴ in which the Supreme Court held that individuals who engage in minor picket line violence during the course of a labor dispute are not subject to prosecution under the Act.¹⁹⁵ The proposed amendments¹⁹⁶ to the Hobbs Act currently under consideration by the Senate would have the effect of overturning *Enmons* by extending the application of the

185. 29 U.S.C. § 160(h) (1976).

186. *See supra* pt. I(A)(2).

187. *See sources cited supra* note 156.

188. *See supra* note 47 and accompanying text.

189. *People v. LoPresto*, 9 Mich. App. 318, 332, 156 N.W.2d 586, 594 (1967); *Newsday, Inc. v. Feldman*, 8 A.D.2d 978, 978-79, 191 N.Y.S.2d 10, 12-13, *motion for leave to appeal denied*, 9 A.D.2d 629, 191 N.Y.S.2d 547 (1959); *see Russell v. UAW*, 258 Ala. 615, 620, 64 So. 2d 384, 388 (1953), *aff'd*, 264 Ala. 456, 88 So. 2d 175 (1956), *aff'd*, 356 U.S. 634 (1958).

190. *See supra* notes 39-42 and accompanying text.

191. W. LaFave & A. Scott, *Handbook on Criminal Law* § 2, at 9, § 5, at 21 (1972); *Senate Hearings on Hobbs Act Amendment*, 108 Lab. Rel. Rep. (BNA) 294, 296-97 (Dec. 21, 1981) (statements of J.W. Supica before Senate Judiciary Subcommittee on Criminal Law) [hereinafter cited as *Senate Hearings*]; *see Driver v. Hinant*, 356 F.2d 761, 765 (4th Cir. 1966); *United States v. Barner*, 195 F. Supp. 103, 105 (N.D. Cal. 1961).

192. 18 U.S.C. § 1951 (1976).

193. *United States v. Enmons*, 410 U.S. 396, 403 (1973).

194. 410 U.S. 396 (1973).

195. *Id.* at 404-06.

196. S. 613, 97th Cong., 1st Sess. (1981).

197. *Senate Hearings*, *supra* note 191, at 295 (statements of Jonathan C. Rose, Assistant Attorney General, before the Senate Judiciary Subcommittee on Criminal Law).

Hobbs Act to any extortive violence that occurs during the course of a legitimate labor dispute.¹⁹⁷

Because of the current limitations on the Hobbs Act, the Ninth Circuit, in *United States v. Thordarson*,¹⁹⁸ applied other federal criminal statutes¹⁹⁹ to strike violence. The court rejected the contentions that the federal courts would become involved in policing routine strike activity²⁰⁰ and transform minor violence into federal crimes.²⁰¹ The court also rejected the argument that labor violence was exempted from federal prosecution by the comprehensive regulation of labor unions set forth by the NLRA.²⁰² While the approach of the *Thordarson* court is by no means settled law, its position seems appropriate in light of the Board's inability to punish and the Board's ineffectiveness in deterring strike violence.

CONCLUSION

The overriding purpose of labor-management relations is the promotion of industrial peace. Strike violence stands as an impediment to the achievement of that goal. The National Labor Relations Board, because of its special competence in labor relations and its broad remedial power, is particularly well-suited to promote industrial peace and undo the effects of strike violence. The Board, however, has unjustifiably restricted its use of its most powerful remedies by relying primarily on cease and desist orders. Because of the NLRB's failure to employ its broad remedial power to control violence, the burden has fallen on state and federal courts, which lack the Board's expertise in labor matters.

When strike violence is flagrant and severely restrains and coerces employees in the exercise of their statutory rights, the Board should not refrain from employing its more extraordinary remedies—decerti-

198. 646 F.2d 1323 (9th Cir.), *cert. denied*, 102 S. Ct. 601 (1981).

199. The court applied the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprise Act, 18 U.S.C. § 1952 (1976), the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1976), and 18 U.S.C. § 844 (1976), against the union in reversing the dismissal of the criminal indictments. 646 F.2d at 1327-31.

200. 646 F.2d at 1329.

201. *Id.* The acts of violence present in *Thordarson* included the use of explosives to destroy vehicles used in interstate commerce. *Id.* The *Thordarson* court distinguished *United States v. Enmons*, 410 U.S. 396 (1973), stating that arson was not the type of minor picket-line violence the *Enmons* Court feared would become federal crimes under the Hobbs Act. *Id.*

202. *Id.* at 1330-31. The court stated that the NLRB does not have exclusive jurisdiction to deal with union misconduct and violence, and that federal criminal statutes could properly be applied. *Id.*

fication, section 10(j) injunctions and the denial of bargaining orders. The Board should also play a greater role in compensating individuals by awarding backpay to employees coerced by violence into joining a strike. Greater use of the NLRB's most powerful remedies will more effectively compensate injured parties, deter strike violence and promote industrial peace.

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