

# The Reagan NLRB, Phase I

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## INTRODUCTION

There is a new National Labor Relations Board (NLRB) in town, dominated by the appointments and philosophies of the current Administration.<sup>1</sup> This NLRB has proceeded with alacrity to respond to its perceived constituency. (Indeed, NLRB precedents have become like a “restricted railroad ticket, good for this day and train only.”<sup>2</sup>) The Board revisions are alternately attacked by union representatives for “malevolence,”<sup>3</sup> defended by management representatives as a “return to sanity,”<sup>4</sup> and described by at least one Board member as merely a re-creation of earlier “normalcy.”<sup>5</sup> This Article reviews and analyzes the more significant decisions issued by the NLRB thus far and their impact upon national labor policy.

## EMPLOYER NEUTRALITY

Section 7<sup>6</sup> of the National Labor Relations Act (NLRA), as amended,<sup>7</sup> guarantees to employees the rights to organize and join unions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their section 7 rights.<sup>8</sup> Section 8(a)(2) makes it an unfair labor practice for an employer to dominate or interfere with, or contribute financial or other support to, a labor organization.<sup>9</sup>

Under the Board’s battered<sup>10</sup> but until recently still viable *Midwest Piping*<sup>11</sup> doctrine, an employer violated sections 8(a)(1) and (2) of the Act<sup>12</sup> by recognizing or

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1. No criticism or value judgment is suggested thereby.

2. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). Such fickleness is not a new phenomenon at the Board. See, e.g., Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78 (1962).

3. *AFL-CIO Views on NLRB Actions*, [News and Background Information] 116 LAB. REL. REP. (BNA) 46 (May 21, 1984).

4. *Rulemaking as Aid in NLRB Policy Reversals*, [News and Background Information] 116 LAB. REL. REP. (BNA) 142 (June 25, 1984) (Remarks of Peter Nash, Esq.).

5. *Defense of NLRB Rulings*, [News and Background Information] 116 LAB. REL. REP. (BNA) 3 (May 7, 1984) (Remarks of Member Dennis).

6. 29 U.S.C. § 157 (1982).

7. 29 U.S.C. §§ 151-169 (1982).

8. *Id.* § 158(a)(1).

9. *Id.* § 158(a)(2).

10. See *Buck Knives, Inc. v. NLRB*, 549 F.2d 1319 (9th Cir. 1977), and cases cited therein.

11. *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945). See generally Getman, *The Midwest Piping Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma*, 31 U. CHI. L. REV. 292 (1964).

12. 29 U.S.C. § 158(a)(1)-(2) (1982).

bargaining with one of two competing unions in the face of rival or conflicting claims that raised a real question concerning representation.<sup>13</sup> In the Board's view, by such conduct the employer not only unlawfully arrogated to itself the Board's representation determination function, but also breached the employer's obligation of neutrality.<sup>14</sup>

Under the *Midwest Piping* doctrine an employer faced with a real question concerning representation could not bargain with the incumbent or any other union until the Board resolved the representation question.<sup>15</sup> To preclude undue advantage for the rival union, however, the incumbent union was permitted to continue administering its contract or processing grievances through its stewards.<sup>16</sup> The condition precedent to establishment of a real question concerning representation was that the rival union claim "not be clearly unsupportable and lacking in substance."<sup>17</sup> The Board found that a real question concerning representation was established, for example, when the rival union filed an election petition supported by an administrative showing of interest.<sup>18</sup> A so-called "bare" or "naked" claim was deemed insufficient.<sup>19</sup> Many courts disagreed with the Board's application, though not the general theory, of the *Midwest Piping* doctrine,<sup>20</sup> particularly when a clear majority of employees desired the recognized union.<sup>21</sup>

The Board recently modified and redefined the *Midwest Piping* doctrine.<sup>22</sup> When an incumbent union is challenged by an outside union, the mere filing of a representation petition by an outside, challenging union will not require or permit the

13. See *Robert Hall Gently Rd. Corp.*, 207 N.L.R.B. 692 (1973); *Inter-Island Resorts, Ltd. (Kona Surf Hotel)*, 201 N.L.R.B. 139 (1973), *enforcement denied*, 507 F.2d 411 (9th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Playskool, Inc., A Div. of Milton Bradley Co.*, 195 N.L.R.B. 560 (1972), *enforcement denied*, 477 F.2d 66 (7th Cir. 1973).

14. *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060, 1070-71 (1945). In *Midwest Piping* the Board found that by executing a union shop contract with one of two rival unions while a representation proceeding was pending before the Board, the employer indicated its approval of the favored union, accorded it unwarranted prestige, encouraged membership therein, discouraged membership in the rival, and thereby rendered unlawful assistance to the favorite, which interfered with, restrained, and coerced the employees in the exercise of their section 7 rights. *Id.* at 1071.

15. *Shea Chem. Corp.*, 121 N.L.R.B. 1027, 1029 (1958).

16. *Id.*

17. *Playskool, Inc., A Div. of Milton Bradley Co.*, 195 N.L.R.B. 560, 560 (1972), *enforcement denied*, 477 F.2d 66 (7th Cir. 1973).

18. *E.g.*, *Inter-Island Resorts, Ltd. (Kona Surf Hotel)*, 201 N.L.R.B. 139 (1973), *enforcement denied*, 507 F.2d 411 (9th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Connie Jean, Inc.*, 162 N.L.R.B. 1609 (1967); *Swift & Co.*, 128 N.L.R.B. 732 (1960), *enforcement denied*, 294 F.2d 285 (3d Cir. 1961). See generally 1 *THE DEVELOPING LABOR LAW* 290-91 (C. Morris 2d ed. 1983).

19. See *Robert Hall Gently Rd. Corp.*, 207 N.L.R.B. 692 (1973).

20. See, *e.g.*, *Buck Knives, Inc. v. NLRB*, 549 F.2d 1319 (9th Cir. 1977), and cases cited therein; *American Can Co. v. NLRB*, 535 F.2d 180 (2d Cir. 1976).

21. See, *e.g.*, *NLRB v. Air Master Corp.*, 339 F.2d 553, 557 (3d Cir. 1964):

To recognize one of two competing unions while the employees' choice between them is demonstrably in doubt, is an unfair labor practice under what the courts have accepted as the normal and proper application of the *Midwest Piping* doctrine. . . . And in principle the same result follows when majority support for the recognized union exists, but has been achieved by coercion or some other unfair labor practice. . . . But where a clear majority of the employees, without subjection to coercion or other unlawful influence, have made manifest their desire to be represented by a particular union, there is no factual basis for a contention that the employer's action thereafter in recognizing the union or contracting with it is an interference with their freedom of choice.

See *NLRB v. Riviera Manor Nursing Home*, 539 F.2d 714 (7th Cir. 1976).

22. See *RCA Del Caribe, Inc.*, 262 N.L.R.B. 963 (1982); *Abraham Grossman (Bruckner Nursing Home)*, 262 N.L.R.B. 955 (1982).

employer to withdraw from bargaining or executing a contract with the incumbent union.<sup>23</sup> Accordingly, the employer will not violate section 8(a)(2) by post-petition negotiations or execution of a contract with the incumbent union.<sup>24</sup> The employer will, however, violate section 8(a)(5)<sup>25</sup> by withdrawing from bargaining simply because an outside union has filed a petition.<sup>26</sup> The incumbent union is not thereby insulated from legitimate outside challenge, and if an election is held, will be put to the test of demonstrating its continued majority status as exclusive bargaining representative. During the interim between the filing of a valid petition and the election, however, the incumbent may continue to exercise its full bargaining rights and powers by virtue of its previously established representative status. If the incumbent prevails in the election any executed contract is valid and binding; if the challenger prevails the incumbent's contract is null and void.

The Board also modified the *Midwest Piping* doctrine as it applies to the initial organizing efforts of rival unions. The Board announced that it will not find section 8(a)(2) violations in rival union, initial organizing situations in which the employer, before a valid election petition has been filed, recognizes a union that represents an uncoerced, unassisted majority.<sup>27</sup> Once notified of a valid petition, however, the employer may not recognize any of the rival unions. Filing a valid petition thus becomes the operative event for imposing strict employer neutrality in rival union, initial organizing situations. Absent a valid petition with its requisite thirty percent showing of employee interest,<sup>28</sup> one of several rival unions cannot preclude employer recognition of a majority union.

There are positive aspects to the foregoing changes. In the rival union situation, the establishment of a clearly defined rule promotes both industrial stability and employee free choice. A rival union with minimal support cannot forestall the establishment of a collective bargaining relationship between the employer and the majority choice. Further, the employer need not guess whether or not a real question concerning representation exists.

In the incumbent union situation, the new "business as usual" approach furthers the statutory policy of stability in labor relations. The new approach also furthers the statutory policy of employee free choice, by avoiding a distorted election choice

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23. RCA Del Caribe, Inc., 262 N.L.R.B. 963, 965 (1982).

24. See Lutheran Hosp. of Md., 265 N.L.R.B. 1198 (1982); Dresser Indus., 264 N.L.R.B. 1088 (1982); see also Richmond Waterfront Terminals, 265 N.L.R.B. 1214 (1982) (execution of new contract with incumbent not election interference).

25. Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the lawful representative of its employees. 29 U.S.C. § 158(a)(5) (1982).

26. As before, good faith withdrawal of recognition based upon objective considerations is not precluded. See Bartenders, Hotel, Motel & Restaurant Employers Bargaining Ass'n, 213 N.L.R.B. 651 (1974); Terrell Mach. Co., 173 N.L.R.B. 1480, 1480-81 (1960), enforced, 427 F.2d 1088 (4th Cir.), cert. denied, 398 U.S. 929 (1970).

27. Abraham Grossman (Bruckner Nursing Home), 262 N.L.R.B. 955, 957 (1982). Recognition of a minority union would still violate section 8(a)(2). See International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altman Texas Corp.), 366 U.S. 731 (1961), in which the court held that employer recognition of a minority union as exclusive bargaining representative violates section 8(a)(1) and (2), notwithstanding any good faith belief in majority status, and that the union thereby also violates section 8(b)(1)(A) by entering into such agreement.

28. A certification petition filed by a union that is not a party to an existing or recently expired contract must include a showing of interest and support by at least 30% of the employees in an appropriate unit. NLRB Statements of Procedure, Series 8, 29 C.F.R. § 101.18 (1983).

between an incumbent union artificially denied the attributes of its office and a rival union artificially placed on an equal footing with the incumbent.

There is the risk, however, that tolerance of incumbent union new contract negotiations and execution during the preelection period will suggest election futility to rank and file employees unschooled in the refinements of labor law. The powerful message received by employees may be that even the federal government cannot upset vested, established relationships. Employees are most likely to receive this message when the new contract contains a union security clause requiring membership in and payment of dues to the incumbent union. Sophisticated principles of contractual defeasance are alien to the shop floor, particularly when the contract on its face purports to be effective and binding for up to three years.<sup>29</sup> Thus, the resultant election choice may be distorted in favor of the incumbent union.

### ELECTION PROPAGANDA

During a preelection period, the employer and the union generally are free to campaign vigorously for employee support, and to express their views on labor policies and problems.<sup>30</sup> Particular expressions or conduct, however, may constitute unfair labor practices and/or grounds for setting aside an election.<sup>31</sup>

Under its long-standing *Hollywood Ceramics Co.*<sup>32</sup> rule,<sup>33</sup> the Board set aside representation elections because of misleading campaign statements in particular circumstances. Under *Hollywood Ceramics* the Board viewed its function as one of limited intervention in elections, and sought to maintain laboratory conditions and strike a balance between employees' rights to an untrammelled choice and the parties'

29. Contracts of a definite duration for terms up to three years bar an election for their entire period, and contracts for longer fixed terms bar an election for the first three years of their terms. See *Malco Theatres, Inc.*, 222 N.L.R.B. 81 (1976); *General Cable Corp.*, 139 N.L.R.B. 1123 (1962).

30. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941). See generally J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976) [hereinafter cited as *UNION REPRESENTATION ELECTIONS*]; R. WILLIAMS, P. JANUS & K. HUHN, *NLRB REGULATION OF ELECTION CONDUCT* (1974); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

31. Whether or not an expression constitutes an unfair labor practice depends upon the presence of threats of reprisal or force or promises of benefit. Section 8(c) of the Act provides that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c) (1982); see *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Golub Corp.*, 388 F.2d 921 (2d Cir. 1967); *Irving Air Chute Co. v. NLRB*, 350 F.2d 176 (2d Cir. 1965); *NLRB v. La Salle Steel Co.*, 178 F.2d 829 (7th Cir. 1949), cert. denied, 339 U.S. 963 (1950).

Section 8(c) applies only to unfair labor practice proceedings, however, not representation proceedings, and does not restrict the Board's power to invalidate elections when expression interferes with employee free choice, irrespective of threats or promises. See *General Shoe Corp.*, 77 N.L.R.B. 124, 126-27 (1948), enforced, 192 F.2d 504 (6th Cir. 1951), cert. denied, 343 U.S. 904 (1952). Accordingly, the Board reviews the propriety of election campaign conduct and sets aside the election results and directs a new election when conduct interferes with employee free choice. The Board seeks to maintain laboratory conditions in election proceedings and to strike a balance between the employees' rights to an untrammelled choice and the parties' rights to wage a free and vigorous campaign. *Id.*; see *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 1786-87 (1962).

32. 140 N.L.R.B. 221 (1962).

33. The progenitor of *Hollywood Ceramics* was *Gummed Prods. Co.*, 112 N.L.R.B. 1092 (1955). See generally Bok, *supra* note 30; Christensen, *Free Speech, Propaganda and the National Labor Relations Act*, 38 N.Y.U. L. REV. 243 (1963).

rights to wage a free and vigorous campaign. The Board devised the following formula in *Hollywood Ceramics* for striking this balance:

We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.<sup>34</sup>

In *Shopping Kart Food Market, Inc.*<sup>35</sup> the Board overruled *Hollywood Ceramics* and held that the Board would no longer set aside representation elections because of misleading campaign statements.<sup>36</sup> The Board found that application of the *Hollywood Ceramics* rule had produced unsatisfactory results, and that the rule had impeded the attainment of employee free choice and produced a host of ill effects. Included among these ill effects were extensive analysis of campaign literature, curtailment of free speech, differing application of the rule by the Board and reviewing courts, increased litigation, and a resultant decrease in the finality of election results.

The Board noted that much of the difficulty lay in the vagueness and flexibility of the *Hollywood Ceramics* rule, as well as in a variety of dubious assumptions concerning the needs of employees for Board protection against campaign misrepresentation.<sup>37</sup> The Board said it would no longer view employees as “naive and unworldly [individuals] whose decision on as critical an issue as union representation is easily altered by the self-serving campaign claims of the parties,” but rather would view employees as “mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.”<sup>38</sup>

In *General Knit of California, Inc.*<sup>39</sup> the Board reversed itself again, overruled *Shopping Kart*, and reinstated the *Hollywood Ceramics* standard. In *Midland Nation-*

34. 140 N.L.R.B. 221, 224 (1962).

35. 228 N.L.R.B. 1311 (1977).

36. *Id.* at 1313.

37. *Id.* at 1312–13. The Board recognized the validity of such critical analyses as Bok, *supra* note 30, and Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976). The full study by Professors Getman, Goldberg & Herman of the effect of preelection campaigns upon employee predispositions in voting was published in UNION REPRESENTATION ELECTIONS, *supra* note 30.

38. 228 N.L.R.B. 1311, 1313 (1977). The Board concluded that while the Act's purpose would best be served by the demise of the *Hollywood Ceramics* rule, the Board would continue to intervene when a party engages in deceptive campaign practices by improperly involving the Board and its processes, or by using forged documents. *Id.*; *see, e.g.*, *Formco, Inc.*, 233 N.L.R.B. 61, 62 (1977); *Silco, Inc., Atlas Div.*, 231 N.L.R.B. 110, 110 (1977), and cases cited therein; *J. Ray McDermott & Co.*, 215 N.L.R.B. 570, 570 (1974); *Cascade Corp.*, 205 N.L.R.B. 638, 638 n.2 (1973); *Sylvania Elec. Prods., Inc.*, 119 N.L.R.B. 824, 827–30 (1957); *United Aircraft Corp., Pratt & Whitney Aircraft Div.*, 103 N.L.R.B. 102, 105 (1953). *But see* *Fabricut, Inc.*, 233 N.L.R.B. 1196 (1977).

Thus, the Board said that although it will not set an election aside because of the substance of a representation, it will set an election aside when the representation is made in a deceptive manner. The Board explained as follows:

The essential difference lies in the fact that, while employees are able to evaluate mere propaganda claims, there is simply no way any person could recognize a forged document “for what it is” from its face since, by definition, it has been altered to appear to be that which it is not.

228 N.L.R.B. 1311, 1314 (1977). The Board also said that it will continue to review the propriety of other campaign conduct, apart from misrepresentations, which interferes with employee free choice. The foregoing aspects of Board doctrine discussed in this footnote have remained generally unchanged. *See* *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982); *Resorts Int'l, Inc.*, 264 N.L.R.B. 1079 (1982); *Affiliated Midwest Hosp., Inc.*, 264 N.L.R.B. 1094 (1982).

39. 239 N.L.R.B. 619 (1978).

*al Life Insurance Co.*<sup>40</sup> the Board reversed itself yet again, overruled *General Knit*, and reinstated the *Shopping Kart* standard. “[W]e will no longer probe into the truth or falsity of the parties’ campaign statements, and . . . we will not set elections aside on the basis of misleading campaign statements.”<sup>41</sup>

The union in *Shopping Kart* and the employer in *Midland* made substantial misrepresentations.<sup>42</sup> Still, the Board found that the employees could evaluate the statements for what they were and thereafter exercise free choice. Constitutional notions of free speech and respected, empirical studies regarding the realities of election campaigns certainly support the Board’s current position.<sup>43</sup>

Notwithstanding the respected, empirical studies to the contrary, however, twenty-five years of labor law practice, including substantial involvement in preelection campaigns, leave me most suspicious of the proposition.<sup>44</sup> My experience suggests that employees do not ignore, cannot evaluate, and are substantially affected by campaign representations, especially those made by their employer.<sup>45</sup> My fear therefore is that deregulation of campaign misrepresentation translates *pro tanto* into diminution of true employee free choice.

### DEFERRAL TO ARBITRATION

Sections 9 and 10 of the Act<sup>46</sup> grant the Board jurisdiction over unfair labor practice and representation matters whether or not such matters also involve breaches of collective bargaining agreements.<sup>47</sup> On the other hand, national labor policy also encourages and supports the private arbitration of disputes arising under labor contracts.<sup>48</sup> Balancing these policies, the Board over the years generally has declined to

40. 263 N.L.R.B. 127 (1982).

41. *Id.* at 133.

42. In *Shopping Kart* the union told employees that the employer’s profits during the preceding year were \$500,000, whereas the profits were actually about \$50,000. 228 N.L.R.B. 1311, 1311 (1977). In *Midland* the employer falsely told employees that the union was composed of highly paid officials who were inept bargainers who had caused violent, disastrous strikes elsewhere. 263 N.L.R.B. 127, 128 (1982).

43. See Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 10 (1984).

44. See generally Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

45. Judge Hays once observed as follows:

The majority opinion demonstrates once more the inescapable truth that United States Circuit Judges safely ensconced in their chambers do not feel threatened by what employers tell their employees. An employer can dress up his threats in the language of prediction (“You will lose your job” rather than “I will fire you”) and fool judges. He doesn’t fool his employees; they know perfectly clearly what he means.

NLRB v. Golub Corp., 388 F.2d 921, 929 (2d Cir. 1967) (Hays, J., dissenting); see also Judge Learned Hand’s statement in NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941):

Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.

46. 29 U.S.C. §§ 159–160 (1982).

47. See *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964); *Smith v. Evening News Ass’n*, 371 U.S. 195 (1962); see also *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967); *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). Section 10(a) provides that the Board’s power “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.” 29 U.S.C. § 160(a) (1982).

48. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior*

exercise jurisdiction concerning unfair labor practices<sup>49</sup> and representation questions<sup>50</sup> which had been or could have been submitted to arbitration under the contract.

Concerning pre-arbitral deferral, the Board held in *Collyer Insulated Wire*<sup>51</sup> that it would withhold its processes until the parties had first submitted the matter to the contractual arbitration procedure.<sup>52</sup> In *General American Transportation Corp.*,<sup>53</sup> however, the Board held that *Collyer* pre-arbitral deferral was not appropriate in cases of employer discrimination, interference with protected rights, or union coercion<sup>54</sup> (*i.e.*, cases involving sections 8(a)(1) and (3), 8(b)(1)(A) and (2)), while in *Roy Robinson Chevrolet*<sup>55</sup> the Board held that deferral was appropriate in refusal to bargain cases<sup>56</sup> (*i.e.*, cases involving sections 8(a)(5) and 8(b)(3)).

In *United Technologies Corp.*<sup>57</sup> the Board overruled *General American Transportation* and held that it would defer to the contractual grievance-arbitration machinery in cases involving employer discrimination, interference with protected rights, or union coercion, as well as in cases involving refusal to bargain.<sup>58</sup> The Board thereby reaffirmed the blanket pre-arbitration deferral policy under *Collyer*.

Concerning post-arbitration deferral, the Board's general policy under *Spielberg Manufacturing Co.*<sup>59</sup> has been to dismiss unfair labor practice or representation

& Gulf Navigation Co., 363 U.S. 574 (1960); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). Section 203(d) of the Act provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d) (1982).

49. See *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); *Dubo Mfg. Corp.*, 142 N.L.R.B. 431 (1963); *Hercules Motor Corp.*, 136 N.L.R.B. 1648 (1962); *United Tel. Co. & United Utils., Inc.*, 112 N.L.R.B. 779 (1955); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955); *McDonnell Aircraft Corp.*, 109 N.L.R.B. 930 (1954); *Crown Zellerbach Corp., Siltcoos Div.*, 95 N.L.R.B. 753 (1951); *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694 (1943). See generally Alleyne, *Arbitrators and the NLRB: The Nature of the Deferral Beast*, 4 INDUS. REL. L.J. 587 (1981); Covington, *Arbitrators and the Board: A Revised Relationship*, 57 N.C.L. REV. 91 (1978); Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty*, 49 IND. L.J. 57 (1973); Nash, Wilder & Banov, *The Development of the Collyer Deferral Doctrine*, 27 VAND. L. REV. 23 (1974); Schatzki, *NLRB Resolution of Contract Disputes Under Section 8(a)(5)*, 50 TEX. L. REV. 225 (1972); Zimmer, *Wired for Collyer: Rationalizing NLRB and Arbitration Jurisdiction*, 48 IND. L.J. 141 (1973).

50. See *Raley's Inc.*, 143 N.L.R.B. 256 (1963).

51. 192 N.L.R.B. 837 (1971).

52. *Id.* at 839. The general prerequisites for pre-arbitral deferral under *Collyer* have been that the dispute arise within the confines of a stable labor-management relationship, that both parties are willing to arbitrate, and that a contract interpretation issue lies at the center of the dispute. See generally I THE DEVELOPING LABOR LAW, *supra* note 18, at 937-56.

53. 228 N.L.R.B. 808 (1977).

54. *Id.* at 808.

55. 228 N.L.R.B. 828 (1977).

56. *Id.* at 829.

57. 268 N.L.R.B. No. 83, 115 L.R.R.M. 1049 (1984).

58. *Id.* at 1051. The Board stated:

It is fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their contract. Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. For dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract. In our view, the statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief.

*Id.*

59. 112 N.L.R.B. 1080 (1955).

matters if the issues have been previously resolved by an arbitration decision.<sup>60</sup> The general prerequisites for post-arbitral deferral under *Spielberg* have been that the issues under the Act must have been presented and considered at the arbitration, the proceedings must have been fair and regular, the proceedings must have been final and binding on all affected parties, and the award must not be repugnant to the purposes and policies of the Act.<sup>61</sup>

In the recent *Professional Porter & Window Cleaning Co., Division of Propoco, Inc.*,<sup>62</sup> and *Suburban Motor Freight, Inc.*<sup>63</sup> decisions, the Board held that it would not honor an arbitration decision unless the unfair labor practice issue involved was both presented to and considered by the arbitrator.<sup>64</sup> Subsequently, in *Olin Corp.*<sup>65</sup> the Board overruled *Propoco* and *Suburban Motor Freight*, and held that in applying the *Spielberg* standards for post-arbitration deferral, the Board would find that an arbitrator has adequately considered the unfair labor practice issue if (1) the contractual and unfair labor practice issues are factually parallel, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue.<sup>66</sup> Any differences between the contractual and statutory standards of review would be weighed in determining whether the award is "clearly repugnant" to the Act. The award need not be totally consistent with NLRB precedent to warrant deference. "Unless the award is 'palpably wrong,' *i.e.*, unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer."<sup>67</sup> Further, under *Olin* the party seeking to avoid deferral must affirmatively demonstrate the defects in the arbitral process or award. Absent a showing of these requisite deficiencies, the Board will not subject the case to *de novo* review.

The resultant wholesale deferral to arbitration effected by current Board policy raises serious questions concerning congressional intention and delegation of power. Section 10(a) clearly states that the Board's power to prevent unfair labor practices "shall not be affected" by other methods of adjustment established by agreement or law, and provides that the Board is empowered to cede jurisdiction only to state or territorial agencies in particular disputes, provided the result is not inconsistent with the Act.<sup>68</sup> Section 14(c)(1) specifically limits Board declination of jurisdiction for

60. The Board has held that post-arbitral deferral under *Spielberg* is not appropriate in cases of alleged violations of section 8(a)(4), which proscribes discrimination for filing charges or giving testimony under the Act, because such matters are strictly within the Board's province. See *Filmation Assocs., Inc.*, 227 N.L.R.B. 1721 (1977).

61. See generally 1 THE DEVELOPING LABOR LAW, *supra* note 18, at 957-84.

62. 263 N.L.R.B. 136 (1982).

63. 247 N.L.R.B. 146 (1980).

64. 263 N.L.R.B. 136, 137 (1982); 247 N.L.R.B. 146, 146-47 (1980).

65. 268 N.L.R.B. No. 86, 115 L.R.R.M. 1056 (1984).

66. *Id.* at 1058.

67. *Id.* (footnote omitted).

68. Section 10(a) provides as follows:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160(a) (1982).



lack of interstate commerce impact, and provides that the Board may not decline jurisdiction over any labor disputes subject to Board jurisdictional standards prevailing as of August 1, 1959.<sup>69</sup> Section 3(b) provides that the Board may delegate its powers to three or more members, and may delegate certain representational determination powers to its regional directors.<sup>70</sup> Under section 10(b) the Board may designate examiners (administrative law judges) to preside at formal unfair labor practice hearings,<sup>71</sup> and under section 10(c) the examiner's decision becomes the final order of the Board,<sup>72</sup> absent timely exceptions.

Nothing in the foregoing statutory provisions or underlying policies suggests that the Board may abdicate or delegate its powers and duties to private arbitrators, or that Congress intended any such discretionary abandonment of responsibility. To the contrary, the precise statutory delineation of permissive delegation strongly suggests that Congress intended no such deferral. This view is buttressed by the validated proposition that private arbitrators are inexpert at interpretation, application, and enforcement of public (statutory) rights.<sup>73</sup> Distinct aspects of national labor policy are implicated and effectuated by the respective functions of the arbitrator and the Board: private contractual rights and obligations by the arbitrator,<sup>74</sup> public rights and obligations by the Board.<sup>75</sup> Contractual and statutory rights have legally independent origins and arguably should be equally available to the aggrieved employee.

69. Section 14(c)(1) provides as follows:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the subchapter II of chapter 5 of title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

29 U.S.C. § 164(c)(1) (1982).

70. *Id.* § 153(b).

71. *Id.* § 160(b).

72. *Id.* § 160(c).

73. See *McDonald v. City of West Branch*, 104 S. Ct. 1799, 1803 (1984); *Barentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 743 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

74. The mission of the arbitration tribunal is to interpret and give content to the collective bargaining agreement as part of a private system of self-government. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). See generally *Cox, Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); *Shulman, Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955). The "therapeutic values" (*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960)) of the arbitral process are heavily reliant upon the arbitrator's knowledge of the "industrial common law" (*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960)), that is, the practices of the industry and shop. "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). The essential task of the arbitrator is to effectuate the intent of the parties rather than the requirements of enacted legislation, and an award is invalid and unenforceable if based upon the arbitrator's views of public law instead of the contract. See *id.* at 56-57; *Barentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981). As stated in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974):

As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties. . . . If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced.

See *McDonald v. City of West Branch*, 104 S. Ct. 1799 (1984).

75. The institutional role of the Board is quite distinct from that of the arbitrator. The primary responsibility of the Board is the resolution of statutory issues. The Board performs two distinct functions under the Act, the prevention and

Notwithstanding the vigor of the foregoing statutory arguments, the correlative statutory argument that national labor policy favors the private resolution of labor disputes through arbitration is equally compelling. Congressional preference for a grievance arbitration system of industrial self-government has been made abundantly clear over the years, and the Board could hardly ignore the reality that a substantial arbitral infrastructure is firmly embedded in the labor relations milieu. The very prevalence and acceptability of arbitration militates against creation of parallel, overlapping, and duplicative remedial structures. A concurrent system would be virtually unworkable and costly as well as wasteful and burdensome beyond tolerance.

The deferral system contemplated by the Board, however, need not entail a wholesale abdication of statutory authority or responsibility. Board power remains paramount, and careful application of the *Spielberg* due process standards can ensure the vindication of public rights embodied in the statute.

### EXCLUSION OF SUPERVISORS

Under the original NLRA the Board held, with Supreme Court approval, not only that supervisors were included under the protections of sections 7 and 8(a)(1) and (3), but also that supervisors had bargaining rights under section 9.<sup>76</sup> In the 1947 Taft-Hartley Amendments Congress rejected the Board's policy of giving supervisors employee status under the Act, and provided in section 2(3) that "employee" does not include "any individual employed as a supervisor."<sup>77</sup> As stated by Justice Harlan:

When in 1947 the National Labor Relations Act was amended to exclude supervisory workers from the critical definition of "employees," § 2(3), it followed that many

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remedying of unfair labor practices, and the determination of questions concerning employee representation. *See Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264-69 (1940); *AFL v. NLRB*, 308 U.S. 401, 405-06 (1940); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 24 (1937). These functions are essentially adjudicative, in which the Board protects and enforces public, not private, rights in giving effect to the national labor policy embodied in the Act. *See Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 192-93 (1941); *National Licorice Co. v. NLRB*, 309 U.S. 350, 362-64 (1940); *Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940). The legitimacy of Board determinations is dependent upon their conformity to statutory policy. *See American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960). "The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (footnote omitted). The specialized competence of the Board relates to the law of the land, not the law of the shop. It is the Board and not the arbitrator "on which Congress conferred the authority to develop and apply fundamental national labor policy." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978). The Board and not the arbitrator "is expert in federal national labor relations policy." *Id.*; *see Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798-800 (1945).

76. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947); *Jones & Laughlin Steel Corp., Vesta-Shannopin Coal Div.*, 66 N.L.R.B. 386 (1946). In *Packard Motor Car*, the Court stated:

[T]here is nothing in the Act which indicates that Congress intended to deny its benefits to foremen as employees, if they choose to believe that their interests as employees would be better served by organization than by individual competition. . . .

There is no more reason to conclude that the law prohibits foremen as a class from constituting an appropriate bargaining unit than there is for concluding that they are not within the Act at all. 330 U.S. 485, 490-91 (1947).

77. Section 2(3) provides in part that "[t]he term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor. . . ." 29 U.S.C. § 152(3) (1982). The term "supervisor" is defined in section 2(11) (*Id.* § 152(11)). Section 14(a) of the Taft-Hartley Act preserved the right of supervisors to become union members, but also made clear that supervisors were not to be regarded as employees. Section 14(a) provides:

provisions of the Act employing that pivotal term would cease to operate where supervisors were the focus of concern. Most obviously, § 7 no longer bestows upon supervisory employees the rights to engage in self-organization, collective bargaining, and other concerted activities under the umbrella of § 8 of the Act. . . .<sup>78</sup>

Accordingly, subsequent to the 1947 Amendments it has been held generally that an employer does not violate sections 8(a)(1) or (3) by discharging or disciplining a supervisor for engaging in union activity.<sup>79</sup>

Notwithstanding the general exclusion of supervisors from the protection of the Act, the Board held over the years that discharge of a supervisor might violate section 8(a)(1) when the discharge actually interfered with the protected section 7 rights of statutory employees.<sup>80</sup> Thus, supervisory discharges for giving testimony adverse to the employer's interest in NLRB or grievance hearings, for refusing to commit unfair labor practices, or for failing to prevent unionization, were held unlawful.<sup>81</sup> The statutory protection thus accorded supervisors stemmed from the need to vindicate employees' section 7 rights.

In addition, supervisory discharges for engaging in union activity or participating in concerted activity were found unlawful when the discharge formed an integral part of the employer's unlawful pattern of conduct designed to discourage employees from seeking enforcement of contractual rights or otherwise engaging in concerted activity.<sup>82</sup>

In *Parker-Robb Chevrolet, Inc.*<sup>83</sup> the Board erased this latter exception and held that termination of supervisors for their own union or concerted activity was not unlawful, whether they engaged in such activity by themselves or in alliance with rank-and-file employees.<sup>84</sup> Discharge or discipline of supervisors was held lawful even when it formed an essential part of an employer's unlawful pattern of conduct designed to discourage employees from seeking enforcement of contractual rights or otherwise engaging in concerted activity.<sup>85</sup> The "integral part" or "pattern of conduct" cases, said the Board, ignored the fact that only employees are protected

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this [Act] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

*Id.* § 164(a); see *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), *cert. denied*, 335 U.S. 908 (1949).

78. *Hanna Mining Co. v. District 2, MEBA*, 382 U.S. 181, 188 (1965) (footnote omitted). See generally *American Broadcasting Cos. v. Writers Guild, Inc.*, 437 U.S. 411 (1978); *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790 (1974); *Beasley v. Food Fair, Inc.*, 416 U.S. 653 (1974); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *MEBA v. Interlake S.S. Co.*, 370 U.S. 173 (1962).

79. See, e.g., *NLRB v. Inter-City Advertising Co.*, 190 F.2d 420, 422 (4th Cir. 1951), *cert. denied*, 342 U.S. 908 (1952). See generally 1 THE DEVELOPING LABOR LAW, *supra* note 18, at 131-33; 2 *Id.* at 1456-57.

80. See *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402, 403-04 (1982), and cases cited therein.

81. *Id.*

82. *Id.*

83. 262 N.L.R.B. 402 (1982).

84. *Id.* at 404. See generally *Bethel, The NLRB and the Discharge of Supervisors: Parker-Robb Brings Questionable Reform*, 54 U. COLO. L. REV. 1 (1982).

85. See *Wer-Coy Fabrication Co.*, 268 N.L.R.B. No. 124, 115 L.R.R.M. 1124 (1984).

against discharge for engaging in union or concerted activity, and that supervisors are unprotected whether acting alone or with statutory employees.<sup>86</sup>

The Board's doctrinal refinement appears to accord with the clear congressional intention to exclude supervisors as such from the self-organizational, collective bargaining, and other concerted activities protected by the Act. Conversely, some limitation upon an employer's freedom regarding supervisors is necessary to preclude establishment of an insulated, supervisory conduit for illegal actions against statutory employees. The Board accommodates these sometimes conflicting policies by its continued proscription of employer conduct that directly interferes with employees' exercise of *their own* section 7 rights, such as supervisory discharges for giving adverse testimony or refusing to commit unfair labor practices.

### INDIVIDUAL ACTIVITY

Section 7 guarantees to employees the rights to organize and join unions, 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.<sup>87</sup> Activity is clearly regarded as concerted when it involves or seeks to involve group action, which is action involving more than one employee.<sup>88</sup>

Further, under the Board's *Alleluia Cushion*<sup>89</sup> doctrine ostensibly single employee complaints or protests were treated as concerted activity when the employee sought to enforce social or protective labor legislation of benefit to all employees.<sup>90</sup> This result was predicated upon the doctrine of implied consent. Because the Legislature enacted certain laws for the protection and benefit of all employees, consent and concert of action were deemed to arise from the mere assertion of such statutory rights. No outward manifestation of support by fellow employees was required. Therefore, when an employee sought to enforce certain social or protective labor legislation the activity was deemed concerted absent evidence that fellow employees disavowed the representation.<sup>91</sup> Under this doctrine the Board held concerted and protected such conduct as an employee's protests concerning alleged sex-based dis-

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86. *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402, 403 (1982). The Board concluded as follows:

In the final analysis, the instant case, and indeed all supervisory discharge cases, may be resolved by this analysis: The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act.

*Id.* at 404 (emphasis in original).

87. 29 U.S.C. § 157 (1982).

88. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325 (9th Cir. 1953); *Ohio Oil Co.*, 92 N.L.R.B. 1597 (1951); *Root-Carlin, Inc.*, 92 N.L.R.B. 1313 (1951). The concept does not extend to so-called individual, isolated gripes. See *NLRB v. Office Towel Supply Co.*, 201 F.2d 838 (2d Cir. 1953); *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949). See generally Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286 (1981); Note, *Protection of Individual Action as "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369 (1983); 1 THE DEVELOPING LABOR LAW, *supra* note 18, at 72-75, 136-42.

89. *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975).

90. See *id.* at 1000. See generally *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 n.15 (1978), and cases cited therein.

91. See *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975); *Jim Causley Pontiac, Div. Jim Causley, Inc.*, 232 N.L.R.B. 125 (1977), *remanded*, 620 F.2d 122 (6th Cir. 1980); *B & P Motor Express, Inc.*, 230 N.L.R.B. 653 (1977).

crimination,<sup>92</sup> an employee's complaint to the Wage & Hour Division of the U.S. Department of Labor,<sup>93</sup> and the individual filing of charges with the EEOC and a state FEP agency.<sup>94</sup>

In *Meyers Industries, Inc.*<sup>95</sup> the Board overruled *Alleluia Cushion* and held that the concept of protected, concerted activity entails an objective standard. It requires a factual showing of some group action or collective activity, or action as a representative on behalf of a group.<sup>96</sup> Solitary employee invocation of relevant workforce legislation (e.g., OSHA) will no longer be sufficient to invoke statutory concertedness, and consent or concert of action will not be presumed or inferred from the mere assertion of such statutory rights or other rights of possible group concern.<sup>97</sup>

In *Meyers Industries* the Board found that the employer did not violate section 8(a)(1) by discharging a driver because of his safety complaints and refusal to drive an unsafe truck after reporting the truck's condition to the Tennessee Public Service Commission.<sup>98</sup> Although another employee had also complained about the truck in the discharged driver's presence, the Board said that "individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action."<sup>99</sup> The Board stated further:

[T]o find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's

92. See *Dawson Cabinet Co.*, 228 N.L.R.B. 290, *enforcement denied*, 566 F.2d 1079 (8th Cir. 1977).

93. See *Triangle Tool & Eng'g, Inc.*, 226 N.L.R.B. 1354 (1976).

94. See *King Soopers, Inc.*, 222 N.L.R.B. 1011 (1976).

Under its *Interboro* doctrine, the Board also holds that individual action to enforce contract terms is concerted activity. *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). See generally Comment, *Constructive Concerted Activity and Individual Rights: The Northern Metal-Interboro Split*, 121 U. PA. L. REV. 152 (1972). The Board regards the individual's enforcement of the contract not only as redounding to the benefit of all employees, but also as merely extending the concerted activity which led to and culminated in the contract.

In *NLRB v. City Disposal Sys.*, 104 S. Ct. 1505 (1984), the Court approved the Board's *Interboro* doctrine. The Court held that an individual truckdriver was engaged in concerted activity when he refused to drive a truck that he honestly and reasonably believed to be unsafe, when the contract provided that employees were not required to drive unsafe vehicles. *Id.* at 1516. The Court agreed with the Board that the individual assertion of a right contained in a contract is an extension of the concerted action that produced the agreement, and that the assertion of such a right affects the rights of all employees covered by the contract. The activity is concerted if based upon the honest and reasonable invocation of a contractual right, whether or not the conduct is actually protected or the contract specifically raised.

95. 268 N.L.R.B. No. 73, 115 L.R.R.M. 1025 (1984).

96. *Id.* at 1028-29.

97. See generally *NLRB General Counsel on Board's Meyers Industries, Inc. Decision*, [News and Background Information] 115 LAB. REL. REP. (BNA) 284 (April 9, 1984) (NLRB General Counsel Guideline Memorandum GC84-3, Feb. 16, 1984).

98. 268 N.L.R.B. No. 73, 115 L.R.R.M. 1025, 1030 (1984). The Board distinguished *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967), as involving an individual attempt to enforce a collective bargaining agreement.

99. 268 N.L.R.B. No. 73, 115 L.R.R.M. 1025, 1030 (1984) (emphasis in original). The Board stated: [W]e are persuaded that the *per se* standard of concerted activity, by which the Board determines what *ought to be* of group concern and then artificially presumes that it *is* of group concern, is at odds with the Act. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7.

*Id.* at 1028 (emphasis in original).

activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.<sup>100</sup>

The Board noted that "absent special circumstances" similar to those in *NLRB v. Burnup & Sims, Inc.*,<sup>101</sup> "there is no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an employee engaged in misconduct."<sup>102</sup>

Section 7 is the heart of the Act. The rights it guarantees to employees to engage in organization, unionization, collective bargaining, and other concerted activities are of supreme importance under our national scheme of labor-management relations. In the past the Board has given an expansive reading to the section 7 concept of concerted activity, treating ostensibly single employee activities (*i.e.*, complaints and protests) as concerted when they reflected or embodied group concerns.

For reasons more nice than real, the Board has retreated to a niggardly reading of section 7, resurrecting outmoded concepts of "uniquely personal rights." The concept of "uniquely personal rights" in the context of the employment relationship has been rejected by the Supreme Court under section 301 of the Act and should be rejected under section 7 as well.<sup>103</sup> Contrary to the Board's position in *Meyers Industries*, the reality is that social and protective labor legislation arises from and is inextricably intertwined with employee group concerns. Such laws arose from the needs and desires of all employees, and were enacted by the Legislature for the protection and benefit of all employees. Concert of action is therefore implicit in the mere assertion of these statutory rights, even by one individual.

The Court recently endorsed the proposition that individual action to enforce contract terms constitutes concerted activity because the individual action not only redounds to the benefit of all employees but also represents an extension of the concerted activity underlying the contract.<sup>104</sup> Assuming *arguendo* the rather dubious proposition that literal concertedness must be found to invoke section 7 pro-

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100. *Id.* at 1029 (footnote omitted).

101. 379 U.S. 21 (1964). The *Burnup & Sims* Court upheld the Board's finding that an employer violated section 8(a)(1) by discharging an employee known to have engaged in protected activity even though the employer was motivated by a good faith but mistaken belief that the employee engaged in misconduct during the protected activity. *Id.* at 23.

102. 268 N.L.R.B. No. 73, 115 L.R.R.M. 1029 n.23 (1984).

103. Section 301 of the Act provides that suits for violation of contracts between employers and unions may be brought in federal court. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). In *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), the Court held that federal courts lacked jurisdiction under section 301 over union actions to recover employees' wage claims. *Id.* at 461. The Court regarded such claims as uniquely personal to the individual employee. The *Westinghouse* doctrine was later squarely rejected in *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962), in which the Court stated:

The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.

See *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

104. *NLRB v. City Disposal Sys.*, 104 S. Ct. 1505 (1984), discussed more fully *supra* note 94.

tections,<sup>105</sup> the same rationale may be applied to individual action to enforce social and protective legislation. Thus, such enforcement benefits all employees and arises from the concertedness precipitating the legislation. Further concertedness is found in the concept of the employee as a private attorney general representing and enforcing public rights.<sup>106</sup>

Equally significant and dubious is the Board's imposition of a discriminatory motivation requirement as a predicate for a section 8(a)(1) violation. While motive has played an uncertain role in independent 8(a)(1) situations,<sup>107</sup> it has been well established over the years that section 8(a)(1) is violated in a wide variety of situations irrespective of motive. The applicable test in appropriate cases has been objective, not subjective, that is, whether or not there is a reasonable tendency that the particular employer conduct will interfere with section 7 rights.<sup>108</sup>

In *NLRB v. Burnup & Sims, Inc.*,<sup>109</sup> for example, the Court held that an employer violated section 8(a)(1) by discharging an employee known to have engaged in protected activity even though the employer was motivated by a good faith but mistaken belief that the employee had engaged in misconduct during the protected activity.<sup>110</sup> The Board found the discharges violative of both sections 8(a)(1) and (3).<sup>111</sup> The Court, however, found it unnecessary to reach questions under section 8(a)(3) (which requires discriminatory motivation) because the Court found a plain

105. See *Meyers Indus., Inc.*, 268 N.L.R.B. No. 73, 115 L.R.R.M. 1025, 1031 (1984) (Zimmerman, dissenting).

106. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (right of individual employee to union representation at investigatory-disciplinary interview as concerted, protected activity).

107. See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308-11 (1965); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). See generally Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491 (1967); Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 CORNELL L.Q. 193 (1966).

108. See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773 (1979); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

109. 379 U.S. 21 (1964).

110. *Id.* at 22. Upon being advised that two union activist employees threatened to use dynamite to get the union in if the union did not acquire the requisite union membership authorizations, the employer discharged the two. The Board found that the charges were untrue, that the employees actually made no threats against the employer's property, and that the employer's honest belief in the truth of the charges was not a defense. *Id.* at 21-22.

111. Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against an employee based on union considerations, that is, 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. 29 U.S.C. § 158(a)(3) (1982). The section thus proscribes (1) discrimination (2) that encourages or discourages union membership. The touchstone under section 8(a)(3) is employer union-related motivation. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961). "The statutory language 'discrimination . . . to . . . discourage' means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an anti-union purpose." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Specific evidence of intent is not always required, and unlawful intent may be inferred when it is a natural consequence of particular action. *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); see *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). See generally Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968); Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735 (1965); Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of American Ship Building & Great Dane Trailers*, 70 COLUM. L. REV. 81 (1970).

violation of section 8(a)(1) "whatever the employer's motive."<sup>112</sup> The Court noted that "protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith."<sup>113</sup> The Board therefore takes a giant and rather disingenuous step when it incorporates a blanket requirement of subjective motivation into section 8(a)(1).<sup>114</sup>

### BARGAINING OBLIGATIONS

Employers and unions have respective and corresponding duties under sections 8(a)(5) and 8(b)(3) of the Act to bargain with each other in good faith concerning mandatory subjects of bargaining.<sup>115</sup> Section 8(d) defines the duty to bargain collectively to include "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."<sup>116</sup> Subjects included in the section 8(d) definition of "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining about which an employer and union must bargain and upon which either party may insist to the point of impasse.<sup>117</sup> Only after bargaining impasse is reached may the party take unilateral action on the matter.<sup>118</sup>

Before a bargaining impasse is reached, however, unilateral action involving mandatory bargaining subjects violates the good faith bargaining obligation.<sup>119</sup> If the

112. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22 (1964). The Court therefore did not reach the question of whether the Board's alternative finding of discriminatory motivation was supported by substantial evidence.

113. *Id.* at 23.

114. Equally disingenuous and puzzling is the Board's token obeisance to *Burnup & Sims* while stating that section 8(a)(1) is not violated when an employer imposes discipline in the good faith but mistaken belief that an employee engaged in misconduct. See *supra* text accompanying notes 101-02.

115. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5) (1982); see *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952). Section 8(b)(3) makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of [section 9(a)]." 29 U.S.C. § 158(b)(3) (1982); see *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

116. 29 U.S.C. § 158(d) (1982). See generally *Cox, The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); *Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950); *Fleming, The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988 (1961); *Gross, Cullen & Hanslowe, Good Faith in Labor Negotiations: Tests and Remedies*, 53 CORNELL L. REV. 1009 (1968).

117. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); see also *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959). See generally *Modjeska, Guess Who's Coming to the Bargaining Table*, 39 OHIO ST. L.J. 415 (1978).

118. See *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Landis Tool Co.*, 193 F.2d 279 (3d Cir. 1952); *NLRB v. Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951); see also *American Distrib. Co. v. NLRB*, 715 F.2d 446 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2170 (1984); *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1910 (1984). An impasse is that stage of bargaining where a party asserting the existence of an impasse is warranted in assuming that further bargaining would be futile. For the determination of when an impasse has been reached, see *E.I. DuPont de Nemours & Co.*, 268 N.L.R.B. No. 161, 115 L.R.R.M. 1194 (1984), reaffirming the guidelines set forth in *Taft Broadcasting Co.*, WDAF AM-FM TV, 163 N.L.R.B. 475, 478 (1967), *review denied sub nom. American Fed'n of Television and Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). See also *Charles D. Bonnano Linen Serv. v. NLRB*, 454 U.S. 404 (1982).

119. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). See generally *Schatzki, The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEX. L. REV. 470 (1966).



matter involves a permissive rather than a mandatory subject of bargaining, though, the parties are not obligated to bargain about the matter.<sup>120</sup>

Section 8(d) purports to relieve a party from midterm bargaining concerning matters contained in the contract. In *Jacobs Manufacturing Co.*<sup>121</sup> the Board held that parties need not engage in midterm bargaining regarding mandatory matters contained in the contract, but that absent waiver they must bargain regarding mandatory matters neither contained in the contract nor discussed in negotiations.<sup>122</sup> If the matter involves a permissive rather than a mandatory subject of bargaining, the parties are not obligated to engage in midterm or other bargaining and unilateral midterm modification of the permissive term does not violate section 8(d).<sup>123</sup>

Reversing its prior position, the Board recently held in *Milwaukee Spring Division of Illinois Coil Spring Co. (Milwaukee Spring II)*<sup>124</sup> that an employer did not violate sections 8(a)(1), (3), (5), or 8(d) by its nonconsensual, midterm, assembly operations department relocation from a union to a nonunion facility to obtain lower labor costs, when the contract did not preclude the move and the employer met its obligation to bargain over the decision and its effects.<sup>125</sup> Neither the recognition nor wage and benefit clauses constituted such contractual preclusion, said the Board, nor did the relocation constitute a modification of the clauses within the meaning of section 8(d). In the Board's view, it is "NLRB textbook law that an employer need not obtain a union's consent on a matter not contained in the body of a collective-bargaining agreement even though the subject is a mandatory subject of bargaining."<sup>126</sup> Further, under section 8(d) an employer must obtain a union's consent before implementing a change during the life of a contract only if the change is in a mandatory term or condition contained in the contract.<sup>127</sup> The standard is the same, said the Board, for work reassignment and relocation decisions. Absent specific contractual prohibition, the employer may transfer or relocate work if the employer first bargains in good faith to impasse and is not motivated by antiunion animus.

In *Milwaukee Spring II* the parties stipulated that the employer's decision to relocate work from the unionized to the nonunionized plant turned upon a reduction

120. See *Allied Chem. & Alkali Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 188 (1971). Thus, bargaining is required over statutory subjects (that is, subjects within the statutory phrase), permitted but not required as to lawful non-statutory subjects, and not permitted as to illegal subjects. See generally 1 THE DEVELOPING LABOR LAW, *supra* note 18, at 757-869.

121. 94 N.L.R.B. 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952). See generally Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 391-401 (1950); Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097 (1950); Findling & Colby, *Regulation of Collective Bargaining by the National Labor Relations Board—Another View*, 51 COLUM. L. REV. 170 (1951); Wollett, *The Duty to Bargain Over the "Unwritten" Terms and Conditions of Employment*, 36 TEX. L. REV. 863 (1958).

122. 94 N.L.R.B. 1214, 1218-19 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952).

123. See *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-88 (1971).

124. 268 N.L.R.B. No. 87, 115 L.R.R.M. 1065 (1984), *reversing* 265 N.L.R.B. 206 (1982), and *overruling* *Boeing Co.*, 230 N.L.R.B. 696 (1977), *enforcement denied*, 581 F.2d 793 (9th Cir. 1978); *University of Chicago*, 210 N.L.R.B. 190 (1974), *enforcement denied*, 514 F.2d 942 (7th Cir. 1975); and *in relevant part* *Los Angeles Marine Hardware Co.*, a Div. of *Mission Marine Assoc., Inc.*, 235 N.L.R.B. 720 (1978), *enforced*, 602 F.2d 1302 (9th Cir. 1979).

125. 268 N.L.R.B. No. 87, 115 L.R.R.M. 1065, 1068-69 (1984).

126. *Id.* at 1067.

127. *Id.* at 1066.

in labor costs, and that the decision was therefore a mandatory subject of bargaining. In *Otis Elevator Co., Wholly Owned Subsidiary of United Technologies*,<sup>128</sup> discussed more fully below, the Board indicated that if the parties had not so stipulated in *Milwaukee Spring II* the Board would have found the decision to be a mandatory subject of bargaining because the decision turned upon labor costs.

Further, in *Otis Elevator Co.* the Board reversed its prior position and held that the employer did not violate sections 8(a)(1) and (5), or 8(d), by refusing to bargain with the union over its decision to transfer and consolidate certain unit work from its New Jersey facility to its Connecticut facility, when the decision was based upon economic considerations unrelated to labor costs.<sup>129</sup> The employer transferred and consolidated its research and development functions because the New Jersey facility used outdated technology, produced a noncompetitive product, and duplicated other operations, and because a newer and larger research and development center was available in Connecticut. The employer's aim was to improve research, development, and the marketability of its product. The decision did not turn upon labor costs, although the Board noted that labor costs may have been one of the underlying factors stimulating the evaluation that generated the ultimate decision.<sup>130</sup>

The Board found that the employer's decision turned upon a fundamental change in the nature and direction of the business, was not amenable to collective bargaining, and therefore was not a mandatory subject of bargaining. The Board considered the critical factor to be the essence of the decision itself, that is, whether it turned upon a change in the scope, nature, or direction of the business, or upon labor costs.<sup>131</sup> Neither the effect on employees nor the union's ability to offer alternatives was critical. Recognizing management needs for predictability, flexibility, speed, secrecy, and profitability, the Board concluded that decisions affecting the scope, nature, or direction of a business are excluded from mandatory bargaining under section 8(d).<sup>132</sup> Such decisions include, said the Board, decisions to sell or merge all or part of a business; to dispose of assets; to restructure or consolidate operations; to subcontract;<sup>133</sup> to invest in labor-saving machinery; to change methods of finance, sales, advertising, or product design; and all analogous decisions. Bargaining over the effects of such decisions remains mandatory.<sup>134</sup>

In *Fibreboard Paper Products Corp. v. NLRB*<sup>135</sup> the Court held that the employ-

128. 269 N.L.R.B. No. 162, 115 L.R.R.M. 1281 (1984), *reversing* 255 N.L.R.B. 235 (1981).

129. *Id.* at 1281.

130. *Id.* at 1282. No allegation was made that the employer acted for antiunion reasons or from a desire to modify or lower labor costs.

131. *Id.* at 1283.

132. *Id.*

133. Conversely, for example, the Board would find subcontracting that turns upon a reduction in labor costs rather than a change in basic operations to be a mandatory subject. The Board stated:

Included within Section 8(d) . . . are all decisions which turn upon a reduction of labor costs. This is true whether the decision may be characterized as subcontracting, reorganization, consolidation, or relocation, if the decision in fact turns on direct modification of labor costs and not on a change in the basic direction or nature of the enterprise.

*Id.* at 1283. That labor costs may be an important factor in the decision, said the Board, does not alter the analysis. Rather, the labor cost element of the decision can be adequately dealt with in the effects bargaining.

134. *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

135. 379 U.S. 203 (1964).

er violated section 8(a)(5) by contracting out maintenance work without first bargaining with the union over that decision.<sup>136</sup> The Court held that the type of contracting-out involved in the case—“the replacement of employees in the existing unit with those of an independent contractor to do the same work under similar conditions of employment”—was a mandatory subject of bargaining under sections 8(a)(5) and 8(d).<sup>137</sup>

The Court noted that the contracting-out of the unit work and the resultant employment termination were “well within the literal meaning of the phrase ‘terms and conditions of employment’” in section 8(d), and that holding contracting-out to be a mandatory subject of bargaining promotes “the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.”<sup>138</sup> The Court also noted the propriety of submitting the particular dispute to collective bargaining because the decision did not alter the employer’s basic operation: the maintenance work still had to be performed in the plant, no capital investment was contemplated, and the employer had simply replaced existing employees with those of the independent contractor to perform the same work under similar conditions of employment. In his concurring opinion, Justice Stewart observed as follows:

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, [investment in labor-saving machinery, liquidation of assets, termination of business, volume and kind of advertising expenditures, product design, manner of financing and sales] which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.<sup>139</sup>

Thereafter, in *First National Maintenance Corp. v. NLRB*<sup>140</sup> the Court held that the employer had no duty to bargain with the union over its decision to close a part of its business,<sup>141</sup> but that the employer was required to bargain about the effect of its decision.<sup>142</sup> The employer terminated its contract to provide maintenance work for a nursing home and discharged those employees who worked for it at the home without bargaining with the union concerning either the decision to terminate the contract or

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136. *Id.* at 215. Upon expiration of the contract the employer contracted out bargaining unit maintenance work for economic reasons without first bargaining with the union; the maintenance work continued to be performed in the plant with employees of the independent contractor instead of the employer’s employees who were discharged. *Id.* at 206.

137. *Id.* at 215.

138. *Id.* at 210–11.

139. *Id.* at 223 (Stewart, J., concurring). Justices Douglas and Harlan joined the concurrence.

140. 452 U.S. 666 (1981).

141. *Id.* at 686.

142. *Id.* at 681.

the effect of that change on unit employees.<sup>143</sup> The decision to terminate the nursing home contract was based upon economic considerations.<sup>144</sup>

The premise underlying mandatory bargaining, said the Court, is that collective discussion backed by the parties' economic power will result in better decisions for labor, management, and society. "This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process."<sup>145</sup> The Court applied a benefits-burdens analysis,<sup>146</sup> and held that the employer's need for freedom in making an economic partial closing decision outweighed the benefits that might be obtained by the union's participation in that decision. The decision, therefore, was not a mandatory bargaining subject.<sup>147</sup>

The Court indicated that labor costs were not a crucial circumstance in the economically based partial termination. Instead, the underlying dispute concerned the management fee over which the union had no control or authority. According to the Court, the employer had no intention of replacing the discharged employees or moving the operation elsewhere; no claim of antiunion animus was made; and the case did not involve an employer's abrogation of ongoing negotiations or an existing bargaining agreement because the union was not selected or certified as bargaining representative until after the economic problem had arisen.<sup>148</sup> The Court noted that while the employer's business enterprise did not involve large capital investments in single locations, the absence of significant investment or withdrawal of capital was not significant. The Court also noted that the decision to terminate work at the nursing home represented a significant change in the employer's operations, a change in the scope and direction of the enterprise, similar to a decision whether to be in business at all or to open a new line of business.

In *Milwaukee Spring II* and *Otis Elevator II* the Board thus endorses and adopts the *Fibreboard* concurring view of Justice Stewart that section 8(d) delineates a

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143. The employer was engaged in the business of providing housekeeping, cleaning, maintenance, and related services for commercial customers. It supplied each customer, at the customer's premises, with a contracted-for labor force and supervision in return for reimbursement of its labor costs and payment of a set fee. The employer contracted for and hired personnel separately for each customer, and did not transfer employees between locations.

144. The termination resulted from a dispute between the employer and the nursing home over the size of the management fee.

145. *Id.* at 678; see *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), in which the Court held that in-plant cafeteria and vending machine food and beverage prices are mandatory subjects of collective bargaining. Classifying such subjects as mandatory, said the Court, channels an area of common dispute into the collective bargaining process, and is neither too trivial nor difficult for resolution in such process, nor beyond the employer's control.

146. The Court stated as follows:

Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. Congress did not explicitly state what issues of mutual concern to union and management it intended to exclude from mandatory bargaining. Nonetheless, in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

452 U.S. 666, 678-79 (1981) (footnotes omitted).

147. *Id.* at 686. The Court stated that it intimated no view as to the duty to bargain concerning other types of management decisions such as plant relocations, sales, other kinds of subcontracting, automation, etc., and that such cases were to be considered on their particular facts. *Id.* at 686 n.22.

148. *Id.* at 687-88.

limited category of issues subject to compulsory bargaining, from which "core of entrepreneurial control" decisions are excluded. The Board also extracts from *Fibreboard* and *First National* a business direction-labor cost dichotomy, excluding the former from the limited scope of section 8(d). The Board's bottom line may well be right, for as the foregoing discussion of *Fibreboard* and *First National* reflects, those opinions contain much language supportive of the Board's conclusion.

There is a risk, however, that the Board has overreached the Court. *Fibreboard* and *First National* also seem to stress the amenability of the matter to meaningful collective bargaining; they do not simply rely on the somewhat vaguer entrepreneurial decision concept. The amenability determination requires an analysis of the underlying decisional reasons. Consequently, particular business direction changes predicated upon non-labor cost or enterprise considerations may nevertheless be amenable to resolution through the collective bargaining process.

The Board essentially discards the many limitations specifically placed by the Court on its *First National* decision, and ignores the Court's explicit declination to extend its holding to such management decisions as plant relocations. Although the Board may well be right in its prescience, one would assume that the Court's precision and caution were intentional, and that had the Court been so inclined it could easily have articulated the somewhat simplistic business direction-labor cost formula. Instead, *First National* expressly relied upon a balancing test, and it seems that plant relocation and other decisions different in kind from partial closings should be analyzed in each case under the same test.<sup>149</sup> Under the *First National* benefits-burdens analysis, the question is whether the decision is based upon labor costs or other factors amenable to resolution through collective bargaining.

#### SUPERSENIORITY FOR UNION STEWARDS

The Board and courts generally have held that absent adequate justification, contractual provisions granting special benefits to union officials or stewards are violative of sections 8(a)(1) and (3), and 8(b)(2) and (1)(A).<sup>150</sup> Under Board doctrine established in *Dairylea Cooperative, Inc.*,<sup>151</sup> superseniority for union stewards is presumptively lawful when restricted to layoff and recall; the General Counsel has the burden of rebutting the presumption.<sup>152</sup> Although the seniority preference for stewards relates benefits to union status, disparate treatment is rationalized because it encourages the continued job presence of the steward and thereby furthers effective contract administration for the benefit of all unit employees. Superseniority pro-

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149. See generally *NLRB General Counsel on Duty to Bargain Cases II*, 1981 LAB. REL. YEARBOOK (BNA) 315 (NLRB General Counsel Guideline Memorandum GC 81-57, Nov. 30, 1981); *NLRB General Counsel on Duty to Bargain Cases I*, 1981 LAB. REL. YEARBOOK (BNA) 312 (NLRB General Counsel Guideline Memorandum GC 81-83, July 14, 1981).

150. See *NLRB v. American Can Co.*, 658 F.2d 746 (10th Cir. 1981), and cases cited therein; *Dairylea Coop., Inc.*, 219 N.L.R.B. 656 (1975), *enforced sub nom.* *NLRB v. Milk Drivers*, 531 F.2d 1162 (2d Cir. 1976). See generally *Note, Superseniority: Post-Dairylea Developments*, 29 CASE W. RES. 499 (1979); *Note, Superseniority: Latitudes and Limitations*, 49 U. CIN. L. REV. 832 (1980).

151. 219 N.L.R.B. 656 (1975), *enforced sub nom.* *NLRB v. Milk Drivers*, 531 F.2d 1162 (2d Cir. 1976).

152. See generally *NLRB General Counsel Memorandum on Dairylea*, 1978 LAB. REL. YEARBOOK (BNA) 330 (NLRB General Counsel Memorandum GC 78-59, Sept. 19, 1978); 1 THE DEVELOPING LABOR LAW, *supra* note 18, at 234-35, 245-46.

visions not limited to layoff and recall are presumptively unlawful, and the party asserting their validity has the burden of rebutting the presumption by establishing justification.<sup>153</sup>

The Board had extended the *Dairylea* presumption of validity to any union officer or official whose responsibilities bore a direct relationship to the effective and efficient representation of bargaining unit employees.<sup>154</sup> Superseniority provisions were unlawful, however, when applied to union officials with strictly internal union duties, and to individuals not involved in unit representation in contract or grievance administration or in furthering the bargaining relationship.<sup>155</sup> The Board recently reversed the foregoing extension and ruled that grants of superseniority which extend beyond employees actually responsible for grievance processing and on-the-job contract administration will be found unlawful.<sup>156</sup> Superseniority must be limited to union employee-agents who must be on the job to perform duties directly related to contract administration.<sup>157</sup>

*Dairylea* rests on the proposition that employees have section 7 rights to refrain from union activities in general and from being union stewards in particular. Consequently, employees should suffer no employment detriment when they exercise these rights. Stewardships generally go to enthusiastic or committed unionists, and refraining employees generally are not made stewards. Thus, under a superseniority system refraining employees suffer the employment detriment of impaired seniority compared to employees who become stewards. The ultimate question then becomes one of justification for this disparate treatment. Justification is found in representational service for the entire bargaining unit.

Tested under these principles, the Board's retrenchment seems appropriate. The grant of superseniority to those who do not perform steward or other on-the-job

153. See *Sheaffer Eaton Div. of Textron, Inc.*, 252 N.L.R.B. 1005 (1980); *Brotherhood of Painters and Allied Trades, Dist. Council 2*, 239 N.L.R.B. 1378 (1979), *enforcement denied sub nom. Paintsmiths, Inc. v. NLRB*, 620 F.2d 1326 (8th Cir. 1980); *Preston Trucking Co.*, 236 N.L.R.B. 464 (1978), *enforced sub nom. Local 20, Int'l Bhd. of Teamsters v. NLRB*, 610 F.2d 991 (D.C. Cir. 1979); *Union Carbide Corp., Chem. & Plastics Operations Div.*, 228 N.L.R.B. 1152 (1977); *Hospital Serv. Plan*, 227 N.L.R.B. 585 (1976); *Auto Warehousemen, Inc.*, 227 N.L.R.B. 628 (1976), *enforcement denied*, 571 F.2d 860 (5th Cir. 1978).

154. See *United Elec., Radio & Mach. Workers, Local 623 (Limpco Mfg., Inc.)*, 230 N.L.R.B. 406 (1977), *review denied sub nom. D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978); *International Union, United Auto., Aerospace and Agricultural Implement Workers, Local 1331 (Chrysler Corp.)*, 228 N.L.R.B. 1446 (1977); *Otis Elevator Co.*, 231 N.L.R.B. 1128 (1977).

155. See *American Can Co.*, 244 N.L.R.B. 736 (1979), *enforced*, 658 F.2d 746 (10th Cir. 1981); *McQuay-Norris, Inc.*, 258 N.L.R.B. 1397 (1981).

156. *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. 406 (1983), *enforced sub nom. Local 900, Int'l Union of Elec. Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984). The Board overruled *United Elec., Radio & Mach. Workers, Local 623 (Limpco Mfg., Inc.)*, 230 N.L.R.B. 406 (1977), *review denied sub nom. D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978), and such of its progeny as *American Can Co.*, 244 N.L.R.B. 736 (1979), *enforced*, 658 F.2d 746 (10th Cir. 1981).

157. *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. 406 (1983), *enforced sub nom. Local 900, Int'l Union of Elec. Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984). Applying the above principles in *UAW, Local 561 (Scovill, Inc.)*, 266 N.L.R.B. 952 (1983), the Board held unlawful the maintenance and enforcement of a contractual provision granting superseniority to certain union officials (recording secretary, financial secretary, trustees, guide, sergeant-at-arms, and board members at large), when none of the normal duties of the officials involved day-to-day administration of the contract or any steward-like functions. *Id.* at 953. The Board found presumptively lawful the shift protection portion of the clause as applied to those grievance handlers with steward-like duties. *Id.* at 953 n.9; see *Wayne Transp., Div. of Wayne Corp.*, 270 N.L.R.B. No. 28, 116 L.R.R.M. 1049 (1984); *UAW, Local 1384 (Ex-Cell-O Corp.)*, 267 N.L.R.B. No. 206, 114 L.R.R.M. 1198 (1983); *Niagara Mach. & Tool Works*, 267 N.L.R.B. No. 112, 114 L.R.R.M. 1076 (1983).

contract administrative functions does not appear justifiable. While such a grant might promote the effective and efficient representation of employees, this is insufficient justification for the inherently discriminatory effect of superseniority provisions. Because the grant of superseniority is inherently discriminatory, the recipient's union position should require the maintenance of an on-the-job presence at specific times necessary to ensure contract enforcement and prompt grievance processing.

### INTERROGATION

The Board generally has regarded employer interrogation of employees concerning their union or other section 7 activities as unlawful, absent legitimate purpose and proper safeguards.<sup>158</sup> The theory is that interrogation creates employee fear of reprisal.<sup>159</sup> Interrogation generally has not been deemed per se unlawful, though. Rather, the test has been whether under all the circumstances the interrogation reasonably tends to restrain or interfere with the employee exercise of protected rights.<sup>160</sup> The answer is to be found in the record considered as a whole.<sup>161</sup>

In several cases involving interrogation of open and active union supporters, the Board appeared to have wandered into a per se approach, finding the interrogation inherently coercive.<sup>162</sup> The Board recently overruled these cases and reaffirmed the applicability of the totality of circumstances test to interrogation in general, and to interrogation of open and active union supporters in particular.<sup>163</sup>

158. See *Clinton Foods, Inc.*, 237 N.L.R.B. 667 (1979); *Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967); *Blue Flash Express, Inc.*, 109 N.L.R.B. 591 (1954). See generally R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 173-77 (1976); 1 THE DEVELOPING LABOR LAW, *supra* note 18, at 119-25.

159. The essence of the Board's rationale was captured in the following statement in *Struksnes Constr. Co.*, 165 N.L.R.B. 1062, 1062 (1967):

In our view any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights. As we have pointed out, "An employer cannot discriminate against union adherents without first ascertaining who they are." That such employee fear is not without foundation is demonstrated by the innumerable cases in which the prelude to discrimination was the employer's inquiries as to the union sympathies of his employees.

For criticism of the underlying assumptions see UNION REPRESENTATION ELECTIONS, *supra* note 30, at 10, 25, 127-28, 149.

160. See *Blue Flash Express, Inc.*, 109 N.L.R.B. 591, 593-94 (1954).

161. See *id.* at 594, in which the Board agreed with the Second Circuit's view in *NLRB v. Syracuse Color Press, Inc.*, 209 F.2d 596 (2d Cir.), *cert. denied*, 347 U.S. 966 (1954), that "the time, the place, the personnel involved, the information sought, and the employer's conceded preference, all must be considered in determining whether or not the actual or likely effect of the interrogations upon the employees constitutes interference, restraint or coercion." *Id.* at 599.

In *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) the court, generally endorsing the Board's comprehensive approach, suggested that the following factors be considered in determining whether a particular interrogation is coercive:

(1) The background, i.e. is there a history of employer hostility and discrimination? (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e. how high was he in the company hierarchy? (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"? (5) Truthfulness of the reply.

See *NLRB v. Lorben Corp.*, 345 F.2d 346 (2d Cir. 1965); see also *Struksnes Constr. Co.*, 165 N.L.R.B. 1062, 1063, (1967) (necessary safeguards for employer poll to verify union claim of majority status); *Johnnie's Poultry Co.*, 146 N.L.R.B. 770 (1964), *enforcement denied on other grounds*, 344 F.2d 617 (8th Cir. 1965) (necessary safeguards for interrogation in preparation for trial).

162. E.g., *PPG Indus., Inc.*, 251 N.L.R.B. 1146 (1980); *Anaconda Co.*, 241 N.L.R.B. 1091 (1979); *Paceco, Div. of Freuhauf Corp.*, 237 N.L.R.B. 399 (1978); *ITT Automotive Elec. Prods. Div.*, 231 N.L.R.B. 878 (1977).

163. *Rossmore House*, 269 N.L.R.B. No. 198, 116 L.R.R.M. 1025, 1026 (1984).

The Board's excision of the open union adherent exception to the overall circumstances test not only accords with the established precedent noted earlier but also accommodates constitutional concerns. Section 8(c) of the Act, implementing the first amendment, provides that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice" unless such expression contains a "threat of reprisal or force or promise of benefit" in violation of section 8(a)(1).<sup>164</sup> Absent threats or promises, free speech notions protect noncoercive questioning. Moreover, absent threats or promises no evidential foundation exists for inference of a fear of reprisal, the touchstone of unlawful interrogation. Further, concerns over employer identification of and resultant retaliation against employees are simply moot in cases involving open, active union adherents. Disclosure in such cases is already made by the employee.

### NO SOLICITATION RULES

Restrictions on employee solicitation during nonworking hours and on distribution during nonworking hours in nonworking areas have long been held violative of section 8(a)(1) unless the employer justifies the restrictions by establishing that special circumstances make the rule necessary to maintain production or discipline.<sup>165</sup> Rules prohibiting solicitation during the employees' own time are presumptively invalid.<sup>166</sup> Conversely, working time is for work, and rules prohibiting solicitation during working time are presumptively valid.<sup>167</sup>

When specifically interpreting particular employer rules, however, the Board has occasionally distinguished between prohibitions using the terms "working hours" and "working time." The Board generally has held that rules using "working hours" are presumptively invalid because the term covers the entire work shift, thereby embracing the employees' own time (*i.e.*, lunch and rest periods).<sup>168</sup> The Board has vacillated, however, concerning construction of the phrase "working time." Reversing course once again, the Board recently held rules prohibiting solicitation during "working time"<sup>169</sup> to be presumptively valid because the term covers the period when employees are performing actual job duties and does not

164. 29 U.S.C. § 158(c) (1982); *see* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); NLRB v. Golub Corp., 388 F.2d 921 (2d Cir. 1967); Irving Air Chute Co. v. NLRB, 350 F.2d 176 (2d Cir. 1965); NLRB v. La Salle Steel Co., 178 F.2d 829 (7th Cir. 1949), *cert. denied*, 339 U.S. 963 (1950).

165. NLRB v. Baptist Hosp., Inc., 442 U.S. 773 (1979); Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978); Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir.), *cert. denied*, 323 U.S. 730 (1944); *see also* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956); Thornhill v. Alabama, 310 U.S. 88, 102-03 (1940); Thomas v. Collins, 323 U.S. 516, 532 (1945) (constitutional overtones). *See generally* Fanning, *Union Solicitation and Distribution of Literature on the Job—Balancing the Rights of Employers and Employees*, 9 GA. L. REV. 367 (1975); Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964); Hanley, *Union Organization on Company Property—A Discussion of Property Rights*, 47 GEO. L.J. 266 (1958).

166. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945).

167. *See id.* at 803 n.10. *See generally* 1 THE DEVELOPING LABOR LAW, *supra* note 18, at 88-107.

168. *See* Essex Int'l, Inc., 211 N.L.R.B. 749, 750 (1974).

169. *Compare id.* (rules using "working time" presumptively valid) with T.R.W. Bearings Div., T.R.W., Inc., 257 N.L.R.B. 442 (1981) (rules using "working time" presumptively invalid).



embrace the employees' own time.<sup>170</sup> In the Board's view, return to the longstanding distinction between "working hours" and "working time" accorded with general understanding and rules promulgated thereunder.

The reasonable, alternative interpretations of "working hours" and "working time" may be debated *ad infinitum*.<sup>171</sup> Suffice to say such judgments are uniquely within the province of the Board.<sup>172</sup> The particular outcome may be less important in this area than the guideline effect. (This is not to suggest that definitional confusion may not impact adversely upon employees, for example, by either precautionary avoidance of permissible activity or revelation of union sympathies by clarification requests.) Because employers and unions rely heavily on such guidelines in their daily affairs, however, these rules of the game should not be lightly or unnecessarily changed but should be altered only when compelling reasons of law or policy so demand. Cyclical reversals predicated essentially upon political incumbency hardly rise to this level.

Decisions (and reversals) such as the foregoing and certain others discussed herein raise fundamental questions concerning administrative policymaking. The Board has substantive rulemaking as well as adjudicatory authority but has chosen not to use its rulemaking powers.<sup>173</sup> While the choice between proceeding by general rule or by individual, ad hoc adjudication is essentially within the discretion of the agency,<sup>174</sup> rulemaking has much to commend itself generally in labor law and particularly in areas such as the foregoing (*i.e.*, no-solicitation rules). The notification and public participation elements of the rulemaking process suggest not only the increased soundness of the emergent rule, but also increased acceptance and compliance. Notice of forthcoming regulation accompanied by an opportunity to be heard is thereby given the entire labor-management community. Justice Douglas once observed that through rulemaking "[a]gencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice."<sup>175</sup> Rulemaking can command an evidentiary depth and policy scope far superior to ad hoc adjudication. By its prospective nature, rulemaking also avoids the often inequitable retroactive impact of adjudicatory decisions.

Administrative inertia, substantive uncertainty, and aversion to the more binding nature of regulations undoubtedly contribute to the Board's avoidance of rulemaking.

170. *Our Way, Inc.*, 268 N.L.R.B. No. 61, 115 L.R.R.M. 1009 (1983), *overruling* *T.R.W. Bearings Div., T.R.W., Inc.*, 257 N.L.R.B. 442 (1981), and *reaffirming* *Essex Int'l, Inc.*, 211 N.L.R.B. 749 (1974).

171. *See, e.g.*, *Essex Int'l, Inc.*, 211 N.L.R.B. 749 (1974) (majority, concurring, and dissenting opinions).

172. *See* *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978); *see also* *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798-800 (1945).

173. *See* *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 779 n.2 (1969) (Douglas, J., dissenting). *See generally* Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 *YALE L.J.* 571 (1970); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 *YALE L.J.* 729 (1961).

174. *See* *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). *See generally* Fuchs, *Development and Diversification in Administrative Rule Making*, 72 *Nw. U.L. Rev.* 83 (1977); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 *U. PA. L. REV.* 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 *HARV. L. REV.* 921 (1965).

175. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777-78 (1969) (Douglas, J., dissenting).

One suspects that the Board is ignorant of and intimidated by the mysteries of the rulemaking process; it is certainly inexperienced therein.<sup>176</sup> Promulgation of a rule involves a more definitive articulation of contemplated regulatory control than does adjudication and leaves less room for indecision. Lastly, the Board could not ignore much less reverse rules and regulations with the fickle dispatch now accorded adjudicatory precedents.<sup>177</sup>

### STRIKER MISCONDUCT

In *Clear Pine Mouldings, Inc.*<sup>178</sup> the Board reversed established precedent<sup>179</sup> and held that verbal threats directed by striking employees against nonstriking employees warranted an employer's refusal to reinstate the strikers, even though the threats were unaccompanied by physical conduct. Such threats may tend to intimidate or coerce employees in the exercise of their section 7 rights, said the Board, and therefore are unprotected.<sup>180</sup> Board Chairman Dotson and Member Hunter further indicated that when evaluating the appropriateness of reinstatement of unfair labor practice strikers, they would no longer balance the severity of the employer's unfair labor practices which provoked the strike against the gravity of the strikers' misconduct.<sup>181</sup> (Board Members Dennis and Zimmerman did not join this portion of the decision.) Rather, in cases involving picket line and strike misconduct they would deny reinstatement and backpay to "employees who exceed the bounds of peaceful and reasoned conduct."<sup>182</sup>

In *Clear Pine Mouldings* nonstrikers were told they would be straightened out, their fingers would be broken, they would live to regret it, their homes or garages would be burned, and they would be killed. Strikers sometimes accompanied the threats by waving clubs and beating on cars. One can hardly fault the Board for finding this strike misconduct unprotected. Violent conduct as well as conduct "classified as 'indefensible' by any recognized standard of conduct"<sup>183</sup> traditionally has been deemed unprotected. My concern is not with the result reached by the Board in this class of cases, but rather with the loose language utilized by the Board in its articulated standard of "peaceful and reasoned conduct."

Central to labor's long march toward worker betterment has been legal certification of the legitimacy of the primary strike. With the growth of industrial empires, the bargaining power of the individual worker became illusory.<sup>184</sup> Employee combination and unionization were essential to give workers some semblance of equality of

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176. Some wags might note that the Board could start with L. MODJESKA, *ADMINISTRATIVE LAW—PRACTICE AND PROCEDURE* (1982).

177. See generally *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Cities of Anaheim v. FERC*, 723 F.2d 656 (9th Cir. 1984).

178. 268 N.L.R.B. No. 173, 115 L.R.R.M. 1113 (1984).

179. E.g., *Coronet Casuals, Inc.*, 207 N.L.R.B. 304 (1973).

180. *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. No. 173, 115 L.R.R.M. 1113, 1114-15 (1984).

181. *Id.* at 1116.

182. *Id.*

183. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); see *NLRB v. Local 1229, Int'l Bhd. of Elec. Workers (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953).

184. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

bargaining power to improve their wages, hours, and working conditions.<sup>185</sup> Recognition of the union as bargaining agent and a resultant collective bargaining process under which the parties order their own industrial relationship by contract became fundamental to the attainment of industrial peace.<sup>186</sup> The use of economic force, weapons, and pressure are essential ingredients of the free collective bargaining process recognized by our society and labor policy.<sup>187</sup> Labor and management shed much blood over the establishment of the foregoing principles and the validation of "labor's cherished strike weapon."<sup>188</sup>

Congressional concern for preservation of the integrity of the primary strike weapon, and recognition of the legitimate use of the strike, have been constant in federal labor policy.<sup>189</sup> Section 13 of the Act reflects Congress' general solicitude for strike activity by providing that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."<sup>190</sup>

185. *See id.*; *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921); *see also Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 497-98 (1978) ("Congress determined that the extension of organizational and collective-bargaining rights would ameliorate these conditions [low wages and poor working conditions in the health-care industry] and elevate the standard of patient care.").

As articulated years ago by Chief Justice Taft in *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921):

Labor unions . . . were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.

186. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937); *see also Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975).

187. *See NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 495 (1960) ("[T]he use of economic pressure is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining."); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967) ("The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms. . . ."); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965) ("Having protected employee organization in countervailance to the employer's bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the Act also contemplated resort to economic weapons should more peaceful measures not avail."); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-34 (1963) ("This repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.").

188. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 183 (1967).

189. *See NLRB v. Drivers, Local 639*, 362 U.S. 274, 285-89 (1960); *UAW v. O'Brien*, 339 U.S. 454, 456-57 (1950). *See generally Cox, Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574 (1951); Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 MICH. L. REV. 191 (1950); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982).

190. 29 U.S.C. § 163 (1982); *see NLRB v. Drivers, Local 639*, 362 U.S. 274 (1960); *see also National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967); *Local 761, IUE v. NLRB*, 366 U.S. 667 (1961); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951); *NLRB v. Int'l Rice Milling Co.*, 341 U.S. 665 (1951). As part of the 1959 amendments to the secondary boycott provisions of the Act, Congress added a proviso to section 8(b)(4) stating that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." 29 U.S.C. § 158(b)(4) (1982).

Further attention to labor history is warranted. Prior to the 1930s, courts held employee concerted action to be tortious and enjoined conspiracy whenever they deemed the particular means or objectives unlawful. The standard of lawfulness was the judge's view of the desirability or undesirability of the activity.<sup>191</sup> Congress enacted the Norris-La Guardia Act<sup>192</sup> to eliminate such subjective judgments from federal court disposition of matters involving labor disputes. That Act specifically restricted the use of the injunction in labor disputes, and enunciated the national labor policy that workers "shall be free from the interference, restraint, or coercion of employers of labor . . . in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."<sup>193</sup> In *United States v. Hutcheson*<sup>194</sup> the Court described the effect of the Norris-La Guardia Act as follows:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.<sup>195</sup>

The guarantee of the right to engage in concerted activities provided by section 7 of the NLRA,<sup>196</sup> couched in the same language as the Norris-La Guardia Act,<sup>197</sup> was intended to further insulate employees from the common law conspiracy doctrine.<sup>198</sup>

Giving effect to this labor law history over the years, the Board, with judicial approval, generally avoided interpreting section 7 in a fashion that would invite scrutiny of the fairness or unfairness, wisdom or unwisdom, desirability or undesirability of activities that were concerted in fact and did not violate clear statutory prohibitions. Although under the Wagner Act the words of section 7 could not be interpreted literally as immunizing all group activity, however conducted and without regard to its aim, from such scrutiny, the exceptions were confined to situations in which (1) the objective of the activity contravened the provisions or basic policies of

191. As Justice Brandeis related in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921):

[Concerted employee conduct] became actionable when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful. It was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workingman and employer; that due to this dependence upon the individual opinion of judges great confusion existed as to what purposes were lawful and what unlawful; and that in any event Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands.

*Id.* at 485 (footnotes omitted).

192. 29 U.S.C. § 102 (1982).

193. *Id.*; see *United States v. Hutcheson*, 312 U.S. 219 (1941).

194. 312 U.S. 219 (1941).

195. *Id.* at 232.

196. See generally Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951); Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195 (1967); Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378 (1969).

197. See *American News Co.*, 55 N.L.R.B. 1302, 1314 (1944) (Millis, Chr., dissenting).

198. See *UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 257-58 (1949).

the Act, or the provisions of a related federal statute,<sup>199</sup> or (2) the means used to obtain a lawful objective were “indefensible”<sup>200</sup> by all recognized standards of conduct. The latter category included, for example, major violence or similar misconduct,<sup>201</sup> slowdowns,<sup>202</sup> intermittent work stoppages,<sup>203</sup> and the refusal to obey orders while drawing pay.<sup>204</sup>

When Congress enacted the Taft-Hartley Amendments to the Act in 1947, it was aware of and approved the foregoing principles which the Board and the courts were applying to define the scope of section 7.<sup>205</sup> After the 1947 Amendments, the Board and the courts continued to treat concerted activities as protected by section 7 unless the activity was statutorily unlawful,<sup>206</sup> or the means used involved major violence or misconduct<sup>207</sup> or were otherwise plainly indefensible by all accepted standards of conduct.<sup>208</sup> With Supreme Court approval the Board thus continued its refusal to inquire into the wisdom, fairness, or reasonableness of the employees’ action.<sup>209</sup> The

199. See *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942) (strike which constituted mutiny under Criminal Code); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939) (strike in breach of collective bargaining contract); *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944) (strike to compel employer to recognize a minority union); *NLRB v. Brashear Freight Lines*, 119 F.2d 379 (8th Cir. 1941) (strike to compel employer to recognize a minority union); *Thompson Prods. Inc.*, 70 N.L.R.B. 13 (1946) (strike to compel employer to violate NLRB certification); and *American News Co.*, 55 N.L.R.B. 1302 (1944) (strike to compel wage increase in violation of Wage Stabilization Act).

200. *Harnischfeger Corp.*, 9 N.L.R.B. 676, 686 (1938).

201. See *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

202. See *Underwood Mach. Co.*, 74 N.L.R.B. 641, 646–47 (1947), *enforced*, 179 F.2d 118 (1st Cir. 1949).

203. See *UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 264–65 (1949).

204. See *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946); *C. G. Conn, Ltd. v. NLRB*, 108 F.2d 390, 397 (7th Cir. 1939).

205. See *UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949).

206. See *American Rubber Prods. Corp. v. NLRB*, 214 F.2d 47, 50–52 (7th Cir. 1954) (strike to compel a wage increase violative of Wage Stabilization Board regulations); *Hoover Co. v. NLRB*, 191 F.2d 380, 385–89 (6th Cir. 1951) (boycott to compel employer to recognize the union while a representation petition filed by another union was pending before the Board); *W. L. Mead, Inc.*, 113 N.L.R.B. 1040, 1043 (1955) (strike in breach of contract).

207. *Victor Prods. Corp. v. NLRB*, 208 F.2d 834, 837 (D.C. Cir. 1953) (forcibly banning ingress to plant); *Hart Cotton Mills, Inc.*, 91 N.L.R.B. 728, 753 (1950), *enforcement denied*, 190 F.2d 964 (4th Cir. 1951) (assault with deadly weapon); *Old Town Shoe Co.*, 91 N.L.R.B. 240, 244 (1950) (breaking window in nonstriker’s home).

208. *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 413 (5th Cir. 1955) (walkout without adequate steps to protect plant); *NLRB v. Reynolds & Manley Lumber Co.*, 212 F.2d 155, 163 (5th Cir. 1954) (walking off job in such manner as to create dangerous situation); *Valley City Furniture Co.*, 110 N.L.R.B. 1589, 1594 (1954), *enforced*, 230 F.2d 947 (6th Cir. 1956) (refusal to perform assigned work while drawing pay); *Montgomery Ward & Co.*, 108 N.L.R.B. 1175, 1177 (1954) (refusal to perform assigned work while drawing pay); *Farber Bros., Inc.*, 94 N.L.R.B. 748, 751–52 (1951) (slowdown); *Elk Lumber Co.*, 91 N.L.R.B. 333, 336–37 (1950) (slowdown); *Carnegie-Illinois Steel Corp.*, 84 N.L.R.B. 851, 853 (1949), *review denied sub nom.* *Albrecht v. NLRB*, 181 F.2d 652 (7th Cir. 1950) (walkout without adequate steps to protect plant).

*NLRB v. Local 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953), falls within this category of indefensible conduct because of the union’s failure to inform the public of any connection between the pending labor dispute and a published attack upon the employer’s product. The Court thus found the attack “as adequate a cause for the discharge of its sponsors as if the labor controversy had not been pending.” *Id.* at 477.

209. See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). In *Washington Aluminum*, the Court upheld the Board’s finding that an employer violated section 8(a)(1) by discharging employees who walked out in concert in protest over cold working conditions, notwithstanding that the employees had not immediately prior to the walkout requested the employer to rectify the objectionable conditions or that leaving work without permission violated plant rules. The Court stressed the breadth of section 7 protection and cautioned against interpretation of the section in a “restricted fashion.” *Id.* at 14. The following passage reflects the Court’s view that forfeiture of section 7 protection is warranted only in restricted, extreme situations:

It is of course true that § 7 does not protect all concerted activities, but that aspect of the section is not involved in this case. The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract. Nor can they be brought under this

protected status under section 7 of a given activity has not been lost because employees could have selected a more prudent, fair, desirable, or reasonable method for achieving their objective.<sup>210</sup>

*Clear Pine Mouldings*, with its standard of “peaceful and reasoned conduct” and treatment of verbal threats as unprotected misconduct, could if strictly applied constitute a major departure from the teachings of history, policy, and precedent, and could run counter to the Court’s admonition that section 7 not be interpreted in a “restricted fashion.”<sup>211</sup>

Board application of the *Clear Pine Mouldings* standard should also be informed by history, precedent and policy in another regard. Labor disputes, and strikes in particular, are frequently heated, passionate affairs wherein tempers flare and word and deed (on all sides) may be less than pristine. Indeed, Justice Holmes termed the labor-management conflict a “battle.”<sup>212</sup> National labor policy has long been tolerant of such realities, as the Board recognized early in its history: “We are also mindful of the fact . . . that the emotional tension of a strike almost inevitably gives rise to a certain amount of disorder and that conduct on the picket line cannot be expected to approach the etiquette of the drawing room or of the conference table.”<sup>213</sup> Undue prohibition or intolerance of strike conduct constitutes a *pro tanto* diminution of the right to strike guaranteed by the Act.<sup>214</sup> As stated by the Third Circuit:

[S]ome disorder is unfortunately quite usual in any extensive or long drawn out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when it provided in Sec. 13 of the Act . . . that

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Court’s more recent pronouncement [*NLRB v. Local 1229, IBEW (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953)] which denied the protection of § 7 to activities characterized as “indefensible” because they were there found to show a disloyalty to the workers’ employer which this Court deemed unnecessary to carry on the workers’ legitimate concerted activities. The activities of these seven employees cannot be classified as “indefensible” by any recognized standard of conduct. Indeed, concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.

*Id.* at 17 (footnotes omitted).

210. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 344 (1938); *Firth Carpet Co. v. NLRB*, 129 F.2d 633, 636 (2d Cir. 1942). See generally 1 *THE DEVELOPING LABOR LAW*, *supra* note 18, at 147–64.

211. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

212. *Vegalahn v. Guntner*, 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting).

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other side is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.

*Id.*

213. *Republic Creosoting Co.*, 19 N.L.R.B. 267, 288 (1940); see *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 58 (1966): “Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions.”

214. See *supra* text accompanying notes 205–10.

nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the Act would be indeed illusory.<sup>215</sup>

National labor policy, informed by first amendment considerations, is also committed to free speech and debate in labor disputes,<sup>216</sup> and is tolerant of “the over-enthusiastic use of rhetoric,”<sup>217</sup> “intemperate, abusive, or insulting language,”<sup>218</sup> and “bitter and extreme charges, counter-charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions.”<sup>219</sup>

Misapplied, the Board’s purported behavioral requirement of “peaceful and reasoned conduct” could become overreaching and singularly out of place in the labor milieu.<sup>220</sup> “[T]he Act’s provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power.”<sup>221</sup>

The indication that the Board may chance its policy of balancing employee misconduct against employer unfair labor practices is troublesome. In *NLRB v. Thayer Co.*<sup>222</sup> the First Circuit per Judge Magruder held that in determining whether reinstatement would effectuate the policies of the Act, the Board must balance the seriousness of the employer’s unlawful acts against the seriousness of the employees’ misconduct.<sup>223</sup> The *Thayer* doctrine was subsequently endorsed by the D.C. Circuit in *Local 833, UAW v. NLRB (Kohler Co.)*,<sup>224</sup> and adopted the following year by the Board.<sup>225</sup> In *Kohler*, Judge Bazelon noted the policy considerations underlying *Thayer* and overlooked by the Board doctrine holding reinstatement automatically precluded by employee misconduct. First, blatant employer unfair labor practices may have provoked the unprotected action. Second, reinstatement is the only sanction that precludes the employer from profiting from the unfair labor practices through discharges that could weaken or destroy the union.<sup>226</sup> Conversely, sanctions other than discharge, including criminal prosecutions, civil actions, unfair labor practice proceedings against unions, and the possibility of discharge, exist to prevent

215. *Republic Steel Corp. v. NLRB*, 107 F.2d 472, 479 (3d Cir. 1939).

216. *See Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); *see also Thomas v. Collins*, 323 U.S. 516, 532 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 102–03 (1940).

217. *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 277 (1974).

218. *Id.* at 272.

219. *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 58 (1966).

220. Tortious or criminal violence or threats thereof are of course subject to state regulation in appropriate cases. *See UAW v. Russell*, 356 U.S. 634 (1958); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954); *Allen-Bradley Local 1111, Elec. Workers v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942); *see also Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977) (intentional infliction of emotional distress). *See generally Come, Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 VA. L. REV. 1435 (1970); *Cox, Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277 (1980); *Cox, Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

221. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965).

222. 213 F.2d 748 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954).

223. *Id.* at 753. On remand the Board declined to follow the balancing doctrine in future cases. *H. N. Thayer Co.*, 115 N.L.R.B. 1591, 1595 (1956).

224. 300 F.2d 699 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962).

225. *See Blades Mfg. Corp.*, 144 N.L.R.B. 561 (1963), *enforcement denied*, 344 F.2d 998 (8th Cir. 1965).

226. 300 F.2d 699, 709 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962).

or remedy certain employee misconduct.<sup>227</sup> The potential retreat from *Thayer* deserves the foregoing policies. The automatic denial of reinstatement rights precludes Board protection of employee rights, and is not essential to protect the legitimate interests of employers and the public.

### NONMAJORITY BARGAINING ORDERS

In *NLRB v. Gissel Packing Co.*<sup>228</sup> the Supreme Court held that the Board has the power to issue a bargaining order when independent unfair labor practices make holding a fair election impossible or improbable.<sup>229</sup> The Court said that the Board could issue a bargaining order in exceptional cases marked by outrageous and pervasive employer unfair labor practices, the so-called *Gissel I* situation. As discussed more fully below, it is not clear from the Court's decision whether a remedial bargaining order can issue in this situation if the union has never attained a majority. The Court also said that the Board could issue a bargaining order in less extraordinary cases marked by less pervasive practices which tend to undermine majority strength and to impede the election processes.<sup>230</sup> In this *Gissel II* situation, the Board is to balance union authorization cards against an election to determine the preferable vehicle for effectuating employee free choice. A *Gissel II* bargaining order is appropriate, said the Court, only when the union had at some point attained a majority.<sup>231</sup> No bargaining order is appropriate in the case of minor or less extensive unfair labor practices which have a minimal effect on the election machinery, the so-called *Gissel III* situation.<sup>232</sup>

In 1982 in *Conair Corp.*<sup>233</sup> the Board held it had authority to issue nonmajority

227. *Id.*

228. 395 U.S. 575 (1969).

229. See generally Carson, *The Gissel Doctrine: When a Bargaining Order Will Issue*, 41 FORDHAM L. REV. 85 (1972); Comment, *Bargaining Orders Since Gissel Packing: Time to Blow the Whistle on Gissel?*, 1972 WIS. L. REV. 1170; Note, *Gissel Bargaining Orders: Circuit Courts Struggle to Limit NLRB Abuse*, 40 WASH. & LEE L. REV. 1661 (1983).

230. 395 U.S. 575, 614 (1969).

231. The Court stated:

The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of the employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . . .

*Id.* at 614-15.

232. *Id.* at 615; see *General Stencils, Inc.*, 195 N.L.R.B. 1109, *enforcement denied*, 472 F.2d 170 (2d Cir. 1972). For compilation of cases in which the Board and the courts have determined which unfair labor practices warrant *Gissel* bargaining orders see 1 THE DEVELOPING LABOR LAW, *supra* note 18, at 508-16.

233. 261 N.L.R.B. 1189 (1982), *enforcement denied*, 721 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 3511 (1984).



bargaining orders in *Gissel I* situations.<sup>234</sup> The D.C. Circuit denied enforcement of the Board's decision,<sup>235</sup> holding that nonmajority bargaining orders are not within the Board's remedial discretion. In *Gourmet Foods, Inc.*<sup>236</sup> the Board recently reversed its policy and held that it lacks authority to issue nonmajority bargaining orders.<sup>237</sup>

The cases before the *Gissel* Court involved *Gissel II* situations—"less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes"<sup>238</sup>—when the unions had in fact attained the requisite majority status at one time. The *Gissel II* situations appear to be analogous to and consistent with prior rulings of the Court upholding bargaining orders when the union's once-attained majority status had been lost or dissipated due to employer unfair labor practices or employee turnover.<sup>239</sup> As noted above, however, it is not clear whether majority status is a prerequisite to issuance of a bargaining order in a *Gissel I* situation. Nor is it clear whether the Court even intended to speak authoritatively on the issue. The answer, for those skillful enough to extract it, lies in the following ambiguous passage in *Gissel*:

[T]he actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards,<sup>240</sup> the Fourth Circuit nevertheless 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." *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (C.A. 4th Cir. 1967); see also *NLRB v. Heck's, Inc.*, 398 F.2d 337, 338.<sup>241</sup>

234. *Id.* at 1194; see *United Dairy Farmers Coop. Ass'n v. NLRB*, 633 F.2d 1054, 1068-69 (3d Cir. 1980) (NLRB has authority to issue nonmajority bargaining order); cf. *NLRB v. Empire Corp.*, 518 F.2d 860, 863 n.3 (6th Cir. 1975) (suggestion of such authority); *J. P. Stevens & Co. v. NLRB*, 441 F.2d 514, 521-22 (5th Cir. 1971) (similar suggestion). See generally *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 3511 (1984), and cases and materials cited therein.

235. *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 3511 (1984). The court stated: "Strong arguments can be made for and against granting the Board the authority in question. Administrators and judges, in our view, should not endeavor to anticipate or preempt debate on and decision of this issue in the political arena." *Id.* at 1384.

236. 270 N.L.R.B. No. 113, 116 L.R.R.M. 1105 (1984).

237. The Board stated:

[T]he majority rule principle is such an integral part of the Act's current substance and procedure that it must be adhered to in fashioning a remedy even in the most "exceptional" cases. We view the principle as a direct limitation on the Board's existing statutory remedial authority as well as a policy that would render improper exercise of any remedial authority to grant nonmajority bargaining orders which the Board might possess.

*Id.* at 1111.

238. 395 U.S. 575, 614 (1969).

239. *E.g.*, *NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962); *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704-05 (1944); *NLRB v. P. Lorillard Co.*, 314 U.S. 512, 513 (1942).

240. In *Gissel* the Court held, contrary to the Fourth Circuit, that authorization cards may be used as valid indications of a union's majority and to support a bargaining order. *Great Atl. & Pac. Tea Co.*, 230 N.L.R.B. 766 (1977). Concerning the general problems of authorization cards see Comment, *Refusal-To-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387 (1966); Note, *Union Authorization Cards*, 75 YALE L.J. 805 (1966).

241. 395 U.S. 575, 613-14 (1969). Professor Gorman has said of this passage that "the Court appeared to suggest that it would not be necessary in such cases to inquire into majority status of the union on the basis of cards." R. GORMAN, *LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING* 95 (1976).

Both *NLRB v. Heck's, Inc.* and *NLRB v. Logan Packing Co.*, cited by the Supreme Court, involved situations in which the unions had acquired a majority of authorization cards. The Fourth Circuit refused to approve bargaining orders in these situations because it viewed authorization cards as unreliable. In *Heck's* the court noted that "[t]his is not one of those extraordinary cases in which a bargaining order might be an appropriate remedy for pervasive violations of § 8(a)(1)."<sup>242</sup> In *Logan Packing* the court similarly rejected the issuance of a bargaining order in the particular case before it as a remedy for the employer's independent violations of section 8(a)(1).<sup>243</sup> The court added, however, in the dictum which formed the predicate for the ambiguity in *Gissel*, that in "exceptional" cases involving "outrageous" and "pervasive" unfair labor practices precluding the holding of a fair election, the Board "may have the power" to issue a bargaining order as a remedy for the unfair labor practices.<sup>244</sup> Such an order would then be imposed, said the court, "without need of answering the question whether the union ever obtained majority status."<sup>245</sup> The court cautioned that "[t]he remedy is an extraordinary one, however, and, in light of the guaranty of § 7 of employees' rights not to be represented, its use, if ever appropriate, must be reserved for extraordinary cases."<sup>246</sup> In *Conair* the D.C. Circuit aptly termed the Court's ambiguous passage "[d]ictum reciting dictum" which "is not a reliable indicator of the Court's probable view on a tense issue."<sup>247</sup>

To impose upon employees a union that has *never* attained majority status is clearly a proposition of novel and major dimensions.<sup>248</sup> The *Gissel* passages discussed above are at best ambiguous. On the one hand, it seems highly unlikely that the Supreme Court meant to announce such a proposition by way of vague dictum. Indeed, a substantial argument may be made that the proposition is so laden with fundamental policy issues and conflicts that go to the heart of the Act that the matter is appropriate only for congressional determination. On the other hand, it obviously cannot be denied that *Gissel* is both ambiguous and suggestive.

Dominant, fundamental principles of national labor policy—attainment of em-

242. *NLRB v. Heck's, Inc.*, 398 F.2d 337, 339 (4th Cir. 1968). The court upheld the Board's finding that the employer violated section 8(a)(1) of the Act by interrogation, threats of reprisal, creating the impression of surveillance, and offering benefits. The court also upheld the Board's finding that the employer violated sections 8(a)(1) and (3) of the Act by unlawfully discharging one employee. *Id.* at 338.

243. 386 F.2d 562, 571 (4th Cir. 1967). The court upheld the Board's findings that the employer engaged in unlawful interrogation and surveillance in violation of section 8(a)(1). The court did comment, however, that the evidence of violations was "minimal." *Id.* at 564.

244. *Id.* at 570.

245. *Id.*

246. *Id.* at 570-71.

247. 721 F.2d 1355, 1381 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 3511 (1984).

248. There are of course a variety of situations in which majority status once established is thereafter presumed despite a possible de facto minority situation. *See, e.g.*, *Brooks v. NLRB*, 348 U.S. 96 (1954) (irrebuttable presumption of majority status for one year following certification); *Brennan's Cadillac, Inc.*, 231 N.L.R.B. 225 (1977) (irrebuttable presumption of majority status for reasonable time after bargaining status established by voluntary recognition, Board orders, or settlement agreements); *Bartenders, Hotel, Motel & Restaurant Employers Bargaining Ass'n*, 213 N.L.R.B. 651 (1974) (irrebuttable presumption of majority status during contract term, rebuttable presumption following contract expiration); *Terrell Mach. Co.*, 173 N.L.R.B. 1480 (1969) (rebuttable presumption of majority status following certification year), *enforced*, 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); *Keller Plastics E., Inc.*, 157 N.L.R.B. 583 (1966) (irrebuttable presumption of majority status for reasonable time after bargaining status established by voluntary recognition, Board orders, or settlement agreements).

ployee free choice and majority rule, and deterrence of unfair labor practices—collide in the nonmajority bargaining order proposition. To deny Board authority to issue such orders enables employers to escape meaningful Board remedies and profit from wrongdoing, for in a *Gissel I* situation by definition the prospect of an untainted election within a reasonable time is remote. To grant Board authority may impose a minority union upon the majority of employees. The Court has stated that there could be “no clearer abridgement of § 7 of the Act” than to impose “an agency selected by a minority of . . . employees . . . upon the nonconsenting majority.”<sup>249</sup>

One compromise resolution of the conflicting labor policies, rejected by the Board, is to incorporate a legal fiction to justify imposition of a nonmajority bargaining order when employee free choice is not ascertainable because of *Gissel I* unfair labor practices. However articulated, a “but-for” presumption is invoked: an inference is drawn that but for the employer’s unfair labor practices a majority of employees would have selected the union as their bargaining representative. The inference is more easily drawn when both (1) substantiality and (2) causal connection are present. When, for example, a union has steadily and progressively signed up a substantial number of employees in a short period, and following the employer’s unfair labor practices only a few or no employees sign up, the inference that but for the unfair labor practices the union probably would have attained a majority may be well founded.<sup>250</sup> When only the factor of substantiality is present, the drawing of the inference is necessarily more strained.

#### UNION FINES

In *Machinists, Local Lodge 1414 (Neufeld Porsche-Audi)*<sup>251</sup> the Board overruled *Machinists, Local 1327 (Dalmo Victor II)*<sup>252</sup> and held that a union may not restrict the right of its members to resign from membership, and may not impose fines upon members who resign from membership and return to work during a strike.<sup>253</sup> The Board found that while union rules restricting resignation advance legitimate union interests in maintaining strike solidarity and protecting strikers’ interests, they substantially impair other fundamental national labor policies.<sup>254</sup> Restrictions on resignations contravene the section 7 rights of employees to refrain from protected concerted activities, said the Board, including the rights to refrain from strikes and to resign union membership.<sup>255</sup> The restrictions further impair the policy distinction

249. *International Ladies’ Garment Workers’ Union v. NLRB (Bernhard-Altman Texas Corp.)*, 366 U.S. 731, 737 (1961); see *Local 57, ILGWU v. NLRB*, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967). The Act places a “nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers.” *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

250. See generally *Conair Corp. v. NLRB*, 721 F.2d 1355, 1387–1401 (D.C. Cir. 1983) (Wald, J., dissenting), *cert. denied*, 104 S. Ct. 3511 (1984).

251. 270 N.L.R.B. No. 209, 116 L.R.R.M. 1257 (1984).

252. 263 N.L.R.B. 984 (1982), *enforcement denied*, 725 F.2d 1212 (9th Cir. 1984). The Board there found valid a 30-day restriction on members’ resignation rights.

253. The Board found that “any restrictions placed by a union on its members’ right to resign . . . are unlawful.” 270 N.L.R.B. No. 209, 116 L.R.R.M. 1257, 1259 (1984).

254. *Id.* at 1260.

255. *Id.*

between permissible internal enforcement and impermissible external enforcement of union rules, which tolerates only internal discipline of members.<sup>256</sup>

The Supreme Court guidelines concerning the legality of internal union discipline allow unions to enforce properly adopted rules reflecting legitimate union interests, which impair no congressional labor law policy, and which are reasonably enforced against union members who are free to leave the union and escape the rule.<sup>257</sup> Accordingly, the Court has held lawful the imposition and enforcement of fines against union members who cross picket lines and return to work during an authorized strike,<sup>258</sup> and has held unlawful the imposition of fines against strikebreaking employees who had been union members at the inception of the strike but who resigned their membership before returning to work.<sup>259</sup> The cases before the Court did not involve ostensibly binding prohibitions against resignation, and neither the *ratio decidendi* of nor dicta in the decisions resolves the legal viability of any such prohibitions.

Clear tension is present between the national labor policies preserving the efficacy of the strike weapon and the voluntary nature of unionism. The statutory language appears to reflect a slight congressional preference for the latter. Thus, while the statutory language generally guarantees noninterference with the right to strike except as otherwise indicated in the Act,<sup>260</sup> the language explicitly guarantees the right to refrain from union activity and membership.<sup>261</sup> The decisional language of the Court also appears to stress the essentiality of voluntarism as a predicate for discipline. Absent further direction from Congress or the Court in an area so charged with implications, the Board does well to proceed with caution and maintain rather than upset the delicate balance seemingly reached by Congress.

### CONCLUSION

Former NLRB Chairman Edward B. Miller has minimized the significance of recent Board reversals, has stated that such decisions have "not effectuated any dramatic or key changes in any long-standing central concepts," and has ascribed criticism of Board changes to election year politics.<sup>262</sup> I respectfully disagree. In my

256. *Id.*

257. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969). See generally 1 THE DEVELOPING LABOR LAW, *supra* note 18, at 166-74; Silard, *Labor Board Regulation of Union Discipline after Allis-Chalmers and Scofield*, 38 GEO. WASH. L. REV. 187 (1969); Note, *The Right to Be a Recalcitrant Union Member*, 24 VAND. L. REV. 105 (1970).

258. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191-92(1967); see *Scofield v. NLRB*, 394 U.S. 423 (1969) (fines lawfully imposed on union members who violated union rule prohibiting acceptance of immediate payment for production in excess of a ceiling rate). See generally Aleson, *Union Fines and Picket Lines: The NLRA and Union Disciplinary Power*, 17 UCLA L. REV. 681 (1970); Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067; Millan, *Disciplinary Developments Under § 8(b)(1)(A) of the National Labor Relations Act*, 20 LOY. L. REV. 245 (1974).

259. *NLRB v. Granite State Joint Bd., Textile Workers, Local 1029*, 409 U.S. 213, 215 (1972); *Booster Lodge No. 405 v. NLRB*, 412 U.S. 84, 87-88 (1973). See generally Archer, *Allis-Chalmers Recycled: A Current View of a Union's Right to Fine Employees for Crossing a Picket Line*, 7 IND. L. REV. 498 (1974); Note, *Union Power to Discipline Members Who Resign*, 86 HARV. L. REV. 1536 (1973).

260. 29 U.S.C. § 163 (1982); see *NLRB v. Drivers, Local 639*, 362 U.S. 274 (1960).

261. 29 U.S.C. §§ 157, 158(a)(3) (1982); see *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

262. *Defense of NLRB's Performance*, [News and Background Information] 116 LAB. REL. REP. (BNA) 103 (June 11, 1984).

view, politics aside, the foregoing exegesis indicates that many of the Board reversals are of major import and profoundly alter the preexisting balance of labor management relations. The decisions on employer neutrality, preelection propaganda, arbitral deferral, and corporate rearrangement, for example, reflect *inter alia* a substantial deregulation of employer conduct with a concomitant, potential disenfranchisement of employee rights and interests. The decisions on individual activity and strike misconduct, for a second example, reflect constriction of the protective ambit previously accorded employee activities. The decision on union fines reflects substantial curtailment of union power to enforce solidarity.

One suspects the Board has only just begun.<sup>263</sup> In this initial phase the Reagan NLRB appears intent upon placing its politicized imprimatur on national labor policy and thereby reordering a perceived imbalance. The Board might do well to heed the Supreme Court's admonition that "the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management."<sup>264</sup>

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263. See *Regulatory Reform for NLRB Stability*, [News and Background Information] 116 LAB. REL. REP. (BNA) 68 (May 28, 1984) (Remarks of Member Zimmerman); *NLRB Chairman on Pace of Decisions*, [News and Background Information] 116 LAB. REL. REP. (BNA) 41 (May 21, 1984) (Remarks of Chairman Dotson); *Case Backlog at Labor Board*, [News and Background Information] 115 LAB. REL. REP. (BNA) 186 (March 5, 1984) (Remarks of Chairman Dotson); *NLRB's Dotson On First Year*, [News and Background Information] 115 LAB. REL. REP. (BNA) 163 (Feb. 27, 1984) (Remarks of Chairman Dotson); *House Hearings on NLRB Case Backlog*, [News and Background Information] 114 LAB. REL. REP. (BNA) 201 (Nov. 14, 1983); see also *AFL-CIO Views on NLRB Actions*, [News and Background Information] 116 LAB. REL. REP. (BNA) 46 (May 21, 1984).

264. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965). "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Id.* at 318.

