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WHITHER THE NIXON BOARD?

J. Ralph Beard*
Mack A. Player**

The Nixon administration has now appointed a majority of members to the National Labor Relations Board. With this change in Board composition have come significant shifts in labor policy. The authors of this Article examine these shifts in policy in light of the approaches of past Boards.†

WITH the advent of each new national administration, a now familiar ritual takes place. National Labor Relations Board watchers scrutinize with care the experience and background of the new Board appointees and survey each Board decision in which they participate for hints of major shifts in national labor policy. Kenneth McGuiness says this is so because "the NLRB has been an agency where interpretations of the law have been peculiarly dependent on the predilections of its members."¹ Now that a Board has been assembled with a majority of Nixon appointees,² it is traditional, if not appropriate, to review their decisions to see if there are any discernible changes in direction from the Kennedy-Johnson Board.³

It is clear that there have been several significant substantive law changes by the new Board. These changes will have real impact and are discussed in later sections of this Article. However, a new Board can make its presence felt in a less overt way by drawing inferences from facts different from those drawn by the preceding Board. These changes in the fact finding role of the Board can markedly affect national labor policy, and will be examined in the first section of this Article.

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¹ K. MCGUINESS, *THE NEW FRONTIER NLRB* 1 (1963).

² The Nixon appointees are Chairman Miller and Members Kennedy and Penello.

³ See also Isaacson, *Discernible Trends in the "Miller" Board—Practical Considerations for the Labor Counsel*, 23 *LAB. L.J.* 531 (1972).

I. CHANGES IN THE BOARD'S FINDING OF FACT

Under the original Wagner Act⁴ the findings of the Board, upon court review, were conclusive "if supported by evidence."⁵ The fact-finding role of the Board was described by the Supreme Court in *Republic Aviation Corp. v. NLRB*⁶ as follows:

Plainly this statutory plan for an adversary proceeding requires that the Board's orders on complaints of unfair labor practices be based upon evidence . . . Such a requirement does not go beyond the necessity for the production of evidential facts, however, and compel evidence as to the results which may flow from such facts. . . . An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions . . . made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.⁷

In 1947 Congress changed the standard of deference to NLRB fact-finding upon court review. In enacting the Taft-Hartley Act Congress provided that the Board's findings of fact would be conclusive only if supported by "substantial evidence."⁸ Some Congressmen believed that this change would "materially broaden the scope of the court's reviewing power"⁹ and thus infuse more uniformity and predictability into Board findings of fact.

Even with this statutory change, however, the Board still has considerable latitude in fact-finding which will be conclusive on subsequent review. The special role of the Board in drawing inferences from evidential facts described in *Republic Aviation* has been reiterated since Taft-Hartley in *Universal Camera Corp. v. NLRB*.¹⁰ In that case

⁴ 49 Stat. 449 (1935).

⁵ § 10(f), 49 Stat. 455 (1935).

⁶ 324 U.S. 793 (1945).

⁷ *Id.* at 799-800.

⁸ National Labor Relations Act [hereinafter cited as NLRA] § 10(f), 29 U.S.C. § 160(f) (1970).

⁹ H. R. CONF. REP. No. 510, 80th Cong., 1st Sess. 56 (1947); see H.R. REP. No. 245, 80th Cong., 1st Sess. 41-43 (1947); S. REP. No. 105, 80th Cong., 1st Sess. 26 (1947).

¹⁰ 340 U.S. 474 (1951).

the Supreme Court said that the Taft-Hartley amendments were not intended

to negative the function of the Labor Board as one of the agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.¹¹

Thus the way in which the Board exercises its fact-finding role can significantly change the impact of the Act without changing a single substantive rule of law. As a result of this process, the Act can take on a different meaning than it had under prior Boards.

A. Impact of the Nixon Board's Fact-Finding on §§ 8(a)(3), 8(a)(1), and 9

The Board's power in this area can be illustrated by examining the Nixon Board's interpretation of two important areas of labor law—the traditional section 8(a)³¹² pretext cases which involve employer discrimination to encourage or discourage membership in a labor organization, and the Board's role in policing election propaganda under sections 8(a)(1)¹³ and 9.¹⁴

1. Section 8(a)(3) of the NLRA—Under section 8(a)(3) an employer's discrimination against an employee is an unfair labor practice only if the employer's motive was to encourage or discourage union activity.¹⁵ Thus the Board must analyze the facts given and determine whether the requisite employer motive was present. Clearly, two

¹¹ *Id.* at 488.

¹² NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). This section provides

(a) It shall be an unfair labor practice for an employer—

....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

¹³ *Id.* § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970). This section provides

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title

¹⁴ *Id.* § 9, 29 U.S.C. § 159 (1970).

¹⁵ *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 313 (1965). The Board may infer improper motive without specific evidence of intent to discourage union membership if the practices are inherently prejudicial to union interests. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Radio Officer's Union v. NLRB*, 347 U.S. 17 (1954); see *American Ship Bldg. Co. v. NLRB*, *supra* at 311. See generally Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 743-52 (1965).

different Boards may reach different motive conclusions from the same set of facts and still be within the allowable area for purposes of conclusiveness for the courts of appeals.

No change has yet been detected in the way in which the Nixon Board as a whole infers employer motivation from a given set of facts. However, there is some indication that at least Chairman Miller applies a stricter standard for inferring improper employer motivation than do his colleagues. *Mark Twain Marine Industries, Inc.*¹⁶ provides a good illustration of this stricter approach. In that case a woman employee claimed she was discharged for her activities on behalf of a union that was trying to organize the plant in which she worked. The employer asserted that the employee was fired for "visiting too much" and "poor workmanship."¹⁷ The trial examiner credited the employee. A majority¹⁸ of the Board members agreed, refusing to overrule the examiner's credibility-finding, and concluded that the employer had the requisite bad intentions. They ordered that the employee be reinstated with back pay. Chairman Miller dissented. He said that he would not infer that an employer had prohibited intentions unless the employee's testimony was corroborated.¹⁹

In coming to the defense of his fellow trial examiner, John F. Funke had this to say about *Mark Twain Marine Industries, Inc.*:

I am in disagreement with the approach . . . taken by Chairman Miller in his dissent. . . .

. . . In such cases there is no substitute for personal observation of the witnesses while under oath and, while errors will be made, they are less likely to be made by an experienced trial examiner who has heard the case . . . than by an *ipse dixit* conclusion formed from a printed record.

. . . .

I also reject the suggestion that individual charging parties occupy a special and inferior status as witnesses. . . . No theory

¹⁶ 185 N.L.R.B. 746 (1970).

¹⁷ Trial Examiner's findings in case no. 14-CA-5348 (May 20, 1970).

¹⁸ The Board in this case pursuant to the provisions of section 3(b) of the National Labor Relations Act (codified at 29 U.S.C. § 153(b) (1970)), delegated its powers in connection with this case to a three-member panel composed of Members Fanning and Brown and Chairman Miller. Members Fanning and Brown constituted the majority for the decision.

¹⁹ 185 N.L.R.B. at 746.

of credibility has been more completely discredited than that of resort to a head count to determine the issue.²⁰

Identical objections were raised by the Supreme Court in 1962²¹ to a prior fifth circuit decision which advocated a position strikingly similar to that of Chairman Miller. In *NLRB v. Tex-O-Kan Flour Mills Co.*,²² the circuit court established a stricter standard of review for reinstatement with back pay orders, holding that there must be impeachment of the discharging employer or substantial contradiction of his testimony before such an order would be upheld.²³ In rejecting this approach, the Supreme Court observed that the trial examiner was in a better position to evaluate the credibility of witnesses and appraise their testimony than either the Board or the reviewing court.²⁴

Thus apparently neither the Supreme Court nor the remaining members of the Board have as yet adopted the position of Chairman Miller.²⁵ However, as Mr. Funke himself pointed out in criticizing the Chairman's approach, ". . . today's dissent may well be tomorrow's law."²⁶ Even if other Board members continue to reject this stricter standard of review, sharp dissents like the one in *Mark Twain Industries, Inc.* have provided like-minded courts with an easy approach to upsetting Board orders.

2. Sections 8(a)(1) and 9 of the NLRA—A more direct change has taken place in the way the Nixon Board draws effect conclusions in its role of policing election campaigns. The Board may overturn an election under two theories. It may find, under section 8(a)(1),²⁷ that the employer's actions constitute an unfair labor practice because they "interfere with, restrain or coerce" the employee in the exercise of his protected rights.²⁸ Or, if the employer's actions do not rise to the level of an unfair labor practice, the Board may overturn an election because the employer interfered with the employee's right to make a reasoned

²⁰ Trial Examiner's findings in cases nos. 24-CA-2843, and 24-CB-733 (Nov. 13, 1970), reprinted in BNA, DAILY LABOR REP. No. 222 at A-3 (Nov. 16, 1970).

²¹ *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962).

²² 122 F.2d 433 (5th Cir. 1941).

²³ *Id.* at 438-39.

²⁴ *Id.*

²⁵ See Federal Prescription Service, 203 N.L.R.B. No. 145, 83 L.R.R.M. 1435 (1973).

²⁶ See note 20 *supra*.

²⁷ NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970).

²⁸ *Id.*

choice under section 9.²⁹ The Kennedy Board well summarized this two-pronged approach in *Sewell Mfg. Co.*³⁰ when it said,

our function, as we see it, is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.³¹

Of course the requirement in section 9 that elections be conducted under ideal conditions for employee freedom of choice³² avoids the

²⁹ *Id.* § 9, 29 U.S.C. § 159 (1970).

³⁰ 138 N.L.R.B. 66 (1962).

³¹ *Id.*

³² NLRA § 9, 29 U.S.C. § 159 (1970). *See, e.g., Sewell Mfg. Co.*, 138 N.L.R.B. 66, 70 (1962). The requirement that elections be conducted under ideal conditions for employee freedom of choice is referred to as the "laboratory conditions" standard. The conduct of elections under "laboratory conditions" was first announced in *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948):

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees When . . . the standard drops too low . . . the experiment must be conducted over again.

The Eisenhower Board tended to apply 8(c) to pre-election speech and to reject the laboratory conditions standard. So long as the statements could be classed as a prediction or statement of legal position, no sanctions were imposed. *Esquire, Inc.*, 107 N.L.R.B. 1238 (1954) (employer promised to litigate before bargaining with union); *Silver Knit Hosiery Mills, Inc.*, 99 N.L.R.B. 422 (1952) (prediction that if union selected employer might close plant). *See Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964). According to Bok,

in principle, the policy was sound enough, for when the employer simply pointed out the adverse consequences which might lawfully result from unionization he provided the employees with information that was clearly pertinent to the decision they were called upon to make. In practice, however, the policy gave hostile employers great leeway to indulge in dire predictions in order to dissuade the employee from supporting the union.

Id. at 75.

See also, Christensen, Free Speech, Propaganda and the National Labor Relations Act, 38 N.Y.U.L. REV. 243, 258 (1963); *Wirtz, The New National Labor Relations Board; Herein of "Employer Persuasion,"* 49 NW. U.L. REV. 594 (1954).

The Kennedy Board, however, reestablished the laboratory standard in *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962):

Conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election. This is so because the test of conduct which may interfere with the "laboratory conditions" for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1).

Id. at 1786-87.

strictures on the Board of section 8(c), which provides that an employer's statement must amount to "a threat of reprisal or force or promise of benefit"³³ to constitute an unfair labor practice. However, in the context of the Board's fact-finding role, whether or not 8(c) applies is immaterial because under both sections 8(a)1 and 9 the Board must infer the *effect* on employees of the employer or union action. Employer motivation does not matter. Thus the Board must determine whether or not the employer's speech or actions had the effect of interfering, restraining or coercing the employee in the exercise of his rights; or it must determine whether or not the employer's speech or actions had the effect of impeding the employee in making a reasoned choice.

Up to now the Board has been very unscientific in its determination of the effect of certain speech or action on an employee. In fact, Board members have had little more than their own visceral reaction to guide them in determining this effect. As a result, this determination has varied with the Board member's experience, background, expertise and possibly political bias; and over the years this variance in drawing effect conclusions has been great. To the Eisenhower Board certain statements by an employer were not considered to have the requisite effect on employees; the Kennedy-Johnson Board, however, was able to infer from very similar language sufficient adverse effect to overturn an election. Today it appears that similar statements will draw no sanctions from the Board in an election campaign.

These changes may be illustrated by showing the different Board conclusions as to the effect of two types of employer language on employees. The first type is language in which the employer, in an election campaign, tells his employees of the disadvantages of unionism and how it may lead to eventual closing of the plant. The second type is statements by an employer to the effect that his wage policy will be unaffected by unionism.

(a.) Employer statements regarding the disadvantages of unionism— In *Silver Knit Hosiery Mills, Inc.*,³⁴ a case decided by the Eisenhower Board, a union challenged an election, claiming employer interference through his pre-election statements. The employer had said that a union would cause strikes, lost pay and higher costs which could lead to a closing of the company. He also said that the company is not required to grant the union's request but is only required by law to bargain in good faith. The Eisenhower Board held that these state-

³³ NLRA § 8(c), 29 U.S.C. § 158(c) (1970).

³⁴ 99 N.L.R.B. 422 (1952).

ments did not have a proscribed effect on the employees. It took the view that labor elections like political campaigns permitted broad propagandist claims and predictions. Applying its experience and expertness, the Board said the remarks were "in the nature of a prophesy that labor trouble might bring financial difficulties which would in turn prevent the Employer from continuing to operate."³⁵

However, to a Kennedy-Johnson Board sitting in *Dal-Tex Optical Co.*³⁶ similar statements were held to have the effect of interfering with employee free choice and the election was overturned. The employer in that case had said:

If I am required by the Court to bargain with this Union, whenever that may be, I will bargain in good faith, but I will have to bargain on a cold-blooded business basis. You may come out with a lot less than you have now. Why gamble because agitators make wild promises to you? If I am required to bargain and I cannot agree there is no power on earth that can make me sign a contract with this Union, so what will probably happen is the Union will call a strike.³⁷

Unlike *Silver Knit Hosiery* this language made no mention of closing the plant. Discarding the idea that labor elections were to be governed by the same rules as political elections, the Board decided the statements were not a prophesy but rather were "calculated to convey to the employees the danger and futility of their designating the Union"³⁸ and thus interfered with the employees' free choice.

To the current Board statements of a similar scope do not have the effect of interference. For example, in *AAA Lapco, Inc.*³⁹ the employer had claimed that all wages, benefits and working conditions would be negotiated, not just demands for additional wages, benefits, and working conditions. He also said that the union could enforce its demands only through costly strikes affecting the company's competitive advantage and leading to replacement of strikers. The Board held that these statements did not violate section 8(a)(1) or interfere with representative elections. In another recent case the employer said unionization would lead to plant removal.⁴⁰ Again the new Board refused to set the

³⁵ *Id.* at 424.

³⁶ 137 N.L.R.B. 1782 (1962).

³⁷ *Id.* at 1784.

³⁸ *Id.* at 1785.

³⁹ 197 N.L.R.B. No. 50, 80 L.R.R.M. 1361 (1972).

⁴⁰ *Birdsall Constr. Co.*, 198 N.L.R.B. No. 20, 80 L.R.R.M. 1580 (1972).

election aside. Instead the Board said the statements were “nothing more than an objective statement of the financial problems” which the company would face in the event of unionization and “a prediction that such problems could make relocation an economic necessity.”⁴¹

(b.) Employer statements regarding the impact of unionism on wage policy—Similar wage policy statements have also implied different things to different boards. A good illustration of the attitude of the Eisenhower Board toward a wage policy statement is *Esquire, Inc.*⁴² In that case the employer had said he would always pay high wages voluntarily with or without a union contract and that selection of the union would not mean bargaining until after extended court litigation. The Eisenhower Board did not find the prohibited effect on the employees and overruled the union objection. It said that the statements were merely “an expression of the employer’s legal position.”⁴³

The Kennedy Board in 1962 was faced with similar employer language. In *The Trane Co.*⁴⁴ the employer had said that his wages were equal to or better than other firms and he would not change his wage policy, union or no union. This Board set the election aside, saying that the speech was “calculated to have a coercive effect upon employees”⁴⁵ and showed that selection of representatives would be a futile act.

In 1970, review of similar language by the Nixon Board resulted in a return to the effect conclusions of the Eisenhower Board. In *Rudy’s Farm Co.*,⁴⁶ the employer had said that the union had gained nothing for other workers, and that the company’s wage and benefits would be passed on without the presence of a union. The employer then added:

Always you should bear in mind that it is Rudy’s which furnished you a job and your paycheck—not the . . . Union. And always you should bear in mind that the . . . Union will never furnish you a day’s work nor a cent of your paycheck.⁴⁷

Overruling the union’s objection and the finding of the hearing officer, the Board said the speech was not excessive but a “legitimate assertion of the Employer’s views . . . that he had treated the employees fairly

⁴¹ *Id.* at 1581.

⁴² 107 N.L.R.B. 1238 (1954).

⁴³ *Id.* at 1239.

⁴⁴ 137 N.L.R.B. 1506 (1962).

⁴⁵ *Id.* at 1510.

⁴⁶ 190 N.L.R.B. No. 62, 77 L.R.R.M. 1157 (1971).

⁴⁷ *Id.* at 1158.

and would continue to do so, coupled with a request that the employees vote against the union."⁴⁸

The conclusion is obvious. In its role of policing election campaigns the Nixon Board is drawing the same conclusions from facts that would have been drawn by the Eisenhower Board. These conclusions are significantly different from those of the Kennedy-Johnson Board. Today, employers in their pre-election speeches apparently can tell employees that bargaining will be from scratch,⁴⁹ that higher union costs could cause plant removal,⁵⁰ that selection of the union will end personal consultation with the employer over problems,⁵¹ and that economic strikers can be replaced permanently.⁵²

B. Conclusion

These ten year fluctuations from Board to Board are not the result of any dramatic change in legal philosophy, but are primarily the result of Boards with differing make-ups drawing different conclusions from the facts. As pointed out earlier, no Board member has a concrete guide as to what conclusion to reach concerning the effect of employer speech or actions upon the employee in a pre-election setting. If such a guide were provided, effect findings could be placed on a more stable footing. Chairman Miller has indicated that greater use may be made of empirical research such as that being conducted by Professors Getman, Goldberg and Herman, and reported in the *Journal of Legal Studies* at the University of Chicago last year.⁵³ This type of research could provide a basis for determining such things as the effect of campaign statements on employees, and thus insure a greater uniformity in effect findings.

A brief review of the results of the Chicago study is instructive. Voters in two union elections were interviewed. The results indicate that eighty percent of the employees voted on the basis of pre-campaign attitudes toward unions. This fact suggests that for the great bulk of employees the campaign may not be significant in altering an initial predisposition to vote for or against union representation. In fact, the study points out that the campaign may strengthen this predisposition;

⁴⁸ *Id.*

⁴⁹ Wagner Indus. Prod. Co., 170 N.L.R.B. 1413 (1968).

⁵⁰ Birdsall Constr. Co., 198 N.L.R.B. No. 20, 80 L.R.R.M. 1580 (1972).

⁵¹ AAA Lapco, Inc., 197 N.L.R.B. No. 50, 80 L.R.R.M. 1861 (1972).

⁵² Bostitch Div. of Textron, Inc., 176 N.L.R.B. No. 47, 71 L.R.R.M. 1241 (1969).

⁵³ Getman, Goldberg, & Herman, *The National Labor Relations Board Voting Study: A Preliminary Report*, 1 J. LEGAL STUDIES 233 (1972).

but it does not appear to change it. Of the remaining 20 percent, the study indicates that 90 percent of these voted against the union. When tested about the campaign issues, however, they were less familiar with the employer's campaign than any other group. The study also demonstrates that employees do not perceive conduct as coercive which the Board labels as such. Apparently then the switch is not made because of the campaign.

The clear implication of this research is that the Board should be cautious in finding violations of sections 8(a)(1) and 9 of the NLRA on the basis of speeches made by the employer.⁵⁴ The trend of decisions of the Nixon Board on the impact of employer statements on union elections seems consistent with this result. Perhaps in the future empirical research such as that conducted in Chicago will help the Board stabilize the exercise of its fact-finding role.

II. MANDATORY SUBJECTS OF BARGAINING

Election propaganda is not the only area where important shifts in labor policy are occurring. One of the clearest changes made by the new Board has been in the vital area of mandatory subjects of bargaining under section 8(a)(5) of the NLRA.⁵⁵ In *General Motors Corp.*⁵⁶ the Nixon Board recently clarified one significant aspect of the employer's obligation to bargain under this provision, holding that there is no duty to bargain where management sells the business regardless of whether the effect is termination of unit jobs. This discussion will focus on the significance of the *General Motors* decision, and the shift it represents in labor policy as developed by previous Boards.

Before reviewing the implications of the *General Motors* case, however, it is appropriate to recall prior Board philosophy. Before 1962 the Board held that there was no statutory obligation on the part of the employer to bargain over basic management decisions.⁵⁷ The NLRA

⁵⁴ *Id.* at 249.

⁵⁵ NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970).

⁵⁶ 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971).

⁵⁷ *E.g.*, *Fibreboard Paper Prod. Corp.*, 130 N.L.R.B. 1558, 1559 (1961); *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999, 1000 (1953). In the original *Fibreboard* consideration, the Labor Board in rejecting the idea that the change itself was a mandatory subject for bargaining said:

[T]he Board has held, the establishment by the Board of an appropriate bargaining unit does not preclude an employer acting in good faith from making changes in his business structure, such as entering into subcontracting arrangements, without first consulting with the representatives of the affected employees.

130 N.L.R.B. at 1560.

was construed as not covering managerial decisions motivated by the economics of business operation.⁵⁸ As a result, decisions to commit capital or managerial effort to a new product line, or to dispose of inefficient operations were considered basic entrepreneurial rights that preceded the bargaining duties imposed by the Act.⁵⁹ Thus although an employer could be held to a duty to bargain on the *effects* of such decisions, he did not have to bargain over the decision itself.

This position had serious effects on job security, and many unions argued that where an employer decision had the effect of terminating unit jobs it involved "conditions of employment" requiring mandatory bargaining under the Act.⁶⁰ In 1962 the Kennedy Board accepted this construction in the companion cases of *Town and Country Manufacturing Co.*⁶¹ and *Fibreboard Paper Products Corp.*,⁶² extending the duty to bargain to economically motivated management decisions to subcontract which had the effect of eliminating bargaining unit jobs.⁶³ These Board decisions constituted major limitations on the unilateral powers of management because they required the employer to bargain over the decision to subcontract itself, and not simply over its effects.

⁵⁸ The Labor Board commented in *Fibreboard*:

[A]lthough the statutory language is broad, we do not believe it is so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort. Under all the circumstances . . . we conclude that Section 8(A)(5) of the Act does not obligate the Respondent to bargain . . . concerning its economically motivated decision to subcontract its maintenance operations.

130 N.L.R.B. at 1561.

⁵⁹ *E.g., id.* at 1560-61.

⁶⁰ The Supreme Court approved a similar argument under the Railway Labor Act in *Railroad Telegraphers v. Chicago & N.W. Ry. Co.*, 362 U.S. 330, 333 (1960). See Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 LAB. L.J. 143, 144-47 (1960).

⁶¹ 136 N.L.R.B. 1022 (1962), *enforcement granted*, 316 F.2d 846 (5th Cir. 1963). The employer eliminated drivers' jobs, giving as his reason the alleged problems with I.C.C. violations and economic considerations. In reversing its previous position the Board said:

In our opinion, the precedents cited and discussed . . . support the conclusion that the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase "other terms and conditions of employment" and is a mandatory subject of collective bargaining within the meaning of section 8(a)(5) of the Act.

Id. at 1027.

⁶² 138 N.L.R.B. 550 (1962). Relying on *Town and Country*, the Board said that the decision to subcontract even for economic reasons was a mandatory subject for bargaining.

⁶³ The basis for this holding was that the changes deemed necessary could be resolved by frank discussion between labor and management. Such resolution could protect unit jobs and effectuate the desired management savings. *Town & Country Mfg. Co.*, 136 N.L.R.B. at 1027. "Experience has shown . . . that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides." *Id.*

The Supreme Court affirmed the Board's *Fibreboard* decision,⁶⁴ but added some significant caveats:

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.⁶⁵

Perhaps concerned that even this limiting language was not precise enough, Mr. Justice Stewart wrote a further explanation in his concurring opinion. Observing that there are many managerial decisions imperiling job security that would not be the subject of collective bargaining, he stated that "[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise"⁶⁶ are not subjects of collective bargaining, regardless of their impact on employment. Such decisions, Justice Stewart noted, lie at the "core of entrepreneurial control."⁶⁷

This explanation of managerial decision making has become increasingly significant because it is contrary to the expansive reading that the Kennedy-Johnson Board later gave to the majority holding in *Fibreboard*.⁶⁸ Taking the position that *any* decision having major effects on unit jobs should be a mandatory subject of bargaining, the Board attempted to extend section 8(a)(5) into many additional areas. For example, in *Star Baby Co.*⁶⁹ the Board held that there was a duty to bargain over the decision to sell the assets of a business where the employer had decided to dissolve its partnership. Similarly, in *Royal Plating and Polishing Co.*⁷⁰ the Board extended the duty to bargain to the sale of facilities that resulted in the partial closing of the employer's

⁶⁴ *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964).

⁶⁵ *Id.* at 215.

⁶⁶ *Id.* at 223.

⁶⁷ *Id.*

⁶⁸ The Board construed the holding broadly to apply to any change in operations which had the effect of eliminating unit jobs. *E.g.*, *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1967). The courts of appeals on the other hand relied heavily on Stewart's concurring opinion to restrict such efforts by the Board. *See* note 77 *infra*.

⁶⁹ 140 N.L.R.B. 678 (1963).

⁷⁰ 148 N.L.R.B. 545 (1964), *enforcement denied*, 350 F.2d 191 (3d Cir. 1965). *See* *Schnell Tool & Die Corp.*, 162 N.L.R.B. 1313 (1967).

business. Other decisions of the Kennedy-Johnson Board required employers to bargain before they transferred work from one plant to another,⁷¹ or before they suspended their distribution system in favor of independent contractors.⁷²

In all these decisions, the Board's criterion for determining whether bargaining would be mandatory for a management decision was the effect of that decision on unit jobs.⁷³ This approach was deemed consistent with the Supreme Court holding in *Fibreboard*, which the Board interpreted as covering decisions involving plant closings and removals as well as subcontracting. This expansive interpretation was criticized by some⁷⁴ as violating the limitations in *Fibreboard*, but in *Ozark Trailers, Inc.*⁷⁵ the Board defended its basic rationale stating:

[A]n employer's decision to make a "major" change in the nature of his business, such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.⁷⁶

Although the Board could give the Supreme Court's holding such a broad interpretation, the courts of appeals could not. Board orders expanding the duty to bargain over management decisions were consistently reversed by the appellate courts—who gave more consideration

⁷¹ *Shell Oil Co.*, 149 N.L.R.B. 305 (1964).

⁷² *Adams Dairy Co.*, 147 N.L.R.B. 1410 (1964).

⁷³ In *Kennecott Copper Corp.*, 148 N.L.R.B. 1653 (1964), for example, the decision to subcontract rebuilding of a mobile mining machine where no jobs were lost and employees worked forty hour weeks was not held to be a violation. A violation was found, however, where an employer closed down his plant and moved it 150 miles without first bargaining with the union. *Standard Handkerchief Co.*, 151 N.L.R.B. 15 (1965).

⁷⁴ See, e.g., note 77 *infra*.

⁷⁵ 161 N.L.R.B. 561 (1967). Three companies with interlocking owners and operations decided to close the portion manufacturing truck bodies about a year after that plant had unionized. The reasons given were economic—that contracting out would be less costly. The union, however, had been told that the closing was due to lack of work and only temporary.

⁷⁶ *Id.* at 566.

than the Board to the majority's caveats and Justice Stewart's concurrence.⁷⁷

Apparently acquiescing in these court decisions, the Nixon Board in *General Motors Corp.*,⁷⁸ held there was no duty to bargain over a transaction involving the sale of the employer's business. Like the decision in *Star Baby Co.*,⁷⁹ the Board faced a sale which meant termination of employee jobs. The operation of the company was sold as a franchise with the new owner continuing to act as a GMC dealer. The union had notice that negotiations were taking place and had asked to be present. The sale was completed and notice was given by the new owners that the change would not permit continued employment of unit workers. Although clearly a parallel of such earlier decisions as *Star Baby*⁸⁰ and *Ozark Trailers, Inc.*,⁸¹ the Board chose to follow the decisions of the courts and exclude the sale from the scope of 8(a)(5):

We believe . . . that this issue is controlled by the rationale the courts have generally adopted in closely related cases, that decisions as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature. They thus lie at the very core of entrepreneurial control, and are not the types of subjects which Congress intended to encompass within "rates of pay, wages, hours of employment or other conditions of employment."⁸²

Other Board decisions have found special circumstances exempting unilateral decisions from bargaining even where subcontracting was at issue.⁸³

⁷⁷ *E.g.*, NLRB v. Adams Dairy, Inc., 350 F.2d 108, cert. denied, 382 U.S. 1011 (1965); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965); NLRB v. Drapery Mfg. Co., 425 F.2d 1026 (8th Cir. 1965). The court in *Adams Dairy* relied heavily on Stewart's opinion when it declared:

In *Adams Dairy* there is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in *Fibreboard*, there was a change in the capital structure of *Adams Dairy* which resulted in a partial liquidation and recoup of capital investment.

350 F.2d at 111.

⁷⁸ 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971).

⁷⁹ 140 N.L.R.B. 678 (1963).

⁸⁰ *Id.*

⁸¹ 161 N.L.R.B. 561 (1967). *See, e.g.*, Adams Dairy, Inc., 147 N.L.R.B. 1410 (1964).

⁸² 77 L.R.R.M. at 1539.

⁸³ *E.g.*, Tellepsen Petro-Chem Constructors, 190 N.L.R.B. No. 76, 77 L.R.R.M. 1235 (1971). *See* Summit Tooling Co., 195 N.L.R.B. No. 91, 79 L.R.R.M. 1396 (1972) (duty to bargain not imposed despite discriminatory motive for closing).

These recent decisions suggest that the Board is now willing to comply with the Supreme Court's restrictive holding in *Fibreboard*. Subsequent to *Fibreboard*, the Board had increasingly required employers to bargain with their union representatives when there was a management decision affecting the length of employment, regardless of how crucial that decision was to the successful operation of the employer's business. In reestablishing a distinction between subjects appropriate for employee bargaining and those falling within an area that should be exclusively within management control, the Board has recognized that the requirement to bargain should not significantly abridge the employer's freedom to manage his business. Thus the *General Motors* decision has reconciled the conflict between the Board's expansive interpretation of *Fibreboard* during the Kennedy-Johnson administration, and the persistent judicial limitations on that interpretation by the Supreme Court and many appellate courts. As a result, *Fibreboard* seems to be valid today only in the narrowest sense.

III. DEFERRAL TO ARBITRATION

In no area has policy change been more significant in scope or implication than in the area of the Board's deferral to arbitration. Beginning with *Collyer Insulated Wire*,⁸⁴ and extending through a series of recent cases, the Nixon Board has embarked upon a new policy that continues to unfold. These cases represent more than a mere change in the Board's exercise of its statutory discretion. At stake are more fundamental issues and interests. Indeed, there are those who argue that *Collyer* represents not merely a change but rather an abdication of the Board's statutory role. Even if one agrees that the Board is acting within its discretion in adopting the deferral policy of *Collyer*, there still remain significant policy questions with regard to the very process to which the Board is deferring—namely labor arbitration. The *Collyer* majority seems to have adopted the popular wisdom of the Supreme Court in the *Steelworkers Trilogy*,⁸⁵ yet the wisdom of relying upon the arbitral process to protect and enforce statutory rights which may have become entwined with questions of contract interpretation remain unproven. The basic premise of *Steelworkers*—that parties should be

⁸⁴ 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971). For a view contrary to that expressed in this section, see Miller, *Deferral to Arbitration—Temperance or Abstinence?* 7 GA. L. REV. 595 (1973).

⁸⁵ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

allowed to resolve their contractual disputes in private forums of their own choosing, even to the point of excluding resort to the courts—hardly supports any suggestion that employers and unions, by means of a collective bargaining contract, should be able to insulate themselves from the provisions of the NLRA and the national policies which it is intended to effectuate. Likewise, even if the logic of *Steelworkers*—that arbitrators are as well suited to interpreting collective bargaining agreements as the courts—is conceded, it is not at all certain that arbitrators have the expertise or even the inclination to decide or enforce statutory issues and policies which long have been entrusted to the expertise of the Board.⁸⁶

Before discussing *Collyer* and its offspring it is necessary to consider briefly the historical background of the Board's policy on deferral to arbitration in the factual situation presented in *Collyer*;⁸⁷ that is, a situation in which the grievance-arbitration machinery is available but has not yet been invoked by the parties. In this type of case, the Board is deferring not to an arbitration award or pending proceeding but

⁸⁶ Lest this somewhat jaundiced introduction of *Collyer* be mistaken for an overprotective concern for the Board's role and its jurisdiction, the author wishes to add that his views in this area stem from his experiences as an arbitrator. This discussion will attempt to analyze *Collyer* from the perspective of the arbitrator.

⁸⁷ The NLRB's policy on deferral to arbitration has formed around two other types of factual situations: that in which arbitration had been involved and an award made, and that in which arbitration and Board processes were invoked simultaneously.

With respect to post-award situations in which charges were filed *after* the arbitration award, the Board announced in *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), that it would dismiss unfair labor practice charges filed after the conclusion of arbitration proceedings in which a determination had been made on the merits. In its subsequent decision in *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955), the Board handed down guidelines for the honoring of arbitration awards rendered prior to the filing of charges before the Board. In such situations the Board stated that it would dismiss unfair labor practice complaints arising from disputes wherein the arbitration proceedings "appear to have been fair and regular, all parties had agreed to be bound, and the decision . . . is not clearly repugnant to the purposes and policies of the Act." *Id.* at 1082. In *Raytheon Co.*, 140 N.L.R.B. 883 (1963), *rev'd*, 326 F.2d 471 (1st Cir. 1964), the Board added a fourth criterion to its *Spielberg* doctrine by holding that the unfair labor practice issue presented in the post-award complaint must have been presented to and considered by the arbitrator.

In the related but factually different situation in which the arbitral process is available and has been involved but no award has issued before resort to the Board, the Board's policies have been less clear. Where parties have attempted to utilize grievance-arbitration machinery while simultaneously pressing charges before the Board, the cases have gone both ways. In some instances the Board has deferred to arbitration while in others it has proceeded to an adjudication despite the pendency of other proceedings. Compare *Hercules Motor Corp.*, 136 N.L.R.B. 1648 (1962), with *Dubo Mfg. Corp.*, 142 N.L.R.B. 431 (1963). See also note 99 *infra*.

rather to the available arbitration process upon which the parties have contractually agreed.

A. Pre-Collyer Developments

The Board's first decision evidencing deference to an available arbitration process was *Consolidated Aircraft Corp.*,⁸⁸ wherein the Board in 1943 held that it would refrain from deciding *any* question of contract interpretation which is capable of being resolved under grievance and arbitration procedures. This deferral principle was subsequently applied in a number of instances by the Board,⁸⁹ even including cases in which no arbitration was available to the parties.⁹⁰

Almost twenty years later, however, the policy announced in *Consolidated Aircraft* was called into serious question by the Kennedy-Johnson Board's holding in *C & C Plywood Corp.*⁹¹ There the Board construed a disputed contract provision⁹² involving the right of an employer to make unilateral wage changes, rather than deferring to an available grievance procedure. Although the case could be distinguished from *Consolidated Aircraft* on the fact that there was grievance machinery but no ultimate arbitration process available to the parties, this did not diminish the force of the majority's commentary on the Board's involvement in contract interpretation. After noting that the Board was not unfamiliar with problems of contract interpretation, the majority rejected the argument that the Board should dismiss a complaint when the validity of a claim involves construction of a col-

⁸⁸ 47 N.L.R.B. 694 (1943). In *Consolidated*, the employer had unilaterally changed a number of wage rates and conditions of employment during the term of the contract without notifying the union. When the union filed an unfair labor practice charge without utilizing the grievance-arbitration machinery, the Board refused to rule on the refusal-to-bargain charge. The Board stated that the parties had already agreed upon a method of contract administration and interpretation which the Board's interference could only undermine. *Id.* at 706. Also, the Board relied upon the facts that the employer did not appear to be trying to undermine the union, that their collective bargaining relationship had been successful in the past, and that the employer remained ready to bargain with the union after its objections were made known. *Id.* at 705.

⁸⁹ *E.g.*, Flintkote Co., 149 N.L.R.B. 1561 (1964); Bemis Bros. Bag Co., 143 N.L.R.B. 1311 (1963); United Tel. Co., 112 N.L.R.B. 779 (1955); McDonnell Aircraft Corp., 109 N.L.R.B. 930 (1954).

⁹⁰ *E.g.*, Midland Broadcasting Co., 93 N.L.R.B. 455, 457 (1951).

⁹¹ 148 N.L.R.B. 414 (1964), *enforcement denied*, 351 F.2d 224 (9th Cir. 1965), *rev'd*, 385 U.S. 421 (1967). In *C & C Plywood*, the employer interpreted a contract provision as permitting him to change rates of pay without notification to the union. He was subsequently charged with refusal to bargain, and the Board found that he had no contractual right to make the unilateral wage changes at issue.

⁹² See note 91 *supra*.

lective bargaining contract.⁹³ Following *C & C Plywood* the Board refused to defer decision in several cases involving unilateral action during the term of a collective bargaining agreement.⁹⁴ Despite some vacillation over the rationale announced in that case, the change in policy soon became unmistakable. During the period from 1960 to 1968, the Board refused to defer to the arbitrators in 16 out of 20 pre-award cases involving questions of unilateral action by the employer and contract interpretation.⁹⁵

With the advent of the Nixon administration and new appointments to the Board came a departure from the Kennedy-Johnson Board's policy of non-deferral in pre-award cases. The forerunner of *Collyer* and its deferral policy in pre-award cases was *Joseph Schlitz Brewing Co.*⁹⁶ In *Schlitz*, the union had filed an 8(a)(5) charge in response to the employer's unilateral change of its past practice of using relief workers to fill in for regular employees during breaktime. Neither party had initiated the grievance and arbitration machinery provided for in the collective bargaining contract at the time charges were filed with the Board. In opting for deferral to arbitration of the dispute, the Board apparently relied upon four factors in the *Schlitz* situation: (1) the contract clearly provided for grievance and arbitration machinery; (2) the unilateral action taken was not designed to undermine the union; (3) the action was not patently erroneous, but rather, was based on a substantial claim of contractual privilege; and (4) it appeared that the arbitral interpretation of the contract would resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act.⁹⁷ Other factors cited by the Board as contributing to the appropriateness of deferral in *Schlitz* were the parties long and successful bargaining relationships; the absence of allegations of other unlawful conduct; the good faith nature of the dispute; and the fact that the employer had urged arbitration and offered to discuss the matter before taking action.⁹⁸ What the *Schlitz* decision meant in terms of future policy on deferral was not immediately apparent since it was decided by only a

⁹³ 148 N.L.R.B. at 416.

⁹⁴ See, e.g., *Huttig Sash & Door Co.*, 154 N.L.R.B. 811 (1965), *enforced*, 377 F.2d 964 (8th Cir. 1967); *Century Papers, Inc.*, 155 N.L.R.B. 358 (1965).

⁹⁵ See Menard, *The National Labor Relations Board—No Longer a Threat to the Arbitral Process?*, 23 LAB. L. J. 140, 144 n.35 (1972).

⁹⁶ 175 N.L.R.B. 141 (1969).

⁹⁷ *Id.* at 142.

⁹⁸ *Id.*

three-member panel and was rather inconsistently followed thereafter.⁹⁹ It remained for the full Board in *Collyer Insulated Wire* to reaffirm the doctrine of *Schlitz* and set the Board's "policy in similar cases in the future."¹⁰⁰

B. *The Collyer Decision*

The factual situation of *Collyer Insulated Wire*,¹⁰¹ reduced to its operative elements, involved certain changes in wage rates and job assignments which the employer claimed were sanctioned by the existing collective bargaining agreement. The changes made were "unilateral" in the sense that the union had not acceded to them, but the employer had discussed them prior to their initiation and remained willing to discuss the changes after they were made. Though a grievance-arbitration process was available, the union did not resort to it but filed unfair labor practices charges with the Board.

Confronted with this pre-award situation in which the parties had not utilized the grievance-arbitration procedures available to them, the three-member majority in *Collyer* cited *Consolidated Aircraft Corp.*¹⁰² and its offspring¹⁰³ and concluded that the Board's deferral to the parties' established grievance arbitration procedure would best serve the policy of promoting industrial peace through collective bargaining.¹⁰⁴ The Board retained jurisdiction for the purpose of possible further consideration of the charges if the parties did not pursue arbitration with reasonable promptness or if the award rendered in arbitration did not meet the criteria of fairness, regularity, and consistency with the Act required in *Spielberg Manufacturing Co.*¹⁰⁵ In essence, the majority applied the *Spielberg* doctrine prospectively in the sense that deferral was made conditional upon the subsequent award's validity under the *Spielberg* guidelines.¹⁰⁶

⁹⁹ See, e.g., *Cello-Foil Prod., Inc.*, 178 N.L.R.B. 676 (1969); *Dresser Indus. Valve & Instrument Div.*, 178 N.L.R.B. 317 (1969); *Zenith Radio Corp.*, 177 N.L.R.B. 366 (1969); *Boston Edison Co.*, 176 N.L.R.B. 942 (1969).

¹⁰⁰ Address by Chairman Edward B. Miller, Western States Employer Ass'n Conference, Pebble Beach, California, August 27, 1971.

¹⁰¹ 192 N.L.R.B. No. 150, 177 L.R.R.M. 1931 (1971).

¹⁰² 47 N.L.R.B. 694 (1943).

¹⁰³ See cases collected at 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1936 n.11 (1971).

¹⁰⁴ *Id.* at 1936.

¹⁰⁵ 112 N.L.R.B. 1080 (1955).

¹⁰⁶ Members Fanning and Jenkins dissented vigorously in *Collyer* as they have done in virtually every *Collyer*-type case which they have considered since. Their disagreement with the policy announced in *Collyer* seems to stem primarily from their different perceptions of the Board's role, its discretion in limiting its statutory responsibility, and its

Immediately after *Collyer* was decided, it was difficult to determine its impact and the breadth of the deferral policy announced there. But with the replacement of Member Brown, who concurred in *Collyer*, by Member Penello, the Board acquired a solid majority which has recently moved to apply the deferral policy of *Collyer* far beyond the factual circumstances of that case and the 8(a)(5) charges involved in both *Schlitz* and *Collyer*. A look at the rapidly expanding *Collyer* policy of arbitration deferral will serve not only to survey the substantive aspects of the policy as it is now being applied but also to emphasize the dramatic departure from prior Board practices and attitudes toward arbitration. The cases used to assess the reach of *Collyer* are only examples. While they do not illustrate all the subtle nuances of development in this area, they do represent the current farthest reaches of the Board's new deferral policy and the significant change which it represents.¹⁰⁷

C. *Post-Collyer Developments*

Since the purpose of this discussion is to highlight changes in Board policy, all the facts or reasoning of the cases which have extended the *Collyer Wire* decision will not be reviewed. With respect to deferral in 8(a)(5) situations, the cases have been numerous enough to establish with some certainty the Board's new policy. In some areas, the cases have been too few to draw many conclusions beyond noting the Board's willingness to defer to arbitration in the face of such charges. However, the overall trend is toward expansion of the *Collyer* policy into areas not previously the subject of deferral and a permissive application of the criteria for deferral outlined in *Collyer*.

1. Section 8(b)(3) cases—*Collyer Insulated Wire* and *Schlitz Brewing Co.* both involved Board deferral to arbitration in the face of 8(a)(5) charges. Whether the Board would defer in the case of analogous section 8(b)(3)¹⁰⁸ charges was answered in *National Biscuit Co.*¹⁰⁹ In this case the union was charged with refusing to be bound by provisions of

expertise. Beyond these considerations concerning the Board and the Act, Members Fanning and Jenkins seem reluctant to subscribe to the efficacious view of arbitration espoused in the *Steelworker's Trilogy*, cases cited note 85 *supra*, especially where unfair labor practices beyond refusals to bargain have been alleged.

¹⁰⁷ Chairman Miller also discusses some of the cases which have significantly expanded *Collyer* in Miller, *Deferral to Arbitration—Temperance or Abstinence?*, 7 GA. L. REV. 595 (1973). The Chairman views this policy of expansion as sound "both in the immediate legal sense and in the sense of long-term . . . administration of the Act." *Id.* at 602.

¹⁰⁸ NLRA § 8(b)(3), 29 U.S.C. § 153(b)(3) (1970).

¹⁰⁹ 198 N.L.R.B. No. 4, 80 L.R.R.M. 1727 (1972).

the contract requiring the employer's drivers to make cash collections, and with unilaterally altering terms and conditions of employment by directing and requiring drivers to cease making cash collections. The union was also charged with violating section 8(b)(1)(A)¹¹⁰ by threatening the union drivers with fines and loss of membership if they did not cease making cash collections. Even though the contract did not compel arbitration unless both parties agreed, the Board, with Members Fanning and Jenkins dissenting, dismissed the charges and left the parties to resolve the dispute through their contractual machinery.¹¹¹ Thus it appears that the Board is equally willing to defer to arbitration whether the alleged conduct constitutes an 8(a)(5) or an 8(b)(3) violation.

One aspect of *National Biscuit* worthy of further mention is the nature of the machinery to which the Board deferred in that case. Unlike *Collyer*, in which the majority implied that the available arbitration process must be an exclusive and compulsory procedure to warrant deferral,¹¹² the contract in *National Biscuit* required only the mandatory submission of disputes to a bipartite panel of union and employer representatives which had authority to make the final decision as to whether arbitration would be invoked.¹¹³ By deferring to arbitration in this situation, the Board extended the logic of *Collyer* to the point of deferring to a process that was "nonexistent" in the sense that the parties had not only not agreed to arbitration, but also had shunned it to the extent of establishing a bipartite panel to avoid it or limit its application.¹¹⁴ Whether the present Board will extend its deferral policy to other types of dispute machinery short of arbitration remains to be seen. The circumstances of *National Biscuit* certainly seem to have opened the door to such a course.

2. Section 8(a)(3) cases—Until July, 1972, the Board's policy of deferral to arbitration was not clear with respect to 8(a)(3) charges. In *Tulsa-Whisenhunt Funeral Homes, Inc.*,¹¹⁵ the Board refused to dismiss 8(a)(3) charges and defer to arbitration on the grounds that the collective bargaining agreement did not provide for final and binding arbitration. Thus the Board did not reach the question of when the *Collyer* deferral policy would be applicable and appropriate with re-

¹¹⁰ NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1970).

¹¹¹ 198 N.L.R.B. No. 4, 80 L.R.R.M. at 1730.

¹¹² See *Collyer Insulated Wire*, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1936 (1971).

¹¹³ 198 N.L.R.B. No. 4, 80 L.R.R.M. 1727, 1729 (1972).

¹¹⁴ *Id.* at 1731 (Fanning and Jenkins, Members, dissenting).

¹¹⁵ 195 N.L.R.B. No. 20, 79 L.R.R.M. 1265 (1972).

spect to alleged violations of section 8(a)(3).¹¹⁶ The answer came in three cases decided in July, 1972.

In *National Radio Co.*,¹¹⁷ the employer was charged with unilaterally imposing a requirement that union representatives record and report their movements in the plant while processing grievances on company time, and with disciplining and subsequently discharging an employee who refused to comply with these reporting requirements. The Board dismissed the 8(a)(5) charge on the rationale of *Collyer*. The 8(a)(3) charge, however, was substantially different from the factual situation of *Collyer* in that the employer's actions toward the discharged employee were alleged to have been motivated by anti-union animus.¹¹⁸ In justifying dismissal of the 8(a)(3) charge and deferral to arbitration in a context admittedly different from *Collyer*, the Board relied upon several grounds. The majority first noted that the Board is "empowered under the statute to defer action on a complained of violation of Sections 8(a)(1) and (3), pending arbitration, if, on balance, to do so will advance the policies and purposes of the Act."¹¹⁹ Implicit in this conclusion was what the majority termed the "tenable assumption"¹²⁰ that the arbitration proceeding will lead to a resolution of the dispute which will not be repugnant to the purposes and policies of the Act. In support of this assumption the majority noted that the interests of the employee and his union were in substantial harmony, that the intersection of such interests was likely in every such case, and that there was no basis for believing that the discharged employee's interests would be inadequately represented under contractual procedures.¹²¹ The majority reinforced its conclusion with two further observations. First, as in *Collyer* and *Schlitz*, the parties had a long-established and stable bargaining relationship. Second, although anti-union animus was allegedly the respondent's motivation for discharge, the majority distinguished the facts of *National Radio* from cases in which a history or pattern of animus toward the exercise of section 8(a)(3) rights had been alleged.¹²²

¹¹⁶ *Id.* at 1267.

¹¹⁷ 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718 (1972).

¹¹⁸ *Id.* at 1721.

¹¹⁹ *Id.* at 1722.

¹²⁰ *Id.*

¹²¹ *Id.* at 1723-24.

¹²² *Id.* at 1724. Members Fanning and Jenkins registered a strong dissent to the majority's expansion of *Collyer*. Citing reasons in addition to those put forward in earlier dissents, the dissenters argued that "[t]o compel the victim of . . . alleged discrimination to resort to arbitration is not 'deferral,' but a subcontracting to a private tribunal of the determina-

Appalachian Power Co.,¹²³ the second case of Board deferral involving 8(a)(3) charges, was concerned with the revocation of a contractual leave of absence permitting an employee to serve as a full-time representative of certain local unions. After the employee had successfully organized an affiliated plant, the respondent revoked the employee's leave of absence with the explanation that his activity was contrary to the letter and intent of the contract provision under which the leave had been granted. The union invoked the arbitration provisions of the contract which called for one management and one union representative to select a neutral third party to complete the three-member arbitration panel. While the selection of a third arbitrator was pending, the unfair labor practice charges which had been filed by the union during the last stage of the grievance procedure were heard and decided. The trial examiner, finding anti-union motivation behind the cancelling of the leave of absence, concluded that the employer had violated sections 8(a)(1) and (3). A majority of the Board disagreed, reasoning that since the essential issue was one of contract interpretation, *Collyer* principles warranted deferral to arbitration.¹²⁴

The third case in which the Board extended its *Collyer* deferral

tion of rights conferred and guaranteed solely by the statute." *Id.* Fanning and Jenkins further noted that statutory protection against 8(a)(3) violations is an *individual* right, unlike the union or group right to be protected from 8(a)(5) violations such as unilateral changes in the collective bargaining agreement. Thus the dissenters argued that rights granted by the Act to individuals cannot be reduced, altered, or displaced by agreements between the union and employer. The dissent further argued that arbitrators, in their preoccupation with determining whether "good cause" or "just cause" existed for a discharge, might well ignore the fact that the true reason for the employee's discharge was his union activity. Such a reduction of the issues to a question of good or just cause for discharge would strip the employee of his statutory protection. *Id.* at 1725. Finally, Members Fanning and Jenkins concluded that, under the majority's rationale, the end result would enable parties to contract themselves out of the Act to any extent they choose by listing in the contract the provisions of the Act they agree not to violate, and appending an arbitration clause to such a listing. *Id.* at 1726.

¹²³ 198 N.L.R.B. No. 7, 80 L.R.R.M. 1731 (1972).

¹²⁴ *Id.* at 1734. Again, Members Fanning and Jenkins dissented. They first commented on the fact that the majority's decision was based solely on the respondent's interpretation of the contract as prohibiting an employee from engaging in organizing activities while on leave. *Id.* at 1735. They argued that this result ignored the violations of 8(a)(1) and (3) as found by the trial examiner without even attempting to interpret the clause in question or judge the reasonableness of the respondent's interpretation. Going further, the dissenters argued that the contract clause, as interpreted by the employer and accepted by the majority, amounted to a waiver by the union of the employee's section 7 rights—a waiver which the majority found not inherently destructive of statutory rights. Finally, Members Fanning and Jenkins accused the majority of accepting such a waiver despite the long line of authority holding that a waiver of statutory rights must be stated in clear and unmistakable terms. *Id.*

policy to cases involving 8(a)(3) charges is *National Tea Co.*¹²⁵ There the employer was charged with discharging two employees who, in protest of what they believed was an unreasonably short break period, instigated an unauthorized strike. The employer based its action on a contract clause which on its face allowed the employer to impose discipline short of discharge within the first twenty-four hours after an unauthorized work stoppage and allowed the employer to discharge employees striking beyond the first twenty-four hour period. Though the strike had lasted less than twenty-four hours, the two employees who had instigated it were discharged. Grievances were filed and eventually resolved in the third step of the grievance procedure. The fourth step in the grievance procedure, binding arbitration, was not reached. The trial examiner recommended dismissal of the complaint after finding that it would be appropriate to defer to the award of the "joint committee" which had heard the grievance in its third stage and had upheld the discharge of the two employees. The majority upheld the trial examiner's deferral on the basis of the *Spielberg* guidelines without reaching the merits.

3. Section 8(a)(1) cases—The Nixon majority has extended *Collyer* to 8(a)(1) cases, such as *Joseph T. Ryerson & Sons*¹²⁶ and *Tyee Construction Co.*,¹²⁷ on basically the same rationale used in the 8(a)(3) area. At the same time there are several cases in this area in which the Board has refused to defer to arbitration on the ground that the interests of the charging parties were in apparent conflict with those of the union and the employer. *Kansas Meat Packers*,¹²⁸ *Pauley*

¹²⁵ 198 N.L.R.B. No. 62, 80 L.R.R.M. 1736 (1972). Members Fanning and Jenkins dissented on the ground that the majority had not even considered whether the allegedly "unauthorized strike" had been protected activity. Noting that strikes over unfair labor practices may be protected even though not authorized by a union, the dissenters argued that the contract provisions in question purported to give the employer the right to fire any strikers so long as the strike was "unauthorized." This, they claimed, ignored the Board's previous holding in *Wagoner Transportation Co.*, 177 N.L.R.B. 452 (1969), *enforced per curiam*, 424 F.2d 628 (6th Cir. 1970), in which the Board had held in the case of an almost identical contract clause that strikes of less than 24 hours duration were protected activity under section 7 of the Act. NLRA § 7, 29 U.S.C. § 157 (1970). To the dissenters, the majority's blind acceptance of the Joint Committee's decision in the face of this prior authority amounted to a "patent abdication of the Board's statutory responsibility" and a complete emasculation of the principles of *Spielberg Manufacturing Co.*, 198 N.L.R.B. No. 62, 80 L.R.R.M. 1736, 1737-38 (1972) (Fanning and Jenkins, Members, dissenting).

¹²⁶ 199 N.L.R.B. No. 44, 81 L.R.R.M. 1261 (1972) (deferred to arbitration). The majority indicated that deferral would be inappropriate where the conduct in question undermines the grievance-arbitration process itself.

¹²⁷ 202 N.L.R.B. No. 34, 82 L.R.R.M. 1548 (1973) (deferral to arbitration).

¹²⁸ 198 N.L.R.B. No. 2, 80 L.R.R.M. 1743 (1972).

Paving Co.,¹²⁹ and *Anaconda Wire Cable Co.*,¹³⁰ are among those cases in which the Board has held that it would be repugnant to the purposes of the NLRA to relegate employees to an arbitral process that is authored, administered and invoked entirely by parties hostile to their interests. In *Kansas Meat Packers*,¹³¹ two employees were allegedly fired for engaging in protected activity in the form of pressing grievances which neither the union nor the employer acted upon. When the employer urged the Board to defer the matter to an available arbitration process under the contract, the Board refused on the ground that the interests of the charging parties were in apparent conflict with those of the union and the employer. An added factor was the refusal of the discharged employees to submit their cause to the grievance-arbitration process. In refusing to dismiss the 8(a)(1) charges the Board held that it would be repugnant to the purposes of the Act to force employees to submit to an arbitral process that is controlled by hostile parties.¹³² Thus *Kansas Meat Packers* and subsequent cases represent the opposite side of the "substantial harmony of interest" question considered in *National Radio*,¹³³ in which the majority found the intersection of employee and union interests to be a factor in favor of deferral to the arbitral process. These cases provide good examples of the Board majority's inclination to apply the same criteria and reasoning to deferral whether the cases present 8(a)(1) or 8(a)(3) violations or both.

4. Other areas—The Nixon majority has extended the *Collyer* deferral doctrine to other unfair labor practice situations, but the cases have been fewer and the trends in these areas are less clear.

(a) Section 8(a)(2) cases—The Nixon Board has evidenced a reluctance to defer to arbitration in two cases, *Ipco Hospital Supply Corp.*¹³⁴ and *Scottex Corp.*,¹³⁵ directly involving 8(a)(2) charges. In the *Ipco* case, for example, it was alleged that the employer violated section 8(a)(2)¹³⁶

¹²⁹ 200 N.L.R.B. No. 124, 82 L.R.R.M. 1005 (1972).

¹³⁰ 201 N.L.R.B. No. 125, 82 L.R.R.M. 1419 (1973).

¹³¹ 198 N.L.R.B. No. 2, 80 L.R.R.M. 1743 (1972).

¹³² *Id.*

¹³³ 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718, 1723 (1972). *Fleet Carrier Corp.*, 201 N.L.R.B. No. 29, 82 L.R.R.M. 1178 (1973) is a recent example of non-deferral in an 8(a)(3) situation which lacked the substantial harmony of interests present in *National Radio*.

¹³⁴ 195 N.L.R.B. No. 182, 79 L.R.R.M. 1641 (1972).

¹³⁵ 200 N.L.R.B. No. 75, 82 L.R.R.M. 1287 (1972).

¹³⁶ NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (1970). This section provides in part:

(a) It shall be an unfair labor practice for an employer—

....

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it

by continuing to recognize a union as the exclusive bargaining representative of its clerical employees at a new facility, by bargaining with the union, and by threatening clerical employees with discharge if they failed to join. When urged to defer to a pending arbitration proceeding, the trial examiner refused deferral on the ground that the matter of recognition was a question exclusively for the Board. The trial examiner concluded that any decision by an arbitrator indicating the union's exclusive representative status and its claim to the benefits of a union security provision at issue would be clearly repugnant to the purpose of the Act and not entitled to acceptance. The Board affirmed the trial examiner's finding of an 8(a)(2) violation.

However, another case¹³⁷ not specifically presenting an 8(a)(2) complaint indicates that the Board might be willing to defer to arbitration in other situations in which an 8(a)(2) charge is involved. In *Urban N. Patman, Inc.*,¹³⁸ the respondent had gradually added a sizeable pre-cooked foods operation to its original sausage manufacturing operation. Although the pre-cooked food employees had never been formally organized nor the union which represented the sausage employees recognized as the bargaining agent for the pre-cooked food employees, the employer had followed a practice of paying the pre-cooked food employees the union scale. When competitive pressures made this unfeasible, the employer sought to reduce the average scale for these employees, but the union would not agree to the reduction. Afterward the employer unilaterally reduced wages in the pre-cooked foods department. The trial examiner deemed the pre-cooked food department an accretion to the existing unit, found violations of sections 8(a)(1) and 8(a)(5), and determined that the issue was not arbitrable within the terms of the contract. The Board majority disagreed and reasoned that the essence of the dispute was whether the present contract covered the pre-cooked foods department. Having framed the issue in terms of contract interpretation, the majority deemed the issue appropriate for deferral under the principles of *Collyer* even though the collective bargaining agreement indicated that the parties had not intended arbitration of wage disputes.¹³⁹

¹³⁷ *Urban N. Patman, Inc.*, 197 N.L.R.B. No. 150, 80 L.R.R.M. 1481 (1972).

¹³⁸ *Id.*

¹³⁹ *Id.* at 1482. For a case indicating that the Board may not be as willing to defer to arbitration in the case of 8(a)(2) complaints as *Patman* might suggest, see *Combustion Engineering, Inc.*, 195 N.L.R.B. No. 161, 79 L.R.R.M. 1577 (1972). In that case the employer was charged with violating section 8(a)(3) when it announced to employees of its new plant that they were subject to the provisions of a union contract covering the employer's

Although *Patman* did not involve an 8(a)(2) complaint, it was concerned with elements of possible employer support or interference which could have formed the basis of 8(a)(2) charges. Thus, as the foregoing discussion suggests, Board policy on deferral in this area, although unclear, apparently depends on whether a central issue involves a unit determination or representation question. If it does, the Board will not defer.¹⁴⁰ On the other hand, if the issue is not so much the appropriateness of the unit as it is contract coverage, Board deferral to arbitration may be likely.

(b) Section 8(b) cases—On the question of the Board's willingness to defer to arbitration when confronted with 8(b) union unfair labor practice charges, the cases have been too few to draw conclusions. As to unfair labor practices against members, the most important single factor in such cases would seem to be the harmony of interest between the union and its members. In *National Radio Co.*,¹⁴¹ the Board deferred to arbitration where confronted with an 8(b)(1)(A)¹⁴² charge because among other factors, there was "substantial harmony" between the interests of the union and the employees involved. Where there is a conflict of union and employee interests, however, as in *Kansas Meat Packers*,¹⁴³ and *Communications Workers Local 1197*,¹⁴⁴ the Board has refused to defer to arbitration. In *Laborers Local 573*,¹⁴⁵ for example, the Board refused to defer to arbitration in the face of 8(b)(1)(A) and 8(b)(2) charges with the explanation that deferral is inappropriate where the interests of the employees were adverse to those of the employer and the union.

nearby plant. Pursuant to a grievance filed by the union, an arbitrator found that the new plant was a "normal accretion" to the existing plant and concluded that the new plant employees were covered by the contract. In refusing deferral to the arbitrator's decision, the Board held that it was the obligation of the Board to determine whether the new employees constituted an accretion to the existing unit. The Board agreed with the trial examiner's finding that the new employees did not constitute an accretion to the existing unit. Even though this case involved an 8(a)(3) charge and concerned deferral to an arbitration award, it does seem to indicate the Board's unwillingness to defer to arbitration in the case of possible 8(a)(2) violations.

¹⁴⁰ See note 139 *supra*.

¹⁴¹ 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718 (1972).

¹⁴² NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1970). 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 157 of this title

¹⁴³ 198 N.L.R.B. No. 2, 80 L.R.R.M. 1743 (1972). See p. 632 *supra*.

¹⁴⁴ 202 N.L.R.B. No. 45, 82 L.R.R.M. 1530 (1973).

¹⁴⁵ 196 N.L.R.B. No. 62, 80 L.R.R.M. 1329 (1972).

Two cases have presented the Board with an opportunity to defer to arbitration when an unfair labor practice against an employee under 8(b)(1)(B)¹⁴⁶ is involved. In *Sheet Metal Workers Local 17*,¹⁴⁷ the Board refused to dismiss 8(b)(1)(B) charges and defer to arbitration where the union had fined a member for allegedly working for less than the area wage scale at a time when he had been employed as a supervisor. The Board noted that an arbitrator, in dealing with the question of whether the supervisor was covered by the contract, would not have to consider the issue which faced the Board—namely, whether the worker involved was a “supervisor” or “employee” within the meaning of the NLRA. Since the Board deemed it necessary to take jurisdiction in order to determine whether the union fine violated the Act, the Board saw less reason to defer other issues in the case to arbitration. Citing re-litigation of issues in different forums as a situation which deferral was designed to avoid, the Board stated that since it must resolve the validity of the union fine, “there is far less compelling reason for not permitting the entire dispute to be resolved in a single proceeding.”¹⁴⁸

In *Mailers Union*,¹⁴⁹ another 8(b)(1)(B) case, the Board deferred to arbitration. There the union was charged with restraining and coercing the employer in the selection of its representative for the purpose of collective bargaining by fining the employer’s foreman, also a union member, for performing an act within the scope of his supervisory authority. In deferring the dispute to the available arbitration process, the Board noted that the contract specifically covered the type of union fine in question and that nothing in the Act prohibited an employer and a labor organization from voluntarily resolving in their contract how a broadly stated legislative policy in 8(b)(1)(B) should function in their particular circumstances. Thus the majority deferred under the principles of *Collyer*.¹⁵⁰

¹⁴⁶ NLRA § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1970).

¹⁴⁷ 199 N.L.R.B. No. 26, 81 L.R.R.M. 1195 (1972).

¹⁴⁸ *Id.* at 1198.

¹⁴⁹ 199 N.L.R.B. No. 69, 81 L.R.R.M. 1310 (1972).

¹⁵⁰ Members Fanning and Jenkins, in dissenting, noted that the Board’s majority was deferring when it could very easily decide the case on the full record presently before it without interpreting the contract or requiring the expertise of an arbitrator. *Id.* at 1311. Essentially, the dissenters did not find the contract and its meaning to be at the center of the dispute as in *Collyer*. The dissenters further argued that the majority’s decision merely confirmed what they had predicted in *National Radio Co.*, 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718, 1726 (1972), would be the result of the *Collyer* principle—that “by incorporating the provisions of the Act into the contract and then appending an arbitration clause, the parties can avoid the sanctions of a Board determination of the alleged violation of the Act.” 199 N.L.R.B. No. 69, 81 L.R.R.M. 1310, 1312 (1972).

D. *Comments from the Viewpoint of an Arbitrator*

It is particularly important and appropriate that *Collyer* be evaluated from an arbitrator's viewpoint because the heart of the problem with that decision lies not in the logic of the decision itself, but rather in the imperfect process of labor arbitration. Others, most notably Judge Hays,¹⁵¹ have identified some of the faults of the labor arbitration process. Now that the majority of the current Board seems increasingly willing to entrust the protection and enforcement of important statutory rights to arbitration, it is time for a reappraisal of that process.

The current majority on the Board obviously has faith in the arbitration process, but experience indicates that the Shulman-Cox-Douglas notion of arbitration to which these Board members apparently subscribe exists only in books. Even a cursory glance at citations in the *Steelworkers Trilogy*¹⁵² will serve to show that the Supreme Court's view of labor arbitration is not based upon empirical evidence or comprehensive studies of the process, but rather upon the personal work of Shulman and Cox. If the perceptions of Shulman and Cox are not wrong, they at least constitute exceptions to the general rule. If these men and their experiences with arbitration were representative of the process in general, the Board's *Collyer* policy would rest on more substantial ground. Unfortunately, this is not the case.

In *Labor Arbitration, A Dissenting View*,¹⁵³ Judge Hays makes several critical observations of the arbitration process which bear repeating here. Unlike the ideal described in the *Steelworkers Trilogy*, the parties to arbitration generally choose an arbitrator not on the basis of his ability to interpret the contract but on the basis of whether he is likely to render a favorable decision.¹⁵⁴ In many instances, deference to the so-called "specialized knowledge" of arbitrators is unwarranted for a number of reasons. First, the parties are not looking for a "philosopher-king" or a statesman, but rather for an arbitrator who will stick to the contract and not take liberties with the agreement in the name of the common law of the shop.¹⁵⁵ Second, the differences between collective bargaining contracts and other types of contracts, a difference thought to require the "specialized knowledge" of an arbitrator, is too

151 P. HAYS, *LABOR ARBITRATION, A DISSENTING VIEW* (1966).

152 See note 2 *supra*.

153 P. HAYS, *supra* note 151.

154 *Id.* at 39.

155 *Id.* at 41.

often exaggerated.¹⁵⁶ Finally, the list of labor arbitrators and their biographical sketches published by BNA affords no support for the theory that arbitrators in general have any special expertise in the labor relations field that gives them an advantage over judges, or for that matter, Board members.¹⁵⁷

In addition, there are several serious faults with the arbitration process that especially reflect on the unsuitability of the process for resolving 8(a)(3) cases. First, the arbitrator does not have at his disposal the type of investigative resources which the Board may bring to bear on a suspected violation. Second, the adversary process does not work effectively in the average arbitration case. The arbitrator can only consider that which is presented to him, but often neither the facts nor the issues are clearly presented. Seldom is an arbitrator afforded the luxury of deciding a case on a well-developed record. Finally, there is the even more serious question of whether the average arbitrator has the experience, much less the inclination, to delve into and consider the intricate questions of motivation or effect essential to the resolution of 8(a)(3) or 8(a)(1) charges. Too often the inquiry may end with "good cause" or "just cause" considerations without going beneath the employer's action to his motivation.¹⁵⁸

One factor not yet considered by the *Collyer* adherents is the problem of arbitration awards which are compromised by arbitrators too conscious of their "batting average." Knowledge of the number of awards rendered each year is not necessary to support the conclusion that the existence of such practices substantially reduces the worthiness of the arbitration process for Board deferral.¹⁵⁹ The Board's *Spielberg* guidelines are of no use here. The difficulty of detecting this type of award means, of course, that the more cases in which the Board defers the more it stands the chance of becoming an unwitting accomplice to injustice.

Another factor against deferral to arbitration, one which has been alluded to by Members Fanning and Jenkins, is simply that arbitration is not as speedy, simple, or inexpensive as the *Collyer* majority might like to think.¹⁶⁰ Today, arbitration is sluggish, complicated, and costly.

¹⁵⁶ *Id.* at 44.

¹⁵⁷ *Id.* at 58.

¹⁵⁸ The distinct possibility of this type of a superficial inquiry concerned dissenting Board Members Fanning and Jenkins in *National Radio Co.*, 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718, 1725 (1972).

¹⁵⁹ *Id.* at 66.

¹⁶⁰ *Id.*

In the period from 1955 to 1956, the arbitration of a dispute took an average of 156 days from the date of the grievance to the end of the arbitration hearing.¹⁶¹ The average time consumed has tended to increase since that study. By contrast, according to the General Counsel's 1970-71 Summary of Operations, the median processing time for unfair labor practices before the Board in fiscal year 1970 was 115 days from filing to the close of the hearing.¹⁶² As for the claim that arbitration is simple because of the absence of "legal technicalities", it should be remembered that legal forms are usually beneficial and frequently vital to the just resolution of the kind of controversy which is treated in arbitration.¹⁶³ Finally, with arbitrators fees running as high as \$500.00 per day or more, and with such expenses as lawyers fees and transcripts, costing about the the same or more than they would for a Board case, the arbitration process can hardly be called inexpensive.¹⁶⁴

Furthermore, there is some evidence that arbitrators hesitate to make any more pronouncements on NLRB policy than are necessary. In a survey of 2,300 labor arbitration awards and opinions covering the period 1959 to 1967, and conducted for the American Arbitration Association, it was determined that 338 cases contained issues within the Board's jurisdiction.¹⁶⁵ Among these 338 cases, arbitrators acknowledged statutory issues in 54 cases, but in only 22 of these 54 cases did the arbitrator attempt any discussion of the statutory problem.¹⁶⁶ From a reading of these 22 decisions, the survey's author concluded that

[w]hen they [arbitrators] dispose of a grievance on a contractual basis, they are inclined to treat statutory issues as irrelevancies. It is in those cases that one finds most of the dicta about arbitration and the NLRB being two separate forums with the arbitrator's function being that of contract interpretation without regard to the consequences if the same issue were brought to the Board

...¹⁶⁷

¹⁶¹ Ross, *The Well-Aged Arbitration Case*, 11 IND. & LAB. REL. L. REV. 262 (1958).

¹⁶² N.L.R.B. GENERAL COUNSEL, SUMMARY OF OPERATIONS, 1970-71. In the absence of contradictory data, it is assumed that the average time from the close of an arbitration or Board hearing to the issuance of the arbitrator's or administrative law judge's decision is approximately the same for both processes.

¹⁶³ P. HAYS, *supra* note 151, at 68.

¹⁶⁴ *Id.* at 67.

¹⁶⁵ Waks, *Arbitrator, Labor Board, or Both*, 19 MONTHLY LAB. REV. 1 (1968).

¹⁶⁶ *Id.* at 1-2.

¹⁶⁷ *Id.* at 4.

Certainly such evidence is grounds for pause about the deferral policy of *Collyer*.

What this survey suggests is that the Board's retention of jurisdiction in *Collyer* deferral cases for the purpose of reviewing any ultimate award is a somewhat hollow safeguard against the violation of statutory rights. Under *Spielberg* the award will be presumed to be worthy of deferral if it meets general guidelines. It is questionable, however, whether such a presumption is warranted when it is apparent from the above study that a great many arbitrators treat statutory issues as irrelevancies. Under *Airco Industrial Gases*,¹⁶⁸ the Board will not honor an award if the arbitrator failed to consider the statutory question involved. But it is difficult to see how the *Collyer* majority can expect statutory rights to be adequately protected when many arbitrators come to their task with a preconceived aversion to statutory issues, and consider those issues only to the extent of finding them irrelevant. The difficulty of overcoming the presumptions of *Spielberg* and the likelihood that an arbitrator has considered statutory issues only in the context of their irrelevance to his decision, indicate that the deferral policy of *Collyer* may amount to the Board turning its head while important statutory rights go unprotected and unenforced.

IV. APPROPRIATENESS OF BARGAINING UNITS

The authority of the NLRB to determine appropriate bargaining units has few limitations. Under section 9(b) of the NLRA¹⁶⁹ the Board has the authority subject to certain exceptions to decide in each case whether "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ."¹⁷⁰

In determining whether the unit petitioned for in a particular case is appropriate, the Board has traditionally looked to "the community of interest among the employees sought to be represented; whether they comprise a homogeneous, identifiable, and distinct group; whether they are interchanged with other employees; the extent of common supervision, the previous history of bargaining, and the geographic proximity of various parts of the employer's operation."¹⁷¹

¹⁶⁸ 195 N.L.R.B. No. 120, 79 L.R.R.M. 1467 (1972).

¹⁶⁹ NLRA § 9b, 29 U.S.C. § 159(b) (1970).

¹⁷⁰ *Id.*

¹⁷¹ Metropolitan Life Ins. Co., 156 N.L.R.B. 1408, 1412 (1966).

In balancing the above factors the Board has recognized that there may be more than one way in which employees may be appropriately grouped for purposes of collective bargaining. The question raised by the more recent decisions is whether among the possible appropriate units the Nixon Board is going to favor larger bargaining units by giving increased weight to the employer's administrative organization.

One indication of the policy of the Nixon Board on the appropriate size for employee bargaining units has come from a recent case involving bargaining units in the retail chain industry. Up until 1962, the Board's policy was to align bargaining units in the retail chain industry with the employer's administrative division or the geographic area involved.¹⁷² Finding that this policy had too frequently operated to impede the employees' exercise of section 7 organizational rights¹⁷³ in retail chain operations, the Kennedy-Johnson Board in *Sav-On Drugs*¹⁷⁴ decided to apply the same unit policy to retail chains as it applied to other cases involving multi-unit enterprises. In 1964, the Board broadened this holding by deciding that single-store units are presumptively appropriate in the retail chain field.¹⁷⁵

In *Gray Drug Stores*,¹⁷⁶ however, the Nixon Board indicated that it would apply the standards established in earlier cases in a different way. In *Gray*, the Board rejected the employer's request for a statewide unit and the union's request for single-store units, and found an appropriate two-county unit consisting of twenty-one stores in Dade County, Florida, and adjacent Broward County. The majority held that the presumptive appropriateness of single-store units had been rebutted by a lack of managerial autonomy at the single-store level, the close geographic proximity of the stores, and the substantial and frequent employee interchange between stores.¹⁷⁷ In addition, it noted that the supervisory authority was exercised by two distinct managers, each of

¹⁷² *E.g.*, *Daw Drug Co.*, 127 N.L.R.B. 1316 (1960).

¹⁷³ NLRA § 7, 29 U.S.C. § 157 (1970). This section 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 agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

¹⁷⁴ 138 N.L.R.B. 1032 (1962).

¹⁷⁵ *Frisch's Big Boy III-Mar, Inc.*, 147 N.L.R.B. 551 (1964).

¹⁷⁶ 197 N.L.R.B. No. 105, 80 L.R.R.M. 1449 (1972).

¹⁷⁷ *Id.* at 1451.

whom had authority over stores in *both* Dade and Broward Counties. Thus a unit division based on counties would not be coextensive with the division of supervisory authority over the stores. With the two-county unit, there would be an intersection of geographical and administrative factors.

In their dissenting opinion, Members Fanning and Jenkins disagreed that the appropriateness of single-store units had been rebutted. Furthermore, they argued that geographic considerations dictated not a two-county unit but rather an eleven-store Dade County unit and a ten-store Broward County unit, since both counties constituted standard metropolitan statistical areas. Fanning and Jenkins concluded that the majority had, in effect, held that factors of geography *and* administration must coincide where previously the Board's practice had been only to group retail chain store employees within *either* the employer's administrative division *or* a geographical area.¹⁷⁸

Whether the Nixon majority will in the future strive for larger units which offer a geographical and administrative common denominator remains to be seen. While such a shift in policy may alleviate some of the unit-fragmentation criticism leveled at the Kennedy-Johnson Board, one can only speculate on whether such larger units will be detrimental to the exercise of employee organizational rights. It would seem that the majority in *Gray Drug Stores* is paying homage to two unit-determination factors which in concert will not necessarily assure the employees involved the optimum exercise of their organizational rights, but may in fact result in larger units which impede the exercise of such rights.

In another recent case, however, a majority of the Nixon Board rested their decision almost solely on the employer's organizational structure, even to the point of ignoring the unwieldy geographic size of the unit. In *Frito-Lay, Inc.*,¹⁷⁹ the Teamster's Union sought to establish a unit of some twenty-nine route salesmen, most of whom worked out of the company's warehouse distribution center in Phoenix, Arizona. The employer contended that the smallest appropriate unit would be one comprising all of the route salesmen assigned to the company's region 2, which covered the territory of Phoenix and Tucson, Arizona, and Las Vegas, Nevada.¹⁸⁰ The Board majority agreed with the em-

¹⁷⁸ *Id.* at 1452-53.

¹⁷⁹ 202 N.L.R.B. No. 143, 82 L.R.R.M. 1705 (1973).

¹⁸⁰ *Id.* Region 2 includes six sales districts, each with its own district manager. Three districts are based in Phoenix, two are based in Tucson, 120 miles to the southeast, and one is based in Las Vegas, 293 miles to the northwest.

ployer basing their conclusion upon a number of factors, among others, "the almost total lack of autonomy at any level below the region, the high degree of authority at the regional sales manager level over hiring, transfer, promotion, discipline, discharge, and other terms and conditions of employment, the fact that the Phoenix employees' contacts with one another are limited, and the lack of common supervision in the requested unit. . . ."181 In addition, the majority specifically disavowed the dissenters' charge that their decision constituted a move "to a new administrative theory calculated to insure unit control by employer organization," and stated its decision to be in "reliance upon those time-tested factors which establish what unit is appropriate for collective bargaining."¹⁸²

Again Members Fanning and Jenkins dissented. After noting that any one factor among those relevant to unit determination might justify the finding of a small unit, they accused the majority of selecting as their decisional basis the one factor which is wholly employer-controlled—common supervision—and applying it in a manner that requires a two-state unit.¹⁸³ In the eyes of the dissenters, the majority determined the unit without paying heed to "time-honored criteria like employee community of interest, lack of interchange, and obvious geographic cohesiveness."¹⁸⁴ Any one of these factors, and certainly the three in combination, according to Members Fanning and Jenkins, dictated a smaller unit. Furthermore, they regarded the district manager as playing a more significant role in personnel matters than the majority had conceded, and deemed the regional manager's role as involving "paper work" approval.

Although the majority claimed to be "totally baffled"¹⁸⁵ by the views of the dissenters, their observation that the majority's rationale represents a "move from the statutory prohibition of unit control by extent of employee organization to a new administrative theory calculated to insure unit control by employer organization" seems justified.¹⁸⁶ There are obvious geographic deficiencies in the two-state unit, and the majority's effort¹⁸⁷ to minimize such deficiencies is unconvincing. Likewise, the majority unsuccessfully developed the employee community of in-

181 *Id.* at 1706.

182 *Id.* at 1707.

183 *Id.*

184 *Id.* at 1708.

185 *Id.* at 1706.

186 *Id.* at 1707.

187 *See id.* at 1705.

terest and rather ineffectively attempted to establish the fact of significant employee interchange. In short, the majority seems to have attempted to soften the impact of its preoccupation with the employer's supervisory organization. If this decision represents the "wave of the future," its rationale, even more so than that of *Gray Drugs*, will constitute a serious distortion of the Board's role under section 9(b). Larger units based upon employer organization to the exclusion of other related factors cannot help but impede employees' exercise of their section 7 organizational rights. And employees who cannot organize cannot engage effectively in the very process which appropriate unit determinations are supposed to facilitate—collective bargaining.

V. LOCKOUTS

In the development of the law of employer lockouts, the Board has applied both 8(a)(1)¹⁸⁸ and 8(a)(3)¹⁸⁹ concepts in order to determine whether an employer has unlawfully interfered with employee rights to organize and bargain. Perhaps more so than in any other area of labor law, the variations of individual philosophies can be traced into ultimate factual conclusions that given employer conduct does, or does not, violate these rights. The course of the law on lockouts is not based upon actual evidence arising from particular cases, nor does it appear to be grounded upon empirical data. In fact, the Board seems to have based its changing position upon historical contemplation of past experience. As a result, the development of the "law" of lockouts; that is, what lockouts "interfere" with employee rights and thus are impermissible, and what lockouts do not "interfere" and thus are permissible, is directly traceable to the underlying mental attitudes of the Board members on the use of the lockout. This discussion will focus on the law of employer lockouts under past Boards and the changes which the Nixon Board has made in this area.

¹⁸⁸ NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970). This section prohibits employer "interference" with rights guaranteed to employees by section 7 of the Act. See note 13 *supra*. The National Labor Relations Board is empowered to weigh the extent of the actual interference and balance it against the numerous property and civil rights possessed by the employer. Although having some earmarks of a legal conclusion, the determination of "interference" is largely an ultimate factual issue which, according to the Supreme Court, reviewing courts should accept without direct evidence that particular conduct, in fact, interferes with employee rights.

¹⁸⁹ NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). See note 12 *supra*. Section 8(a)(3), long thought to require actual proof of employer motive to discourage union membership, has for several years now been interpreted within the context of presumptions arising from objective evidence. See *NLRB v. Great Dane Trailer, Inc.*, 388 U.S. 26 (1967); *NRLB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Radio Officer's Union v. NLRB*, 347 U.S. 17 (1954).

A. Truman Era

During the 1940's and early 1950's the Board viewed employer lockouts with a great deal of suspicion, permitting their use only in well and narrowly defined circumstances. Lockouts were acceptable only when "defensive" and when anti-union animus was clearly absent. Thus the Board would not permit lockouts that came early in the organizational or bargaining stages since there could be little if any permissible economic justification for such lockouts, and the anti-union animus of the employers was self-evident.¹⁰⁰ In addition, the Board recognized that a lockout of employees while organizational activities were underway would certainly have a devastating impact upon that, and future organizational efforts. Similarly, a lockout close upon the heels of a successful organizational effort, during the early stages of bargaining, would have the foreseeable impact of undercutting the organization by frustrating its purpose of collective bargaining. Thus the Board realized that if such lockouts were permitted, employers could avoid their statutory obligations to bargain.¹⁰¹

The Board in this period did, however, recognize that "lockouts are permissible to safeguard against unusual operational problems or hazards or economic loss where there is reasonable ground for believing that a strike was threatened or imminent."¹⁰² The key word in this test is "unusual." The economic loss which the employer attempted to avoid by the lockout had to be more than that which normally flowed from a strike. The damage had to be atypical; caused uniquely by the timing of the work stoppage. Therefore, where a threatened strike would cause spoilage of materials then in processing,¹⁰³ or where a strike would strand the goods of customers in the employer's shop,¹⁰⁴ a lockout was permitted. Professor Oberer has observed that the potential economic loss in these and other cases was relatively insignificant, and that other factors, including bargaining leverage, was probably the motivating factor in the employer's use of the lockout.¹⁰⁵ Nevertheless, throughout the pre-Eisenhower period, the Board refused to recognize

¹⁰⁰ See, e.g., *North Country Motors, Ltd.*, 133 N.L.R.B. 1479 (1961); *Flora Constr. Co.*, 132 N.L.R.B. 776 (1961).

¹⁰¹ See, e.g., *Scott Mfg. Co.*, 133 N.L.R.B. 1012 (1961); *Jay Co.*, 103 N.L.R.B. 1645 (1958).

¹⁰² *Quaker State Oil Ref. Corp.*, 121 N.L.R.B. 334, 337 (1958).

¹⁰³ *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943).

¹⁰⁴ See *Packard Bell Electronics Corp.*, 130 N.L.R.B. 1122 (1961); *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951).

¹⁰⁵ Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Foods*, 51 *Cornell L.Q.* 193, 196-99 (1966).

the legitimacy of "bargaining" or "offensive" lockouts and searched, in each case, for atypical or "defensive" economic justification.

Furthermore, the Board steadfastly refused to recognize any special economic justification flowing from a multi-employer bargaining unit.¹⁹⁶ When the union utilized "whipsaw" tactics by striking one member of the unit at a time, the Board prohibited lockouts by the non-struck members of the unit. There was no unusual economic need of the *particular employer* and a lockout was in the nature of a retaliation against the union for exercising its right to strike at another employer. In spite of overwhelming judicial rejection of this hard line against using the lockout to defend against whipsaw strikes,¹⁹⁷ the Board maintained its ground until its membership was ultimately altered in 1954.

B. Eisenhower Era

The newly constituted Eisenhower Board made no revolutionary shift in policy, but in applying the policy developed by the Truman Board, a perceptible change was effected. In the well-known *Buffalo Linen*¹⁹⁸ case the question was raised as to the legality of lockouts by non-struck members of a multi-employer unit in response to strikes called at the shops of other members of the unit. In a brief opinion refusing to accept the recommended decision of the trial examiner, the Board recognized the interest of the individual employers in the solidarity of the multi-employer relationship and viewed lockouts by the non-struck members as being defensive and privileged. Thus the Board retained the old dichotomy of "offensive" v. "defensive," but appeared to liberalize situations in which the employer's conduct would be considered "defensive." The Board implicitly recognized that the multi-employer bargaining unit was an important bargaining technique to counterbalance the "monopoly" power of a single strong union. Further, it held that the preservation of that unit against economic attack warranted Board protection. This underlying philosophy is, of

¹⁹⁶ *Davis Furniture Co.*, 94 N.L.R.B. 279 (1951), *remanded sub nom.*, *Leonard v. NLRB*, 197 F.2d 435 (9th Cir.), *on remand sub nom.*, *Davis Furniture Co.*, 100 N.L.R.B. 1016 (1952), *enforcement denied sub nom.*, *Leonard v. NLRB*, 205 F.2d 355 (9th Cir. 1953); *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950), *remanded*, 190 F.2d 576 (7th Cir. 1951), *on remand*, 99 N.L.R.B. 1448 (1952), *enforced*, 204 F.2d 529 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953).

¹⁹⁷ *NLRB v. Continental Baking Co.*, 221 F.2d 427 (8th Cir. 1955); *NLRB v. Spalding Avery Lumber Co.*, 220 F.2d 673 (8th Cir. 1955); *Leonard v. NLRB*, 205 F.2d 355 (9th Cir. 1953); *Morand Bros. Beverage Co.*, 190 F.2d 576 (7th Cir. 1951).

¹⁹⁸ *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447 (1954).

course, what one would expect from a so-called "pro-management" Board.

Ironically, the second circuit reversed the Board.¹⁹⁹ On review, the Supreme Court reversed the second circuit and thus affirmed the Board.²⁰⁰ In this, its first lockout case, the Supreme Court indicated that the Labor-Management Relations Act did not condemn lockouts *per se*, nor was legality necessarily confined to narrowly defined, unusual or unique circumstances. The Court held that Congress had committed the fact-finding task primarily to the Board with only limited review of its conclusions. The Court then observed that the Board had "correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from disintegration threatened by the . . . strike action was lawful."²⁰¹

Thus, to a degree, as is true with any Supreme Court decision, a "low water mark" was drawn, below which future Boards would have difficulty in retreating. Admittedly, the "low water mark" derived from this case is a hazy line caused by the clear announcement that the legislative scheme allows the Board to establish the permissible parameters of the lockout. Nonetheless, future Boards would have difficulty in denying the following propositions: first, that lockouts have some, albeit ill-defined, legitimacy; and second, that lockouts are permissible to protect interests not directly related to unusual economic loss to the employer.

C. *Kennedy-Johnson Era*

By the early 1960's the Board was strictly construing the *Buffalo Linen* decision and applying its "defensive" v. "offensive" analysis to strike down lockouts with a vigor perhaps unknown even in the Truman era. The extent to which the Board stretched to find a violation in the face of its own pre-Eisenhower precedent can be illustrated by an important case decided in that period, *American Ship Building*.²⁰² There the employer, who was engaged in the highly seasonal business of ship repairing, locked out a large majority of its employees in order to avoid a strike at a time that would cause unreasonable damage to himself and his customers. Although the trial examiner believed the employer's actions economically justified, the newly constituted Board

¹⁹⁹ *Truck Drivers Union v. NLRB*, 231 F.2d 110 (2d Cir. 1956).

²⁰⁰ 353 U.S. 87 (1957).

²⁰¹ *Id.* at 97.

²⁰² *American Ship Bldg. Co.*, 142 N.L.R.B. 1362 (1963), *enforced*, 331 F.2d 839 (D.C. Cir. 1964), *rev'd*, 380 U.S. 300 (1965).

was not convinced that the employer was threatened with a peak season strike. Rather, it felt that the employer was utilizing the lockout as an offensive weapon to force a favorable settlement of the negotiating dispute. Therefore, the Board held the lockout to be both coercive and discriminatory within the meaning of sections 8(a)(1) and 8(a)(3).

The Supreme Court, however, agreed with the trial examiner that a lockout was permissible under the circumstances.²⁰³ Mr. Justice Goldberg particularly took issue with the Board's decision, categorizing its finding that a strike was not threatened as "irrational," without a "scintilla" of evidence to support it.²⁰⁴ The assurance from union representatives that no strike would be forthcoming was, in his opinion, nothing more than "hopeful augury."²⁰⁵

Justice Stewart speaking for a majority of the Court analyzed the lockout in traditional 8(a)(1)²⁰⁶ and 8(a)(3)²⁰⁷ terms. First, he could find no interference with any "right" possessed by the employees under section 8. There was no "interference" with the right to bargain because the parties had in fact bargained to impasse, and the right to strike had not been interfered with since the right does not "carr[y] with it the right exclusively to determine the timing and derivation of all work stoppages."²⁰⁸ Similarly, Justice Stewart held under section 8(a)(3) that lockouts to support a bargaining position were not inherently destructive of employee rights and, therefore, carried with them no implication that the employer acted to discourage union membership. Since no evidence of actual anti-union animus existed, he found that the Board had not proved the motive necessary for an 8(a)(3) violation.

Thus despite the opposite thrust of its earlier decision in *Buffalo Linen*, the Court was no longer willing to defer to the Board's findings of fact that certain lockouts constituted "interference" or carried with them improper motive. Although giving lip service to the role of the Board in balancing competing interests, the Court suggested that as a matter of law the Board could not be an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."²⁰⁹ In short, the Court in effect held in

²⁰³ 380 U.S. 300 (1965).

²⁰⁴ *Id.* at 335.

²⁰⁵ *Id.* at 333.

²⁰⁶ See note 188 *supra*.

²⁰⁷ See note 189 *supra*.

²⁰⁸ 380 U.S. at 310.

²⁰⁹ *Id.* at 317, quoting *NLRB v. Insurance Agent's Int'l Union*, 361 U.S. 477, 497-98 (1960).

American Ship Building that the lockout was a permissible weapon and was to be examined under a traditional 8(a)(1) and 8(a)(3) analysis. Thus the future utilization of the "offensive" v. "defensive" approach to lockouts was largely precluded.

The Supreme Court dealt another serious blow to the Board's fact-finding function when it refused to accept the Board's holding in *Brown Food*.²¹⁰ In that case, a union had struck a member of a multi-employer unit. In response, *all* of the employers of that unit locked out their regular employees, and continued operation by hiring temporary replacements. According to the Board, no economic justification existed for the non-struck employers' lockout of their employees.

In an opinion written by Mr. Justice Brennan, the Court held that non-struck employers had a right to lock out their employees as a method of preserving the multi-employer unit. Furthermore, the Court recognized that a struck employer had a right to replace his strikers. In so doing non-struck employers would be placed at an economic disadvantage unless they too could hire replacements. The Court thus could find no substantial "interference" with employee rights, and concluded that the business purpose in staying in business and preserving the solidarity of the unit against whipsaw tactics prohibited the inference of illegal motive.

With *American Ship Building* unquestionably validating the use of the lockout as a weapon to aid an employer's bargaining position, and with *Brown Food* sanctioning the use of a lockout coupled with replacements under a situation that might be classified as "defensive," the attention of the Board necessarily turned away from the legality of lockouts. The Board no longer had the broad and flexible power to balance away the right of the employer to lock out because the Court had established a new "low water mark." The Board had been effectively deprived of the power to retreat to an old analysis that would declare most lockouts invalid.

The Court, however, did not resolve all lockout questions. The first of these unanswered questions was the timing of the lockout. More particularly, the Court left unresolved whether a bargaining impasse was a condition precedent to a permissible lockout. The facts of *American Ship Building* and the comment of the Court expressly limiting its decision to lockouts "after a bargaining impasse has been reached,"²¹¹

²¹⁰ John Brown (d/b/a Brown Food Store), 137 N.L.R.B. 73 (1962), *enforcement denied*, 319 F.2d 7 (10th Cir. 1963), *aff'd*, 380 U.S. 273 (1965).

²¹¹ 380 U.S. at 318.

left the Board with some room in which to maneuver within its fact-finding role. From its earliest days the Board had held that the timing of a lockout was directly related to an employer's ability to interfere with employee rights. Organization and early bargaining lockouts had always been outlawed. Given the Board's obvious opposition to the bargaining lockout, regardless of its timing, it was quite predictable that the Board, in its fact-finding capacity would limit *American Ship Building* to its facts and conclude that a lockout prior to impasse "interfered" with the bargaining rights of the employees. Furthermore, one might have predicted that the Board would have been quite strict in determining when the parties, in fact, had reached a bargaining impasse.

As perhaps an example of the exception that proves the rule, the Board did not follow what would have appeared to have been its policy predilections. At first the Board refused to take the bait offered by the Court in *American Ship Building*. In *Ruberoid Co.*,²¹² on a fairly debatable issue of whether an impasse had been reached, the Board affirmed the trial examiner's finding of an impasse, and thus the legality of the bargaining lockout. In avoiding the issue, and thus perhaps inadvertently, the Board established the precedent that an impasse would not be strictly construed. In *Darling & Co.*²¹³ the Board met the issue directly. With one member dissenting the trial examiner's recommendation that an impasse was a necessary prerequisite to a valid bargaining lockout was rejected. In so holding, the Board broadly interpreted the test it believed was dictated for its use by the Court in *American Ship Building*. The majority stated that the absence of an impasse may be some evidence of improper motive, but rejected any *per se* rule that in every case the employer necessarily has the motive of "hostility to the bargaining process"²¹⁴ simply because he locks out his employees before a bargaining impasse is actually reached. This position has now been judicially confirmed,²¹⁵ and it is doubtful at this stage or in the foreseeable future that the Board will adopt any *per se* rule requiring a bargaining impasse as a condition precedent to a valid bargaining lockout.

The Court also left unresolved the right of an employer after a

²¹² 167 N.L.R.B. 987 (1967).

²¹³ 171 N.L.R.B. 801 (1968), *enforced sub nom.*, *Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969).

²¹⁴ 171 N.L.R.B. at 802-03.

²¹⁵ See, e.g., *Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969); *Detroit Newspaper Publisher Ass'n*, 346 F.2d 527 (6th Cir. 1965).

lockout to bring negotiating pressure on a union by operating his plant with temporary replacements or non-unit employees. The reaction of the Board to this problem was predictable. Unenthusiastic about the bargaining lockout to begin with, it was not likely to accept continued operation by the employer. Thus the Board held in *Inland Trucking*²¹⁶ that the factors of a bargaining lockout and continued operation by utilization of temporary help was an interference with employee rights not counterbalanced by employer justification, and that such continued operation after a lockout was inherently destructive of employee rights, thus carrying with it conclusive proof of improper motive. In March, 1971, the Board's conclusion was affirmed by the seventh circuit,²¹⁷ which adopted similar reasoning. Both the Board and the court, in rejecting any analogy to *Brown Foods*, held that *Brown Foods* was a special situation in which the replacements were not considered to be "economic weapons" and "were deemed justified by particular circumstances as fair defensive responses to a situation precipitated by a strike."²¹⁸ Thus the Board clung to the battered remains of the old "defensive-offensive" dichotomy, not to justify the lockout, but in its analysis of the "plus factor" of replacements.

D. Nixon Era

By the time the Seventh Circuit had affirmed *Inland Trucking* the character of the Board was changing. Soon after that decision, the new Nixon Board in *Ottawa Silica Co.*²¹⁹ was faced with a situation wherein it could either re-evaluate, distinguish or apply *Inland Trucking*. The facts in *Ottawa Silica* were quite similar to those in *Inland Trucking* except that following the bargaining impasse and lockout, the employer continued operation, not by hiring temporary replacements, but by the utilization of its own non-unit employees. On the basis of *Inland Trucking*, the trial examiner found that the offensive lockout coupled with continued operations with non-unit employees constituted unlawful "interference." That decision was reversed. Members Kennedy and Penello, speaking for the "majority," essentially re-evaluated the premises upon which *Inland Trucking* was based. Chairman Miller concurred on the ground that the facts in *Inland Trucking* were distinguishable and not controlling in the present case. In *Inland Truck-*

²¹⁶ *Inland Trucking Co.*, 179 N.L.R.B. 350 (1969).

²¹⁷ 440 F.2d 562 (7th Cir. 1971).

²¹⁸ *Id.* at 564.

²¹⁹ 197 N.L.R.B. No. 53, 80 L.R.R.M. 1404 (1971).

ing the operation continued by hiring new employees. In the present case the operation was continued by utilization of the employer's own employees, albeit non-unit employees. The Chairman apparently believed that this difference, rather minor in appearance, was decisive. Holdovers from the Kennedy-Johnson era, Members Fanning and Jenkins joined in a dissent. They found *Inland Trucking* both persuasive and controlling.

Unlike the Board of two years before, the two-man majority simply could not find that the continued operation following a bargaining lockout had an impact that was "inherently destructive."²²⁰ Rather, they believed that its influence on employees was "comparatively slight" having no "great tendency to discourage union membership."²²¹ While the Johnson Board distinguished *Brown Foods* as a special "defensive" situation, the Nixon appointees relied on *Brown Foods* as sanctioning the use of replacements during a lockout.

The question of whether *Inland Trucking* was dead, or merely limited to its facts was perhaps answered by a Board decision, *Inter Collegiate Press*.²²² In *Inter Collegiate Press*, the Board was presented with facts that were almost indistinguishable from those in *Inland Trucking*. Following a bargaining lockout the employer hired new employees as temporary replacements. The trial examiner applied *Inland Trucking* and found a violation. Again the Board reversed. Members Kennedy and Penello merely relied upon their opinion in *Ottawa Silica*. Chairman Miller concurred on the basis of *Brown Foods*, and indicated that he was opposed to any *per se* rule either giving blanket validity or invalidity to the hiring of temporary replacements following a lockout. Instead, he believed that *Brown Foods* taught that the facts of each case must be separately weighed to determine: (1) the extent of the tendency to discourage union activity, and (2) the balance supplied by legitimate and significant business justification.²²³ Chairman Miller searched the record of this particular case and stated that he was "unable to detect any evidence that the use of temporary replacements here had any greater tendency to discourage union membership than did like conduct in the *Brown* case."²²⁴

It is clear from the foregoing discussion that the difference between

²²⁰ 179 N.L.R.B. at 356.

²²¹ 80 L.R.R.M. at 1407.

²²² 199 N.L.R.B. No. 35, 81 L.R.R.M. 1508 (1972).

²²³ 81 L.R.R.M. at 1510-11.

²²⁴ *Id.* at 1511.

the present Board and its predecessors is that one group of intelligent and well-informed men viscerally reacted to a particular set of facts with alarm, if not outright horror, and concluded that the employer's action had an overpoweringly adverse impact on employee rights. Another group of intelligent and well-informed men viewed identical facts and concluded that the "attempt to remain open for business with the help of temporary replacements [is] a measure reasonably adapted to the achievement of a legitimate end."²²⁵ This difference cannot be explained by the fact that in the two intervening years an empirical study had revealed the true impact of replacements on the psyche of locked out employees, or whether the presence of replacements, in fact, had a chilling effect upon the bargaining process. The difference must be based solely upon subjective suppositions and assumptions that are drawn from the training, background, experience and philosophy of the men themselves. There was an old saw in the 16th century that the justice from the court of Chancery varied with the length of the chancellor's foot. Should national labor policy in the 20th century depend so largely upon the subjective evaluations of Board members? If it does, the result may be judicial usurpation of the fact-finding role, as has largely occurred in the lockout area.

VI. BARGAINING ORDER REMEDIES

In 1969, in *NLRB v. Gissel Packing Co.*,²²⁶ the Supreme Court upheld the Labor Board's issuance of a bargaining order as an appropriate remedy, even though the union had not been certified through the Board's election process.²²⁷ This decision expressly overruled those

²²⁵ 80 L.R.R.M. at 1407.

²²⁶ 395 U.S. 575 (1969).

²²⁷ Section 9(c) of the NLRA provides for Board elections and certification when questions concerning a union's representation arise. It provides in part:

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate

parts of three per curiam opinions²²⁸ by the Fourth Circuit in which the court declined to enforce such orders on the ground that union authorization cards are inherently unreliable indicators of union majority.²²⁹ Because of this inherent unreliability, the Fourth Circuit felt that an employer should be entitled to withhold recognition of a union until the results of a Board election and certification become known to him.²³⁰ After the *Gissel* decision, however, the employer could be forced to bargain with an uncertified union when the employer has been found to have committed serious unfair labor practices²³¹ that

hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

²²⁸ The *Gissel* decision represented a consolidation of four lower court cases, three of which came from the Court of Appeals for the Fourth Circuit, and one from the Court of Appeals for the First Circuit. *NLRB v. Gissel Packing Co.*, 398 F.2d 336 (4th Cir. 1968), *modifying per curiam*, 157 N.L.R.B. 1065 (1966); *NLRB v. Heck's, Inc.*, 398 F.2d 337 (4th Cir. 1968), *modifying per curiam*, 166 N.L.R.B. 186 (1967); *General Steel Products, Inc. v. NLRB*, 398 F.2d 339 (4th Cir. 1968), *modifying per curiam*, 157 N.L.R.B. 636 (1966); and *NLRB v. Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968), *enforcing* 164 N.L.R.B. 261 (1967).

The Supreme Court affirmed the position of the Court of Appeals for the First Circuit. *NLRB v. Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968), *enforcing* 164 N.L.R.B. 261 (1967).

²²⁹ *NLRB v. Gissel Packing Co.*, 398 F.2d 336, 338-39 (1968).

²³⁰ Section 9(a) of the NLRA, enunciates the concept of majority rule for purposes of collective bargaining by providing in part:

Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

NLRA § 9(a), 29 U.S.C. § 159(a) (1970). Under the majority rule concept an employer has committed an unfair labor practice if he commences to bargain with a union that is not representative of a majority of employees in an appropriate bargaining unit, even though the employer may believe the union to represent such a majority at the time he begins bargaining. *See, e.g., International Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1960).

Thus the Fourth Circuit decisions relied on the position that an employer could withhold recognition of a union claiming majority status, absent a Board certification of the union. Furthermore, this court interpreted section 9(c) of the NLRA to require a Board certification election as a condition precedent to the Board's ability to grant certification to a union claiming majority status.

²³¹ Several examples of the serious unfair labor practices found by the Board in the *Gissel* complex of cases were noted by the Court. According to the Board, the employers had engaged in restraint and coercion of employees in violation of section 8(a)(1) of the National Labor Relations Act by "coercively interrogating employees about Union activities, threatening them with discharge, and promising them benefits, . . . threatening reprisals, creating the appearance of surveillance, and offering benefits for opposing the Union" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 583 (1969).

interfered with the election process and tended to preclude the holding of a fair election,²³² and when some other convincing means of the union's majority status existed.²³³

The *Gissel* decision is now probably the cornerstone and point of origin for Board practice in the area of remedies for an employer's refusal to bargain with a union claiming majority status by means other than certification elections. The decision itself is well-known in labor circles and has received extensive commentary in legal publications.²³⁴ It is therefore not the present purpose of this discussion to further analyze the *Gissel* decision, but rather to determine whether the Nixon Board has answered one of the most significant questions that has arisen with respect to the use of a bargaining order remedy since *Gissel*—whether the Board, under any circumstances, will use its remedial power under section 10(c) of the NLRA²³⁵ to issue a bar-

²³² *Id.* at 594.

²³³ In *Gissel*, for example, the controversy was precipitated by and centered upon the union's demand for recognition on the basis of a valid card majority. The Supreme Court chose to recognize in some instances that although cards are inferior to the election process, they can adequately reflect employee sentiment when the election process itself has been impeded. In this regard, the Court approved a liberalized version of the *Cumberland Shoe* doctrine, *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1964), for purposes of determining whether authorization cards will be counted as valid in deciding the union's representative status. Under this approach a single-purpose union authorization card, unambiguous on its face, designating the union as the bargaining agent, will be counted unless the language on the card "is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 606 (1969).

²³⁴ See, e.g., Christensen, *Gissel Packing and "Good Faith Doubt:" The Gestalt of Required Recognition of Unions Under the NLRA*, 37 U. CHI. L. REV. 411 (1970); Platt, *The Supreme Court Looks at Bargaining Orders Based on Authorization Cards*, 4 GA. L. REV. 779 (1970); Note, *NLRB v. Gissel Packing Co.: Bargaining Orders and Employee Free Choice*, 45 N.Y.U.L. REV. 318 (1970); 1969 DUKE L.J. 1075.

²³⁵ The Board's remedial power becomes operative under section 10(c) of the NLRA once an unfair labor practice is proved by a preponderance of the evidence. Section 10(c) provides in relevant part:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter

The Board's proper exercise of its remedial power is discussed in the following line of decisions. *Textile Workers v. NLRB*, 388 F.2d 896 (2d Cir. 1967); *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292 (2d Cir. 1967); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). See also Fanning, *New and Novel Remedies for Unfair Labor Practices*, 3 GA. L. REV. 256 (1969); Note, *A Survey of Labor Remedies*, 54 VA. L. REV. 38 (1968).

gaining order as a remedy for an employer's unfair labor practices which tend to make the holding of a fair election impossible, and which are committed at a time before the union involved has made an otherwise convincing showing of majority status through the use of authorization cards or by some other means.²³⁶

At the outset, this question seems to require the Board to become concerned with what are sometimes two competing interests. On the one hand, there is the interest in preserving employee freedom of choice; that is, freedom to choose which union the majority of employees desire to represent them, or freedom to choose no collective bargaining representative at all if the employees so desire. On the other hand, however, lies the interest in preserving national labor policy, a necessary ingredient of which is to provide a wholesome environment within which the collective bargaining process may be effectuated. When an employer commits what have been labeled outrageous and pervasive unfair labor practices that tend to preclude the possibility of a union's obtaining majority status, this environment is destroyed. The question then becomes whether a bargaining order is a proper remedy under these circumstances, or whether the Board is faced with its own type of Hobson's choice by having at hand only traditional remedies for section 8(a)(1),²³⁷ 8(a)(2)²³⁸ or 8(a)(3)²³⁹ violations.

As a matter of certainty the Court in *Gissel* suggested the possibility that the use of a bargaining order without inquiry into majority status could be an appropriate remedy in exceptional cases marked by outrageous and pervasive unfair labor practices.²⁴⁰ However, in *Gissel* there was a showing of majority status through union authorization cards, and the question of whether a bargaining order could issue for

²³⁶ See note 8 *supra*.

²³⁷ NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970).

²³⁸ NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (1970).

²³⁹ NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970).

²⁴⁰ NLRB v. *Gissel Packing Co.*, 395 U.S. 575, 613-14 (1969). The Court stated:

[T]he Fourth Circuit . . . left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.

Id. (citations omitted).

outrageous unfair labor practices absent a showing of majority status, was not directly before the Court.²⁴¹ Furthermore, the *Gissel* decision was rendered by the Warren Court, with the Chief Justice himself delivering the opinion. The obvious question therefore is whether, even should the Board make such use of the bargaining order remedy, the present Court would uphold its validity. While this question is beyond the scope of this discussion, its presence, of course, is heavily felt.

The question of whether the Nixon Board was willing to move beyond the area of traditional remedies for employer unfair labor practices during a union organizational drive, arose in the recent case of *J.P. Stevens & Co. v. NLRB*.²⁴² There the union demanded recognition as the bargaining representative of a majority of employees on the basis of union authorization cards.²⁴³ The employer, however, refused to grant recognition and assumed the union would refer to the Labor Board. The union did so, filed an election petition, and thereafter lost the election.²⁴⁴ The union immediately filed unfair labor practice charges before the Board.²⁴⁵

In finding a bargaining order to be an appropriate remedy in these circumstances under the *Gissel* rationale, the Board adopted the trial examiner's findings and recommendations²⁴⁶ that the employer was guilty of extensive unfair labor practices which violated sections 8(a)(1)²⁴⁷ and 8(a)(3)²⁴⁸ of the NLRA. Further, the Board seemed to conclude that the unfair labor practices committed by the employer were of such nature that the holding of a rerun election would not fairly express true employee sentiment.²⁴⁹ Under these circumstances

²⁴¹ 395 U.S. 575 (1969).

²⁴² 441 F.2d 514 (5th Cir. 1971), enforcing 179 N.L.R.B. 254 (1971).

²⁴³ *Id.* at 516-17.

²⁴⁴ *Id.* at 517. The union lost the election by a vote of 198 to 110.

²⁴⁵ The Fifth Circuit made it clear in a footnote in its opinion that a union does not waive its right to assert unfair labor practices before the Board by first proceeding with an unfavorable Board election. It stated that "[i]t is now clear that even though a union has requested a Board election, it is not precluded from obtaining recognition, following its election defeat, through the unfair labor practice procedure." *Id.* at 517 n.3 (citations omitted).

²⁴⁶ *J.P. Stevens & Co.*, 179 N.L.R.B. 254, 255-85 (1969).

²⁴⁷ NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970). See note 13 *supra*.

²⁴⁸ NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). See note 12 *supra*.

²⁴⁹ The Board determined that the employer's unfair labor practices were calculated to and in fact did dissipate what was once the union's majority status. Under the circumstances they determined that the holding of a "fair and coercion free" rerun election to be improbable if not impossible. *J.P. Stevens & Co. v. NLRB*, 179 N.L.R.B. 254 (1969).

the Board deemed it appropriate to order the employer, Stevens, to bargain with the union. However, it is clear from the Board opinion that it considered the union to have had at one time a showing of majority status through the use of cards.²⁵⁰ Since the employer's serious unfair labor practice unfairly dissipated such status, it appeared unlikely that employee freedom of choice would be harmed to any significant extent by the order to bargain. While the Board's bargaining order in *J.P. Stevens* was thus apparently grounded in the union's previous showing of majority status through the use of cards, and therefore in line with the *Gissel* rationale, the Fifth Circuit in granting enforcement²⁵¹ of the bargaining order seemed to place its primary reasoning on other grounds. Specifically the court indicated that it might condone the issuance of a bargaining order as a proper remedy for outrageous unfair labor practices even despite the absence of a convincing showing of union majority.²⁵²

Thus there are grounds for believing that the Supreme Court and at least one federal court of appeals might approve the use of a bargaining order as a justifiable remedy for serious unfair labor practices which would undermine the holding of a fair election, even when the union has failed to demonstrate majority status. Since the *Gissel* opinion was decided after the Nixon administration had already taken office, one can only speculate what would have been the Board's position on this question had *Gissel* been decided earlier in the Johnson administration.²⁵³ However, from recent decisions it appears that the

²⁵⁰ *Id.* at 282, 283.

²⁵¹ *J.P. Stevens & Co. v. NLRB*, 441 F.2d 514 (5th Cir. 1971).

²⁵² The Court spoke of two circumstances under the *Gissel* decision which would justify the bargaining remedy. The first of these is a situation in which the union has never demonstrated majority support in an appropriate unit, but where the employer has committed unfair labor practices that are so "outrageous" and "pervasive" that their "coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *Id.* at 519. The second occurs when the employer's unfair labor practices are less pervasive and, as a result, the Board, "to protect employee free choice, must determine not only that a fair election is improbable, but also that at one point the union had a majority." *Id.* The Fifth Circuit, while later noting that a card showing had once been made by the union, went on to say: "In agreement with the Board we think the present proceedings constitute one of those 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices which, under *Gissel*, justify the issuance of a bargaining order despite the absence at one point of a union-demonstrated majority." *Id.* at 521.

²⁵³ It should perhaps be noted here that all of the four decisions consolidated before the Supreme Court in *Gissel* were decided by the Board within a fifteen month period from March 11, 1966, to June 28, 1967. *General Steel Prod., Inc. v. NLRB*, 157 N.L.R.B. 636 (1966), was decided on March 11, 1966 before Members Brown, Fanning and Zagoria;

Nixon Board has not seen fit to issue a bargaining order in the absence of a union demonstrated majority.

In the case of *Loray Corp.*,²⁵⁴ the union began an organizational campaign in January of 1969 which lasted through May of that year. During this time the employer conducted no less than twelve "captive audience"²⁵⁵ meetings in response to the organizational campaign. Also the employer, among other things, threatened to fire employees for union activity, caused the arrest of a union representative for distributing handbills in the plant's vicinity, and threatened to close the plant if the union came in.²⁵⁶ These acts were followed by actual discharge of at least one employee, who was, coincidentally, actively involved in union activity, for a poor production record.²⁵⁷ In all, the trial examiner found twenty-three instances of unlawful interference with

NLRB v. Gissel Packing Co., 157 N.L.R.B. 1065 (1966), was decided on March 25, 1966 before Members Fanning, Brown and Jenkins; NLRB v. Sinclair Co., 164 N.L.R.B. 261 (1967) was decided on May 2, 1967 before Chairman McCulloch and Members Brown and Jenkins; and NLRB v. Heck's, Inc., 166 N.L.R.B. 186 (1967) was decided on June 28, 1967 before Members Fanning, Jenkins and Zagoria. This time period, of course, was during the height of the Johnson administration. The Supreme Court's decision, however, was handed down on June 16, 1969, after the Nixon administration had been in office for some five months.

²⁵⁴ 184 N.L.R.B. No. 57, 74 L.R.R.M. 1513 (1970).

²⁵⁵ Under the decision of NLRB v. United Steelworkers, 357 U.S. 357 (1958), it is not unlawful discrimination within the meaning of NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970), for an employer to use his own premises to deliver anti-union propaganda and to deny the same to the union. See also NLRB v. Livingston Shirt Corp., 107 N.L.R.B. 400 (1953). However, there must be other available means of union access to employees. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); NLRB v. Stowe Spinning Co., 386 U.S. 226 (1946). The test of whether an employer's propaganda constitutes unlawful coercion is found in NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941). Employer conduct which might not be enough to bring about an unfair labor practice finding under section 8(a)(1) may be enough to justify the Board's setting an election aside. E.g., General Shoe Corp., 77 N.L.R.B. 124 (1948). See also Dal-Tex Optical Co., 137 N.L.R.B. 1782 (1962).

²⁵⁶ *Loray Corp.*, 184 N.L.R.B. No. 57, 74 L.R.R.M. 1513 (1970).

²⁵⁷ *Id.* at 1515. The present test for determining whether an employer's conduct is in violation of section 8(a)(3) was enunciated by Chief Justice Warren in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967), which approved several prior decisions on the same issue. The Court dispensed with the traditional concept of finding motive, either express or implied, to encourage or discourage union membership. Such an analysis was used by Justice Harlan in *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961). In *Great Dane* the Court apparently turned to an effect analysis. If the effect of the employer's discriminatory conduct is inherently destructive of important employee rights, then no proof of actual motivation by the employer to encourage or discourage union membership is necessary, and the Board is justified in finding a section 8(a)(3) violation even though the employer may have advanced a substantial business justification. However, where the adverse effect of the discriminatory conduct is comparatively slight, then a showing of actual motive on the part of the employer must be made to find a section 8(a)(3) viola-

employee rights²⁵⁸ along with several section 8(a)(3) violations.²⁵⁹ The Board adopted the trial examiner's findings that the employer had violated sections 8(a)(1)²⁶⁰ and 8(a)(3)²⁶¹ of the NLRA and consequently issued a lengthy list of remedies.²⁶²

During the period of its organizational drive, the union had demanded recognition at least once from the employer as bargaining representative of the production and maintenance unit of employees.²⁶³ Moreover, some employees engaged in a "stand out" during this time to protest the employer's discriminatory conduct and to consequently show their union support.²⁶⁴ However, the Board refused to adopt the trial examiner's recommendation that a bargaining order should be issued, stating:

Although we agree that Respondent's conduct was 'outrageous' and 'pervasive,' we are of the opinion that a bargaining order in the circumstances here is not appropriate.

We note that the record does not at any point reveal a showing of majority status on the part of the Union. . . . [N]o substantial evidence of employee interest in the Union was introduced at the

tion, if the employer advances a substantial business justification for his conduct. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). *E.g.*, *NLRB v. Brown*, 380 U.S. 278 (1965); *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965) (Goldberg, J., concurring); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

²⁵⁸ *Loray Corp.*, 184 NLRB No. 57, 74 L.R.R.M. 1513 (1970).

²⁵⁹ Among the section 8(a)(3) violations found were discriminatory discharge and layoff of employees. *Id.* at 1515-16.

²⁶⁰ See note 247 *supra*.

²⁶¹ See note 248 *supra*.

²⁶² Among the remedies issued by the Board were: (1) each employee must be advised individually of his statutory rights and his exercise of those rights must be respected by the employer; (2) the chief executive officer and owner of the company must personally sign notices to employees; (3) the company must personally read the notice to all employees at an assembled meeting; (4) the employer must mail the notices to all employees so that they may read them at their own leisure; (5) union access to bulletin boards must be granted; (6) the company must give the union access to company facilities that are customarily used for employee meetings in order to rebut the impact of employer coercion; (7) the employer must supply the union with names and addresses of employees; and (8) a board election must be held since under the circumstances, the Board found it would be impossible for the union to obtain the required number of employee signatures for a petition.

The Board noted that these extensive remedies were not intended to be punitive or to harass the employer, but were necessary in light of the employer's flagrantly coercive and restraining conduct. *Loray Corp.*, 184 N.L.R.B. No. 57, 74 L.R.R.M. 1513 (1970). See *J.P. Stevens & Co. v. NLRB*, 441 F.2d 514 (5th Cir. 1971); *Textile Workers v. NLRB*, 388 F.2d 896 (2d Cir. 1967). See also Note, *A Survey of Labor Remedies*, 54 VA. L. REV. 38 (1963).

²⁶³ *Loray Corp.*, 184 N.L.R.B. No. 57, 74 L.R.R.M. 1513 (1970).

²⁶⁴ *Id.* at 1515.

hearing, and union authorization cards allegedly secured by the Union were not placed into evidence. The record, therefore, does not reflect how many, if any, valid authorization cards were obtained by the Union. Indeed, the issue of the Union's majority status, or the desire of the Respondent's employees in being represented by the Union was not litigated at any state of the proceeding. Moreover, we have devised special remedies for the aggravated and pervasive 8(a)(1) and (3) violations which in our opinion will enable employees freely to exercise their Section 7 rights to choose whether or not they wish to be represented by the Union. In the circumstances, we find, therefore, that a bargaining order is not appropriate, and the Trial Examiner's recommended remedy and order in regard thereto is not adopted.²⁰⁵

Perhaps a bargaining order would have been issued had not an extensive list of remedies already been compiled by the Board.²⁰⁶ Moreover, the *Loray* case did not indicate just how substantial the majority showing must be before the Board deems it justified under the circumstances to infer such status and issue a bargaining order. Whatever the outcome under other circumstances, however, a later decision, *Louisburg Sportswear Co. v. NLRB*,²⁰⁷ suggests that it is still not Board policy to issue a bargaining order when no convincing evidence of a representative majority has been shown by the union.

Louisburg Sportswear involved a union demand for recognition on the basis of ninety-four cards obtained from the 180 employees of the employer. The employer declined recognition, however, and a subsequent election was held which the union lost, whereupon it filed with the Board charges of unfair labor practices against the employer. The Board found the employer's unfair labor practices to be "so flagrant and coercive in nature as to require, even in the absence of an 8(a)(5) violation, a bargaining order to repair the effect."²⁰⁸ The Court of Appeals for the Fourth Circuit seemed to interpret this language as saying that the Board found the employer's unfair labor practices to be so pervasive and outrageous as to warrant the imposition of a bargaining order "whether or not the union ever had a valid card major-

²⁰⁵ *Id.* at 1517.

²⁰⁶ See note 262 *supra*.

²⁰⁷ 462 F.2d 380 (4th Cir. 1972), *enforcing in part*, 180 N.L.R.B. 739 (1970).

²⁰⁸ *Louisburg Sportswear Co. v. NLRB*, 180 N.L.R.B. 739, 740 (1970). The Board relied on the *Gissel* opinion to support its holding. See notes 249 & 250 *supra*.

ity. . .²⁶⁹ However, an addendum to the Fourth Circuit's opinion²⁷⁰ indicates that such an interpretation is incorrect. That addendum states:

[O]ur interpretation of the Board's decision is questioned to the extent that we construed that decision to order bargaining whether or not a card majority ever existed. This interpretation was prompted by our examination of the language of the Board's decision in light of the language of *Gissel*. The Board disclaims any policy or authority under existing Board decisions to order bargaining in the absence of a card majority and states that this has been the Board's practice both before and after *Gissel*. In this case, the Board relied on its finding that at "times material herein" the union represented a majority of the employees. Therefore, our opinion should not be read as a statement that the Board's bargaining order had a secondary basis independent of the finding of a card majority or as implying that the Board, in this or any other case, has exercised an authority it now disclaims.²⁷¹

On the basis of this language, it seems that the Nixon Board will not extend the *Gissel* decision to situations in which a union is unable to demonstrate majority status. This approach is unfortunate because it means that bargaining orders will not be issued when there is no clearly demonstrated union majority, regardless of the conduct of an employer. Outrageous and pervasive unfair labor practices occurring early in a union's organizational campaign may eliminate any possibility of a union's obtaining majority status. As a result, an employer could avoid the requirements of bargaining with a union by making it impossible for that union to ever obtain majority status. Certainly the interest in preserving employee freedom of choice must be carefully protected. But if the cost of insisting upon a clear showing of majority status is the frustration of the collective bargaining process, that interest must be protected in some other way. When an employer has made it impossible for a union to effectively organize and thus obtain any showing of majority support, the Board should use its remedial power under section 10(c) of the NLRA to issue a bargaining order.²⁷²

²⁶⁹ *Louisburg Sportwear Co. v. NLRB*, 462 F.2d 380, 382 (4th Cir. 1972).

²⁷⁰ *Id.* at 387.

²⁷¹ *Id.*

²⁷² Although outside the scope of this discussion, perhaps the most significant recent development with respect to the Board's use of a bargaining order is the case of *NLRB v. Mansion House Center Management Corp.*, 473 F.2d 471 (8th Cir. 1973). For a discussion of the case itself and its impact on labor policy, see 7 GA. L. REV. 770 (1973).

VII. CONCLUSION

This Article has attempted to review some of the most significant changes in Labor Board policy during the Nixon administration, and to examine these changes in light of previous Board policy. While only those cases most clearly indicating this evolution have been discussed, each section represents a synthesis of many Board decisions. As a result, it has been possible to discern trends in the development of the law in each of the areas examined and to pinpoint departures from past Board approaches.

A brief summary of the conclusions reached in each section may prove helpful. During the Nixon administration, the Board has indicated an unwillingness to find violations of sections 8(a)(1) and 9 of the NLRA on the basis of speeches made by the employer.²⁷³ In the important area of mandatory subjects of bargaining under section 8(a)(5), the Board seems to have reestablished a distinction between subjects appropriate for employee bargaining and those that should be exclusively within management control.²⁷⁴ From recent cases expanding *Collyer Wire*, it appears that the Nixon Board will continue to defer to arbitration processes in an increasing number of situations.²⁷⁵ In addition, the Board under section 9(b) of the NLRA apparently will designate larger units based upon employer organization as appropriate units for collective bargaining.²⁷⁶ In the lockout area, the Board has indicated that fewer employer lockouts will be considered violative of employee rights.²⁷⁷ Finally, it seems that the Board will not issue a bargaining order under the rationale of *Gissel* as a remedy for an employer's unfair labor practices when the union cannot make a convincing showing of majority status.²⁷⁸

These changes demonstrate the limited application of the tenet that "a well established principle, expressive of the earlier decisions, is clearly dispositive of the controversy."²⁷⁹ Labor law continually evolves and develops as the composition of the Board and political disposition of the country changes. The purpose of this Article has been to illustrate this process by comparing the approach of the Nixon Board with the

²⁷³ See pp. 608-17 *supra*.

²⁷⁴ See pp. 617-22 *supra*.

²⁷⁵ See pp. 622-39 *supra*.

²⁷⁶ See pp. 639-43 *supra*.

²⁷⁷ See pp. 643-52 *supra*.

²⁷⁸ See pp. 652-61 *supra*.

²⁷⁹ E.H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1972), quoting O'Meara, *Natural Law and Everyday Law*, 5 NATURAL LAW FORUM 83, 87 (1960).

approaches of past Boards. Hopefully, it has provided the reader with an insight not only into the significance of recent changes in labor policy, but also into the nature of Board operation and its impact on labor law.