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A CASE ANALYSIS OF SECTION 8(A) (2) OF THE TAFT-HARTLEY ACT, 1950 to 1974

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CHAPTER I

INTRODUCTION

Section 8(a)(2) of the Taft-Hartley Act reads:

> It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay . . .[1]

The purpose of this dissertation is to analyze the effects of this section on the status of labor-management relations in the United States.

The time period selected for study was from 1950 to 1974. The year 1950 was selected as the early cutoff date. Prior to that year a large number of studies were dedicated to determining the effects of the Taft-Hartley amendments on the Wagner Act. Since several of these admendments affected

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[1]61 U.S. Stat. 136 (1947).

Section 8(a)(2), it was included in most of these studies. However, after 1950 research in this area declined because many felt that the Taft-Hartley amendments had corrected the controversy surrounding Section 8(a)(2). Some authors have even gone as far as stating, ". . . under the amended NLRA the importance of 8(a)(2) has declined."[2] However, an increasing number of 8(a)(2) cases are being heard by the National Labor Relations Board which makes a study of this Section of some importance.

From 1950 to 1974 the National Labor Relations Board heard 832 cases involving 8(a)(2) charges. Over 250 of these cases were appealed to appropriate circuit courts and five were heard by the Supreme Court of the United States. This dissertation will attempt to analyze these cases and their effects on labor relations in this country.

Historical perspectives including a brief review of the literature on company unions and Section 8(a)(2) will be presented in Chapter Two. The development of company unions occurred in six distinct periods which are thoroughly discussed in this chapter. First, developments prior to the War Labor Board will be discussed. Then, in order, the following periods will be analyzed: the period during the War Labor Board, the

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[2]Charles O. Gregory and Harold A. Katz, Labor and the Law, (New York: W.W. Norton & Company, 1979), p. 363.

period following the War Labor Board but prior to passage of the Wagner Act and including the NIRA, the period prior to passage of the Taft-Hartley Act and including the Wagner Act, and the period following Taft-Hartley. The remaining chapters will discuss issues arising in the period following the Taft-Hartley amendments to the Wagner Act.

Chapter Three will be concerned with employer actions which the board has traditionally held indicative of company domination of a union. It will also explore the subtle differences between a Board finding of domination and one of mere unlawful support. In this respect, a number of cases will be examined in which the Board has reversed trial examiners (later called administrative law judges) and in which appellate courts have reversed the Board on these issues. A total of 184 cases will be examined in this chapter.

Chapter Four will analyze 254 cases in which discriminatory treatment of employees or threats of discriminatory treatment were significant issues. As a necessary side issue, free speech and its relationship to 8(a)(2) and discriminatory treatment will also be discussed. Additionally, topics such as employer threat of discharge, promise of concessions, threat of plant shutdown, threat of benefit withdrawal, interrogation of employees, control over employee transfers, and use of discretionary seniority clauses will also be examined.

Financial and material support of a union by an employer

is the general topic of Chapter Five. In addition to financial assistance, such difficulties as employer provision of premises, materials, and various services will be examined. In all, 228 cases were studied in this chapter.

Chapter Six addresses the most difficult issues to be covered in this study--employer contracts with and recognition of unions. The Midwest Piping doctrine--probably the most complicated rule of law to originate under Section 8(a)(2) --will be discussed along with union majority problems and union security issues. Including a total of 468 cases, this chapter examines difficulties which occurred most frequently in cases heard by the Board.

Chapter Seven will reexamine the case totals of the previous four chapters from a different point of view. There are three possible union mixes involved in each case. These are two affiliated unions, one affiliated union and one unaffiliated union, and a single individual filing a charge. This chapter will explore these mixes and how they have changed over the years both within the four major types of cases (Chapters Three through Six) and for all 8(a)(2) cases.

Conclusions will be drawn in Chapter Eight. A brief summary of previous chapters will be given along with some final insights about the 832 cases.

CHAPTER II

HISTORICAL PERSPECTIVES

Before discussing the history of company unions, the term "company union" needs to be properly defined. Industry spawned many names for organizations which would otherwise be called company unions. Some of these names are: employee association, joint conference, works council, industrial democracy, employee representation, goodwill plan, joint conference committee, industrial council, cooperative association, and shop committee.[1] These names as well as others are encompassed by the definition of company unions set forth by the Bureau of Labor Statistics in its excellent 1935 study. For historical purposes the Bureau's definition will be adopted in this paper:

> The Bureau has accepted the term "company union," using it in its generic sense, as an organization of workers confined to a particular plant or company and having for its purpose the representation of employees in their dealings with management.[2]

Of course, legal definitions of company domination or

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[1] U.S., Department of Labor, Bureau of Labor Statistics, Characteristics of Company Unions 1935, Bulletin no. 634, (Washington, D.C.: Government Printing Office, 1938), p. 3.

[2] Ibid.

interference will be used where appropriate.[1]

The history of company unions and laws affecting them can be divided into six distinct periods. This chapter will, therefore, be organized into six corresponding subdivisions: Developments before the War Labor Board, Developments under the War Labor Board, Post War Labor Board-Pre NIRA Developments, From the NIRA to the Wagner Act, From the Wagner Act to Taft-Hartley, and Developments Following Taft-Hartley.

Developments Before the War Labor Board

Important factors to be considered during these years are the strength of the trade union movement and the attitude of employers regarding this movement. The late 1880's and 1890's were lean years for organized labor. However, before 1901, some membership gains were made, and by 1914, union membership reached 2.7 million.[2] This growth alarmed employers and evoked an expected response:

> An open-shop drive resulted which was participated in by many employers' associations. The National Association of Manufacturers, the American Anti-Boycott Association, and the Citizen's Industrial Association, were leaders in the drive. They urged members to maintain open shops, sometimes maintained black lists, gave assistance to

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[1]Legal definitions will be used after passage of the Wagner Act.

[2]Harry A. Millis and Emily Clark Brown, From the Wagner Act to Taft-Hartley, (Chicago: University of Chicago Press, 1950), p. 15.

employers engaged in industrial disputes, and opposed legislation sponsored by unions.[1]

Prior to World War I there were relatively few organizations which could be considered company unions. In fact the first proposal for such a plan seems to have been made in 1886.[2] In addition, two very influential programs were initiated during this period, the Filene Co-operative Association and the Industrial Representation Plan of the Colorado Fuel and Iron Company. Other plans of lesser significance were also introduced.

The Filene Co-operative Association[3]

The Filene store began as a small shop in Boston in 1881. The founder, William Filene, believed in a philosophy of worker participation in management. Curiously, while he was head of the store no formal procedures for worker participation were ever instigated. However, in 1898 a committee of employees was established to administer an insurance plan

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[1] Ibid.

[2] John R. Commons, gen. ed., History of Labor in the United States, 1896-1932, 4 vols. (New York: MacMillan Company, 1935), vol. 3: Working Conditions by Don D. Lescohier, p. 336.

[3] For an excellent appraisal of this association see Mary La Dame, The Filene Store, Industrial Relations Series (New York: Russel Sage Foundation, 1930).

and medical clinic.[1]

The association was formally composed after Filene's sons, Edward A. and A. Lincoln, took over the business from their father. In 1903, the first constitution of the Filene Co-operative Association was created. It was very democratic in nature and originally provided for a full vote of all members on any important matter. As the organization grew, it became necessary to use a representative system of democracy, and a council was formed. For the most part, expenses of the association were born by the owners of the store.[2]

Unions were never a problem at the Filene store. The reasons for this were twofold. Filene paid wages higher than the prevailing rate, and no dues were required to join the association.[3] An interesting side light to this is a case where two union members quit paying their dues, renounced their union, and asked to join the association. Management, however, urged them to rejoin their union and they complied. Joint membership in unions and the Filene Co-operative Association was then allowed.[4]

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[1]Lescohier, p. 337.

[2]Mary La Dame, pp. 119-138.

[3]Ibid., p. 334.

[4]Ibid., pp. 137-138.

The Filene brothers hoped that in future years worker participation could evolve into worker ownership. This never came to pass, and, indeed, the participation of workers rarely went very far. Adjustment of grievances was the association's primary bailiwick:

> Throughout the history of the Association, its participation in the management of the store has been limited very largely to problems of personnel. In relation to the more vital of these, injustices excepted, it has had little weight. It has been chiefly concerned with matters of discipline and welfare. Furthermore, its activity in problems of management other than those relating to personnel has been exceedingly narrow.[1]

In regard to wages, the association didn't bargain. It merely confirmed the rates set by management.

The Industrial Representation Plan of the Colorado Fuel and Iron Company[2]

This plan was born in the aftermath of one of the bloodiest strikes for union representation in the history of labor movements. The men involved referred to it not as a strike but as a gory civil war. In one incident eleven children and two women were killed in an attack on a tent colony of miners. Could anyone blame the residents for giving each encounter a typical war name such as Attack on Chandler or the

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[1]Ibid., p. 327.

[2]Ben M. Selekman and Mary Van Kleeck, Employees' Representation in Coal Mines, Industrial Relations Series (New York: Russel Sage Foundation, 1924).

Battle of Hogback Hill?[1]

Even though the strike for union representation failed, it convinced John D. Rockefeller, Jr. of the need for some type of employee representation in the Colorado Fuel and Iron Company. At his request Mackenzie King prepared a plan:

> One of the results of the Colorado coal war was the Rockefeller Employee Representation Plan, prepared by Mackenzie King, later Premier of Canada, for the governing of industrial relations in the Colorado Fuel and Iron Company. Club houses, bathhouses, and dispensaries were built at different mining camps. The plan was a substitute for collective bargaining with regular labor organizations.[2]

In 1915 the plan was put to a vote of the miners. It was approved by an eighty-four percent majority.[3]

Plainly, the Representation Plan was a response to the drive for unionization. Accordingly, union members never favored it. They felt that any improvements in working conditions were directly attributable to the 1913-1914 strike. Workers also pointed out that the Plan provided no resources for strikes and virtually no opportunity for wage bargaining.[4]

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[1]Ibid., pp. 9-10.

[2]John R. Commons, gen. ed., History of Labor in the United States, 1896-1932, 4 vols. (New York: MacMillan Company, 1935), vol. 4: Labor Movements, by Selig Perlman and Philip Taft, p. 351.

[3]Selekman and Van Kleeck, p. 27.

[4]Ibid., pp. 292-297.

In relation to this Selekman and Van Kleeck state, "Experience seems to show that a representation plan cannot hold the confidence or interest of employees if it is confined to the purveying of grievances to management."[1]

While it is true that the plan provided little in the way of collective bargaining, it cannot be denied that, for its day, it was quite revolutionary. Don D. Lescohier states:

> At the time of its installation . . . the Colorado Fuel and Iron Plan stood out like a mountain peak. It covered far more employees than any other plan of the pre-war period; and it was installed by the powerful Rockefeller interests. It was studied more intensively and perhaps copied more frequently than any other plan. It was a full fledged "company union" and set an important example for industrialists seeking a substitute for unions.[2]

The plan lasted until 1933.

Other Plans

There were a number of other plans launched during the early 1900's deserving mention. The plan at the Nernst Lamp Company was begun in 1904. The vice-president, H.F. Porter, proposed a "factory committee" with representatives from all phases of the business to confer with management. Like other

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[1]Ibid., p. 398.

[2]Lescohier, p. 341.

plans of this period, its function was purely advisory. Similar organizations were formed in the American Rolling Mill Company in 1904, and in the Nelson Valve Company in 1907.[1]

The years 1911, 1912, and 1913 were also important. According to Don D. Lescohier:

> The Co-operative Welfare Association of the Philadelphia Rapid Transit Company, started in 1911, and the Employees' Mutual Benefit Association of the Milwaukee Electric Railway and Light Company 1912, laid the foundations for what labor now terms Company Unions.[2]

Another notable movement was begun in 1913. This was the "industrial democracy movement."[3] An interesting example of this movement was the plan installed at the Packard Piano Company after an unsuccessful strike:

> . . . it called the attention of labor to the fact that this so-called Industrial Democracy might be a fancy name for a new method of driving out unions. Experience with the Leitch plan (Industrial Democracy) as used by other companies confirmed the suspicion.[4]

These plans were obviously viewed by management as favorable alternatives to the trade union movement.

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[1]Lescohier, p. 338.

[2]Ibid.

[3]U.S., Department of Labor, p. 7.

[4]Lescohier, p. 339.

One final representation plan should be addressed. It was the Industrial Representation Plan of the Minnequa Steel Works of the Colorado Fuel and Iron Company.[1] It was put into operation three months after the representation plan in the coal mines of the same company was adopted. One large difference, however, was that there was no violence or strikes involved in the initiation of this plan. It was approved by a vote of the workers in which approximately seventy-three percent voted for the plan.[2] In other ways the plan was similar to that of the coal mines. It concerned itself primarily with adjusting grievances and provided very little in the way of wage bargaining.[3]

Developments Under the War Labor Board

Labor conditions during World War I were as to be expected. The draft removed men from the work force, and the large demand for war goods increased the demand for labor. This would seem to be a perfect position for unions:

> Labor difficulties had arisen in direct consequence of the sudden enormous demand for labor in various war

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[1]Ben M. Selekman, Employees' Representation in Steel Works, Industrial Relations Series (New York: Russel Sage Foundation, 1924).

[2]Ibid., pp. 37-44.

[3]Ibid., pp. 90-139.

> industries in the face of a labor supply decreased by the draft and reduced immigration. With no centralized machinery available for directing the labor supply or enforcing a balanced wage policy, an unrestrained competitive bidding for labor had set in, leading to great inequality and instability of wage rates . . . Moreover, rapidly rising living costs led workers to demand higher wages. With a scarcity of labor, trade-unions found it feasible to strike in order to get wage increases.[1]

Undoubtedly this was an ideal situation for unions, but not an ideal situation under which to fight a war.

As a result the Shipbuilding Labor Adjustment Board was established in 1917, and the National War Labor Board was begun in 1918. The goal of the War Labor Board was to keep labor-management relations problems from interfering with the war effort. Millis and Brown in referring to the War Labor Board state:

> Its agreed-upon statement of principles and policies provided that there should be no strikes or lockouts and that the right of workers to organize and bargain collectively was not to be denied or interfered with. Employers were not to engage in discrimination, nor were unions to engage in coercion of workers or employers in efforts to increase their membership.[2]

The solution reached by the Board was inspired by the British "Whitley Councils" and the United States' past experiences with employee representation plans.[3] The Board brought forth

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[1]U.S., Department of Labor, p. 11.

[2]Millis and Brown, p. 16.

[3]U.S., Department of Labor, p. 12. See also Perlman and Taft, p. 409.

a model employee representation plan and installed it in a number of plants. The Pittsfield, Massachusetts plant of the General Electric Company was the first to have a representation plan inaugurated by the Board. In all, one hundred and twenty-five plans were launched directly by the Board.[1] Nonetheless, a number of voluntary plans were also started during this period. Some of the companies with voluntary plans were the Youngstown Sheet and Tube Company, the International Harvester Company, the Goodyear Tire and Rubber Company, the Standard Oil Company of New Jersey, the Standard Oil Company of Indiana, the Procter and Gamble Company, and the Bethlehem Steel Corporation.[2]

The attitudes of both workers and management toward policies of the Board were unsure at best. Management's views were as follows, according to the Bureau of Labor Statistics:

> Some employers regarded works councils as a "revolutionary step"; some were simply annoyed by them; some thought them superfluous; others found them satisfactory as long as trade-unions did not get control over them; the majority discovered this type of workers' representation more or less helpful in improving the morale and efficiency of their labor force.[3]

Workers' attitudes were positive or negative according to the situation that existed in the company prior to the

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[1]Perlman and Taft, p. 409.

[2]Ibid. See also U.S., Department of Labor, p. 15.

[3]U.S., Department of Labor, p. 17.

establishment of the representation plan. If the company had successfully resisted unionization in the past, the new plan was viewed favorably. If, on the other hand, the new plan was used as a weapon against unionization; condemnation was the result.[1]

Without question the policies of the War Labor Board fostered the development of company unions. Inevitably, the end of the War terminated the Board's influence, and, as a result, a number of representation plans disappeared:

> After the Armistice the Board's power to improve labor standards vanished, but the legacy of its work for collective dealing between employer and employees remained to plague the labor movement. Many of the "converted employers" . . . hastened to readjust the plan to their own satisfaction.[2]

Thus, World War I served more as an impetus to company unionism than as a windfall for the trade-union movement.

Post War Labor Board - Pre NIRA Developments

The time period immediately following the War was prosperous, but this prosperity was short-lived. After the Armistice, government contracts were cancelled and returning soldiers were dumped on the labor market. The economy made a slight recovery in 1919 and 1920, but before mid-1920 the

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[1] Ibid.

[2] Perlman and Taft, p. 409.

recovery lagged. By 1921, the country was in the grips of a severe economic depression. However, the economy bounced back quickly and continued expanding until 1929.[1]

The fortunes of the labor movement waned during this period. Union membership dropped from a high of five million immediately following the Armistice to 3.6 million in 1923.[2] The reasons for this were many, but the most important was the carryover of the company union idea from the war period. Joseph Rayback pointed out that the most important factor in the decline of unionism after 1924 was, ". . . the adoption by large portions of industry of 'welfare capitalism.'"[3] Rayback takes a moderate view of company unions during this time. While he refers to them as, "organizations of workers created or inspired by the employer in order to provide a docile labor supply."[4] he also states:

> After the war industrial managers quickly recognized that these plans could be used to bring management and

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[1]Gilbert C. Fite and Jim E. Reese, An Economic History of the United States (Boston: Houghton Mifflin Company, 1973), pp. 484-506.

[2]Millis and Brown, p. 17.

[3]Joseph G. Rayback, A History of American Labor (New York: MacMillan Company, 1959), p. 304.

[4]Ibid.

> labor into closer relationship . . . When all the ideas were assembled and put into effect, industry produced a highly adequate substitute for union-management contractural relations.[1]

Company unions, it seems, were just a small part of a much larger ploy, the "American Plan." The "American Plan" surfaced during a period of intense nationalism manifesting itself in restrictive immigration laws and a rejection of the League of Nations. Perhaps more important than these two events was the fact that Attorney General A. Mitchell Palmer was spending a great deal of effort ridding the United States of dangerous radicals.[2] Given this kind of atmosphere it comes as no surprise that employers hit upon the idea of identifying unions with un-American activity:

> In such an environment, an obviously effective tactic would be that of identifying unions as un-American groups. This was the purpose of the "American Plan." Employer Associations led this successful drive to sell the open shop . . . In mass production industries, such as automobiles and electrical manufacturing, enthusiasm for "scientific management" and "welfare capitalism" was at a high point. These devices together with the flowering of company unions and other aggressive anti-union tactics were successful in warding off such weak thrusts as the unions managed to make relative to organizing the factories.[3]

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[1]Ibid., p. 305.

[2]Sanford Cohen, Labor in the United States (Columbus, Ohio: Charles E. Merrill Books, Inc., 1960), p. 112.

[3]Ibid.

In addition, employers made liberal use of yellow-dog contracts and strikebreakers.[1]

The American Plan turned out to be a powerful weapon against trade-unionism. Predictably, this alarmed unionists and they responded by condemning the Plan. Nevertheless, their position was so weak that they decided to adopt a harmonious attitude toward management. According to the Bureau of Labor Statistics:

> Union-management cooperation became the new goal of trade-union policy, the implication being that the spirit of industrial cooperation was welcomed by trade-union leaders. They held, however, that the workers should cooperate through the medium of the trade-unions rather than through company unions.[2]

All was not rosy in the trade-union movement. Two meaningful revolts were initiated against company unions during this period. The first was a strike in 1926, against the Interborough Rapid Transit Company of New York. The second was a 1927 strike against the renowned Industrial Representation Plan of the Colorado Fuel and Iron Company (the Rockefeller Plan).[3]

The strike against the Interborough Rapid Transit Company ended in the courts. Significantly, the outcome was

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[1]Millis and Brown, p. 18.

[2]U.S., Department of Labor, p. 26.

[3]Perlman and Taft, p. 590.

in the union's favor. Perhaps of more consequence was that this became the first instance in which the courts showed any signs of changing their opinions on "yellow-dog" contracts.[1]

The more important of the two strikes was probably the strike against the Colorado Fuel and Iron Company. The Representation Plan had lasted over 12 years. However, the workers had never been satisfied with the plan and when Sacco and Vanzetti were executed, the I.W.W. recognized an opportunity. In 1927, the I.W.W. called a brief strike against all Colorado mines and six thousand of the twelve thousand miners in Colorado answered the call.[2]

At first the mine owners were not concerned about the intrusion of the I.W.W. Management felt that having both the United Mine Workers and the I.W.W. trying to organize the miners would work in their favor. In the end they hoped that unionism would be eliminated from Colorado entirely.[3]

Events did not work out as the owners had hoped. The I.W.W. managed to work cooperatively with the remnants of the United Mine Workers and a strike was ordered. Demands were for restoration of previous wages, recognition of mine committees, opening the mining camps to union organizers, and

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[1]Ibid., p. 593.

[2]Ibid.

[3]Ibid., p. 594.

enforcement of current mining laws.[1]

Eventually, ten thousand of the twelve thousand Colorado miners participated in the strike. It turned out to be a bloody one:

> On November 21, the bloodiest encounter of the strike occurred, at the entrance of a mine owned by the Rocky Mountain Fuel Company, between the State police and the strikers. The miners had held meetings on the property of that Company without molestation. This time, contrary to the wishes of the management, which did not share in the belligerent attitude of the other operators, the State police after a warning opened fire on unarmed miners, killing six and wounding 20.[2]

This was not the only encounter. On January 12, 1928 the Walsenburg police along with the State police opened fire on a parade of miners. One miner was killed and two were wounded.[3]

The strike resulted in a great deal of bitterness between the mine owners and the workers. The Rockefeller Plan was never favored by the miners, but the strike made feelings against the plan run even higher. According to Perlman, the events leading up to and during the strike resulted in, ". . . exposure of the hollowness of the claims of the Rockefeller Plan."[4]

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[1] Ibid.

[2] Ibid.

[3] Ibid.

[4] Ibid., p. 595.

At the height of the strike, the second largest mining company in Colorado, the Rocky Mountain Fuel Company, came under control of Josephine Roche.[1] She proposed a democratic plan for representation of workers in the Rocky Mountain Fuel Company coupled with recognition of the United Mine Workers. This agreement with the United Mine Workers functioned so well that in 1931, when the company was endangered by wholesale price-cutting, the miners volunteered to loan half their wages for two and a half months without interest and with no fixed pay-back date to the company. The company offered to pay interest, but the miners refused to accept it. Interestingly, the operators in competition with Rocky Mountain protested that this was unfair competition. Eventually the loan was repaid.

Another absorbing view of this period is put forth by Joseph Rayback:

> Although the Interborough and Colorado conflicts revealed that Welfare Capitalism was not always accepted, for the most part it was successful. The appeal of organized labor had always been based on the fact that it was the only force capable of fighting exploitive and calloused employers. When the exploiting employer was replaced by a benevolent gentleman eager to take care of his labor force, unionism was greatly weakened.[2]

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[1]For an excellent discussion of Josephine Roche and the Rocky Mountain Fuel Company see Mary Van Kleeck, Miners and Management, Industrial Relations Series (New York: Russel Sage Foundation, 1934).

[2]Rayback, p. 306.

In any case, the result during this period was an increase in company unionism and a decrease in trade-unionism.

An additional development occurred in the craft unions of the railroads. The railroads had followed a policy of refusing to recognize trade-unions and of substituting company unions. The upshot was massive strikes.[1] Subsequently, Congress passed in 1926 the Railway Labor Act[2] which forbade company interference with unions in the railroad industry. In less than ten years, the Wagner Act would do the same thing for all industry.

Near the end of this era, the depression occurred. Unemployment rose to intolerably high levels, and union membership plunged to new lows. In 1933, unemployment reached its highest point--twenty-five percent, while, concurrently, union membership reached its low--2.7 million.[3] Company unions fared no better. According to the Bureau of Labor Statistics:

> Many company unions were . . . abandoned and relatively few new ones established during the depression. Company unionism, along with personnel management and welfare programs, was on the retreat with every indication of further curtailment.[4]

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[1] U.S., Department of Labor, p. 20.

[2] 44 Stat. 577 (1926).

[3] Fite and Reese, pp. 471-475.

[4] U.S., Department of Labor, p. 27.

From the NIRA to the Wagner Act

The onset of the depression changed many views of the American economy. The standard of living declined not only for blue collar workers but for white collar workers as well. The result was wholesale loss of confidence in the American economic system and its ability to maintain full employment. Accordingly, Millis and Brown state:

> It came to be rather commonly believed, also, that an increase in mass purchasing power was necessary to sustain full production and employment under conditions of modern mass production; and if this was so, then support for unionism and collective bargaining was desirable, to balance the unrestrained power of the great corporations.[1]

The atmosphere was ripe for a change in law.

The National Industrial Recovery Act was passed in June of 1933. Section 7(a) encouraged collective bargaining. It stated:

> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or

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[1]Millis and Brown, pp. 19-20.

> to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.[1]

The meaning of section 7(a) was clear to workers and unions alike--the government was encouraging collective bargaining. A wave of organizational campaigns sprung up in such industries as coal, clothing, textile, and iron and steel. Employers were faced with a brief dilemma. They didn't want to deal with unions, but the law mandated collective bargaining. History provided an easy answer, company unions. Employers in automobile, rubber, steel, meat packing, and other industries began a counterattack in the form of company unions.[2]

The battle lines were drawn in a war that both sides were determined to win. The result was a rapid increase in strike activity. This increase was so great that it threatened the recovery program and made further action necessary.[3] On August 5, 1933 President Roosevelt created the National Labor Board:

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[1]48 Stat. 195 (1933).

[2]James A. Gross, The Making of the National Labor Relations Board, vol. 1 (Albany: State University of New York Press, 1974), pp. 14-24. See also Millis and Brown, p. 22. and Alvin L. Goldman, The Supreme Court and Labor-Management Relations Law (Lexington, Mass.: D.C. Heath and Company, 1976), p. 27.

[3]Gross, pp. 14-15 See also Millis and Brown, p. 22.

> . . . on August 5, 1933, on the recommendation of the Labor and Industrial Advisory Boards of the National Recovery Administration, the President established a National Labor Board . . . The Board's functions were then, broadly, to settle by mediation, conciliation, or arbitration any controversies between employers and employees which tended to impede the purposes of the NIRA.[1]

The problems that the National Labor Board faced were tremendous, and it had very little ammunition with which to attack them. In many cases, companies refused to comply with the law and ignored the NLB. In these instances the case was turned over to the Compliance Division, but all it could do was remove the Blue Eagle--symbol of compliance with the NIRA--from the company's store window and letterheads. This, obviously, had little effect. The only other possibility was to turn the case over to the Attorney General for prosecution, and this device did not work much better.[2]

The NLB's lack of effectiveness prompted the formation of the National Labor Relations Board in 1934. Unfortunately, it did not function any more effectively than its predecessor. In the first six months of its existence, twenty-four Blue Eagles were removed, but after this period removal became more difficult. Furthermore, the Blue Eagle had lost most of its impact for the public. Millis and Brown state, "Attempts

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[1]Millis and Brown, p. 22.

[2]Ibid., p. 23.

to obtain enforcement by the Department of Justice failed."[1] Thus, there was little that the National Labor Relations Board could do.

The surge of company unionism prompted several major studies of their nature; the most prominent was conducted by the Bureau of Labor Statistics. The first part of the study consisted of a questionnaire sent to 43,000 establishments, producing 14,725 usable replies.[2] Several provocative results were obtained from this questionnaire. The Bureau of Labor Statistics found that approximately twenty percent of all workers were covered by company unions. However, in very large firms almost fifty percent of the workers were covered by company unions. Perhaps the most interesting finding was that two-thirds of all company unions were formed under the National Industrial Recovery Act.[3] Quite clearly the Act had fostered company unionism.

In addition to the questionnaire, the Bureau's staff personally visited 125 firms with company unions. They interviewed workers, employers, and local citizens.[4] This survey proved even more informative than the questionnaire.

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[1]Ibid., p. 26.

[2]U.S., Department of Labor, p. 31.

[3]Ibid., pp. 32-50.

[4]Ibid., p. 77.

One issue the study addressed was the question of how and why the company unions were started. The purpose of formation was very clear. In fifty-two cases (forty-two percent) the company union was started due to trade union activity. The NIRA's influence was responsible in thirty-one cases (twenty-five percent). Initiation of twenty-eight company unions (twenty-two percent) was attributed to strike activity, and in fourteen cases (eleven percent) the desire for improved personnel relations was accountable.[1] The Bureau of Labor Statistics concludes:

> Over the period of 20 years, the threat of unionism, frequently evidenced by strikes, was the most impelling force in the establishment of two-thirds of the company unions. While the passage of such legislation as the NIRA gave impetus to company-union formation, it was the actual presence of trade-union agitation which encouraged most of the swing toward company unionism.[2]

One interviewed employee stated, "The plan is not now in operation. It was started to prevent the trade-union getting strength and to do our own bargaining."[3]

Invariably, when both a trade-union and a company union tried to organize the same plant, management preferred the company union. Consequently, employers used several tactics to thwart trade-unions. They praised company unions

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[1]Ibid., p. 81.

[2]Ibid., p. 84.

[3]Ibid., p. 156.

and bitterly attacked the trade-unions. In some cases workers were threatened with dismissal, and in others management threatened to close down the plant if the company union was rejected.[1]

As to be expected under these circumstances, company unions were almost always initiated by management. According to the Bureau, "The great majority of company unions were set up entirely by management."[2] Probably more important was the fact that, although trade-union activity was an important factor in the formation of sixty-four percent of the company unions, it was shown as an alternative on the ballot in only two cases. Moreover, five company unions were established after negative votes in secret ballot elections.[3] "The existence of a company union," according to the Bureau, "was almost never the result of a choice by the employees in a secret election in which both a trade-union and a company union appeared on the ballot."[4]

Most company unions were totally financed by the employer. Approximately two-thirds of the total relied

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[1]Ibid., pp. 88-196.

[2]Ibid., p. 199.

[3]Ibid., pp. 93-96.

[4]Ibid., p. 200.

entirely on the company for financial support. Only ten percent of all company unions were self supporting. In addition employers used the concomitant lack of union dues as an argument in favor of company unions and against trade-unions.[1] True collective bargaining could scarcely take place in a situation where a company union was totally financed by an employer.

Company unions failed their members in many respects. A large number of company unions were formed in establishments with several plants. The unions in these plants had almost no contact with each other; furthermore, these businesses were members of industrial, regional, and national associations. A company union with its restriction to one isolated plant could hardly hope to deal effectively with such associations. It should also be pointed out that company unions paid little attention to legislation affecting them, did very little wage bargaining, and in only twenty-seven percent of the unions studied did monthly meetings occur. The biggest failing was in adjustment of grievances, supposedly a company union specialty. One-third of the unions surveyed handled no grievances. Of the remaining two-thirds, one-third handled grievances effectively, one-third handled them with limited

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[1]Ibid., pp. 114-119.

effectiveness, and the remaining one-third handled them ineffectively.[1]

In describing the period of the National Industrial Recovery Act, Joseph Rosenfarb offers a fitting conclusion:

> Their formation and establishment have been initiated by employers, owing to their realization that individual bargaining--a misnomer, to be sure--would not meet the situation created by the NRA. But instead of accepting collective bargaining as a method of labor relations they decided to frustrate genuine collective bargaining by granting the semblance and withholding its substance.[2]

From the Wagner Act to Taft-Hartley

In 1935, the Supreme Court in the Schechter Poultry case[3] declared section 3 of the National Industrial Recovery Act unconstitutional. While the Court did not rule on section 7(a) its enforcement relied on the codes established under section 3. Thus, the Schechter decision effectively eliminated section 7(a).

However, in less than six weeks Congress had passed the National Labor Relations Act--commonly referred to as the Wagner Act.[4] The Wagner Act affected company dominated

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[1] Ibid., pp. 143-201.

[2] Joseph Rosenfarb, The National Labor Policy and How It Works (New York: Harper and Brothers Publishers, 1940), p. 105.

[3] 295 U.S. 495 (1935).

[4] 49 U.S. Stat. 449 (1935).

unions in two ways. First, it outlawed them under section 8(2), and secondly it established the National Labor Relations Board[1] which was empowered to remedy unfair labor practices committed by employers. Section 8(2) stated:

> It shall be an unfair labor practice for an employer--(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

Clearly, section 8(2) intended the elimination of company domination or interference with unions.

Fittingly, the first case decided by the National Labor Relations Board (hereinafter referred to as the Board) involved an 8(2) charge. The Pennsylvania Greyhound case[2] was a typical example of a company dominated union. The employer was completely responsible for formation of the union, and even conducted union elections itself. The Board issued a cease and desist order against the company, but more importantly, it disestablished the union.

The Pennsylvania Greyhound case was eventually appealed to the Supreme Court.[3] In this case along with another case

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[1]This is a different board from that of the same name established under the NIRA.

[2]1 NLRB 1 (193).

[3]303 U.S. 261 (1938).

decided the same year,[1] the Supreme Court upheld the Board. Therefore, disestablishment became an acceptable legal remedy for company domination of unions.[2] A later study by the Board found, as to be expected, that disestablishment was a highly effective remedy.[3]

Another question addressed frequently by the Board was what constitutes employer interference and support of a union. According to the Seventh Annual Report of the Board:

> An employer is not permitted to participate in the establishment of a labor organization or in its administration, nor to contribute any support to it. He is held responsible for any interference or attempted promotion of the organization by his agents. It is an unfair labor practice, for example, for employers or their agents to take part in the formation of the organization, to aid in drafting the constitution, to circulate petitions in its support, to disparage to employees a rival organization, to encourage membership by any means, or to aid the organization by supplying financial aid or the use of company facilities such as bulletin boards, mailing lists, or office space.[4]

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[1] NLRB v. Pacific Greyhound Lines, 303 U.S. 272 (1938).

[2] National Labor Relations Board, Third Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1939), pp. 233-234. See also Millis and Brown, pp. 105-106.

[3] National Labor Relations Board, Eighth Annual Report of the National Labor Relations Board, (Washington, D.C.: Government Printing Office, 1944), pp. 70-71.

[4] National Labor Relations Board, Seventh Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1943), p. 45.

Evidently the Board intended that labor unions be established and run independently of employers.

Prior to the Jones and Laughlin Steel case[1] in which the Supreme Court ruled the Wagner Act constitutional, company interference with unions continued to be quite open. After it appeared that the Act would stand, employers became more careful.[2] "Early in the Act's administration," according to the Board's Fifth Annual Report, "the typical company union showed its illegality upon its face. Now, more subtle methods of control are used . . ."[3] Banning company domination spawned the reformation of most of the old NIRA employee representation plans, supposedly to bring them within the terms of the Wagner Act. The Board was, therefore, faced with deciding if the change was in name only or if the union was truly unassisted.

To solve this particular problem, the Board developed what was later called the "fracture doctrine." Millis and Brown state:

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[1] NLRB v. Jones and Laughlin Steel Corp. 301 U.S. 1 (1937).

[2] National Labor Relations Board, Fourth Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1940), p. 71.

[3] National Labor Relations Board, Fifth Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1941), pp. 95-96.

> In later cases the Board continued to apply this test of "cleavage" or what came to be known as the "fracture doctrine". Where it found identity of officers between the old company-dominated union and the new independent, similarity of structure, transfer of assets between the organizations, or evidence of favoritism by the employer, among other factors which indicated that there had not been a sharp break with the past, it continued to order disestablishment.[1]

Of course a labor organization that was found to have broken with the past would be left alone.[2]

An unanticipated and very difficult problem also arose under this section of the Act. It turned out that in a number of cases the employer would interfere with the organizational attempts of one of two affiliated unions. Specifically, an AFL affiliate would compete with a CIO affiliate for recognition, and the employer would typically prefer the older more "conservative" AFL union.[3] In these cases instead of disestablishing the offending union, the Board would set aside the contract and issue a cease and desist order to the employer. Thus, the employer was prevented from interfering or showing any favoritism until a union had been certified.[4]

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[1]Millis and Brown, p. 107.

[2]National Labor Relations Board, Fourth Annual Report, p. 73.

[3]Electric Products Corporation, 3 NLRB 475 (1937).

[4]For a good discussion of this problem see Millis and Brown, pp. 204-205.

The above solution led to a great deal of criticism toward the Board. It was claimed that the Board discriminated against "independent" unions because it disestablished them while it only issued cease and desist orders in cases involving affiliated unions.[1] Regardless, the Board's stated policy did not involve discrimination:

> The Board has distinguished this kind of case from the usual case of domination and support of a labor organization, in which the illegally dominated or supported organization is ordered disestablished, and has held simply that such assistance by an employer constitutes interference, restraint, and coercion with the meaning of Section 8(1) of the Act.[2]

Under this policy it didn't matter if the offending union was affiliated or independent. If the union was found illegally assisted but not dominated, a cease and desist order was issued. However, it was highly unlikely that an affiliated union would be dominated. Consequently, appearances were somewhat deceiving. Millis and Brown state:

> . . . the Board disestablished "independents" only when there was clear evidence that there had been such interference by the management with the right of employees to an unimpeded free choice, that in its judgment the organization was "company-dominated" and incapable of acting as the independent representative of employees; and the courts upheld the theory of the Board on this point. Every case was decided on its own facts. The

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[1]Ibid., p. 109.

[2]National Labor Relations Board, Eighth Annual Report, p. 30.

> record shows that many independents were accepted as bona fide and given the use of the Board's machinery of elections.[1]

Nevertheless, this was a reproach that the Board could not seem to shake.

A related policy was established in the Midwest Piping and Supply Co., Inc. case.[2] In this case the company executed a closed-shop contract with one of two competing unions. At the time both unions had filed representation petitions with the Board that were still pending. The Board ruled that the signing of a contract under these circumstances constituted illegal interference on the part of the employer. This decision resulted in a long lasting policy termed the Midwest Piping doctrine. This policy and the justification for it are stated in the Tenth Annual Report of the Board:

> . . . Congress has clothed the Board with the exclusive power to investigate and determine bargaining representatives. Consequently, an employer may not disregard the jurisdiction of the Board and preclude the holding of an election under Board auspices, by resolving the conflicting representation claims on the basis of proof which the employer deems sufficient but which is not necessarily conclusive. Moreover, the effect of such conduct is to accord unwarranted prestige and advantage to one of two competing labor organizations and thereby prevent a free choice by the employees.[3]

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[1]Millis and Brown, p. 109.

[2]63 NLRB 1060 (1945).

[3]National Labor Relations Board, Tenth Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1946), p. 39.

Despite the above problems, the Wagner Act was relatively well accepted until after the end of World War II. At this time strike activity increased rapidly. Opposing factions recognized the opportunity and began a campaign to amend it. A hostile press aided in these efforts making a change inevitable. The Wagner Act was thought responsible for three difficulties which most people believed justified a change: 1. Labor had come to a dominant position in the American economy, 2. Unions had not developed a sense of responsibility to their members, their employers, or the public, 3. Equivalent limitations should be put on both unions and employers.[1]

Sanford Cohen describes this period well:

> The frequency of jurisdictional disputes, the occasional examples of coercive picketing, the well publicized work stoppages during the war, irregularities in the internal affairs of some unions, and the failure of the CIO and the AFL to accommodate their differences are examples of factors that destroyed some part of the general sympathy for unionism.[2]

He further states:

> The collective bargaining turbulence of the 1945-1946 period . . . was annoying to a nation anxious to resume its peacetime ways. Probably more than anything else, the post-war strike wave was responsible for the growth

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[1]Millis and Brown, pp. 271-315.

[2]Cohen, p. 504.

> of a feeling that "something ought to be done about labor unions."[1]

Given the prevailing attitude, significant alteration of the Act was almost a certainty.

It cannot be denied that the Wagner Act had a major effect on company unionism.[2] In the first three years of the Wagner Act, fully twenty percent of all unfair labor practice charges fell under Section 8(2). By fiscal year 1938, over one thousand 8(2) charges were filed, and in fiscal year 1939, 8(2) charges made up thirty percent of all unfair labor practice charges filed with the board. However, after 1939, the percentage and the absolute numbers began to decline. In the last full year of the Wagner Act decisions (1947), only 311 8(2) charges were filed making up 7.3 percent of all unfair labor practice charges (See Table 1).

Developments Following Taft-Hartley

In 1947, the Labor Management Relations Act (the Taft-Hartley Act) was passed.[3] Section 8(2) of the Wagner Act was adopted in identical form as Section 8(a)(2) of the Taft-

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[1] Ibid., p. 505.

[2] Millis and Brown, p. 104.

[3] 61 U.S. Stat. 136 (1947).

TABLE 1

TOTAL 8(2) CHARGES FILED WITH THE NATIONAL LABOR RELATIONS BOARD EXPRESSED IN ABSOLUTE NUMBERS AND AS A PERCENTAGE OF TOTAL UNFAIR LABOR PRACTICE CASES, FISCAL YEARS 1936-1948

Fiscal Year	Total Unfair Labor Practice Cases	Total 8(2) Charges Filed	8(2) charges as a % of Total Unfair Labor Practice Cases
1936	865	197	22.8
1937	3,124	616	19.7
1938	6,807	1,327	19.5
1939	2,514	755	30.0
1940	2,902	708	24.4
1941	4,817	688	14.3
1942	4,967	613	12.3
1943	3,403	337	9.9
1944	2,573	187	7.3
1945	2,427	199	8.2
1946	3,815	315	8.3
1947	4,232	311	7.3
1948[a]	296	11	3.7

SOURCE: Compiled from National Labor Relations Board, First Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1936). to Thirteenth Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1949).

[a]Fiscal year 1948 is not a complete year due to passage of the Taft-Hartley Act in 1947.

Hartley Act. However, several changes in the law affected Board policies regarding domination of and interference with unions.

Section 9(c)(2) reads:

> In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

Section 10(c) reads in part:

> . . . That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope.

The effect of section 9(c)(2) was to prohibit the Board from denying a place on a ballot, ". . . by reason of an order which had discriminated against an unaffiliated union."[1] Consequently, the way was opened for an increase in the number of "independent" unions on ballots in representation elections. Mention should be made that during the latter years of the Wagner Act large numbers of independent unions had already appeared on ballots. It should, therefore, come as no surprise that the end result of this alteration was not relaxation of the treatment of independent unions, but stricter

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[1]Millis and Brown, p. 521.

treatment of affiliated unions.[1]

Section 10(c) effected a threefold policy modification by the Board. First of all, if the Board found domination of a union, it would be disestablished whether or not it was affiliated. Secondly, where the board found simple interference with no domination, it would issue a cease and desist order with no disestablishment regardless of affiliation. The third point was that the same standards would be applied to both affiliated and unaffiliated unions in determining if a new union is a dominated "successor" to an older disestablished company union.[2] Put simply, there would be no difference in the treatment of affiliated or unaffiliated unions.

In relation to this policy, it was thought that "Possibly the facts would never sustain a charge that an affiliated union is 'company dominated' to an extent requiring disestablishment."[3] This proved not to be the case. In 1951, the Board disestablished an affiliated union for the first time.[4] The union was a Teamsters affiliate of the

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[1]Ibid., p. 427.

[2]National Labor Relations Board, Thirteenth Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1949), p. 51.

[3]Millis and Brown, p. 428.

[4]Jack Smith Beverages, Inc., 94 NLRB 210 (1951).

American Federation of Labor. The company president and branch manager had solicited members for the union, the company had paid all dues, and the contract was signed while another union was attempting to organize the plant.

In accordance with the above policies, the Board developed guidelines as to what constituted company domination of a union. These guidelines consist of employer establishment and maintenance of the union, employer use of an agent to control the union, active supervisory personnel in the union, and internal union laws which give effective control of the union to management. If none of these conditions are present or unless an unusual circumstance prevails, the Board determines that the union has been interfered with but not dominated.[1]

Section 14(a) of the Act which allowed supervisors to become members of a union raised some questions regarding the use of their membership as an indication of domination or interference. However, the Board pointed out that while the law allowed supervisors to join unions it did not prohibit the Board from considering their active participation as an indication of employer interference.[2]

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[1]National Labor Relations Board, Fourteenth Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1950), p. 57.

[2]National Labor Relations Board, Thirteenth Annual Report, p. 54.

Another change occurred when the Board modified its Midwest Piping doctrine in 1951. It was felt that this modification was necessary to facilitate the continuity of bargaining:

> A majority of the Board held that an employer may continue bargaining with a union which has been the established majority representative, even in the face of a rival union's petition, if the petition raises no valid question of representation, either because it proposes an inappropriate unit or for other reasons. However, the Board made it clear that an employer and a union do so at their own risk, subject to unfair labor practice charges if the Board later finds that the petition did raise a valid question of representation.[1]

After the Wagner Act was passed, it was thought that charges involving company unionism would eventually disappear.[2] Indeed, as was seen in the previous subsection, 8(2) charges did decrease during the latter years of the Wagner Act. Furthermore, after passage of Taft-Hartley the number of 8(a)(2) charges declined until 1958. From 1958 on, the number of 8(a)(2) charges have generally increased reaching a high of 1,003 in 1976. It is true, however, that expressed as a percentage of all unfair labor practice charges filed, there has been a general decrease (See Table 2).

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[1]National Labor Relations Board, Sixteenth Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1952), p. 160.

[2]Rosenfarb, p. 135.

TABLE 2

TOTAL 8(a)(2) CHARGES FILED WITH THE NATIONAL LABOR RELATIONS BOARD EXPRESSED IN ABSOLUTE NUMBERS AND AS A PERCENTAGE OF TOTAL UNFAIR LABOR PRACTICE CASES, FISCAL YEARS 1948-1977

Fiscal Year	Total Unfair Labor Practice Cases	Total 8(a)(2) Charges Filed	8(a)(2) Charges as a % of Total Unfair Labor Practice Cases
1948[a]	2,553	197	7.7
1949	4,154	534	12.9
1950	4,472	570	12.7
1951	4,164	489	11.7
1952	4,306	406	9.4
1953	4,409	421	9.5
1954	4,373	445	10.2
1955	4,362	403	9.2
1956	3,522	383	10.9
1957	3,655	367	10.0
1958	6,608	706	11.6
1959	8,266	724	8.8
1960	7,723	820	10.6
1961	8,136	653	8.0
1962	9,231	691	7.5
1963	9,550	729	7.6
1964	10,695	667	6.2
1965	10,931	669	6.1
1966	10,902	748	6.9
1967	11,259	738	6.6
1968	11,892	841	7.1
1969	12,022	622	5.2
1970	13,601	592	4.5
1971	15,467	670	4.3
1972	17,733	766	4.3
1973	17,361	716	4.1
1974	17,978	934	5.2
1975	20,311	905	4.5
1976	23,496	1,003	4.3
1977	26,105	954	3.7

SOURCE: Compiled from National Labor Relations Board, Thirteenth Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1949). to Forty-Second Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1977).

[a]Fiscal year 1948 is not a complete year due to passage of the Taft-Hartley Act in 1947.

Conclusion

Company unionism as an idea began in the late 1800's, but did not reach full flower until World War I and the War Labor Board. During the 1920's the concept was kept alive under such terms as the American Plan and Welfare Capitalism. Section 7(a) of the National Industrial Recover Act truly gave company unionism the impetus it needed to encompass twenty percent of the surveyed work force. Company unionism was in full swing when the Wagner Act was passed in 1935. In the early years of the Wagner Act, the number of 8(2) charges filed were quite high, 1,327 in 1938, but the number dwindled in later years. After the Taft-Hartley Act was passed, the number of 8(a)(2) charges filed continued to decline until 1957. Then began an increase in the absolute number of 8(a)(2) charges filed. However, throughout the entire period the number of filed 8(a)(2) charges expressed as a percentage of total unfair labor practice charges declined.

CHAPTER III

EMPLOYER DOMINATION

The Taft-Hartley Act substantially changed decisions in 8(a)(2) cases by requiring in Section 10(c) that ". . . in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope." Prior to the Taft-Hartley amendments, the Board ordered all illegal nonaffiliated unions disestablished whereas employers usually were ordered simply to cease and desist from dominating or interfering with illegal affiliated unions. The reason for treating affiliated and unaffiliated unions differently was that the Board felt the parent organizations could reorganize the illegal union once the employer domination stopped. The rationale for the Taft-Hartley change was given in the Legislative History of the Labor Management Relations Act, 1947:

> If it is an independent union, not affiliated with a national or international organization, the Board usually annihilates it by requiring the employer to "disestablish" it, by denying to it a place on the Board's ballots, or by punishing an employer that deals with it. By its ingenious and discriminatory application of this section and of its powers under section 10, the Board has liquidated many unions that workers wished as their bargaining agents. In a few instances, the Board has used the section against affiliated unions, and particularly those connected with

> the A.F. of L. But in these cases, it has discriminated again, imposing a penalty less than the death sentence that would have been forthcoming had the union been an independent.[1]

In order to accomodate itself to changes required by 10(c), the Board now provides different remedies for 8(a)(2) violations depending on the degree of union assistance involved in each case. The Fourteenth Annual Report of the National Labor Relations Board states:

> . . . when the employer's conduct amounts to domination, he is ordered to disestablish the organization, whether or not it is affiliated, and to cease dealing with it as a labor organization. On the other hand, if the conduct amounts only to unlawful support, he is ordered to refrain from recognizing or otherwise dealing with the organization unless and until it shall have been certified by the Board in a subsequent election as the collective bargaining representative of the employees.[2]

Hence, the distinction between a finding of domination and a finding of unlawful support is a crucial one.

This chapter will deal with 271 cases which involved employer actions the Board has deemed partially indicative of domination of a union.[3] It should be emphasized that these

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[1]U.S., Congress, Senate, Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 93d Cong., 2d Sess., 1974, p. 320.

[2]National Labor Relations Board, Fourteenth Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1950), p. 57.

[3]National Labor Relations Board, Fifteenth Annual Report of the National Labor Relations Board, (Washington, D.C.: Government Printing Office, 1951), p. 101.

tactics used singly, without evidence of additional assistance, would severely curtail the likelihood of a Board finding of domination.[1] Nevertheless, each category of employer action will be examined separately. Such analysis is necessary to clarify the issues involved in each classification.

The first topic addressed will be that of employer formation or initiation of a union. Then, in order, attention will be directed toward the following types of employer interference: supervisory personnel actively involved in a union, lack of clear cleavage from a previous company dominated union, agents of the employer involved with the formation or administration of a union, pervasive company control of a union, charges filed six months after the violation, employer use of a lockout to force membership in a favored union, and disagreement regarding a finding of domination.

Employer Formation or Initiation of a Union

Employer formation or initiation of a union was an issue in 152 cases during the 1950-1974 period (see Table 3). Ultimately, the company was found guilty of an 8(a)(2) violation in 147 (96.7%) of these cases. In only five cases (3.3% of the total) did the outcome result in a no violation finding.

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[1] Ibid.

TABLE 3

Total Number of 8(a)(2) Cases Involving Employer Formation or Initiation of a Union Heard Before the National Labor Relations Board, 1950-1974, According to Guilt

Year	Total #	# Guilty	% Guilty	Year	Total #	# Guilty	% Guilty
1950	10	9	90.0	1963	5	5	100.0
1951	6	6	100.0	1964	11	11	100.0
1952	13	13	100.0	1965	11	11	100.0
1953	6	6	100.0	1966	6	6	100.0
1954	6	6	100.0	1967	7	7	100.0
1955	2	2	100.0	1968	6	5	83.3
1956	0	0	...	1969	6	5	83.3
1957	3	2	66.7	1970	4	4	100.0
1958	4	4	100.0	1971	6	6	100.0
1959	2	2	100.0	1972	5	5	100.0
1960	8	8	100.0	1973	6	6	100.0
1961	6	6	100.0	1974	5	4	80.0
1962	8	8	100.0	Total	152	147	96.7

SOURCE: Data compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington, D.C.: Government Printing Office, 1950 to 1974).

Eventually, fifty-two of these cases were appealed to the appropriate circuit court. Board orders involving 8(a)(2) violations were enforced in forty-five (86.5% of the total appealed) instances. Only on seven occasions did a circuit court reverse a violation finding by the Board.

Several interesting issues make themselves apparent in this group of cases. In Ed Taussig, Inc.[1] the company initiated, formed, sponsored, and promoted the Employees' Management Committee. Although the company engaged in no other unfair labor practices, the Board found an 8(a)(2) violation because the respondent had invaded a field of activity exclusively reserved to employees. In a later related decision,[2] the Board pointed out that slight suggestions by an employer, regarding a choice between unions, can have a potent effect on employees. Furthermore, company formation or initiation of a union significantly surpasses the effects of mere suggestion. Therefore, a clear violation of 8(a)(2) had resulted.

Employer formation, as opposed to initiation, of a union was an issue in Harrison Sheet Steel.[3] Here there was some question as to whether or not the company had initiated

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[1]108 NLRB 470 (1954).

[2]Alarm Device Manufacturing Co., 175 NLRB 659 (1969).

[3]94 NLRB 81 (1951), 194 F. 2d 407 (CA-7, 1952).

the union. However, the company had formed the labor organization, and, therefore, was found to have violated section 8(a)(2). Similar rulings were issued in Hankins Container[1] and Ferguson-Lander Box Company[2]. In both of these cases, employees initiated the labor organizations in question, but the company formed and structured them. The Board once again found this clearly in violation of 8(a)(2).

San Leandro Imports[3] provides a fascinating variation on employer formation of unions. The owner of San Leandro Imports instructed a supervisor named Holsten to form a company union entitled the Automobile Salesmen's Association. After the Association was formed and the employer realized that he had violated Taft-Hartley, Holsten was fired for creating the union. As a defense the employer then claimed he had purged the Association of all company interference. Ruling that the firing of Holsten revealed domination rather than a lack of it, the Board found San Leandro guilty of violating 8(a)(2).

The Hertzka and Knowles case[4] furnishes an important

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[1]145 NLRB 640 (1963).

[2]151 NLRB 1615 (1965).

[3]173 NLRB 629 (1968).

[4]206 NLRB 191 (1973), 503 F. 2d 625 (CA-9, 1974), cert. den. 423 U.S. 875 (1975).

final topic for consideration in this section. Formation of a committee system was suggested by the company. Management representatives presided at, attended, and voted in the meetings that formed the committee system. The committees were structured such that management attended, voted, and observed the votes of others at each meeting. The company claimed that this involvement was simple cooperation. However, the Board found the employer's actions to be in violation of 8(a)(2). Interestingly, the Ninth Circuit Court of Appeals did not agree. It pointed out that there was no evidence of employee dissatisfaction with the committees and that only a purely adversarial model of labor relations would find such employer conduct unlawful. Thus, the true desires of employees must be considered of paramount importance in any Board decision.

Supervisory Personnel Actively Involved In a Union

Active involvement of supervisory personnel within unions was a question in 107 cases during the twenty-five year period under study (see Table 4). In eighty-six cases (80% of the total) the Board found companies guilty of violating 8(a)(2). Not guilty verdicts accounted for the remaining twenty-one rulings (20%).

Thirty-seven of these cases were pursued through the legal system to the appropriate circuit courts of appeals.

TABLE 4

Total Number of 8(a)(2) Cases Involving Active Supervisory Participation in Union Affairs Heard Before the National Labor Relations Board, 1950-1974, According to Guilt

Year	Total #	# Guilty	% Guilty	Year	Total #	# Guilty	% Guilty
1950	1	1	100	1963	2	2	100
1951	3	3	100	1964	4	4	100
1952	2	2	100	1965	8	7	88
1953	5	5	100	1966	4	4	100
1954	1	0	0	1967	1	1	100
1955	0	0	...	1968	10	8	80
1956	0	0	...	1969	11	7	64
1957	2	2	100	1970	4	3	75
1958	3	2	67	1971	5	4	80
1959	1	1	100	1972	9	6	67
1960	7	7	100	1973	4	4	100
1961	7	6	86	1974	1	1	100
1962	12	6	50	Total	107	86	80

SOURCE: Data compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington, D.C.: Government Printing Office, 1950 to 1974).

On twenty-nine occasions (78% of the cases appealed) circuit courts enforced Board rulings regarding Section 8(a)(2). However, 8(a)(2) violation findings by the Board were reversed in eight instances (22%).

Section 14(a) of Taft-Hartley, which permits supervisors to join and remain union participants, provides for interesting analysis when considered conjunctively with Section 8(a)(2). Immediately after Taft-Hartley was passed, the Board was faced with resolving the conflict inherent in these two sections. This difficulty was partially unraveled in the Kresge Department Store case.[1] The Board held, in this decision, that Section 14(a) did not prohibit consideration of supervisory membership in unions as a factor in finding employer domination or interference with a labor organization.

The Valentine Sugars case[2] provides an enlightening example of the Board's application of the above doctrine. The Board, on this occasion, considered the involvement of supervisors in the company's independent union as partially indicative of an 8(a)(2) violation. The Fifth Circuit Court

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[1] 77 NLRB 212 (1948).

[2] 102 NLRB 313 (1953), 211 F. 2d 317 (CA-5, 1954).

of Appeals, reversing this ruling, held that union membership of low level supervisors does not violate 8(a)(2). A corresponding set of decisions was issued in Wayside Press.[1] Participation by foremen in the Employees' Independent Union was cited by the Board as the primary reason for its ruling--an 8(a)(2) violation. The Ninth Circuit Court held that the acts of such supervisory personnel, as the foremen in this example, must be examined within their overall setting. The foremen, according to the circuit court, were minor supervisors who spent no more than twenty to twenty-four percent of their time in supervisory capacity. Therefore, their union involvement was not a violation of the Act.[2]

Further clarification of these issues was provided in the significant Nassau and Suffolk Contractors' Association case[3] where a distinction was drawn between supervisors inside the bargaining unit (low level supervisors) and supervisors not in the unit (high level supervisors).[4] Active participation in

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[1]103 NLRB 11 (1953), 206 F. 2d 862 (CA-9, 1953).

[2]See also Ace Wholesale Electric Supply Company, 133 NLRB 480 (1961), 310 F. 2d 539 (CA-9, 1962); Coca-Cola Company of Sacramento, 146 NLRB 1045 (1964), 346 F. 2d 625 (CA-9, 1965); and Beach Electric Company, 174 NLRB 210 (1969).

[3]118 NLRB 174 (1957).

[4]The distinction between high level and low level supervisors was further emphasized in A. L. Mechling Barge Lines, Inc., 197 NLRB 592 (1972).

union affairs by executives or high level supervisors was found, due to the possible effects on the union's internal balance of power, to be a clear violation of 8(a)(2).[1] Low level supervisors within the bargaining unit were ruled free to participation in all union activities with two exceptions. (1) Even minor supervisors may not serve on negotiating committees.[2] This would obviously result in management sitting on both sides of the negotiating table, a situation the Board has always tried to prevent. (2) Minor supervisors whose conduct has been ratified by management or whose actions are believed by employees to be on behalf of management may not participate freely in union affairs.[3] Their free participation under these circumstances would, obviously, give management control over the labor organization.

Active involvement of supervisory personnel in a labor organization was also at issue in Anchorage Businessmen's Association.[4] Supervisors of this company participated regularly

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[1]See Bottfield-Refractories, 127 NLRB 188 (1960), 292 F. 2d 627 (CA-3, 1961).

[2]See also The Bassick Company, 127 NLRB 1552 (1960); Powers Regulator Company, 149 NLRB 1185 (1964), 355 F. 2d 506 (CA-7, 1966); Jansen Electronics Manufacturing, Inc., 153 NLRB 1555 (1965); and Russell Motors 198 NLRB 351 (1972), 481 F. 2d 996 (CA-2, 1973).

[3]See also Banner Yarn Dyeing Corporation, 139 NLRB 1018 (1962); and International Typographical Union, 185 NLRB 496 (1970), 452 F. 2d 976 (CA-10, 1971).

[4]124 NLRB 662 (1959), 289 F. 2d 619 (CA-9, 1961).

in meetings of the Anchorage Professional Pharmacy Association, an independent union. They voted in these meetings, thereby affecting the internal administration of the union, and they served on the negotiating committee. On this basis, the trial examiner held the union to be dominated and ruled it disestablished. However, the Board ruled that active participation of supervisors in union affairs does not per se constitute evidence of domination. Thus, the company was held guilty, merely, of unlawful support. The Ninth Circuit Court of Appeals upheld this ruling. In two related cases, Bisso Towboat Company[1] and U.M.W. Welfare and Retirement Fund[2], the Board reduced findings of domination to unlawful support on the same basic premise.

Kugler's Restaurant[3] provides further clarification of this issue. Supervisors were also members of the independent union in this case, but their involvement was much more extensive. Not only were supervisors members, but they also signed the union contract. One of these who signed was a former union president. Evidence further indicated that this supervisor forced the secretary-treasurer to sign the contract. Another

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[1]192 NLRB 885 (1971).

[2]192 NLRB 1022 (1971).

[3]151 NLRB 1566 (1965).

supervisor took an active role in removing an employee, whose ideas ran counter to those of management, from the independent's presidency. The resultant vacancy was filled with an employee of the supervisor's own choosing. The Board, on this occasion, reversed the trial examiner's finding of simple unlawful support, and, instead, ruled that the union was dominated. The degree of supervisory interference, therefore, is the key in determining whether or not a union has been dominated.

Another problem involving participation by supervisors in union activity has been to correctly define the term supervisor. Section 2(11) of Taft-Hartley provides the following definition:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The above definition was somewhat illuminated in the Ohio Power case.[1] Ruling on this case, the Sixth Circuit Court of Appeals held that section 2(11) was to be interpreted in the disjunctive. Thus, the possession by an employee of any one of the authorities listed, places that employee in the supervisory class. For the

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[1] Ohio Power Company v. NLRB, 176 F. 2d 385 (CA-6, 1949), cert. den. 338 U.S. 899 (1949).

most part, then, the Board's job is one of going through the categories listed in section 2(11) and determining on a case by case basis if an employee possesses one of the authorities.[1] Additionally, the Board has ruled, with the District of Columbia Circuit Court affirming, that infrequent exercise of supervisory authority is no defense. The ability of a supervisor to exercise control is the only valid test.[2]

The one difficulty with this definition has involved the requirement that an employee exercise independent judgment to be considered a supervisor. In Arduini Manufacturing Company[3] the Board considered the ratio of supervisors to workers as an indication of opportunity to employ independent judgement. The respondent company had claimed, in this instance, that there was only one supervisor for ninety employees. The Board found this highly unlikely and ruled that the ten leadmen in question were supervisors. The fact that they organized the shop committee was, therefore, a violation of 8(a)(2).[4]

The final issue to be addressed on this category is

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[1]See Matthews Drivurself Service, 133 NLRB 1513 (1961); National Gypsum Company, 139 NLRB 916 (1962); Riker Video Industries, 171 NLRB 3 (1968); E.E.E. Company, 171 NLRB 982 (1968); Hesston Corp., 175 NLRB 96 (1969); Marinette Marine Corp., 179 NLRB 627 (1969); and Big T Food Store, 200 NLRB 409 (1972).

[2]Mississippi Valley Barge Line Company, 151 NLRB 676 (1965), 353 F. 2d 904 (CA D of C, 1965).

[3]153 NLRB 887 (1965).

[4]See also American Coach Company, 169 NLRB 1065 (1968).

involvement of supervisors in the formation of independent unions. Supervisors helped form a shop committee in Webb Manufacturing Company[1] and an Employees' Association in C. Randall.[2] Both times the supervisors met the section 2(11) definition. The Board, significantly, ruled their formation of independent unions to be in violation of 8(a)(2).

Lack of Clear Cleavage

Lack of clear cleavage from a previous company dominated union was an issue in only eight cases during the 1950-1974 period, with the last case occurring in 1967. The Board found the respondent companies violated 8(a)(2) in all eight instances. Four of these cases were pursued to Circuit Courts of Appeal. Two Board rulings were enforced, but two were reversed.

To determine if a new union is truly an independent one or just a successor to a former company union, the Board has historically made use of the "fracture doctrine." This doctrine requires that the company make a clearly defined break with the prior, dominated union. Factors which tend to mitigate against a Board finding of clear cleavage are (1) carry-over of officers, (2) similarity of structure, (3) carry-over of assets, and (4)

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[1] 154 NLRB 827 (1965).

[2] 88 NLRB 140 (1950).

anything which indicates that the new organization is a mere successor and not a "new" union.[1] This group of cases tends to confirm continued Board application of these policies.

In Majestic Metal Specialties[2] and Huberta Coal Company[3] officers of previous, dominated unions were carried over to new, successor organizations. The Board cited this carry-over as a factor in both decisions and ruled a violation of 8(a)(2). The Majestic Metal ruling went unchallenged, but Huberta Coal was appealed to the Sixth Circuit Court where the Board's decision was affirmed.

Two other issues were cited by the Board within this group of cases as indicative of successorship. In Lawson Milk Company[4] management had failed to completely disestablish a dominated union. A guilty finding was the result with the verdict being upheld in the appeals court. Lack of clear cleavage disavowel of former illegal conduct was the cause of viola-

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[1]Harry A. Millis and Emily Clark Brown, From the Wagner Act to Taft-Hartley, (Chicago: University of Chicago Press, 1950), p. 107.

[2]92 NLRB 1854 (1951).

[3]168 NLRB 122 (1967), 408 F. 2d 793 (CA-6, 1969).

[4]136 NLRB 538 (1962), 317 F. 2d 756 (CA-6, 1963).

tion findings by the Board in three other cases.[1]

The two cases which were reversed by appeals courts were interesting in their simplicity. In Coca-Cola Bottling of Indianapolis[2] the Seventh Circuit Court of Appeals held that evidence did not support the Board's finding. Lack of substantial evidence was also cited by the Sixth Circuit Court of Appeals in its reversal of the Board's guilty finding in National Cash Register Company.[3] Therefore, neither company was found in violation of the Act.

Agents of the Employer Involved With the Formation or Administration of a Union

Interference with a union by agents of an employer was an issue in seven cases during the 1950-1974 period. The Board found respondent companies guilty of 8(a)(2) violations in all seven instances. However, four cases were appealed out of which three Board rulings were upheld and one was reversed.

Rinker Materials Corporation[4] supplied a typical illustration of employer use of an agent to assist a favored union.

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[1] Farrington Manufacturing Company, 93 NLRB 1416 (1951); Meyer and Welch Company, 96 NLRB 236 (1951); and Lenscraft Optical Company, 128 NLRB 836 (1960).

[2] 142 NLRB 1030 (1963), 333 F. 2d 185 (CA-7, 1964).

[3] 167 NLRB 1047 (1967), 405 F. 2d 497 (CA-6, 1969).

[4] 162 NLRB 1670 (1967).

On this occasion the respondent company selected an employee (an agent) to solicit memberships in the Laborers Union. The company paid him while he was organizing and allowed him to use the plant manager's office. The obvious purpose of all this was to keep the Teamsters from organizing the plant. In this respect the company succeeded, but the Board found it guilty of interference with the union. Similar decisions were issued in Department Store Food Corporation of Pennsylvania[1], Mears Coal Company, et. al.[2] and Harrawoods, Inc.[3]

An interesting variation on this theme is found in Fiore Brothers Oil Company.[4] Anthony Bartholdi, the son-in-law of the company's president, acted as an agent for the company. He solicited membership cards for the favored union, told employees that the company was going union, and precipitously signed a contract after he had gotten a majority of workers to sign membership cards. Bartholdi also reneged on a promise to sign a card for the competing union. The Board, ruled that without Bartholdi's efforts a majority of workers would not have signed and found Fiore Brothers guilty of an 8(a)(2) violation.

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[1]172 NLRB 1203 (1968), 415 F. 2d 74 (CA-3, 1969).

[2]175 NLRB 837 (1969), 437 F. 2d 502 (CA-3, 1970).

[3]193 NLRB 1136 (1971).

[4]137 NLRB 191 (1962), 317 F. 2d 710 (CA-2, 1963).

An additional significant ruling on this subject was made in Niagara Frontier Services.[1] Although not a supervisor, Johnson, an employee of Niagara, was used in important managerial functions. She watched various stores' receipts, and, in general, had the run of all the stores. Her freedom according to the Board was such that employees of the company would naturally believe her acts to be on behalf of management. The Board found her efforts in assisting the Retail Clerks and opposing the Amalgamated Meat Cutters to be illegal interference under Section 8(a)(2). The most notable factor in this case was that Johnson was not acting on the approval of her employer. Nevertheless, the Board, referring to International Association of Machinists v. NLRB[2], pointed out that an employer may be held guilty of illegal assistance even though the actions of his agents are not expressly authorized by him.

The only decision in this group to be reversed was Tennessee Consolidated Coal Company.[3] The United Mine Workers complained, in this instance, that an organizer for the Southern Labor Union, Campbell, acted as an agent for the company by soliciting workers for Tennessee Consolidated at the same time

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[1]186 NLRB 769 (1970).

[2]311 U.S. 72 (1940).

[3]131 NLRB 536 (1961), 307 F. 2d 374 (CA-6, 1962).

that he solicited memberships in the Southern Labor Union. The company claimed that Campbell was acting on his own as opposed to acting on behalf of Tennessee Consolidated. The Sixth Circuit Court agreed with the company, and, therefore, reversed the Board's ruling.

Pervasive Company Control

Pervasive company control of a union was addressed in Ace Wholesale Electrical Supply Company[1]. A number of supervisors, on this occasion, helped to form and administer the Brown Employees Association. Coupled with this was limited collective bargaining on the part of the Association as evidenced on two fronts: (1) wages and hours were not considered bargaining issues by the Association, and (2) the Association formally renounced all strike activity and instead stated its intention to rely on friendly negotiation and arbitration to settle all disputes. The Board ordered the Association disestablished and cited these two issues as evidence of pervasive company control of the union. However, the Ninth Circuit Court ruled that supervisory influence in this case was minor, and, therefore, no violation had occurred. A similar decision was issued in the Leslie Metal Arts case[2]

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[1]133 NLRB 480 (1961), 310 F. 2d 539 (CA-9, 1962).

[2]194 NLRB 20 (1971), 472 F. 2d 583 (CA-6, 1972).

where the Sixth Circuit Court ruled that while the company's illegal activities violated 8(a)(2), they were not of such a pervasive nature to justify the Board's disestablishment order.

Beiser Aviation Corporation[1] and Prince Macaroni Manufacturing Company[2] were two related cases in which the Board reversed unlawful support findings by trial examiners and ruled instead that the unions were dominated. In the former the Board stated that the complete context of the case must be considered, and on that basis found the Beiser Employees Association dominated. In the latter case, the Board took under consideration the weakness of an employees' committee as a bargaining agent. The result was a Board finding of domination which was substantially enforced by the First Circuit Court of Appeals.

The Board in Ben Carson Manufacturing Company[3] emphasized union independence as an indicator of company domination. This case involved company use of a shop committee to

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[1]135 NLRB 399 (1962).

[2]138 NLRB 979 (1962), 329 F. 2d 803 (CA-1, 1964).

[3]112 NLRB 323 (1955).

keep out a competing affiliated union. The labor organization's ability to stand on an independent footing was cited by the Board as the practical distinction between unlawful support and domination. Thus, the shop committee was disestablished.[1] Union independence was also a factor in three additional cases in which Board decisions were either partially or totally reversed by circuit courts of appeal.[2] The fact that each union was capable of standing on its own led to these three reversals.

Charges Filed Six Months After the Violation

Inclusion of this division stems directly from section 10 (b) of Taft-Hartley which requires all unfair labor practice charges to be filed within six months of their alleged occurrence. In Edmont, Inc.[3] and Herrin Transportation,[4] the Board reduced trial examiner findings of domination to unlawful support because domination had not occurred within six months prior to the filing of charges. Domination was found in Distribution Centers of Detroit[5] to have occurred both six months prior to

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[1]See also Han-Dee Manufacturing Co. 132 NLRB 1542 (1961).

[2]Coca-Cola (Stockton), 102 NLRB 586 (1953), 212 F. 2d 465 (CA-9, 1954); Hotpoint Division, General Electric, 128 NLRB 788 (1960), 289 F. 2d 683 (CA-7, 1961); Coppus Engineering Corp., 115 NLRB 1387 (1956), 240 F. 2d 564 (CA-1, 1967).

[3]139 NLRB 1528 (1962).

[4]151 NLRB 108 (1965).

[5]197 NLRB 1 (1972).

filing of the charge and inside the six month period. Consequently, in a split decision the Board ruled that Distribution Centers had dominated its independent union. The key, therefore, to a finding of domination in this class of cases is occurrence of illegal activity during the six month period.

Employer Use of a Lockout

Employer use of a lockout to force employee membership in a favored union is not one of the traditional methods of achieving domination. However, this methodology was an issue twice during the period in question. The Board found 8(a)(2) violations in both cases. These decisions were both upheld in appeals courts.

In Seven Up Bottling Company (Sacramento)[1], the Sacramento Seven Up Employees Union had formerly bargained on a regular basis. No agreement could be reached in its last negotiations. Further, the company used a lockout against the union, and then conditioned reemployment on the signing of an agreement. The Board held that this placed the union in a helpless, subservient position and, thus, violated 8(a)(2). The Ninth Circuit Court enforced most of the Board's original ruling, but on the lockout issue, it remanded the case to the Board for further hearing. The Board reaffirmed its previous

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[1]147 NLRB 401 (1965), 352 F. 2d 509 (CA-9, 1965), 158 NLRB 1223 (1966).

verdict. The Perry Coal Company case[1] was very similar in nature to Seven Up of Sacramento. Perry Coal Company used a lockout to encourage United Mine Worker membership. On this basis the Board found an 8(a)(2) violation, and the Seventh Circuit Court concurred. Lockouts for this purpose are clearly not to be allowed.

Disagreement Regarding a Finding of Domination

Conflict over what determines domination occurred in a total of thirty-one cases (see Table 5). Twenty involved disagreements between a trial examiner (or an administrative law judge) and the Board. Of these twenty, the Board reversed twelve, substituting rulings of unlawful support for domination. In the residual eight cases of the twenty, this process was inverted with the Board finding domination in lieu of unlawful support. Three of the latter were affirmed by a circuit court of appeals, and one was reversed on domination but affirmed on unlawful support.

The eleven remaining cases involved either a disagreement between the Board and circuit courts or differences within the Board itself. There were eight occurences of dissension between the Board and a circuit court of appeals. The Board found domination and a circuit court reversed their findings in all eight instances. Five domination rulings were reduced to

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[1]125 NLRB 1256 (1959), 284 F. 2d 910 (CA-7, 1961).

TABLE 5

Number of Final Decisions Involving Controversy Over Company Domination Heard Before the National Labor Relations Board, 1950-1974, According to Guilt

Decision	Board Reversal of a Trial Examiner (or an Administrative Law Judge)		Disagreement within the Board		Circuit Court Reversal of the Board	
	Trial Examiner Decision	Board Decision	Majority Decision	Minority Opinion	Board Decision	Circuit Court Decision
Domination	12	8	0	3	9	0
Unlawful Support	8	12	3	0	0	6
Not Guilty	0	0	0	0	0	3

SOURCE: Data compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington, D.C.: Government Printing Office, 1950 to 1974).

simple interference, but, interestingly, three rulings of domination were completely overturned with a circuit court ruling that no violation of the Act had occurred. The last three cases involved disagreements within the Board as to what constituted domination.

Summary and Conclusions

Five of the eight topics discussed in this chapter have analyzed types of employer interference with union activity which the National Labor Relations Board has traditionally considered partially indicative of union domination. Employer formation or initiation of unions was the most numerous category occurring in 129 cases, but it was followed closely by active involvement of supervisory personnel in unions which occurred in a total of 107 cases. By virtue of such high levels of occurrence, these two methods of employer interference continue to present difficulties to the Board. The three other topics--lack of clear cleavage, agency problems, and pervasive company control--were much less numerous (less than ten cases each). The final three topics discussed in this chapter consisted of charges filed six months after the violation (a technical difficulty which occurred in only a few cases), employer use of a lockout (a non-traditional method of employer interference which occurred in only two cases), and disagreement regarding a finding of domination (thirty-one cases).

At the time Taft-Hartley was passed, it was feared that the equal treatment modifications continued in Section 10(c) would provide government protection for company-dominated unions.[1] However, this proved not to be the case. Faced with a choice of treating nonaffiliated unions more leniently or affiliated unions more severely, the Board chose the latter.[2]

Some confusion over what constituted domination resulted in 31 cases in which there was disagreement between trial examiners (later called administrative law judges), the Board, and the circuit courts. On this basis an argument could be made that decisions were simpler before the 10(c) changes.

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[1]U.S. Congress, Senate, Committee on Labor and Public Welfare, Legislative History, p. 383.

[2]National Labor Relations Board, Thirteenth Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1949), p. 51. See also Millis and Brown, p. 427.

CHAPTER IV

DISCRIMINATORY TREATMENT OF EMPLOYEES OR THREATS THEREOF

This chapter explores 254 8(a)(2) cases which involved discriminatory treatment of employees or threats of such treatment. The first section of this chapter investigates free speech issues and their significant relationships to the remaining topics. Since a number of these topics involve employer threats, an analysis of the free speech issue and its relationship to Section 8(a)(2) is necessary. Then, in order of relative frequency, the following topics will be discussed: employer threat of discharge or disciplinary action, employer promise of concessions, employer threat of plant shutdown, employer threat to withdraw benefits, employer interrogation of employees, employer control of transfers, and employer use of discretionary seniority clauses.

Free Speech

Due to the nature of the violations discussed in this chapter, the issue of free speech arises in a substantial number of cases. The Labor Management Relations Act specifically addresses this difficulty in Section 8(c) where it states:

> 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.

Thus, the Board is left with the difficult task of determining if certain employer statements are mere expression of views of coercive in nature.

In its 1940 ruling in International Association of Machinists v. NLRB[1], the Supreme Court set the tone for rules regarding free speech and section 8(a)(2). It stated, "Known hostility to one union and clear discrimination against it may indeed make seemingly trivial intimations of preference for another union powerful assistance for it."[2] In other words, the total set of circumstances surrounding the speeches or statements in question must be considered when determining if the employer has violated the Act. The Supreme Court continued, "Slight suggestions as to the employer's choice between unions may have a telling effect among men who know the consequences of incurring that employer's strong displeasure."[3]

The Board has continued to follow the above doctrine in determining if statements by employers have violated the Act. In Irving Air Chute Company[4], workers were threatened with discharge. Furthermore, the company suggested organization of the Elected Committee and gave support and assistance to it.

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[1]311 U.S. 72 (1940).

[2]Ibid., p. 78.

[3]Ibid.

[4]149 NLRB 627 (1964), 350 F. 2d 176 (CA-2, 1965).

The Board ruled that Irving Air Chute had violated section 8(a)(2). In affirming the Board's ruling, the Second Circuit Court held that the company's free speech defense was invalid in light of the surrounding circumstances. Specifically, Irving Air Chute, and not the employees, was the driving force behind the Elected Committee. In Guard Services, Inc.[1] a company representative gave a speech to the guards and in it stated, "It would be my suggestion, and we would be most happy to have all you Guards to set up a small committee . . . Many small companies each year are finding it increasingly desirable to set up their own independent union. This has many advantages."[2] The trial examiner ruled this to be legal free speech. However, the Board found it to be a violation because it (1) suggested the formation of an independent union, (2) assured employees that such an organization would be favorably received by Guard Services, and (3) offered benefits to employees if an independent union was formed.[3]

Of course distinct threats or promises or benefits are clearly violative of the Act. This was the Board's ruling in

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[1]134 NLRB 1753 (1961).

[2]Ibid.

[3]See also Alarm Device Manufacturing Company, 175 NLRB 659 (1969); Sportspal, Inc., 214 NLRB 917 (1974); and Sweatermasters Company, 176 NLRB 301 (1969).

Wagner Iron Works[1], a case in which the employer made flagrant use of threats and promises of disparate treatment. The Seventh Circuit Court enforced this ruling. The Board issued a similar ruling in Stainless Steel Products[2].

A further point in this line of reasoning is that an employer is not allowed to make damaging and unqualified assertions unless he can show a reasonable basis for such assertions. This was the issue at hand in Miller-Charles and Company[3]. The General Manager of Miller-Charles made a speech to relevant employees in which he portrayed the dire consequences of bringing in an outside union. He asserted that the shop would have to cut down production and eventually shut down completely. The Board found these statements in violation of the Act. The Second Circuit Court concurred with this analysis and pointed out that the General Manager's statements were not in good faith.

On the other hand, employer statements favoring one union over another which are devoid of threats or promises of benefit are legal free speech. The Corning Glass case[4]

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[1]104 NLRB 445 (1953), 220 F. 2d 422 (CA-7, 1955).

[2]157 NLRB 232 (1966).

[3]146 NLRB 405 (1964), 341 F. 2d 870 (CA-2, 1965).

[4]100 NLRB 444 (1952), 204 F. 2d 422 (CA-1, 1953).

illuminates this point. A few of Corning's supervisors encouraged workers to join the A.F.L. union favored by Corning over the opposing C.I.O. union. The trial examiner and the Board agreed that while the supervisor's statements contained no overt promises or threats they went further than section 8(c) permits. The First Circuit Court reversed this decision on grounds that section 8(c) allows the company to give verbal encouragement to one union over another. Since Corning's supervisors used no threat of reprisal or promise of benefit, no violation of the Act had occurred.[1]

In conclusion, it is generally legal for employers to make good faith statements to workers that favor one union over another. However, if the statement contains any threat or promise of benefit, it is not legal free speech. Also, it is permissable for the Board to consider all circumstances surrounding employer statements. If noncoercive statements are made in a coercive atmosphere, they are not legal free speech.

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[1]See also Bernhardt Brothers Tugboat Service, 142 NLRB 851 (1963), 328 F. 2d 757 (CA-7, 1964); Missouri Heel Company, 209 NLRB 481 (1974); Continental Distilling Sales Company v. NLRB, 348 F. 2d 246 (CA-7, 1965); Lake City Foundry Company v. NLRB, 432 F. 2d 1162 (CA-7, 1960); Coppus Engineering Corporation v. NLRB, 240 F. 2d 564 (CA-1, 1957); and Greyhound Airport Service, 204 NLRB 900 (1973).

Discharge or Disciplinary Action

Employer threats to discharge or take disciplinary actions against workers who chose to join "unfavored" unions were a factor in 129 cases during the period of study (see Table 6). This was the largest number of cases pertaining to any one issue in this chapter. Of these 129 cases, the Board ruled that companies were guilty of violating section 8(a)(2) in 120 instances (ninety-three percent of the total). Forty-nine Board rulings were appealed to circuit courts which upheld forty-one of them.

The Clement Brothers Company case[1] and the Kent Corporation case[2] yield unexceptional examples of Board rulings regarding employer discharge or threats to discharge workers. In the former case, the Operating Engineers and District 50 of the United Mine Workers were competing with each other to represent the Clement Brothers employees. The company favored District 50 over the Operating Engineers, and, in support of this position, threatened workers with economic reprisals such as discharge for refusal to join the United Mine Workers. Both the Board and the trial examiner agreed that this violated 8(a)(2). However, the trial examiner found no violation in the signing of a contract after the above occurrences. According

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[1] 165 NLRB 698 (1967), 407 F. 2d 1027 (CA-5, 1969).

[2] 212 NLRB 595 (1974).

TABLE 6

Total Number of 8(a)(2) Cases Involving Employer Threat of Discharge or Disciplinary Action Heard Before the National Labor Relations Board, 1950-1974, According to Guilt

Year	Total #	# Guilty	% Guilty	Year	Total #	# Guilty	% Guilty
1950	0	0	...	1963	6	6	100
1951	6	5	83	1964	7	7	100
1952	3	3	100	1965	6	6	100
1953	6	6	100	1966	6	6	100
1954	2	1	50	1967	3	3	100
1955	1	0	0	1968	5	5	100
1956	0	0	...	1969	6	5	83
1957	4	4	100	1970	10	8	80
1958	2	2	100	1971	4	4	100
1959	5	5	100	1972	2	1	50
1960	11	10	91	1973	7	7	100
1961	9	9	100	1974	11	10	91
1962	7	6	86	Total	129	119	92

SOURCE: Data compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington, D.C.: Government Printing Office, 1950 to 1974).

to the trial examiner only seven of 129 signed authorization cards were tainted, leaving a clear majority in favor of District 50. The Board disagreed that the signing of this contract was legal. The simple mathematical formula used by the trial examiner, according to the Board, was not realistic in determining the pervasive effects of company threats. On eighteen separate occasions after the signing of the contract, threats were made, and three workers were fired for supporting the Operating Engineers. Accordingly, the Board ruled, with the Fifth Circuit Court affirming, that the Clement Brothers illegally assisted District 50 in violation of 8(a)(2). Similarly, in Kent Corporation the Boilermakers were competing with an employee's association to represent Kent's workers. The company fired workers for filing unfair labor practice charges and for supporting the Boilermakers. An 8(a)(2) violation ruling by the Board was the result.

Further enlightenment regarding this issue is furnished in Mid-States Metal Products[1] and Fender Electric Instrument Company[2]. In both of these cases, incumbent unions prevailed on employers to assist them in maintaining their membership in the face of opposition. In the former case, the Chemical

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[1]156 NLRB 872 (1966).

[2]133 NLRB 676 (1961).

Workers arranged an employee's dismissal for aiding attempts at decertification, and in the latter, the Fender Employees Association had four employees fired for considering membership in another union. Section 8(a)(2), according to the Board, was violated on both occasion.

In the Continental Can case[1], the trial examiner and the Board significantly disagreed over their rulings. Continental Can had just opened a plant in New Jersey and had made a pay offer to the United Papermakers and Paper Workers (the union representing this plant) of $1.78 per hour. However, Continental also had a plant in Tonawanda where the workers were being paid $1.91 per hour. Realizing that $1.78 was unacceptable to the New Jersey employees, management upped its offer to $1.81, and then, because the workers threatened to strike, the company increased its offer to $1.86. While the bargaining agent for the union was conducting a vote to see if the workers would accept $1.86, a melee occurred. Afterwards, the bargaining agent gave the company names of eight workers who then were dismissed. The trial examiner, ruling that expressing dissatisfaction with union affairs is protected activity, found the firings to be unlawfully supportive of the Paper Workers; and, therefore, in violation of 8(a)(2). The Board in reversing the Trial Examiner,

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[1]136 NLRB 1135 (1962).

pointed out that the Act does not protect violence and that fighting is not a protected activity. Furthermore, the company was unaware that opposition to the bargaining agent was the cause of the fracas, and when they discovered this fact they reinstated with no loss of pay those workers who could prove they were not involved in any fighting. Thus, the Board found that no violation of the Act had occurred.

The Wagner Iron Works case[1] involved a representation struggle between the CIO's United Auto Workers, the AFL's Bridge, Structural, and Ornamental Iron Workers, and an independent union called the Temporary Committee. The Auto Workers filed unfair labor practice charges against the company on the grounds that employees favoring the Auto Workers were threatened with reprisals. The Board agreed and ruled that 8(a)(2) had been violated. The Seventh Circuit Court enforced the Board's ruling and stated that the company's efforts in support of the AFL affiliate went far beyond free speech.

Klein's Golden Manor[2] is a recent case in which the Board found insufficient evidence to support a ruling that the dismissals in question were discriminatory in nature and in violation of 8(a)(2). Local 1115 of the Joint Board, Nursing

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[1] 104 NLRB 445 (1953), 220 F. 2d 126 (CA-7, 1955).

[2] 214 NLRB 807 (1974).

Home and Hospital Employees Division had competed with Local 4 of the Medical and Health Employees Union to represent Klein's employees. Local 1115 claimed that workers were threatened with bodily injury if they testified against Klein's. They also claimed that two employees were fired for joining Local 1115. The Board pointed out that the general counsel must bear the burden of proof. In this case the general counsel failed in this endeavor and a not guilty ruling was the result.

Of the forty-nine cases in this group which were appealed to circuit courts, seven Board decisions regarding discriminatory discharge were reversed (one was remanded). The most common ground for reversal was insubstantial evidence to support a charge of disriminatory discharge. This was the basic difficulty in Shen-Valley Meat Packers[1], Farmbest, Inc.[2], Stewart-Warner[3], and A. O. Smith Company[4]. The three remaining reversals were for an assortment of reasons. The Cabot Carbon Company Employee Committee was not, according to the Fifth Circuit Court, a labor organization under the law. Thus, an 8(a)(2) violation could not be found (this particular finding

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[1]105 NLRB 491 (1953), 211 F. 2d 289 (CA-9, 1954).

[2]154 NLRB 1421 (1965), 370 F. 2d 1015 (CA-8, 1967).

[3]94 NLRB 607 (1951), 194 F. 2d 207 (CA-4, 1952).

[4]132 NLRB 339 (1962), 343 F. 2d 103 (CA-7, 1965).

was later overruled by the Supreme Court).[1] Although an employee thought he had been fired in Ace Wholesale Electrical Supply Company[2], the individual who fired him did not have the authority to do so. The fact that the employee subsequently failed to show up for work meant that he had actually quit. Finally, discharges in Wah Chang Corp.[3] were for soliciting union members during working hours--an activity prohibited by contract--and were not in violation of 8(a)(2).

Concessions

Offering of concessions from employers to employees to inhibit organization by an external union, was an issue in eighty-four cases heard before the National Labor Relations Board between 1950 and 1974 (see Table 7). The Board found the company guilty of violating section 8(a)(2) in all eighty-four cases. Thirty-eight of these decisions (forty-five percent of the total) were appealed. Circuit courts of appeal affirmed 8(a)(2) violations in thirty-four cases (eighty-nine percent), ruled no violation had occurred in three cases (eight percent), and remanded one case to the Board for further study regarding jurisdiction.

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[1] Cabot Carbon Company, 117 NLRB 1633 (1957), 256 F. 2d 281 (CA-5, 1958), 360 U.S. 203 (1959).

[2] 133 NLRB 480 (1961), 310 F. 2d 539 (CA-9, 1962).

[3] 124 NLRB 1170 (1959), 305 F. 2d 15 (CA-9, 1962).

TABLE 7

Total Number of 8(a)(2) Cases Involving Employer Promise of Concessions Heard Before the National Labor Relations Board, 1950-1974, According to Guilt

Year	Total #	# Guilty	% Guilty	Year	Total #	# Guilty	% Guilty
1950	3	3	100	1963	1	1	100
1951	5	5	100	1964	8	8	100
1952	3	3	100	1965	3	3	100
1953	6	6	100	1966	2	2	100
1954	0	0	...	1967	6	6	100
1955	3	3	100	1968	2	2	100
1956	0	0	...	1969	3	3	100
1957	1	1	100	1970	4	4	100
1958	1	1	100	1971	2	2	100
1959	2	2	100	1972	3	3	100
1960	4	4	100	1973	2	2	100
1961	9	9	100	1974	7	7	100
1962	4	4	100	Total	84	84	100

Source: Data compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington, D.C.: Government Printing Office, 1950 to 1974).

A typical and recent example of this type of employer action is provided in the Hydro-Dredge Accessory Co. case.[1] Hydro-Dredge was being organized by an outside union, the International Association of Machinists, and was resisting this organization attempt by supporting formation of an Employee's Association. Consequently, employees of Hydro-Dredge were given raises for not joining the Machinists. The Board held this to be in violation of section 8(a)(2). Similar rulings on wage concessions were issued in Gaynor News Company[2], Philamon Laboratories[3], and Dove Manufacturing[4]. In all three of these cases, circuit courts affirmed 8(a)(2) violations.

Pacific Electricord[5] furnishes further enlightenment in the area of wage concessions. An Employee Committee, which had represented Pacific Electricord's workers for several years, was being challenged by the International Brotherhood of Electrical Workers. Prior to the election, management told workers that a ten cent wage increase would be granted regardless of who won the election. The Board ruled that this action

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[1] 215 NLRB 138 (1974).

[2] 93 NLRB 299 (1951), 197 F. 2d 719 (CA-2, 1952).

[3] 131 NLRB 80 (1961), 298 F. 2d 176 (CA-2, 1962).

[4] 145 NLRB 1379 (1964), 355 F. 2d 727 (CA-9, 1966).

[5] 153 NLRB 521 (1965).

demonstrated to employees that the Employee Committee would obtain as much as an outside union. Therefore, the company assisted the Committee in violation of 8(a)(2).

Several other types of concessions were also uncovered. In Standard Transformer[1] employees were offered additional vacations and vacation pay in order to discourage an outside union. Further examples of employer concessions include offering Blue Cross and Blue Shield benefits,[2] promising promotions,[3] promising advantageous transfers,[4] guaranteeing full time work,[5] and, finally, in the Coal Creek Coal case[6] offering a free chicken dinner and beer if the workers voted to retain their present independent union.

Three cases concerning employer concessions were reversed by circuit courts. Because the promise of a fifteen dollar bonus for voting against the Molder's Union was not made

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[1]97 NLRB 669 (1951), 202 F. 2d 846 (CA-6, 1953).

[2]Howard Creations, Inc., 212 NLRB 179 (1974).

[3]Hibbard Dowel Company, 119 NLRB 1763 (1958), 273 F. 2d 565 (CA-7, 1960).

[4]Nathan's Famous of Yonkers, Inc., 186 NLRB 131 (1970).

[5]Park Edge Sheridan Meats, Inc., 139 NLRB 748 (1962), 323 F. 2d 956 (CA-2, 1963).

[6]97 NLRB 14 (1951), 204 F. 2d 579 (CA-10, 1963).

by a company representative, Lake City Foundry[1] was reversed. No reason was stated by the circuit court for reversal of Multi-Color Company,[2] while Boyles Famous Corned Beef[3] was reversed because the alleged company promise of benefit was not substantiated by evidence.

Employer Threat of Shutdown

Employer threats to shutdown operations were involved in forty-three cases during the period under study (1950 to 1974). The Board found 8(a)(2) violations in forty-two of these cases (ninety-eight percent of the total). Seventeen of these were appealed to appropriate circuit courts. Of these seventeen, sixteen shutdown threats were upheld as 8(a)(2) violations, and one was reversed.

Sportspal, Inc.[4] provides a typical example of company use of shutdown threat. The United Steelworkers had organized the employees at Sportspal. A majority of the workers had signed authorization cards, and, on that basis, the Steelworkers had filed a representation petition. After the request for recognition, management threatened to shutdown the plant if

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[1]173 NLRB 1081 (1968), 432 F. 2d 1162 (CA-7, 1970).

[2]114 NLRB 1129 (1955), 250 F. 2d 573 (CA-6, 1957).

[3]168 NLRB 299 (1968), 400 F. 2d 154 (CA-8, 1968).

[4]214 NLRB 917 (1974).

they were forced to deal with the Steelworkers. The company vice-president wrote a statement and gave a speech against the Steelworkers. Eventually, Sportspal helped to form and support the rival Company Union. This resulted in an election victory for the Company Union over Steelworkers. It also resulted in an 8(a)(2) violation ruling by the Board. A large number of decisions along these lines have, in the past, been issued by the Board.[1]

The case of Fotochrome, Inc.[2] presented interesting difficulties to the Board. The International Jewelry Workers had represented employees of Fotochrome for many years. They were contemplating a strike. To combat this difficulty, the company decided to bring in the International Production Service and Sales Employees Union. A number of supervisors aided this effort by telling workers the plant might close if the Jewelry Workers were successful. The trial examiner for this case ruled that Fotochrome had not violated the Act because the company president had effectively disavowed the acts of his supervisors. The Board reversed the trial examiner

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[1]See, for example Hydro-Dredge Accessory Co., 215 NLRB 138 (1974); Croscill Curtain Co., 130 NLRB 1465 (1961), 297 F. 2d 294 (CA-4, 1961); Hibbard Dowel Co., 119 NLRB 1763 (1958), 273 F. 2d 565 (CA-7, 1960); and Standard Transformer, 97 NLRB 669 (1951), 202 F. 2d 846 (CA-6, 1953).

[2]146 NLRB 1010 (1964), 343 F. 2d 631 (CA-2, 1965).

on the grounds that the president had contacted only three of his 180 workers. The Second Circuit Court concurred with the Board's findings of an 8(a)(2) violation.

Not guilty rulings were the eventual result in the two final cases discussed in this section. In Greyhound Airport Service[1], a supervisor was overheard telling a third party that he thought if the American Transit Union was successful in replacing Greyhound's current independent union, Greyhound might close down. The Board ruled this a permissible expression of views. Armco Drainage and Metal Products[2] presented further complications. A third party with a minor connection to Armco attempted to coerce employees by telling them that if they joined the United Auto Workers the plant would shut down. The Board found this to be a violation of 8(a)(2). However, the Sixth Circuit Court held that Armco was not responsible for the third party's actions, and had not, therefore, violated the Act in this respect.

Withdrawal of Benefits

In the period from 1950 to 1974, twenty cases involved issues relating to employer withdrawal of benefits or threats of withdrawal. The Board decided that Section 8(a)(2) had been

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[1]204 NLRB 900 (1973).

[2]106 NLRB 725 (1953), 220 F. 2d 573 (CA-6, 1955).

violated in eighteen of these cases (ninety percent) and that no violation had occurred in the remaining two. Six cases were pursued to circuit courts of appeal. Board decisions regarding 8(a)(2) were enforced in four cases, but they were reversed in two cases.

The most common benefit withdrawn was wages. This type of case was exemplified in Mastelotto Enterprises[1]. Mastelotto was being organized by both the Operating Engineers and the Cement Workers. Management favored the Cement Workers by soliciting signatures for them and by paying lower wages to members of the Operating Engineers. The Board found this to be in violation of 8(a)(2) and issued similar rulings in Salant and Salant, Inc.[2] and Spitzer Motor Sales[3].

Many other types of benefits were also withdrawn in attempts to favor one union over another. Some examples include withdrawal of vacation benefits[4], withdrawal of stock options[5],

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[1]181 NLRB 243 (1970).

[2]92 NLRB 343 (1950).

[3]102 NLRB 437 (1953).

[4]Dove Manufacturing Company, 149 NLRB 1408 (1964).

[5]Coal Creek Coal Company, 97 NLRB 14 (1951), 204 F. 2d 579 (CA-10, 1953).

withdrawal of parking privileges[1], and withdrawal of overtime[2].

The two circuit court decisions which reversed Board rulings were very straightforward. In Stewart-Warner[3] an election was challenged due to alleged threats and refusal of the company to allow one of two competing unions to use a bulletin board. These actions favored the International Brotherhood of Electrical Workers. The Fourth Circuit Court, contrary to the Board's illegal interference ruling, found neither Stewart-Warner nor the Electrical Workers in violation of the Act. This decision was based on two factors. (1) The opposing union in this case had not filed the required non-Communist affadavits. (2) The facts of the case supported both Stewart-Warner's and the Electrical Workers' arguments that they had not violated the Act. In Armco Drainage[4] the Board also ruled that 8(a)(2) had been violated. This decision was partially based on a company threat of loss of back pay for any worker who joined the United Auto Workers Union, which was attempting to organize the plant. The Sixth Circuit Court ruled that the

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[1]Kiekhaefer Corporation, 127 NLRB 1381 (1960), 292 F. 2d 130 (CA-7, 1961).

[2]A&S Electronic Die Corporation, 172 NLRB 1478 (1968), 423 F. 2d 218 (CA-2, 1970).

[3]94 NLRB 607 (1951), 194 F. 2d 207 (CA-4, 1952).

[4]106 NLRB 725 (1953), 220 F. 2d 573 (CA-6, 1955).

facts of the case did not support the finding, and while it agreed other violations had occurred, it reversed that portion of the Board's order involving the loss of back pay.

Interrogation

There were nineteen cases during the twenty-five year period under study in which interrogation of employees by management or management's representatives was a significant issue. The Board found companies guilty of 8(a)(2) violations in seventeen of these cases (eighty-nine percent of the total). A total of seven Board decisions were appealed to circuit courts which affirmed all seven rulings.

A significant issue involving interrogation and Section 8(a)(2) was brought up in the Powers Regulator Company case[1]. The United Steel Workers were attempting to organize Powers, and thus, were competing with the Powers Employees Shop Union. The company favored its own independent union over the Steel Workers. This was evidenced by the fact that the company interrogated and gave the impression of surveillance to employees who favored the Steel Workers. The company also threatened to close the plant. On these issues the trial examiner ruled that 8(a)(1) had been violated, but 8(a)(2) had not. The Board disagreed with the trial examiner on grounds that the above actions took place during the Steel Workers organization

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[1]149 NLRB 1185 (1964), 355 F. 2d 506 (CA-7, 1966).

campaign, therefore, inevitably resulting in company assistance to the independent union. The Seventh Circuit Court of Appeals concurred with the Board on these issues, and upheld the Board's 8(a)(2) violation ruling. The Board has issued similar rulings in Home Dairies[1], and Filtron Company[2], Aristocrat Inns of America[3], and Goshen Litho[4].

Syracuse Color Press[5] represents an informative qualification to the above rulings. In this case the International Mailers were competing with the International Bookbinders to represent employees at Syracuse Color Press. The company favored the Bookbinders because they were a member of the Allied Trade Council which allowed the company to use the union label on their products (comic books). Syracuse Color Press felt the use of this label was economically advantageous. Consequently, on one occasion high level company officials interviewed five employees in the company office about their feelings toward the Mailers. As a result, the Mailers filed

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[1] 105 NLRB 323 (1953).

[2] 134 NLRB 1691 (1961), 309 F. 2d 184 (CA-2, 1962).

[3] 146 NLRB 1599 (1964).

[4] 196 NLRB 977 (1972), 476 F. 2d 662 (CA-2, 1973).

[5] 103 NLRB 377 (1951), 209 F. 2d 596 (CA-2, 1954).

8(a)(2) and 8(a)(1) charges against Syracuse Color Press. The Board ruled that this interview session was a single incident which was insubstantial and insufficient to support an 8(a)(2) violation ruling. However, due to the implied threats conveyed during the interview, the Board found Syracuse in violation of section 8(a)(1). The Second Circuit Court agreed with these rulings and enforced the Board's order.

Two salient points arise from these cases. (1) For interrogation to be violative of the Act it must be coercive in nature[1]. (2) If coercive interrogation takes place during an organization campaign, and if it favors one union over another, the interrogation violates section 8(a)(2).

Control of Transfers

Discriminatory treatment of employees through company control of personnel transfers was a significant issue in fifteen cases heard before the National Labor Relations Board from 1950 to 1974. The Board found companies guilty of violating section 8(a)(2) in all fifteen cases. Nine of these decisions were appealed to Circuit Courts (sixty percent of the total). Of these nine, five Board rulings regarding 8(a)(2) were affirmed and four were reversed.

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[1]See for example Wayside Press v. NLRB, 206 F. 2d 862 (CA-9, 1953).

The four cases in this group which were reversed by circuit courts were very similar in nature. Federal Mogul Corporation[1] exemplifies these decisions. The charges in this case resulted from an organizational campaign conducted by the Teamsters in opposition to the Coldwater Distribution Center Employee Representative Committee. The Board ruled that on the totality of the evidence Federal Mogul had interfered with and dominated the Employee Representative Committee. A disestablishment order was the result. One of the specific issues the Board considered in this ruling was that Federal Mogul had the ability to control the Employee Representative Committee through personnel transfers. The Sixth Circuit Court took issue with this viewpoint and stated, "Any employer has the potential power through promotion, transfer and discharge, to affect the status of an employee for organizational purposes. However, in the absence of specific evidence that an employer has so used these powers, this factor is of little weight in determining whether an employer has violated Section 8(a)(2) of the Act."[2] Thus, the Sixth Circuit Court ruled that Federal Mogul had not violated the Act. In fact it concluded that, "The relationship between

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[1]164 NLRB 131 (1967), 394 F. 2d 915 (CA-6, 1968).

[2]Ibid., p. 919.

Coldwater and the committee, in this case, presents an excellent example of cooperative efforts between labor and management."[1] Hotpoint Division, General Electric[2], Coppus Engineering Corporation[3], and Chicago Rawhide Manufacturing Company[4] are all cases in which circuit courts reversed the Board on the same basic issues discussed above.

While the ability to control the composition of union committees is not violative of the Act, employer use of this ability is. Clapper's Manufacturing[5] illustrates this point. Clapper's employees were represented by an Employees Committee, the composition of which was controlled by the company through transfer, promotion, and discharge of members. The Board took this into consideration in finding that Clapper's had violated Section 8(a)(2). The Third Circuit Court of Appeals enforced the Board's ruling. Similar decisions on this issue were rendered in Tuscarora Plastics[6],

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[1]Ibid., p. 921.

[2]128 NLRB 788 (1960), 289 F. 2d 683 (CA-7, 1961).

[3]115 NLRB 1387 (1956), 240 F. 2d 564 (CA-1, 1957).

[4]105 NLRB 727 (1953), 221 F. 2d 165 (CA-7, 1955).

[5]186 NLRB 324 (1970), 458 F. 2d 414 (CA-3, 1972).

[6]167 NLRB 1059 (1967).

H & H Plastics Manufacturing Company[1], and General Shoe Corporation[2].

Discriminatory Seniority Clauses

Seniority clauses and their use to assist one union over another were at issue in fourteen cases during this study. The Board found companies guilty of violating section 8(a)(2) in ten of these cases (seventy-one percent). Five Board rulings were pursued to appropriate circuit courts where two Board decisions were enforced and three were reversed.

The Board has consistently ruled that an agreement which gives a union the final authority to determine seniority of employees and to enforce such a provision violates section 8(a)(2). This was the Board's ruling in the Minneapolis Star case[3] in which the Teamster's Union caused the respondent company to discriminate against a Carpenter by dropping him to the bottom of the regular seniority list. A similar decision was issued in Gibbs Corporation[4]. In this case the contract with Gibbs gave the union control over seniority and prompted

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[1]158 NLRB 1395 (1966), 389 F. 2d 678 (CA-6, 1968).

[2]90 NLRB 1330 (1950), 192 F. 2d 504 (CA-6, 1951), cert. den. 343 U.S. 904 (1952).

[3]109 NLRB 727 (1954).

[4]120 NLRB 1079 (1958).

the Board to rule that 8(a)(2) had been violated. The Board's reasoning was that such seniority clauses tend to encourage membership in the incumbent union at the expense of a competing union.[1]

It should be pointed out that the above rule applies only where the union has final authority to determine seniority and where the union applies these seniority rules in a discriminatory manner. In the St. Johnsburg Trucking Company case,[2] the seniority clause in question directed the company to create a seniority list to be approved by the union (Teamsters). However, the union was not given final authority to settle disputes over seniority. Instead, if there was a dispute, arbitration was to be used. Consequently, St. Johnsburg was found not guilty of violating the Act. The Second Circuit Court reversed the Board's 8(a)(2) violation ruling in the Meenan Oil Company case[3] on these same basic premises.[4]

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[1]See also Progressive Kitchen Equipment Company, 123 NLRB 992 (1959); Marcus Trucking Company, 126 NLRB 1080 (1960), 286 F. 2d 583 (CA-3, 1961); St. Louis Harbor Service Company, 150 NLRB 636 (1964); and Rath Packing Company, 153 NLRB 125 (1965).

[2]120 NLRB 636 (1958).

[3]121 NLRB 580 (1958), 266 F. 2d 552 (CA-2, 1959).

[4]See also Florida Power and Light Company, 126 NLRB 967 (1960).

The Wheland Company case[1] provides an important caveat to the above decisions. Wheland, due to existing business conditions, decided to consolidate the two separate plants it had been operating. The International Association of Machinists and the United Steelworkers represented employees at the Manufacturing Division plant, and the Allied Industrial Workers represented employees at the Ordinance Division plant. Allied obtained a majority of signed authorization cards, and, on this basis, Wheland recognized this union as the exclusive representative of the company's workers. In bargaining with Allied, the company agreed to establish a new seniority roster which gave preferential seniority to the former Allied members (the Ordinance Division employees). The Board found this seniority clause to be in violation of 8(a)(2). However, the Sixth Circuit Court did not agree with this decision. It pointed out that, "Seniority arises only out of contract or statute." and further stated, "The National Labor Relations Act does not compel a bargaining representative to limit seniority clauses solely to the relative length of employment of the respective employees."[2] Thus, Wheland had simply bargained with the employees' legal representative on the issue of

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[1]120 NLRB 814 (1958), 271 F. 2d 122 (CA-6, 1959).

[2]Ibid., pp. 124-125.

seniority, and had, therefore, not violated the Act.[1]

Summary and Conclusions

This chapter has examined several types of actual or threatened discriminatory treatment of employees by employers. An important aspect of these actions is the employer's right to free speech. Basically, it was found that an employer cannot make statements that, on their face value, contain any threat or promise of benefit. Neither is it legal for employers to make what would otherwise be considered legal free speech statements in a coercive atmosphere. With this in mind, discriminatory discharge or disciplinary action was analyzed. The fact that this charge occurred in 129 cases and that several Board rulings were overturned in circuit courts indicates the continuing difficulty associated with this topic. Concessions offered by employers in order to assist a favored union also occurred in a large number of cases (eighty-four). However, adjudication of this charge was much less complicated. The Board ruled that companies had violated 8(a)(2) in all of these cases, and circuit courts reversed only three of these decisions. Likewise, of forty-two cases involving shutdown threats--seventeen of which were appealed--

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[1]See also Central States Petroleum Union, 127 NLRB 223 (1960), 288 F. 2d 166 (CA of DofC, 1961).

only one Board ruling was reversed. Employer threats to withdraw benefits was also a very straightforward section. Only two Board decisions relating to this difficulty were reversed, and they were both reversed due to insubstantial evidence to support the charge. While interrogation was a significant issue in only nineteen cases, two important points were brought out. First, coercive interrogation violates the Act, and second, if coercive interrogation takes place during an organizational campaign, and if it favors one union over another, the interrogation violates 8(a)(2). The analysis of employer control over transfers made the important point that an employer's mere ability to control transfers does not in itself violate the Act. A violation does occur if the employer makes discriminatory use of this ability. Charges involving discriminatory seniority clauses were the least frequent in this group (fourteen cases). It was found that seniority clauses which give unions the final authority in seniority determination are violative of the Act. The point was also made that seniority need not just relate to length of employment. Instead, seniority arises out of contract and is, therefore, a bargainable issue.

CHAPTER V

FINANCIAL AND MATERIAL SUPPORT

This chapter will deal with 228 cases in which an employer was charged with providing a union with some type of financial or material support. The first and most numerous of the charges to be discussed in this chapter is that of employer provision of financial assistance to a union. Then, in order of relative frequency, the following types of assistance will be discussed: employer provision of premises, employer provision of materials or services, and employer use of discriminatory no solicitation rules.

Financial Assistance

Employers were accused of giving financial assistance to unions in 150 cases during the twenty-five year period under study (see Table 8). Thus, financial assistance was an issue in eighteen percent of all 8(a)(2) cases heard by the National Labor Relations Board from 1950 to 1974. Of these 150 decisions, the Board held employers guilty of violating 8(a)(2) in 134 instances. Fifty-one of these rulings were appealed to circuit courts which upheld thirty-nine Board rulings and reversed twelve.

While Section 8(a)(2) of the Act clearly forbids employers to give financial assistance to a labor organization, the proviso

TABLE 8

Total Number of 8(a)(2) Cases Involving Financial Assistance of a Union Heard Before the National Labor Relations Board, 1950-1974, According to Guilt

Year	Total #	# Guilty	% Guilty	Year	Total #	# Guilty	% Guilty
1950	4	4	100.0	1963	6	6	100.0
1951	9	9	100.0	1964	6	6	100.0
1952	6	6	100.0	1965	5	5	100.0
1953	11	10	90.9	1966	8	8	100.0
1954	3	3	100.0	1967	10	10	100.0
1955	2	2	100.0	1968	5	4	80.0
1956	1	1	100.0	1969	8	5	62.5
1957	2	1	50.0	1970	5	4	80.0
1958	3	3	100.0	1971	4	3	75.0
1959	3	3	100.0	1972	4	4	100.0
1960	10	10	100.0	1973	5	3	60.0
1961	12	12	100.0	1974	4	3	75.0
1962	14	9	64.3	Total	150	134	89.3

SOURCE: Data compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington, D.C.: Government Printing Office, 1950 to 1974).

to this section creates some difficulties. It states, "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time of pay." Accordingly, employers are allowed to pay union members for time spent "conferring" with management. Questions obviously arise as to what constitutes conferring with an employer. This inevitably complicates the financial assistance issue.

The complicated question of employee receipt of pay for time spent during union meetings was addressed in Aerovox Corporation.[1] In this case workers were paid for time spent at meetings of the Employer Committee (an inside union). In regard to this issue the Board stated, "An employer may without violating the law meet with its employees on its property to negotiate agreements and to settle grievances and . . . it may compensate employees for time spent on these matters . . ."[2] In this instance, however, the Board held that the meetings in question surpassed these conditions due to discussions of internal committee management. The resulting illegal financial assistance ruling was upheld by the District of Columbia Circuit

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[1]102 NLRB 1526 (1953), 211 F.2d 640 (CA DofC, 1954), cert. den. 347 U.S. 968 (1954).

[2]Ibid.

Court.[1]

The Farmbest, Inc. case[2] also helps unravel some of the difficulties which arise from interpretation of the proviso. The trial examiner in this case ruled that Farmbest had illegally provided financial assistance to a union by compensating employees for attendance at union meetings. The trial examiner emphasized that this occurred in the context of other acts of assistance, and, therefore, violated 8(a)(2). The Board, in reversing the trial examiner on this issue, pointed out that grievances were not discussed at these meetings. In fact they were held to discuss the company's future plans and to discuss daily problems of production and procedure. These meetings were, consequently, covered by the proviso and were perfectly legal. Other 8(a)(2) violations were found which were sustained by the Eighth Circuit Court.

In the Coastal State Petrochemical Company case[3] the Board once again struggled with this issue. Coastal State had compensated employees for attending union meetings. However, there was no evidence of any other type of interference on the

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[1]See also Firedoor Corporation of America, 127 NLRB 1123 (1960), 291 F.2d 328 (CA-2, 1961), cert. den. 368 U.S. 921 (1961); Steel Industries, Inc., 138 NLRB 1235 (1962), 325 F.2d 173 (CA-7, 1963); Wean Manufacturing Company, 147 NLRB 112 (1964); and Pacific Electricord 153 NLRB 520 (1965).

[2]154 NLRB 1421 (1965), 370 F.2d 1015 (CA-8, 1967).

[3]175 NLRB 555 (1969).

part of Coastal State. The Board ruled that this type of payment alone could not be considered unlawful support, and was, therefore, not violative of the Act.

A related category of issues is that of company pay to workers during speeches given by union organizers. In Ridgewood Art Woodcraft[1] workers were paid overtime wages to listen to a Carpenter's Union organizer. This was found by the Board to be an illegal act in support of the Carpenters. Similar rulings were issued in Palette Sample Card Company[2] and Knickerbocker Plastic Company.[3]

Another common form of financial support is employer payment of union fees or dues. In ABC Machine and Welding Service[4] the International Association of Machinist lodged just such a complaint. In fact, ABC had paid the employees' initiation fees and first month's dues to enable them to join the Boilermakers. The trial examiner for this case found no violation in these payments, but the Board found them to be illegal.[5] An

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[1]181 NLRB 756 (1970).

[2]134 NLRB 70 (1961).

[3]96 NLRB 586 (1951).

[4]122 NLRB 944 (1959).

[5]See also Superior Derrick Corporation, 126 NLRB 188 (1960); Western Auto Associate Store, 143 NLRB 703 (1963); Sweater Bee by Banff, Ltd., 197 NLRB 805 (1972), 486 F.2d 1395 (CA-2, 1973); and Freeman G. Gaffney, 205 NLRB 1012 (1973), 506 F.2d 1052 (CA-3, 1974).

interesting variation on this type of complaint is found in Rinker Materials Corporation.[1] Instead of directly paying employees' dues, Rinker raised wages just enough to cover them. This type of action was also ruled illegal by the Board.

Financial assistance to unions has taken many other forms. In Meyer and Welch[2] assistance consisted of an illegal $1,500 cash payment to the Teamsters. Payment of legal fees for an Employee Committee was found in violation of the Act in the Bev Cal Optical Company case.[3] In several instances, vending machine money has been used to assist favored union. In the Connor Foundry Company case[4] both vending machine money and flower fund money was used to illegally support an inside union.[5] Koehler's Wholesale Restaurant Supply[6] furnishes a good summary of various types of illegal financial support given to unions. Koehler's provided financial support to its

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[1]162 NLRB 1670 (1966).

[2]91 NLRB 1102 (1950).

[3]157 NLRB 1287 (1966).

[4]100 NLRB 146 (1952).

[5]See also Beaver Machine and Tool, 97 NLRB 33 (1951); Globe Products, 102 NLRB 278 (1953); Tuscarora Plastics, 167 NLRB 1059 (1967); and Triggs-Miner Corporation, 180 NLRB 206 (1969).

[6]139 NLRB 945 (1962), 328 F.2d 770 (CA-7, 1964).

inside union by giving (1) direct payments to the union, (2) vending machine money to the union, (3) free use of the premises to the union, and (4) free legal aid to the union. The fact that these were all violations of 8(a)(2) was clearly upheld in the Seventh Circuit Court.

The final but very important type of financial assistance to be discussed in this section is that of company provision of union elections. The Board ruled this type of assistance illegal in the Prince Macaroni case.[1] Prince Macaroni was found to have paid for union elections by (1) fabricating the ballot boxes, (2) making the ballots, (3) paying part-time clerical help to count the ballots, and (4) paying employees for time spent during the election. The First Circuit Court of Appeals enforced the Board's order with respect to these payments.[2]

Twelve Board decisions regarding financial assistance issues were reversed. Of these twelve, six were reversed on grounds that the assistance in question was merely cooperative in nature. In the Post Publishing case[3], for example, union use of cafeteria and vending machine profits was found to be,

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[1]138 NLRB 979 (1962), 329 F.2d 803 (CA-1, 1964).

[2]See also McCullough Motors, 201 NLRB 1709 (1973).

[3]136 NLRB 272 (1962), 311 F.2d 565 (CA-7, 1962).

". . . a permissible form of friendly cooperation . . . not the form of 'support' designed to interfere with, restrain or coerce employees in the free exercise of their right to choose or change their bargaining representative."[1] Reversals on similar grounds were made in Coca-Cola Bottling-Indianapolis[2], Federal Mogul Corporation[3], Chicago Rawhide Manufacturing Company[4], Wayside Press[5], and Hertzka and Knowles.[6] Both Coppus Engineering Corporation[7] and Hotpoint Division, General Electric[8] were reversed because the payments in question were minimal. In Lake City Foundry[9] payments to workers for time spent at union meetings were permissible because the opposing union had not made a request for similar treatment. Payments

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[1]Ibid., p. 571.

[2]142 NLRB 1030 (1963), 333 F.2d 185 (CA-5, 1964).

[3]163 NLRB 927 (1967), 394 F.2d 915 (CA-6, 1968).

[4]105 NLRB 727 (1953), 221 F.2d 164 (CA-7, 1955).

[5]103 NLRB 11 (1953), 206 F.2d 862 (CA-9, 1953).

[6]206 NLRB 191 (1973), 503 F.2d 625 (CA-9, 1974), cert. den. 423 U.S. 875 (1975).

[7]115 NLRB 1387 (1956), 240 F.2d 564 (CA-1, 1957).

[8]128 NLRB 788 (1960), 289 F.2d 683 (CA-7, 1961).

[9]173 NLRB 1081 (1968), 432 F.2d 1162 (CA-7, 1970).

for attendance at union meetings in Essex Wire[1] were found legal because they were for time spent conferring with the employer and were, therefore, covered by the proviso. Payments for workers to travel to the NLRB regional office were questioned in the Valentine Sugars case[2]. The Fifth Circuit Court found them to be legal because they showed no demands by the company on the union, and they showed no concessions by the company to the union. Thus, these payments did not constitute illegal interference. Finally, no reasons for reversal were given in the Multi-Color Company case.[3]

In conclusion, payments by an employer to his employees for time spent at union meetings are legal as long as they are strictly confined to conferences with the employer. However, if these meetings involve such things as discussions of internal union affairs, payment for worker attendance would be considered illegal financial support to the union in question. Accordingly, employer payment to employees for listening to speeches given by union organizers are also illegal. Other types of financial assistance such as employer payment of legal fees, employer payment of union dues, direct payments to the union, and vending machine money turned over to a union are also generally illegal.

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[1]107 NLRB 1153 (1954), 219 F.2d 433 (CA-6, 1955).

[2]102 NLRB 313 (1953), 211 F.2d 317 (CA-5, 1954).

[3]114 NLRB 1129 (1955), 250 F.2d 573 (CA-6, 1957).

Mitigating against these conclusions are the possibilities that such financial assistance is only cooperative in nature, or of such a minimal amount as to be irrelevant.

Employer Provision of Premises

From 1950 to 1974 the National Labor Relations Board heard 136 cases involving 8(a)(2) charges in which union use of company premises was a significant issue (see Table 9). Companies were found guilty of violating 8(a)(2) in 125 of these cases. Fifty-nine cases were pursued through the legal system to appropriate courts of appeal where forty-four Board decisions regarding employer provision of premises were upheld and fifteen were reversed.

The major problem addressed in these cases was that of union use of company premises to conduct union meetings, usually during organizational campaigns. The Justus Company case[1] provides a good example of just such a situation. The Teamsters were attempting to organize Justus when the company suggested formation of an employee committee. The employee committee was allowed to meet on company property, but the Teamsters were not. The fact that this conduct discriminated against the Teamsters and that it occurred in the context of other violations led the

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[1] 199 NLRB 422 (1972).

TABLE 9

Total Number of 8(a)(2) Cases Involving Union Use of an Employer's Premises Heard Before the National Labor Relations Board, 1950-1974, According to Guilt

Year	Total #	# Guilty	% Guilty	Year	Total #	# Guilty	% Guilty
1950	6	6	100.0	1963	3	2	66.7
1951	7	7	100.0	1964	6	5	83.3
1952	5	5	100.0	1965	6	6	100.0
1953	17	17	100.0	1966	8	8	100.0
1954	4	3	75.0	1967	8	8	100.0
1955	6	6	100.0	1968	3	3	100.0
1956	1	1	100.0	1969	3	2	66.7
1957	2	1	50.0	1970	4	4	100.0
1958	1	1	100.0	1971	3	2	66.7
1959	2	2	100.0	1972	4	4	100.0
1960	9	7	77.8	1973	3	2	66.7
1961	9	8	88.9	1974	5	4	80.0
1962	11	11	100.0	Total	136	125	91.9

SOURCE: Data compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington, D.C.: Government Printing Office, 1950 to 1974).

Board to issuing an 8(a)(2) violation ruling.[1] In Wemyss v. NLRB[2] the Ninth Circuit Court emphasized the above position. Similarly, this case involved a company which discriminatorily allowed union use of its premises. The court stated, "The preference given organizers of the Association over organizers of Local 439 in assistance and in the use of respondent's premises constituted employer interference . . ."[3]

While these rulings may seem clear and straight forward, other decisions regarding union use of company premises have muddied the waters considerably. In a case involving seven mining companies[4], the Third Circuit Court of Appeals held that an authorization given by the Peles Brothers mine to the Southern Labor Union for them to meet on company property was not sufficient evidence on which to base an unlawful support ruling. Specifically, the court pointed out that this action was not in itself, ". . . enough to establish that the SLU was chosen by the employees as a result of management assistance or domination."[5]

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[1]See also Clapper's Manufacturing, 186 NLRB 324 (1970), 458 F.2d 414 (CA-3, 1972); Milco Undergarment Company, 106 NLRB 767 (1953), 212 F.2d 801 (CA-3, 1954); and Marathon Electric, 106 NLRB 1171 (1953).

[2]212 F.2d 465 (CA-9, 1954).

[3]Ibid., p. 473.

[4]NLRB v. Mears, 437 F.2d 502 (CA-3, 1970).

[5]Ibid., p. 509.

Clearly, use of company property by a union does not necessarily constitute a violation of the act. Some clarification of these points is provided in Coamo Knitting Mills[1]. The trial examiner in this case had found Coamo guilty of assisting the International Ladies Garment Workers Union partially because Coamo had allowed the union to use company premises for union meetings. The Board reversed this finding while pointing out that use of company property does not per se establish unlawful support. Instead, unlawful support rulings must be based on the totality of facts. All relevant circumstances must be considered.[2]

The holding of union elections on company property is also an issue which arose in several cases. Rulings on this topic have been very similar to those discussed above. In both McCullough Motors[3] and Monolith Portland Cement[4] the fact that union elections were held on company property was considered supportive evidence in Board findings of unlawful support. However, in Hesston Corporation[5] holding union elections

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[1]150 NLRB 579 (1964).

[2]See also Manuela Manufacturing Company, 143 NLRB 379 (1963).

[3]201 NLRB 1709 (1973).

[4]94 NLRB 1358 (1951).

[5]175 NLRB 96 (1969).

on company premises was not found to be illegal. In this case, once again, the Board emphasized that consideration of all the circumstances of a case must be made in order to find illegal support.

Of the fifteen Board decisions regarding union use of company premises which were reversed by circuit courts, seven were on grounds that employer cooperation with unions is legal provided no other unlawful support is found.[1] The minimal nature of the assistance in question was the cause of two other reversals.[2] Two additional Board decisions were overturned because the involved companies had not discriminated in regard to union use of their premises[3]. Scarcity of meeting places in rural areas was cited by the Fifth Circuit Court as its basis for reversing the Board on the issue of union use of company property. Since meeting places in such areas are diff-

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[1] Hertzka and Knowles, 206 NLRB 191 (1973), 503 F.2d 625 (CA-9, 1974), cert. den. 423 U.S. 875 (1975); Hotpoint Division, General Electric, 128 NLRB 788 (1960), 289 F.2d 683 (CA-7, 1961); Federal Mogul Corporation, 163 NLRB 927 (1967), 394 F.2d 915 (CA-6, 1968), Magic Slacks, Inc., 136 NLRB 607 (1962), 314 F.2d 844 (CA-7, 1963); Chicago Rawhide Manufacturing Company, 105 NLRB 727 (1953), 221 F.2d 165 (CA-7, 1955); Newman-Green, 161 NLRB 1071 (1966), 401 F.2d 1 (CA-7, 1968); and Armco Drainage, 106 NLRB 725 (1953), 220 F.2d 573 (CA-6, 1955).

[2] Gulfcoast Transit Company, 135 NLRB 185 (1962), 332 F.2d 28 (CA-5, 1964); and Coppus Engineering Corporation, 115 NLRB 1387 (1956), 240 F.2d 564 (CA-1, 1957).

[3] Lake City Foundry, 173 NLRB 1081 (1968), 432 F.2d 1162 (CA-7, 1970); and Wayside Press, 103 NLRB 11 (1953), 206 NLRB 862 (CA-9, 1953).

cult to find, the court reasoned, union use of company property under these circumstances is permissible.[1] In overturning the Board's ruling in Boyle's Famous Corned Beef[2] the Eighth Circuit Court emphasized that union use of company premises is not per se a violation of the Act. Further, in Modern Plastics Corporation[3] the Sixth Circuit Court cited a lack of employee dissatisfaction with the favored union and the absence of attempts by the employer to control the union in setting aside the Board's original order. No reason for reversal was reported in the final case.[4]

Employer Provision of Materials or Services

In the twenty-five year period between 1950 and 1974 the National Labor Relations Board heard 116 cases which involved charges of employer provision of materials or services to a favored union (see Table 10). The Board found 8(a)(2) violations in 108 of these cases. Forty-four Board rulings were pursued to the appropriate circuit courts where thirty-five decisions

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[1] Valentine Sugars, 102 NLRB 313 (1953), 211 F.2d 317 (CA-5, 1954).

[2] 168 NLRB 299 (1967), 400 F.2d 154 (CA-8, 1968).

[3] 155 NLRB 1126 (1965), 379 F.2d 201 (CA-6, 1967).

[4] Multi-Color Company, 114 NLRB 1129 (1955), 250 F.2d 573 (CA-6, 1957).

TABLE 10

Total Number of 8(a)(2) Cases Involving Employer Provision of Services or Materials to a Union Heard Before the National Labor Relations Board, 1950-1974, According to Guilt

Year	Total #	# Guilty	% Guilty	Year	Total #	# Guilty	% Guilty
1950	2	2	100.0	1963	2	1	50.0
1951	6	6	100.0	1964	4	4	100.0
1952	5	5	100.0	1965	9	8	88.9
1953	12	12	100.0	1966	5	5	100.0
1954	3	2	66.7	1967	7	7	100.0
1955	3	3	100.0	1968	4	4	100.0
1956	1	1	100.0	1969	6	4	66.7
1957	2	2	100.0	1970	3	3	100.0
1958	0	0	...	1971	4	3	75.0
1959	1	1	100.0	1972	2	2	100.0
1960	9	8	88.9	1973	2	2	100.0
1961	7	6	85.7	1974	4	4	100.0
1962	13	13	100.0	Total	116	108	93.1

SOURCE: Data compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington, D.C.: Government Printing Office, 1950 to 1974).

regarding employer provision of materials or services were upheld and nine were overturned.

Use of company bulletin boards by a favored union is an important type of material support because it allows a favored union easy access to publicity and puts an outside union at a severe disadvantage. This principle was clearly detailed in a very early circuit court case, Western Union Telegraph Co. v. National Labor Relations Board.[1] Down through the years the Board has continued to apply this doctrine.[2] However, in the A. O. Smith Company case[3] the Seventh Circuit Court rejected the Board's unlawful support ruling based on one union's use of company bulletin boards. The circuit court held such use lawful in this instance because the opposing union had not requested use of the boards. This lack of discrmination led the court to conclude, "It is our view that the Company remained passive and did not lend assistance to either group . . ."[4] Thus, for bulletin board use to be unlawful it must be discriminatory.

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[1]113 F.2d 992 (CA-2, 1940).

[2]See for example Ephraim Haspel, 109 NLRB 37 (1954), 228 F.2d 155 (CA-2, 1955); Air Control Products, 139 NLRB 607 (1962), 344 F.2d 902 (CA-5, 1965); and Hi-Temp, Inc., 204 NLRB 1098 (1973), 503 F.2d 583 (CA-7, 1974).

[3]132 NLRB 339 (1961), 343 F.2d 103 (CA-7, 1965).

[4]Ibid., p. 114.

Most other cases in this group involve support through employer provision of either secretarial or clerical services or office materials. Ultrad Corporation[1] is a recent case in which company provision of supplies and materials was considered unlawful support. This ruling was affirmed by the Seventh Circuit Court.[2] Other types of support which fall under this general heading are company preparation and distribution of union minutes[3], and in Distribution Centers of Detroit[4], company assistance in the composition of grievances. Nevertheless, all assistance of this type is not illegal. In NLRB v. Newman-Green, Inc.[5] the Seventh Circuit Court reversed the Board's ruling on this type of support. It stated, ". . . assistance under 8(a)(2) does not . . . mean all and every assistance."[6] The only type of assistance which is prohibited, according to this court, is that which interferes with the employees' section

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[1]185 NLRB 434 (1970), 454 F. 2d 520 (CA-7, 1971).

[2]See also Sportspal, Inc., 214 NLRB 917 (1974); Master Engineering Corporation, 215 NLRB 376 (1974); and A&P Iron Works, 179 NLRB 291 (1969).

[3]See Reed Rolled Thread Die Company, 179 NLRB 56 (1969), 432 F. 2d 70 (CA-1, 1970); and Clapper's Manufacturing, 186 NLRB 324 (1970), 458 F. 2d 414 (CA-3, 1972).

[4]197 NLRB 1 (1972).

[5]401 F. 2d 1 (CA-7, 1968).

[6]Ibid., p. 4.

7 right to unfettered self-organization.

In Howard Creations, Inc.[1] material assistance took the form of an interpreter provided by the company. Most of the workers at Howard Creations spoke Spanish which created difficulties for unions attempting to organize the plant. Company provision of a Spanish interpreter for use by the favored union (Workers of America and Canada International Union in this case), therefore, contributed to the unlawful support ruling issued by the Board.

Crowley's Milk Company[2] and Milco Undergarment Company[3] furnish two additional types of material support for discussion. In the former, Crowley's allowed a favored union to keep union funds in a company safe, and in the latter, Milco provided a company car for use by a favored union. This assistance was partially responsible for the unlawful support rulings issued by the Board in both cases. Circuit courts upheld both decisions in regard to unlawful support.

The nine reversals in this group follow the pattern set by other reversals described in this paper and can be divided into three basic groups. Circuit courts reversed five 8(a)(2)

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[1]212 NLRB 179 (1974).

[2]88 NLRB 1049 (1950), 208 F.2d 444 (CA-3, 1953).

[3]106 NLRB 767 (1953), 212 F.2d 801 (CA-3, 1954).

violation rulings by the Board on grounds that the assistance involved in those cases constituted only legal forms of cooperation.[1] Additionally, in two cases reversals were handed down because the assistance was of such a minimal nature.[2] Reasons for the final two reversals were similar in that circuit courts found no anti union bias on the part of the two companies. Additionally, they found no employee protest against the existing unions, and, generally, no insidious attempt on the part of the employers at company control of the unions in question.[3]

Discriminatory Use of No Solicitation Rules

The final type of material support to be discussed in this chapter is that of company use of discriminatory no solicitation rules. This charge occurred in forty-five cases heard by the National Labor Relations Board between 1950 and 1974. The Board found companies guilty of violating 8(a)(2)

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[1]Wayside Press, 103 NLRB 11 (1953), 206 F.2d 862 (CA-9, 1953); Chicago Rawhide, 105 NLRB 727 (1953), 221 F.2d 165 (CA-7, 1955); Magic Slacks, Inc., 136 NLRB 607 (1962), 314 F.2d 844 (CA-7, 1963); Federal Mogul Corporation, 163 NLRB 927 (1967), 394 F.2d 915 (CA-6, 1968); and Lake City Foundry, 173 NLRB 1081 (1968), 432 F.2d 1162 (CA-7, 1970).

[2]Coppus Engineering Corporation, 115 NLRB 1387 (1956), 240 F.2d 564 (CA-1, 1957); and Gulfcoast Transit Company, 135 NLRB 185 (1962), 332 F.2d 28 (CA-5, 1964).

[3]Valentine Sugars, 102 NLRB 313 (1953), 211 F.2d 317 (CA-5, 1954); and Modern Plastics, 155 NLRB 1126 (1965), 379 F.2d 201 (CA-6, 1967).

in thirty-nine of these cases. A total of twenty Board decisions regarding solicitation rules were appealed of which fifteen were enforced and five were reversed. One reversal was overturned by the Supreme Court.

In a very early case, International Association of Machinists v. NLRB[1], the Supreme Court made it clear that company use of discriminatory no solicitation rules could lead to illegal interference rulings under section 8(a)(2). Clearly this doctrine has been followed closely by the lower courts and the Board. Northern Metal Products Company[2] provides a good example. In this case the International Association of Machinists were attempting to organize Northern Metal and were being opposed by an independent union favored by the company. Northern Metal had a rule which prohibited oral solicitation during nonworking time in working areas. The company disparately applied this rule in favor of the independent union and in violation of the Act. Additionally, the rule as stated violated the Act because it covered nonworking time.[3] Interestingly, in American Coach Company[4] the Board overlooked a similar rule

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[1]311 U.S. 72 (1940).

[2]171 NLRB 98 (1968).

[3]See also Campco Plastics Company, 142 NLRB 1272 (1963); Stainless Steel Products, 157 NLRB 232 (1966); G&H Towing Company, 168 NLRB 589 (1967); and Dolores, Inc., 98 NLRB 550 (1952).

[4]169 NLRB 1065 (1968).

for two reasons. (1) The company was not enforcing the rule (which obviously eliminated the possibility of discrimination). (2) The company had no knowledge that the independent union they supposedly favored was doing any soliciting at all. As a result, the Board found that American Coach Company had not violated 8(a)(2).

Generally, circuit courts have also adopted discriminatory treatment as an 8(a)(2) violation. In the Bernhardt Brothers Tugboat Service, Inc. case[1] the Seafarers International Union was competing with the National Maritime Union to represent Bernhardt's employees. Organizers for the National Maritime Union were allowed aboard the tugboat to solicit membership, but organizers for the Seafarers International Union were not. The Seventh Circuit Court concurred with the Board in its finding that Bernhardt had violated the Act.[2]

The four circuit court reversals of Board decisions on no solicitation rules which were not appealed to the Supreme Court furnish important modifications to the above analysis.

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[1]142 NLRB 851 (1963), 328 F.2d 757 (CA-7, 1964).

[2]See also Komatz Construction, 191 NLRB 846 (1971), 458 F.2d 317 (CA-8, 1972); Aaron Convalescent Home, 194 NLRB 750 (1971), 479 F.2d 736 (CA-6, 1973); Hunter Outdoor Products, 176 NLRB 449 (1969), 440 F.2d 876 (CA-1, 1971); and Kiekhaefer Corporation, 127 NLRB 1381 (1960), 292 F.2d 130 (CA-7, 1961).

The earliest reversal occurred in Stewart-Warner Corporation[1] and was justified, according to the Fourth Circuit Court, because a valid election had already been held. Thus, the court stated, "The company . . . was under no obligation to permit adherents of the UE [loser of the election] to use its premises to foment discord and dissatisfaction. . ."[2] The Ninth Circuit Court reversed the Board's decision in Wah Chang Corporation[3] because even though the no solicitation rule in question was too broad, the legal portion of the rule was all that Wah Chang ever enforced. The fact that the opposing union had not requested permission to solicit was, according to the Eighth Circuit Court, grounds for reversal in the Gem International, Inc. case[4]. Topps Kermill, Inc.[5] was reversed by the First Circuit Court because the company had no knowledge of the existence of a rival union. According to the courts ". . . one cannot 'discriminate' against someone not known to exist."[6]

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[1]94 NLRB 607 (1951), 194 F.2d 207 (CA-4, 1952).

[2]Ibid., p. 210.

[3]124 NLRB 1170 (1959), 305 F.2d 15 (CA-9, 1962).

[4]137 NLRB 1343 (1962), 321 F.2d 626 (CA-8, 1963).

[5]143 NLRB 694 (1963), 325 F.2d 293 (CA-1, 1963).

[6]Ibid., p. 294.

Undoubtedly, the most important case in this group is the Supreme Court decision in Nutone, Inc.[1] The Board held in this case that the no solicitation rule in effect at Nutone was legal even though it was somewhat broad. The fact that the company solicited against unions on its property while barring the United Steelworkers from soliciting on company property was cited by the Circuit Court in the District of Columbia as cause for reversal on this issue. The Supreme Court disagreed. It pointed out first of all that there was no question about the legality of the no solicitation rule. The only valid question was whether or not the company had used the rule in a discriminatory manner. According to the court, Nutone had used the rule legally for two reasons. (1) The Steelworkers had not asked Nutone to make an exception to the rule. If the Steelworkers had requested solicitation privileges and been turned down, a violation would have resulted. (2) There was no evidence showing that the no solicitation rule kept the union from communicating freely with Nutone's employees in other ways. Therefore, the rule had not been applied discriminatorily, and Nutone had not violated the Act in this respect.

Summary and Conclusions

A cursory examination of the four preceding topics reveals

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[1] 112 NLRB 1153 (1955), 243 F. 2d 593 (CA DofC, 1956), 357 U.S. 357 (1958).

a rather large number of Board decisions in each category which were reversed by circuit courts. Furthermore, the primary difficulty in these decisions seems to be one of determining whether or not a given type of support is either illegal interference or merely cooperative assistance.[1] This paper has emphasized the courts' and the Board's position that some cooperative assistance to a favored union is perfectly legal. However, the question of where the courts draw the line between illegal support and lawful assistance is a difficult one to answer.

One basic question the courts ask in determining the legality of an employers financial or material support of a union is whether or not the assistance in question violates the employees' section 7 rights to a free and unfettered choice of their own representative.[2] The Fifth Circuit Court in Keller Ladders Southern, Inc.[3] stated, "So long as the acts of cooperation do not interfere with the freedom of choice of the employees, there is no violation of the Act." Interestingly,

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[1]See for example Sherman Division, St. Regis Paper Company, 191 NLRB 818 (1971); and Longchamps, Inc., 205 NLRB 1025 (1973).

[2]Wean Manufacturing Company, 147 NLRB 112 (1964).

[3]161 NLRB 21 (1966), 405 F.2d 663, 667 (CA-5, 1968).

the Board in its decision on this case pointed to the fact that the assisted union went first to the employer to ask for his help in organizing the plant and then, only after receiving the employer's assistance, approached the workers. The Fifth Circuit Court concurred with this line of reasoning and further stated, "The vice in the cooperative relationship . . . was one of joining hands to the exclusion of the employees."[1] Thus, employer cooperation with a union which interferes with the workers' rights to a free choice of their own representative clearly surpasses the legal level of assistance and violates Section 8(a)(2). At least two other relevant considerations are brought into play by the courts and the Board in making decisions of this type. (1) Clearly, total support of a union by an employer is illegal under the Act.[2] (2) Whether or not a particular kind or amount of support is illegal depends a great deal on the context in which it occurred. If the assistance in question occurred singly and had little effect, it would probably not be considered illegal. However, if financial or material assistance occurs in the context of widespread support, an 8(a)(2) violation would, undoubtedly, result.[3]

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[1]Ibid.

[2]See for example St. Joseph Lead Company, 171 NLRB 541 (1968).

[3]See for example Wyco Metal Products, 183 NLRB 901 (1970).

CHAPTER VI

CONTRACT DIFFICULTIES

Significantly, over half of all the 8(a)(2) cases heard by the Board from 1950 to 1974 involved issues relating to contracts with and recognition of unions (see Table 11). This paper will explore these issues on three fronts. The first section will deal with perhaps the most complicated doctrine to arise from Section 8(a)(2)--the Midwest Piping doctrine. Then, union majority problems and union security issues will be examined.

The Midwest Piping Doctrine[1]

In its earliest and simplest form the Board's Midwest Piping doctrine held, ". . . as a general rule that the execution of a contract with one or two or more competing unions while a petition for a representation election is pending with the Board constitutes illegal assistance."[2] In this form the Midwest Piping rule seems quite simple. However, during the

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[1]The Midwest Piping doctrine takes its name from an early Board decision in Midwest Piping and Supply Co., 63 NLRB 1060 (1945).

[2]National Labor Relations Board, Sixteenth Annual Report of the National Labor Relations Board (Washington, D.C.: Government Printing Office, 1952), p. 160.

TABLE 11

Total Number of 8(a)(2) Cases Involving Contract Difficulties Heard Before the National Labor Relations Board, 1950-1974, According to Guilt

Year	Total #	# Guilty	% Guilty	Year	Total #	# Guilty	% Guilty
1950	7	7	70.0	1963	19	17	89.5
1951	20	18	90.0	1964	16	13	81.3
1952	16	14	87.5	1965	17	15	88.2
1953	21	20	95.2	1966	16	13	81.3
1954	11	6	54.5	1967	28	26	92.9
1955	21	18	85.7	1968	19	19	100.0
1956	2	2	100.0	1969	25	19	76.0
1957	13	13	100.0	1970	19	16	84.2
1958	14	13	92.9	1971	22	15	68.2
1959	20	19	95.0	1972	24	17	70.8
1960	25	19	76.0	1973	16	16	100.0
1961	25	18	72.0	1974	26	22	84.6
1962	23	20	87.0	Total	468	395	84.4

SOURCE: Data compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington, D.C.: Government Printing Office, 1950 to 1974).

period under study this doctrine underwent several complicating changes which are described below.

The first line of modifications to be addressed involves incumbent unions and their status under the Midwest Piping rule. In William Penn Broadcasting Co.[1] the Board altered its Midwest Piping doctrine such that employers were given the option of continuing the bargaining process with an incumbent union even if a petition for a representation election was pending before the Board. The Board stated, ". . . the pendency of a petition for certification imposes no duty upon an employer to refrain from continuing exclusively to recognize and deal with an incumbent bargaining representative."[2] However, the Board emphasized that this exemption applied only when the petition did not have, ". . . a character and timeliness which create a real question concerning representation."[3] Further, the Board stressed that for such a question to be real the petitioning union must base its claim on an appropriate unit of employees. The rationale for these modifications was to facilitate the bargaining process and to provide employees with "the benefits of an uninterrupted bargaining relationship whenever a clearly unsupportable or

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[1]93 NLRB 1104 (1951).

[2]Ibid.

[3]Ibid.

specious rival union claim is made upon an employer."[1] It should also be emphasized that this ruling did not preclude the petitioning union from later filing an unfair labor practice charge against the company. If the petitioning union's claim was found to be real, the Board would rule that the company had violated section 8(a)(2).

Citing the need for stability and continuity in the industrial relations process, the Board in its William D. Gibson Co. decision[2] further altered its Midwest Piping rule. This decision completely exempted companies which were bargaining with active incumbent unions from the Midwest Piping doctrine. The Board felt that the decertification process could correct any errors the company might make in contracting with an incumbent union of questionable status. The Board stated, ". . . any contract entered into by an incumbent union and an employer after a rival union has made a timely representation claim does not bar an election in the representation proceeding."[3]

Four years after the Gibson ruling the Board reversed itself, thus, restoring the William Penn interpretation of Midwest Piping. This action was taken in Shea Chemical Corp.

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[1]Ibid.

[2]110 NLRB 660 (1954).

[3]Ibid.

in which the Board stated, "We now hold that upon presentation of a rival or conflicting claim which raises a real question concerning representation, an employer may not go so far as to bargain collectively with the incumbent (or any other) union unless and until the question concerning representation has been settled by the Board."[1] The Board further reinforced William Penn by making it clear that a rival union's claim must be a valid one in order to invoke Midwest Piping. The Board stated, ". . . the Midwest Piping doctrine does not apply in situations where, because of contract bar or certification year or inappropriate unit or any other established reason, the rival claim and petition does not raise a real representation question.[2] Alternatively put, in order to invoke the Midwest Piping rule, the petitioning union must be claiming to represent an appropriate unit of employees, and its claim must be timely.

The above ruling was found not to apply in G & H Towing Co.,[3] because G & H and the incumbent union had merely extended their previous contract until an election and the time after the election during which the non-incumbent union was filing objections. The Board ruled that G & H and the incumbent union

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[1]121 NLRB 1027 (1958).

[2]Ibid.

[3]168 NLRB 589 (1967).

had merely acted to preserve the status quo, and, therefore, no Midwest Piping violation could be found. However, in Midtown Service Co.[1] the Board held, with the Second Circuit Court concurring, that Shea Chemical did apply because a new agreement containing various improvements was executed by the incumbent union and the employer. Thus, Shea Chemical will not be invoked when the parties to the contract are acting merely to preserve the status quo, but any further negotiations will violate Midwest Piping.

In the midst of these alterations of the Midwest Piping doctrine, a subtle change in definitions occurred. The Board in Novak Logging Co.[2] restated the Midwest Piping rule such that a question of representation could exist whether or not a petition was actually pending before the Board. The Eighth Circuit Court in Iowa Beef Packers, Inc. v. NLRB[3] explicitly agreed with this change in definition when it stated, ". . . while pendency of one union's petition for Board certification may be a prime factor . . . it is not ipso facto determinative."[4] Instead, the Court proposed that Midwest Piping would be violated, ". . . if, at the time of recognition,

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[1]171 NLRB 1306 (1968), 425 F.2d 665 (CA-2, 1970).

[2]119 NLRB 1573 (1958).

[3]331 F.2d 176 (CA-8, 1964).

[4]Ibid.

the employer had actual or constructive knowledge that a real question concerning the representation of his employees existed."[1]

An important point that both William Penn and Shea Chemical emphasize is that for a recognition claim to be valid it must be timely. Timeliness is not really a problem in a situation where there is no present contract and no incumbent union. However, once there is a current contract with a incumbent union several important rules arise. In general, a petition for recognition will not be considered valid if it is filed within one year of a Board conducted representation election. Additionally, the contract itself may act as a bar to a representation election if it meets the following criteria. ". . . the contract must be in writing, properly executed, and binding on the parties; it must be of definite duration and in effect for no more than 3 years; and it must also contain substantive terms and conditions of employment which in turn must be consistent with the policies of the Act. Established Board policy requires that to serve as a bar to an election a contract must be signed by all parties before the rival petition is filed."[2] Accordingly,

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[1]Ibid.

[2]National Labor Relations Board, Fortieth Annual Report of the National Labor Relations Board, (Washington, D.C.: Government Printing Office, 1975), p. 53.

the time period during which a valid petition can be filed is rather narrowly defined. The Deluxe Metal Furniture Co. rule[1] originally established a sixty day insulated period immediately preceding the termination date of the contract. Additionally, a petition would be considered premature if filed more than 150 days prior to the termination date of the contract. Later, in Leonard Wholesale Meats, Inc.[2] this time period was shortened to ninety days leaving a thirty day period for valid petitions to be filed.

The Board specifically applied these rules to the Midwest Piping doctrine in City Cab, Inc.[3] City Cab was found not to have violated 8(a)(2) by executing a new contract with the incumbent union because the challenging union had not filed prior to the sixty day insulated period established in Deluxe Metal. On the other hand, the fact that a claim was established too early (sixteen months prior to the expiration date of the contract) was the reason the Board exempted Gaylord Printing Company[4] from a Midwest Piping violation. The Board emphasized that for a claim to be valid when no

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[1]121 NLRB 995 (1958).

[2]136 NLRB 1000 (1962).

[3]128 NLRB 493 (1960).

[4]135 NLRB 510 (1962).

representation petition has been filed (as in this case) the claim must be active and continuing.[1]

Two other pertinent timing issues also arose in this group of cases. In Guy's Foods, Inc.[2] an incumbent union had negotiated a contract which called for ratification by Guy's employees. After the contract was negotiated but prior to its ratification, a challenging union filed an election petition. The contract was then ratified and enforced by the company. The Board, with the District of Columbia Circuit Court concurring, ruled that the petitioning union's claim was a valid one, and, therefore, the Midwest Piping rule had been violated. The second issue involved the execution of a contract with a victorious union in an election at a time when objections to the election were pending before the Board. The Board ruled that such conduct violated the Midwest Piping rule and the Second Circuit Court affirmed this decision.[3]

The decisions in Shea Chemical and William Penn also emphasized that for a challenging union's recognition claim to be valid it must be predicated on an appropriate unit. Thus, in many cases, prior to a Midwest Piping determination, the Board, as it is empowered to do, must decide a unit question.

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[1]See also Novak Logging Co., 119 NLRB 1573 (1958).

[2]158 NLRB 936 (1966), 379 F. 2d 160 (CA DofC, 1967).

[3]National Container Corp., 103 NLRB 1544 (1953), 211 F. 2d 525 (CA-2, 1954).

The various issues involved are discussed below

In a very early case, Roegelein Provision Co.[1], the Board was required to decide if a multiemployer or a single-employer unit was proper. Roegelein had entered into a contract with the incumbent union which represented a multi-employer unit while another union's petition for a single-employer unit was pending. In relation to this issue the Board stated, ". . . absent an affirmative showing of the appropriateness of the new unit sought, an employer does not violate the law by continuing to recognize the incumbent union."[2] On the contrary, in this case the Board found the appropriateness of the multiemployer unit to be affirmatively established. Accordingly, the challenging union's claim was not found to be a valid one, and, thus, Midwest Piping was held to be inapplicable. In Boy's Market, Inc.[3] the Board held a two-employer unit which was part of a larger multi-employer association to be an appropriate one for certain snackbar employees. These employees had not previously been included in the multiemployer unit. Therefore, the execution of a contract with the Hotel and Restaurant Employees which

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[1]99 NLRB 830 (1952).

[2]Ibid.

[3]156 NLRB 105 (1965), 370 F.2d 205 (CA-9, 1966).

were claiming to represent only the two-employer unit was not in violation of Midwest Piping. The Ninth Circuit Court agreed with this line of reasoning.

However, in Holyoke Food Mart[1] the Board made it clear that if a contract was executed at a time when the appropriate unit was still in question, a violation would occur. In this case, the company walked out of a representation hearing and recognized the Meat Cutters on a card check. The Meat Cutters had claimed a fourteen store unit, but the Retail Clerks had claimed single units in three stores. The company maintained in this case that the Board should not make a decision on 8(a)(2) until the appropriate unit was decided. If the appropriate unit turned out to be the fourteen store unit, Holyoke argued no violation could be found. Since a clear question of representation existed at the time recognition was granted, the Board held that Holyoke had illegally assisted the Meat Cutters.

In Belleville News Democrat[2] the Board was once again called upon to decide a case involving multiemployer unit questions. In this case, the company had unequivocally withdrawn from a multiemployer unit, but had imposed the multiemployer contract on his employees at a time when Local 38 of

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[1]191 NLRB 470 (1971).

[2]195 NLRB 431 (1972).

the Printing Pressmen was requesting recognition. The union representing the multiemployer unit disclaimed any interest in contesting Local 38's claim. Under these circumstances the Board held that Belleville News Democrat had clearly violated Midwest Piping.

Board decisions regarding appropriate bargaining units quite often rely on determining whether or not extension of contract coverage can truly be considered an accretion. Generally, if the Board finds that extension of an incumbent union's contract to cover a previously uncovered group of employees is an accretion, then a challenging union's representation claim would not be considered a valid one, and, therefore, Midwest Piping would not be applicable. However, if the Board ruled that no accretion had occurred, the challenging union's claim would be valid and the Midwest Piping rule would be invoked. Factors which the Board considers in accretion cases are, ". . . functional integration of business, centralized control of management, similarity of working conditions, collective bargaining history, local power to hire and fire, lack of employee interchange, and geographical distance."[1]

Application of the above guidelines occurred in Hudson

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[1]NLRB v. Sunset House, 415 F.2d 545, 546 (CA-9, 1969).

Berlind Corporation.[1] The respondent had acquired from different companies two new warehouses represented by different unions. These two warehouses were to be merged and operated at a third facility. Hudson Berlind decided to recognize and negotiate with the union which represented the warehouse with the largest number of employees. A contract was executed with this union prior to transfer of operations, and without notification to the smaller union. The company claimed that there was no real question concerning representation due to the fact that the larger union (thirty-one members, ten of which resigned rather than transfer) was accreting the smaller union (ten members all of which remained after the transfer). The Second Circuit Court agreed with the Board that the new plant represented a separate unit and that no accretion had occurred. Additionally, the Court stated, ". . . this numerical superiority was not sufficiently predominate to remove any real question concerning representation."[2] Thus Hudson Berlind had violated Midwest Piping.[3]

A similar question the Board is called upon to answer

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[1]203 NLRB 421 (1973), 494 F.2d 1200 (CA-2, 1974).

[2]Ibid., p. 1203.

[3]See also Newspaper Agency Corp., 201 NLRB 480 (1973). 505 F.2d 335 (CA DofC, 1974); Airmatics System, 209 NLRB 71 (1974); White Front Sacramento, 166 NLRB 44 (1957); and Schreiber Trucking, 148 NLRB 697 (1964).

is whether or not an employer which acquires a new company is a successor to the previous owner. If the Board finds a new owner to be a successor, the new owner is bound by the previous owner's contract. If, on the other hand, a new owner alters operations sufficiently to create a distinctly new unit, a real question concerning representation can be created, thus, invoking the Midwest Piping rule. Factors which the Board considers in determining whether or not a new employer is a successor are use of, ". . . the same facilities and work force to produce the same basic products for essentially the same customers in the same geographic area."[1]

The above principles were applied in Plant & Field Service Corp.[2] The respondent in this case replaced another employer as the maintenance contractor at an oilfield operation and extended its contract with the Seafarers to cover its workers at the new facility. The Board found that the respondent was not a successor and was not obligated to honor the former employer's contract with the Oilfield Maintenance Workers. Thus, Midwest Piping was found to be inapplicable

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[1] Security-Columbian Banknote Company, 215 NLRB 450 (1974).

[2] 184 NLRB 849 (1970).

because Plant & Field Service had a valid contract with the Seafarers and no real question of representation existed.[1]

A similar difficulty occurs when an employer acquires a new plant and begins to secure the necessary complement of workers to operate the facility. In Fruehauf Trailer Co.[2] two plants were being consolidated into a single new facility. One plant had been represented by the United Auto Workers and the other by the Allied Industrial Workers. At a time when only five employees were actually working at the new location (eventually 100 employees were to be hired) Fruehauf extended its contract with the Allied Industrial Workers to cover the new plant. Interestingly, Fruehauf had also continued to offer to negotiate with the United Auto Workers regarding any new operation the respondent might initiate within close proximity to that plant. The majority of the Board ruled on this basis that the Auto Workers had a valid claim, and, thus, Fruehauf's recognition of the Allied Industrial Workers constituted prohibited assistance under the Act.[3] Chairman McCulloch chose not to rely on this line of reasoning because a representative complement of workers was not employed at the time the contract

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[1]See also N.L.R.B. v. Security-Columbian Banknote Co., 541 F.2d 135 (CA-3, 1976).

[2]162 NLRB 195 (1966).

[3]See also A.O. Smith, Corp., 122 NLRB 321 (1958).

was extended. However, a unanimous Board agreed that the extension of the contract constituted premature recognition and, consequently, unlawful support under the Act. In a recent case of similar facts--Plastics Plant, Plumbing Fixtures Division[1]--an Administrative Law Judge concurred with Chairman McCulloch's views in Fruehauf. According to the Administrative Law Judge, "If, because of an insufficient complement of employees and substantial lack of normal production, there could not be a "real question concerning representation," then I fail to see how Midwest Piping Co. . . . would be involved in this case."[2] The Board concurred with this rationale.

Recognition of a challenging union while the incumbent union is out on strike is another circumstance where the question of a valid claim arises. In Twin County Transit Mix, Inc.[3] the respondent recognized a rival union while his employees were conducting an economic strike. All the strikers had been replaced before the respondent executed the new contract. However, the Board pointed out that the economic strikers were still employees under the Act, and, therefore, their claim was

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[1]214 NLRB 629 (1974).

[2]Ibid., p. 633.

[3]137 NLRB 1708 (1962).

a real and valid one. Hence, the signing of a contract under these circumstances violated Midwest Piping.[1]

One point the Board has continually emphasized is that a naked or specious claim of representation does not invoke the Midwest Piping doctrine. In Robert Hall Gentilly Road Corp.[2] the Retail Clerks were competing with the Amalgamated Clothing Workers to represent the respondent's employees. The Retail Clerks requested a representation election, but it had only twenty-four authorization cards signed out of 155 employees. The Regional Director asked the Retail Clerks to submit additional cards or withdraw its petition. The Retail Clerks withdrew its petition but informed the Regional Director that it would like to participate in any representation election that might be held. The Amalgamated Clothing Workers on the same day that the Retail Clerks withdrew its petition informed the Regional Director that it did not wish to proceed to an election. The next day the Clothing Workers approached the respondent and asked for recognition on the basis of a third party card check which was completed six days later. The Clothing Workers had 114 cards signed and on this basis the respondent recognized them. The Administrative Law Judge held the recognition to be

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[1]See also Metropolitan Millwork Inc., 138 NLRB 1482 (1962), 326 F. 2d 49 (CA-2, 1963); and Tri-W Construction Co., 139 NLRB 1286 (1962).

[2]207 NLRB 692 (1973).

in violation of the Midwest Piping rule. The Board reversed the Administrative Law Judge, holding that the Retail Clerks were not engaged in an active, ongoing organizational campaign. Consequently, the Retail Clerks' representation claim was a naked one which eliminated the application of Midwest Piping.[1]

Fourteen Board decisions regarding the Midwest Piping doctrine were reversed by Circuit Courts of Appeal. Twelve of these decisions were founded on one basic premise which was clearly expressed by the Seventh Circuit Court in NLRB v. Indianapolis Newspapers when it stated, ". . . once indisputable proof of majority choice is presented to the employer, the Act imposes on him a duty to award recognition to the agent so chosen by his employees."[2] Thus, indisputable evidence of majority status invalidates the Midwest Piping requirement of neutrality, and recognition may be granted by the employer.[3]

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[1]See also Coronet Manufacturing Co., 133 NLRB 641 (1961).

[2]210 F. 2d 501, 504 (CA-7, 1954).

[3]See also Pittsburgh Valve Co., 114 NLRB 193 (1955), 234 F. 2d 565 (CA-4, 1956); Cleaver-Brooks Manufacturing Corp., 120 NLRB 1135 (1958), 264 F. 2d 637 (CA-7, 1959), cert. den. 361 U.S. 817 (1959); Swift and Co., 128 NLRB 732 (1960), 294 F. 2d 285 (CA-3, 1961); Iowa Beef Packers, Inc. 144 NLRB 615 (1963), 331 F. 2d 176 (CA-8, 1964); Sturgeon Electric Co., Inc., 166 NLRB 210 (1967), 419 F. 2d 51 (CA-10, 1969); American Bread Co., 170 NLRB 85 (1968), 411 F. 2d 147 (CA-6, 1969); Peter Paul, Inc., 185 NLRB 281 (1970), 467 F. 2d 700 (CA-9, 1972); Modine Manufacturing Co., 186 NLRB 629 (1970), 453 F. 2d 292 (CA-8, 1971); Playskool, Inc., 195 NLRB 560 (1972), 477 F. 2d 66 (CA-7, 1973); Kona Surf Hotel, 201 NLRB 139 (1973), 507 F. 2d 411 (CA-9, 1974); and Suburban Transit Corp., 203 NLRB 465 (1973), 499 F. 2d 78 (CA-3, 1974).

Another important reversal occurred in the Air Master Corp. case.[1] During the negotiating process, an overwhelming majority of Air Master's employees signed cards disaffiliating themselves from the incumbent union and joining a challenging union. The fact that the challenging union was recognized by Air Master coupled with the fact that the former incumbent union's international still claimed representational status led the Board to ruling that Air Master had violated Midwest Piping. However, the Third Circuit Court held that the overwhelming defection of employees from the former incumbent union, invalidated the international's representation claim and made Midwest Piping inapplicable. The Board acceded to this line of reasoning in cases following the Air Master reversal.[2] An additional factor pointed to in the Air Master reversal is that a Board election is not necessarily required to establish the representational status of two or more competing unions. However, the Sixth Circuit Court had already established and emphasized that viewpoint in its denial of the Board's petition for enforcement in Wheland Company.[3] The Court emphasized that employees

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[1]142 NLRB 181 (1963), 339 F.2d 553 (CA-3, 1964).

[2]Sinclair Manufacturing Co.; 178 NLRB 182 (1969), American Cystoscope Makers, 190 NLRB 590 (1971); and Environmental Control Systems, 190 NLRB 594 (1971).

[3]120 NLRB 814 (1958), 271 F.2d 122 (CA-6, 1959).

have a right to representation prior to the holding of a Board election, and that an employer is obligated to bargain with a majority representative, ". . . unless the employer has a good faith doubt as to its majority status."[1] The final reversal occurred in Traub's Market[2], but the Court provided no written opinion for analysis.

Majority Difficulties

This section will deal with cases in which the question of company assistance to unions through contracts derives from alleged recognition of minority unions or unions with tainted majorities. The Board had consistently held that recognizing or contracting with minority unions provides them with assistance which violates Section 8(a)(2) of the Act. Similarly, recognizing or contracting with a union which has obtained a tainted majority also violates 8(a)(2).

The Board dealt with minority union problems in the Harrison Sheet Steel Company case[3], an early decision which was upheld by the Seventh Circuit Court. Harrison Sheet Steel clearly favored the Teamsters over any other union. This was indicated in several ways, the most prominent of which was the

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[1]Ibid., p. 124.

[2]205 NLRB 787 (1973), 505 F. 2d 730 (CA-3, 1974).

[3]94 NLRB 81 (1951), 194 F. 2d 407 (CA-7, 1952).

conduction of an election. The employees were assembled at various places and handed pieces of paper. They were told to vote yes if they wanted to be represented by the Teamsters, and no if they wanted the plant to close down. Interestingly, the majority voted no. Not to be discouraged, Harrison recognized the Teamsters anyway. The Board found such recognition, without question, to be in violation of Section 8(a)(2).[1]

In a more recent case, Vernon Devices, Inc.[2], the Board dealt with the same basic difficulty. Vernon's employees had refused to sign authorization cards for Local 531 of the Teamsters. Local 531 requested recognition in spite of these refusals, and Vernon granted it and promptly executed a contract. At the time, Local 445 of the Teamsters had a valid majority of signed authorization cards. The Board ruled that Vernon had violated Section 8(a)(2) by recognizing and contracting with a minority union.[3]

In 1961, Bernhard-Altmann Texas Corporation[4] an

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[1]See also Eastern Massachusetts Street Railway Company, 110 NLRB 1963 (1954), 235 F. 2d 700 (CA-1, 1956).

[2]215 NLRB 475 (1974).

[3]See also Master Engineering Corporation, 215 NLRB 376 (1974); and Milco Undergarment Company, 106 NLRB 767 (1953), 212 F. 2d 801 (CA-3, 1954).

[4]122 NLRB 1289 (1959), 280 F. 2d 616 (CA DofC, 1960), 366 U.S. 731 (1960).

important case regarding recognition of minority unions reached the Supreme Court. The facts of this case began in 1956 when the International Ladies' Garment Workers' Union began an organization campaign in Bernhard-Altmann's San Antonio plant. During the campaign a number of workers went on strike in protest of a wage reduction, and while on strike signed ILGWU authorization cards. During the strike (which was not organizational in nature), the ILGWU began negotiations with Bernhard-Altmann in New York City where both parties' home offices were located. The union claimed to have obtained a valid majority of signed authorization cards. This assertion was accepted by the company, recognition was granted, and a contract was executed. The General Counsel was able to prove conclusively that at the time recognition was granted the ILGWU did not represent a majority of workers. However, none of the parties disputed the fact that at the time the contract was formally executed the ILGWU represented a clear majority in the appropriate bargaining unit. The Board held that recognizing a minority union was illegal assistance in violation of Section 8(a)(2). It also found irrelevant the fact that between recognition and formal execution of a contract the ILGWU had obtained a majority. The Circuit Court of the District of Columbia affirmed this ruling and was later upheld by the Supreme Court. In enforcing the Board's order the Supreme Court stated, ". . . such acquisition of majority status itself might indicate that the recognition secured by the August 30

agreement afforded petitioner a deceptive cloak of authority with which to persuasively elicit additional employee support."[1] The fact that the employer had recognized the ILGWU in good faith was also found to be irrelevant by the Supreme Court.[2]

The Keller Plastics Eastern, Inc. decision[3] was very closely related to Bernhard-Altmann. In this case Keller Plastics recognized a union which had originally obtained a valid majority. In the interim between recognition and the execution of a contract, the union lost its majority. The company was unaware of this occurrence, and in good faith signed a three year contract with the union. Thus, the company was accused of contracting with a minority union, and on the basis of the above facts the General Counsel contended that the Bernhard-Altmann rule was controlling. However, the Board pointed out that in Bernhard-Altmann recognition had been invalidly granted while in this case recognition was perfectly proper. Under these circumstances, certification must be honored for a reasonable period--usually one year in the absence of unusual circumstances. Consequently, Keller Plastics was found not to have violated 8(a)(2).

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[1] Ibid., p. 736.

[2] See also Clegg Machine Works, 129 NLRB 1243 (1961), 304 F.2d 168 (CA-8, 1962); and Hi-Temp, Inc., 204 NLRB 1098 (1973), 503 F.2d 583 (CA-7, 1974).

[3] 157 NLRB 583 (1966).

Bowman Transportation Inc.,[1] another important case which reached the Supreme Court, also involved company recognition of a minority union. The Board, the Circuit Court, and the Supreme Court all agreed that Bowman had violated the Act by negotiating a contract with the United Mine Workers before any employees had actually authorized it as their representative. The point of contention was the Board's remedy for this violation. The Board had issued its standard cease-and-desist order directing the company to withdraw and withhold recognition from the Mine Workers unless and until it was certified by the Board as the employees' exclusive representative. The difficulty arose from the fact that the United Mine Workers was not in compliance with sections 9(f), (g) and (h) making it ineligible for Board certification. Since the United Mine Workers could not be certified by the Board, the effect of the remedy was to disestablish the union--a remedy employed by the Board only in cases where a union is dominated by a company. However, the Board had found the Mine Workers to be an assisted union not a dominated union. The District of Columbia Circuit Court overturned this remedy leaving it to the offending employer and the assisted union to decide when the effects of the unfair labor practices had dissipated and, therefore, when to hold an election. The

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[1]112 NLRB 387 (1955), 237 F.2d 585 (CA DofC, 1956), 355 U.S. 453 (1958).

Supreme Court agreed that the Board cannot, through the requirement of a Board certification, make noncompliance a reason for denying the employees the right to choose the assisted union at an election . . ."[1] On the other hand, the Supreme Court did not agree that the offending company and union be allowed to choose when an election should be held. Instead, the Court stated, "Nothing in the subsections . . . is a barrier to the conduct by the Board of an election not followed by a certification . . ."[2] According to the Court, the Board could conduct an election and in the case of a noncomplying union certify only the arithmetical results after which the employer could grant exclusive recognition.

Another important question involving majority difficulties is that of whether or not at the time of recognition a company is employing a representative complement of workers. Cen-Vi-Ro Pipe Corporation[3] typifies Board decisions on this issue. The General Laborers Union had legitimately executed a contract to represent Cen-Vi-Ro's workers from 1964 to 1966. After the contract was executed, the plant was forced to close down because of insufficient work. However, in 1968 the plant was reactivated and before any employees were hired a new

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[1]Ibid., p. 462.

[2]Ibid., p. 461.

[3]180 NLRB 344 (1969), 457 F.2d 775 (CA-9, 1972).

collective bargaining contract was entered into by the company and the General Laborers Union. The Board found this to be in violation of 8(a)(2). The Ninth Circuit Court concurred stating, "The Act guarantees to employees the right to an uncoerced selection of their bargaining representatives. By entering into a collective bargaining agreement containing a union security clause before the employees were hired . . . the Company and the Union illegally interfered with that right."[1]

In Hayes Coal Company[2] the Board clearly specified the requisites to a finding of premature recognition. In this case Hayes Coal Company was newly purchased and at the time of contract execution was operating one production line which included ten men. Six of these men had signed valid authorization cards. After six months another ten man shift was added. The complaining union claimed that premature recognition had been granted in the initial six month period because a representative complement of workers had not been employed at that time. The Board disagreed with this position and stated, "The correct test is whether, at the time of recognition, the jobs or job classifications designated for the operation involved are filled or substantially filled and the operation is in normal or

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[1]Ibid., p. 776.

[2]197 NLRB 1162 (1972).

substantially normal production."[1] Thus, as long as the above conditions are satisfied it is perfectly proper for a company and a union to execute a contract.[2]

Illegal contracts in support of a union can also arise from company recognition of a union which has obtained a tainted majority of employees. Basically, any form of coercion which would bring into question the validity of signed authorization cards or election results and which culminates in recognition of a thusly assisted union results in an 8(a)(2) violation finding by the Board. Predominantly, such coercion takes the general form of discriminatory treatment of employees or financial and material support of a favored union.[3]

Howard Creations, Inc.[4] provides a good example of company recognition of a union on the basis of tainted authorization cards. The president of Howard Creations disliked the Amalgamated Clothing Workers and consequently when they began organizing his plant, he threatened to close down the plant and told his employees that he would not let the Amalgamated

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[1]Ibid.

[2]See also Fraser & Johnston Company, 189 NLRB 142 (1971), 469 F. 2d 1259 (CA-9, 1972); and W.L. Rives Company, 136 NLRB 1050 (1962), 328 F. 2d 464 (CA-5, 1964).

[3]See Chapter Four and Chapter Five.

[4]212 NLRB 179 (1974).

represent them. In support of this position, the company allowed rival unions to solicit on company property during company time while at the same time prohibiting the Amalgamated from doing the same. The company even provided an interpreter for the rival union organizers as most of Howard's employees spoke only Spanish. On the basis of authorization cards obtained in this manner, Howard executed a contract with the Amalgamated's rivals. On this point the Board referred to NLRB v. Midtown Service Company[1] where the Second Circuit Court stated, "Once majority status is tainted, to uphold a contract negotiated with it thereafter would be to reward the employer for its misconduct." Thus, contracting with a union which has not obtained an uncoerced majority is in violation of 8(a)(2).[2]

Of the Board decisions regarding majority difficulties which were reversed by Circuit Courts the predominant reason was insubstantial evidence to support a finding of coercion

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[1] 425 F. 2d 665, 669 (CA-2, 1970).

[2] See also Malcolm Konner, Inc., 141 NLRB 541 (1963), 338 F. 2d 972 (CA-3, 1964); Bernhardt Brothers Tugboat Service, Inc., 142 NLRB 851 (1963), 328 F. 2d 757 (CA-7, 1964); and Clement Brothers Company, Inc., 165 NLRB 698 (1967), 407 F. 2d 1027 (CA-5, 1969).

on the company's part.[1] In addition, one Board ruling was overturned because the Board had based its decision on an inappropriate unit.[2] Finally, the Board's illegal recognition ruling in Stewart-Warner,[3] was rejected by the Fourth Circuit Court because evidence clearly established that Stewart-Warner had properly recognized the Electrical Workers even though the Board election which had established their majority was being challenged at the time. The Court held that Stewart-Warner had adequately ascertained the majority status of the Electrical Workers and thus the execution of a contract was perfectly proper.

Union Security

Basically there are two sources of illegality connected with union security clauses. The first results from the signing of an illegal contract (discussed in the previous two sections) which includes what might otherwise be considered a

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[1]See Lake City Foundry Co., 173 NLRB 1081 (1968), 432 F.2d 1162 (CA-7, 1970); Majestic Weaving Co., 147 NLRB 859 (1964), 355 F.2d 854 (CA-2, 1966); Englander Company, Inc., 118 NLRB 707 (1957), 260 F.2d 67 (CA-9, 1959); Continental Distilling Sales Co., 145 NLRB 820 (1964), 348 F.2d 246 (CA-7, 1965); and Gulfcoast Transit Company, 135 NLRB 185 (1962), 332 F.2d 28 (CA-5, 1964); Chicago Rawhide Manufacturing Company, 105 NLRB 727 (1953), 221 F.2d 165 (CA-7, 1955); Valentine Sugars, Inc., 102 NLRB 313 (1953), 211 F.2d 317 (CA-5, 1954); and GEM International, Inc., 137 NLRB 1343 (1962), 321 F.2d 626 (CA-8, 1963).

[2]Michigan Advertising Distributing Company, 134 NLRB 1289 (1961), 316 F.2d 145 (CA-6, 1963).

[3]94 NLRB 607 (1951), 194 F.2d 207 (CA-4, 1952).

legal union security clause. The second results from the inclusion of an illegal union security clause in a contract which in all other respects would be legal. Since other causes of illegal contracts were discussed in the previous two sections, this section will be devoted specifically to union security clauses which on their own merit provide illegal assistance to a union.

Essentially there are three sections which can make a union security clause illegal and in violation of section 8(a)(2). The first is to maintain an illegal closed shop. The second is to require union membership prior to the expiration of the thirty day grace period granted in section 8(a)(3). The third involves difficulties with dues checkoff authorizations.

In American Dredging Company, the Board held that the maintenance of a closed shop provided illegal assistance to an incumbent union in violation of 8(a)(2). This decision was appealed to the Third Circuit Court where it was upheld. The Circuit Court emphatically held that American Dredging had violated 8(a)(2), ". . . by maintaining and giving effect to illegal closed shop hiring provisions in the collective bargaining contract between respondent and the union . . ."[1]

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[1]123 NLRB 139 (1959), 276 F.2d 286, 287 (CA-3, 1960).

Failure to allow the required thirty day grace period was the cause of charges being filed in Campbell Soup Company[1] and Western Building Maintenance Company[2]. In each of these cases the Board ruled that failure to allow the thirty day grace period provided incumbent unions with unlawful support. The Ninth Circuit affirmed both of these rulings.

Several difficulties have arisen from dues deduction actions taken by employers. In Seven-Up Bottling Company of Sacramento[3] dues deductions were made without contractual support and were, therefore, illegal under section 8(a)(2). This ruling was confirmed in the Ninth Circuit Court. In Hope Industries[4] the company decided to deduct union dues without voluntary authorization, an action which the Board found clearly in violation of 8(a)(2). The most difficult ruling involving dues authorization is contained in the Penn Cork & Closures, Inc. decision.[5] In this case a union security

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[1]152 NLRB 1645 (1965), 378 F.2d 259 (CA-9, 1967).

[2]162 NLRB 779 (1967), 402 F.2d 775 (CA-9, 1968).

[3]165 NLRB 607 (1967), 420 F.2d 495 (CA-9, 1969).

[4]198 NLRB 853 (1972).

[5]156 NLRB 411 (1965), 376 F.2d 52 (CA-2, 1967), cert. den. 389 U.S. 843 (1967).

provision in the contract was overturned in a section 9(e)(1) election. Afterwards, the company continued to check off dues despite revocation requests on the part of a number of employees. However the Board, with the Second Circuit Court concurring, pointed out that the primary reason for rescinding a union security provision would be to avoid payment of dues, and that, ". . . recission of the union security clause would be of little benefit if it did not provide relief from continued payment of union dues . . ."[1] Thus, such an action provides illegal support to a union in violation of 8(a)(2).

The most important decision involving union security occurred in the Bryan Manufacturing Company case.[2] In this case a contract containing a union security clause was signed with a minority union. Ten months after the contract was signed the unfair labor practice complaint was filed. The Board with the District of Columbia Circuit Court affirming ruled that Section 10(b)--the six month limitation statute--did not preclude the finding of an 8(a)(2) violation in the instant case. According to the Board's and the Circuit Court's rationale the enforcement of the union security provision in the contract constituted continuing violation of the Act

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[1]Ibid., p. 55.

[2]119 NLRB 502 (1957), 264 F.2d 575 (CA DofC, 1959), 362 U.S. 411 (1960).

within the six month limitation period. However, in 1960 the Supreme Court reversed this ruling. According to the majority decision, ". . . a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the Section 10(b) proviso."[1] Simply put, the violation ruling in this case relied on events which occurred outside the six month limitation. Justice Whittaker and Frankfurter dissented from the majority on this issue. The flavor of their dissent is contained in the following statement by Justice Whittaker. "Surely, the continuing offense of enforcing a contract, made by an employer with a union which was not of the employees' "own choosing," was not intended by Congress to be left without a remedy."[2]

In this group of cases there was another important reversal of a Board decision. This occurred in the Industrial Towel and Uniform Service case.[3] A worker for the respondent company had executed a check off authorization and then quit work due to ill health. Three years later the worker was rehired and dues were checked off under the old signature. The Board ruled that the rehired worker was a new employee and,

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[1]Ibid., p. 422.

[2]Ibid., p. 439.

[3]195 NLRB 1121 (1972), 473 F.2d 1258 (CA-6, 1973).

consequently, the dues check off was in violation of 8(a)(2). The Circuit Court reversed this ruling, and found instead that the rehired worker was not a new employee and had not taken the proper steps to revoke the check off authorization. Thus, the respondent company had not violated the Act.

Summary and Conclusions

Of all the difficulties surrounding Section 8(a)(2) of the Taft-Hartley Act, those involving union contracts and recognition have been the most numerous and the most complex. For example, in the twenty-five years under study, the Midwest Piping doctrine has undergone several significant changes resulting in a complicated rule of law for the Board to follow. Additionally, cases involving majority difficulties have presented continuing problems for the Board and the Courts. Finally, enforcement of a union security clause which illegally supports a union has been an ongoing issue in many cases and persists in being a troublesome matter.

CHAPTER VII

THE FOUR MAJOR GROUPS OF CASES AND THEIR RESULTING UNION MIXES

In each of the previous four chapters, case totals and percentage of 8(a)(2) violations found by the National Labor Relations Board were briefly discussed. This chapter will reexamine those totals according to the type of unions involved in each case. There are three possible union mixes included in each 8(a)(2) case. One mix consisted of an independent union which competed against an affiliated union. This was generally thought of as the traditional company union case. Another possibility was a case wherein two affiliated unions were competing against one another. The final alternative was a case in which an individual filed an 8(a)(2) charge against a single union.

Table 12 provides a breakdown of all cases involving those issues discussed in Chapter Three which related to company domination of a union. Of the total 271 cases, only twenty-six were the result of individually filed charges, which represented 9.6 percent of the total. Cases involving two affiliated unions were slightly more numerous occurring in fifty-four instances which represented twenty percent of the total. Not unexpectedly, the most numerous type of case found in this group was the standard company union case where an

TABLE 12

Total Number and Percentages of 8(a)(2) Cases Involving Issues Relating to Company Domination of a Union Which Were Heard by the National Labor Relations Board, 1950-1974, According to the Mix of Unions Contained in Each Case

Year	2 affiliated		1 affiliated 1 unaffiliated		Individual Filed Charges		Total
	Total	% of Yearly Total	Total	% of Yearly Total	Total	% of Yearly Total	
1950	2	18.2	9	81.8	0	0.0	11
1951	2	22.2	7	77.8	0	0.0	9
1952	2	18.2	8	72.7	1	9.1	11
1953	2	11.1	16	88.9	0	0.0	18
1954	1	14.3	6	85.7	0	0.0	7
1955	0	0.0	3	100.0	0	0.0	3
1956	0	0.0	1	100.0	0	0.0	1
1957	1	16.7	4	66.7	1	16.7	6
1958	1	12.5	5	62.5	2	25.0	8
1959	2	40.0	3	60.0	0	0.0	5
1960	3	20.0	8	53.3	4	26.7	15
1961	3	20.0	11	73.3	1	6.7	15
1962	1	5.3	13	68.4	5	26.3	19
1963	0	0.0	6	100.0	0	0.0	6
1964	0	0.0	17	94.4	1	5.6	18
1965	4	20.0	16	80.0	0	0.0	20
1966	3	30.0	6	60.0	1	10.0	10
1967	2	14.3	10	71.4	2	14.3	14
1968	4	30.8	6	46.2	3	23.1	13
1969	4	25.0	10	62.5	2	12.5	16
1970	4	50.0	4	50.0	0	0.0	8
1971	4	28.6	9	65.3	1	7.1	14
1972	5	41.7	7	58.3	0	0.0	12
1973	2	28.6	4	57.1	1	14.3	7
1974	2	40.0	2	40.0	1	20.0	5
Total	54	20.0	191	70.5	26	9.6	271

Source: Data Compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington: Government Printing Office, 1950 to 1974).

independent union opposed an affiliated one. This union mix occurred in 70.5 percent of all cases in this group (191 of 271). On a yearly basis, the highest percentage of cases involving independent unions occurred in 1955, 1956, and 1963--all years in which 100 percent of the cases consisted of this traditional mix. The lowest percentage (forty percent) took place in 1974, a year in which only five of this type case materialized.

Chapter Four dealt with issues relating to discriminatory treatment of employees. A breakdown of these cases can be found in Table 13 where it can be seen that these issues arose in a total of 254 cases. The traditional company union case (an affiliated union opposing an independent union) cropped up in 112 instances which accounted for 44.1 percent of the total. Interestingly, this was a much smaller percentage than that found in the domination issues table. Two opposing affiliated unions were involved in 111 cases or 43.7 percent of the total. Additionally, individually filed charges resulted in thirty-one cases which amounted to 12.2 percent of the total. Clearly, cases involving two affiliated unions were much more important in this group of cases than in the domination group.

On the other hand, examination of Table 14 reveals that the traditional company union case made up a substantial percentage (65.8 percent) of all financial support cases. This was not to be unexpected due to the relatively similar nature of

TABLE 13

Total Number and Percentages of 8(a)(2) Cases Involving Issues Relating to Discriminatory Treatment of Employees Which Were Heard by the National Labor Relations Board, 1950-1974, According to the Mix of Unions Contained in Each Case

Year	2 affiliated		1 affiliated 1 unaffiliated		Individual Filed Charges		Total
	Total	% of Yearly Total	Total	% of Yearly Total	Total	% of Yearly Total	
1950	4	66.7	2	33.3	0	0.0	6
1951	7	53.8	5	38.5	1	7.7	13
1952	1	16.7	4	66.7	1	16.7	6
1953	5	29.4	12	70.6	0	0.0	17
1954	1	25.0	0	0.0	3	75.0	4
1955	1	33.3	2	66.7	0	0.0	3
1956	0	0.0	1	100.0	0	0.0	1
1957	1	25.0	3	75.0	0	0.0	4
1958	2	33.3	1	16.7	3	50.0	6
1959	2	22.2	3	33.3	4	44.4	9
1960	8	38.1	8	38.1	5	23.8	21
1961	5	38.5	7	53.8	1	7.7	13
1962	4	40.0	3	30.0	3	30.0	10
1963	5	55.6	4	44.4	0	0.0	9
1964	6	33.3	10	55.6	2	11.1	18
1965	2	22.2	7	77.8	0	0.0	9
1966	7	58.3	4	33.3	1	8.3	12
1967	7	53.8	5	38.5	1	76.9	13
1968	4	44.4	5	55.6	0	0.0	9
1969	9	69.2	3	23.1	1	7.7	13
1970	8	61.5	5	38.5	0	0.0	13
1971	5	50.0	5	50.0	0	0.0	10
1972	3	30.0	5	50.0	2	20.0	10
1973	6	60.0	3	30.0	1	10.0	10
1974	8	53.3	5	33.3	2	13.3	15
Total	111	43.7	112	44.1	31	12.2	254

Source: Data Compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington: Government Printing Office, 1950 to 1974).

TABLE 14

Total Number and Percentages of 8(a)(2) Cases Involving Issues Relating to Financial and Material Support of a Union Which Were Heard by the National Labor Relations Board, 1950-1974, According to the Mix of Unions Contained in Each Case

Year	2 affiliated		1 affiliated 1 unaffiliated		Individual Filed Charges		Total
	Total	% of Yearly Total	Total	% of Yearly Total	Total	% of Yearly Total	
1950	3	42.9	4	57.1	0	0.0	7
1951	4	33.3	8	66.7	0	0.0	12
1952	1	12.5	6	75.0	1	12.5	8
1953	1	5.6	17	94.4	0	0.0	18
1954	1	16.7	5	83.3	0	0.0	6
1955	3	42.9	4	57.1	0	0.0	7
1956	1	50.0	1	50.0	0	0.0	2
1957	1	25.0	3	75.0	0	0.0	4
1958	1	33.3	2	66.7	0	0.0	3
1959	2	50.0	1	25.0	1	25.0	4
1960	5	35.7	7	50.0	2	14.3	14
1961	6	42.9	8	57.1	0	0.0	14
1962	4	23.5	13	76.5	0	0.0	17
1963	3	33.3	6	66.7	0	0.0	9
1964	1	11.1	7	77.8	1	11.1	9
1965	3	25.0	9	75.0	0	0.0	12
1966	5	41.7	7	58.3	0	0.0	12
1967	5	35.7	9	64.3	0	0.0	14
1968	3	30.0	6	60.0	1	10.0	10
1969	6	46.2	7	53.8	0	0.0	13
1970	1	16.7	5	83.3	0	0.0	6
1971	2	28.6	5	71.4	0	0.0	7
1972	2	28.6	5	71.4	0	0.0	7
1973	4	57.1	2	28.6	1	14.3	7
1974	3	50.0	3	50.0	0	0.0	6
Total	71	31.1	150	65.8	7	3.1	228

Source: Data Compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington: Government Printing Office, 1950 to 1974).

domination and financial support. However, this percentage was not nearly as great as that which occurred in the domination cases. Additionally, 31.1 percent of the total 228 cases in this group involved two opposing affiliated unions, and a mere 3.1 percent were the result of individually filed charges.

Contract difficulties were encountered in more 8(a)(2) cases than any of the three previously discussed types of cases. A breakdown of these 468 cases is presented in Table 15. The traditional company union case accounted for only eighty-nine total or nineteen percent of the 468. Cases resulting from individually filed charges amounted to only 18.2 percent of the total (eighty-five of 468). Significantly, 294 cases involved two competing, affiliated unions. This was 62.8 percent of the total. Interestingly, for the years 1950-1959, the average number of cases deriving from two affiliated unions was seven per year. For the fifteen years after 1959, the average was fifteen. In the same time periods, the percentages go from averaging 47.4% per year to 80%. Clearly, in this category, cases involving two competing affiliated unions have through the years become much more important. Evident also was the fact that this was the only category of cases studied in which cases involving two affiliated unions outnumbered those involving independent unions.

From the above discussion, it can be concluded that

TABLE 15

Total Number and Percentages of 8(a)(2) Cases Involving Issues Relating to Contract Difficulties Which Were Heard by the National Labor Relations Board, 1950-1974, According to the Mix of Unions Contained in Each Case

Year	2 affiliated		1 affiliated 1 unaffiliated		Individual Filed Charges		Total
	Total	% of Yearly Total	Total	% of Yearly Total	Total	% of Yearly Total	
1950	4	40.0	5	50.0	1	10.0	10
1951	9	45.0	2	10.0	9	45.0	20
1952	7	43.8	5	31.3	4	25.0	16
1953	9	42.9	8	38.1	4	19.0	21
1954	7	63.6	2	18.2	2	18.2	11
1955	12	57.1	4	19.0	5	23.8	21
1956	1	50.0	0	0.0	1	50.0	2
1957	6	46.2	3	23.1	4	30.8	13
1958	7	50.0	2	14.3	5	35.7	14
1959	7	35.0	2	10.0	11	55.0	20
1960	12	48.0	7	28.0	6	24.0	25
1961	12	48.0	8	32.0	5	20.0	25
1962	15	65.2	5	21.7	3	13.0	23
1963	17	89.5	1	5.3	1	5.3	19
1964	8	50.0	6	37.5	2	12.5	16
1965	12	70.6	3	17.6	2	11.8	17
1966	12	75.0	3	18.8	1	6.3	16
1967	21	75.0	5	17.9	2	07.1	28
1968	15	78.9	4	21.1	0	0.0	19
1969	17	68.0	3	12.0	5	20.0	25
1970	13	68.4	2	10.5	4	21.1	19
1971	18	81.8	3	13.6	1	4.5	22
1972	18	75.0	2	8.3	4	16.6	24
1973	15	93.8	1	6.3	0	0.0	16
1974	20	76.9	3	11.5	3	11.5	26
Total	294	62.8	89	19.0	85	18.2	468

Source: Data Compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington: Government Printing Office, 1950 to 1974).

8(a)(2) cases involving contract difficulties have become the most important category of 8(a)(2) cases heard by the Board by virtue of their extremely large numbers. Additionally, the large increase in the number of cases involving two competing, affiliated unions leads to the hypothesis that this category of cases has become much more important over the years than the traditional company union case.

The above observation--that the traditional 8(a)(2) case involving an affiliated union and an independent company union has been diminishing in importance while cases involving two competing affiliated unions have been increasing in both number and importance--can be confirmed most simply by examining Table 16. From 1950 to 1974 both the percentage and the absolute number of cases involving two affiliated unions has increased. In absolute terms the number of cases has gone from around ten per year to over twenty. In relative terms, cases involving two affiliated unions have gone from representing around thirty-five percent of the total number of 8(a)(2) cases heard by the Board per year to over sixty percent.

Statistical significance of this change can be confirmed by estimating the following regression equation:

$$AA_i = \beta_0 + \beta_1 Y + u_i$$

where AA_i represents the percentage of cases involving two affiliated unions, Y represents the year, and u_i represents the assumed normally distributed error term. The resulting

TABLE 16

Total Number and Percentages of 8(a)(2) Cases Heard by the National Labor Relations Board, 1950-1974, According to Mix of Unions Involved in Each Case

Year	2 affiliated		1 affiliated 1 unaffiliated		Charges filed by individual		Total
	Total	% of Yearly Total	Total	% of Yearly Total	Total	% of Yearly Total	
1950	8	36.4	11	50.0	3	13.6	22
1951	11	36.7	8	26.7	11	36.7	30
1952	9	36.0	11	44.0	5	20.0	25
1953	13	30.2	25	58.1	5	11.6	43
1954	8	33.3	10	41.7	6	25.0	24
1955	14	43.8	12	37.5	6	18.8	32
1956	1	20.0	2	40.0	2	40.0	5
1957	8	42.1	6	31.6	5	26.3	19
1958	9	37.5	8	33.3	7	29.2	24
1959	7	26.9	6	23.1	13	50.0	26
1960	20	39.2	18	35.3	13	25.5	51
1961	18	41.9	19	44.2	6	14.0	43
1962	19	39.6	19	39.6	10	20.8	48
1963	21	63.6	11	33.3	1	3.0	33
1964	17	37.0	26	56.5	3	6.5	46
1965	13	35.1	21	56.8	3	8.1	37
1966	15	53.6	11	39.3	2	7.1	28
1967	25	54.3	17	37.0	4	8.7	46
1968	21	63.6	8	24.2	4	12.1	33
1969	22	48.9	15	33.3	8	17.8	45
1970	20	60.6	9	27.3	4	12.1	33
1971	23	62.2	12	32.4	2	5.4	37
1972	22	57.9	11	29.0	5	13.2	38
1973	20	66.7	6	20.0	4	13.3	30
1974	22	64.7	6	17.6	6	17.6	34
Total	386	...	308	...	138	...	832

Source: Data compiled from National Labor Relations Board, Decisions and Orders of the National Labor Relations Board, vol. 88 to vol. 216 (Washington: Government Printing Office, 1950 to 1974).

estimates are:

$$AA_i = -43.43 + 1.43Y \qquad R^2 = .6242$$
$$\qquad\qquad\quad (.2315) \qquad t = 6.18$$

where the calculated t value is greater than the critical t value at the .99 level of significance. Therefore, it can be concluded that the coefficient of Y is significantly greater than 0. The conclusion can thus be drawn that for the twenty-five years of study, the percentage of cases heard by the Board which involved two affiliated unions has increased significantly. A corollary to this finding is the conclusion that the remaining two categories of cases--those involving an affiliated and an independent union and those involving a single union (where the charges have been filed by an individual instead of another union)--have been significantly declining.

In 1950, the most frequent type of 8(a)(2) case involved domination of a nonaffiliated union. By 1974, the most frequent type of 8(a)(2) case involved a contractual dispute with an affiliated union.

Economic Implications

Section 1 of the National Labor Relations Act justifies its existence by asserting that strife between labor and management burdens or obstructs commerce by, ". . . causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from

or into the channels of commerce." It further states that business depressions are partially aggravated because of industry's ability to depress, ". . . wage rates and the purchasing power of wage earners in industry . . ." The solution proposed by the Act was, therefore, to encourage the practice of collective bargaining by guaranteeing workers, ". . . full freedom of association, self-organization, and designation of representatives of their own choosing . . ."

One of industry's most effective tools in its fight against the union movement was the company union.[1] In Chapter Two this thesis emphasized the point that Section 8(a)(2) was directed at the elimination of company unions and company interference with unions. To the extent that company unionism was successful, legitimate unionism was invariably resisted. Thus, the economic effects of Section 8(a)(2) will hinge on whether or not unionism in general can successfully provide wage levels or other benefits in excess of those that would exist in the absence of unionism.

Many studies have been instigated for the purpose of determining whether or not unions affect relative wages. Milton Friedman's thoughts on the subject appeared in The Impact of the Union--a book edited by David McCord Wright

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[1]See Chapter Two of this thesis and Benjamin J. Taylor and Fred Witney, Labor Relations Law (Englewood Cliffs: Prentice-Hall, Inc., 1979), p. 134.

in 1956. Friedman contended that the effect of unionism on the structure and level of wage rates is greatly exaggerated.[1] In 1963, one of the most important studies regarding unions and relative wages was published by H. G. Lewis. In this study, Lewis found that unions raised wages an average of ten to fifteen percent.[2] However, Lewis did not include personal characteristics of workers in his formulation of a model to test for union effects. Leonard Weiss included personal characteristics and found that these characteristics accounted for a great deal of the wage differentials normally observed in the economy. Weiss concluded, ". . . employers who for any reason pay high salaries receive "superior" labor in the bargain."[3] In a later study, Frank Stafford with another data set also tested to see if unions affect relative wages. When Stafford included personal characteristics he found a significant positive relationship between unionism and wages.[4]

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[1]Milton Friedman, "Some Comments on the Significance of Labor Unions for Economic Policy," The Impact of the Union, ed. David McCord Wright (New York: Kelley and Millman, Inc., 1956), pp. 204-234.

[2]H. G. Lewis, Unionism and Relative Wages in the United States (Chicago: The University of Chicago Press, 1963), p. 193.

[3]Leonard W. Weiss, "Concentration and Labor Earnings," The American Economic Review, 56 (March, 1966), p. 116.

[4]Frank P. Stafford, "Concentration and Labor Earnings: Comment," The American Economic Review, 58 (March, 1968), p. 179.

Another line of studies was begun by Orley Ashenfelter and George E. Johnson when they used a simultaneous equation approach which determined wages, unionism, and labor quality jointly. They stated in their conclusion, ". . . we are prepared to say only that we are uncertain of the magnitude of the effect of unions on interindustry wage differences."[1] In a similar analysis Peter Schmidt and Robert Strauss concluded essentially that unionism does not create high wages, instead, ". . . higher earnings make one more likely to be unionized."[2] Finally, Lawrence M. Kahn in a very recent paper found that unionism does, indeed, raise wages, but it also induces firms to substitute skilled labor and capital for unskilled labor. In other words, firms respond to union enforced higher wages by employing more productive workers.[3]

It seems clear from the above discussion that there is no consensus of views on whether or not unionism can affect relative wages. Thus, the labor economist is faced with the problem of determining why unions exist if they do not benefit

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[1]Orley Ashenfelter and George E. Johnson, "Unionism, Relative Wages, and Labor Quality in U.S. Manufacturing Industries," International Economic Review, 13 (October, 1972), p. 505.

[2]Peter Schmidt and Robert P. Strauss, "The Effect of Unions on Earnings and Earnings on Unions: A Mixed Logit Approach," International Economic Review, 17 (February, 1976), p. 208.

[3]Lawrence M. Kahn, "Unionism and Relative Wages: Direct and Indirect Effects," Industrial and Labor Relations Review, 32 (July, 1979), p. 531.

the level of workers' wages. A concomitant difficulty is explaining why some employers fight unionism so intensely if its effects are so minimal. Generally, labor economists have fallen back on the argument that unions supply non-economic benefits to workers in the form of grievance procedures, seniority rules, and many other work related regulations.[1]

Whatever the effects of unions are, company unions have always been a powerful and potent tool in the fight against unionism. The first section of this chapter discussed trends in 8(a)(2) cases heard by the National Labor Relations Board. Clearly, the trend has been away from the traditional company union case where management initiates a union or financially supports it or uses overt discrimination in order to maintain its existence. Strictly on this basis it could perhaps be argued that 8(a)(2) has done its work. The traditional forms of domination and interference do, indeed, seem to be on the wane. However, a more subtle type of interference has taken the place of these more overt types. Interference in the form of signing an illegal contract has now become the predominant type of 8(a)(2) case. Furthermore, this case generally involves two affiliated unions instead of the traditional case involving an independent union along with an affiliated

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[1]See for example E. R. Livernash, "The Relation of Power to the Structure and Process of Collective Bargaining," The Journal of Law and Economics, 6 (October, 1963), pp. 10-40.

union. Obviously, the only reason management has to sign such a contract is to obtain favorable treatment from the contracting union. Labor economists refer to this type of agreement as a "sweetheart" contract and it has the same implications for organized labor as did the company union.

If 8(a)(2) were abolished, and sweetheart agreements were thus condoned, it is quite possible that unions signing such contracts would provide neither the wage benefits (if any exist) nor the non-economic benefits now provided by legitimate unions. At this writing, there has been little support for the abolition of this section of Taft-Hartley. Repealing it might weaken the rights that blue collar workers have obtained under the National Labor Relations Act.

CHAPTER VIII

CONCLUSION

Immediately following passage of Taft-Hartley the number of charges filed under Section 8(a)(2) declined. However, after 1958 the filing of 8(a)(2) charges began to increase. Over the years this trend has continued making study of this particular section highly pertinent.

One early difficulty with which the Board has frequently dealt is that of what constitutes domination as opposed to unlawful support of a labor union. Prior to passage of Taft-Hartley, the Board disestablished independent unions that had violated Section 8(2), but had merely used a cease and desist order against affiliated unions. After passage of Taft-Hartley--which required equal treatment of affiliated and nonaffiliated unions under Section 10(c)--the Board changed its approach. Any union which was found to be dominated was disestablished while a union which was merely unlawfully assisted was issued a cease and desist order. The Board also decided to raise its standards for domination, and resorted to disestablishment in only extreme cases. Unfortunately, this change in philosophy created some problems as discussed in Chapter Three. These difficulties resulted in a number of cases where trial examiners, administrative law

judges, the Board, and the courts all disagreed as to what constitutes employer domination of a union. In this instance, it seems, the equal treatment provision of Taft-Hartley created more confusion than it eliminated. It appears that the same types of violations which occurred before Taft-Hartley (i.e. supervisors involved in unions and employer formation of unions) continue to occur after its passage. On this basis an argument could be made for more disestablishment orders instead of fewer.

Discriminatory treatment of employees or threats of such treatment which was a significant issue in 254 cases continues as a difficulty with which the Board must contend. Discriminatory discharge or disciplinary action in support of a favored union was quite a common occurrence as was the offering of concessions to favored unions. Additionally, shutdown threats continue to occur in representative numbers.

Chapter Five dealt with the unexpectedly complex issues of financial or material support of a favored union. Since Section 8(a)(2) specifically prohibits financial support, Board and Court decisions on this and surrounding topics might be thought to be rather cut and dried. However, the Board and the courts have consistently held that some cooperative assistance to a favored union is legal. The difficulty arises when the Board and courts attempt to draw the line between legal cooperative assistance and illegal support. One important factor

considered in these decisions is whether or not the support in question interferes with the employees' Section 7 rights to a free choice of their own representatives. If the support does interfere with this right, an 8(a)(2) violation is found. Two additional factors are generally considered by the courts. (1) Total company support of a union is typically found to be in violation of 8(a)(2). (2) The environment in which the assistance in question occurred is also an important consideration. If the assistance takes place in the context of widespread company support of a union, a violation would normally be found. However, if the support occurs singly and has little effect, no 8(a)(2) violation results.

The very large number of cases dealing with questions of illegal contracts (over 400) indicates an important switch from the types of cases at which Section 8(a)(2) was originally aimed. This section originally focused on independent unions which were controlled by employers.[1] However, a close examination of Chapter Six reveals an increasing number of cases in which the employer is caught between two affiliated unions attempting to organize his plant. Section 8(a)(2) comes into play when the employer assists one of these unions. Specifically, this chapter was concerned with assistance through the execution of a contract. The Midwest Piping doctrine holds

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[1]See Chapter Two.

that 8(a)(2) is violated if an employer, at the time of recognition, knows that a real question concerning representation exists in his plant. Through the years this doctrine has undergone many changes and has, thus, become a highly complex rule of law which arises in a large number of cases. A violation of 8(a)(2) also occurs when an employer contracts with a minority union or a union with a tainted majority. Similarly, contracts which contain illegal union security clauses also violate 8(a)(2) by assisting the union with which the contract was signed.

Finally, it is evident by the increasing number of charges filed under Section 8(a)(2) that this section continues to exercise significant influence on labor relations in this country. However, it appears that the mix of cases heard by the Board and the courts has been undergoing significant changes. More and more charges are being filed by affiliated unions against other affiliated unions. Thus, the major difficulties faced by the Board under this Section have shifted from overt company domination and interference to dealing with a subtler form of company interference--sweetheart contracts. The result of this change is an inordinate number of cases involving contract difficulties as seen in Chapter Six and Chapter Seven. Indeed, Section 8(a)(2) has not diminished in importance. Its direction of emphasis has just shifted.

BIBLIOGRAPHY

Ashenfelter, Orley and George E. Johnson. "Unionism, Relative Wages and Labor Quality in U.S. Manufacturing Industries." International Economic Review, 13 (October, 1972), 488-508.

Cohen, Stanford. Labor in the United States. Columbus: Charles E. Merrill Books, Inc., 1960.

Commons, John R., gen. ed. History of Labor in the United States. 4 vols. New York: MacMillan Company, 1935. Vol. 3: Working Conditions, by Don D. Lescohier.

Commons, John R., gen. ed. History of Labor in the United States. 4 vols. New York: MacMillan Company, 1935. Vol. 4: Labor Movements, by Selig Perlman and Philip Taft.

Fite, Gilbert C. and Jim E. Reese. An Economic History of the United States. Boston: Houghton Mifflin Company, 1973.

Friedman, Milton. "Comment." The Review of Economics and Statistics. 38 (February, 1955), 401-406.

Goldman, Alvin L. The Supreme Court and Labor-Management Relations Law. Lexington: D. C. Heath and Company, 1976.

Gregory, Charles O., and Harold A. Katz. Labor and the Law. New York: W. W. Norton and Company, 1979.

Gross, James A. The Making of the National Labor Relations Board. Vol. 1. Albany: State University of New York Press, 1974.

Gullett, Carlos Ray. The Impact of Employee Representation Plans Upon the Development of Management Worker Relationships in the U.S. Doctoral dissertation, Louisiana State University, 1970.

Hendricks, Wallace. "Labor Market Structure and Union Wage Levels." Economic Inquiry, 13 (September, 1975), 401-416.

Hendricks, Wallace. "Regulation and Labor Earnings." The Bell Journal of Economics, 8 (Autumn, 1977), 483-496.

Kahn, Lawrence M. "Unionism and Relative Wages: Direct and Indirect Effects." Industrial and Labor Relations Review, 32 (July, 1979), 520-532.

Kleeck, Mary Van. Miners and Management. Industrial Relations Series. New York: Russel Sage Foundation, 1934.

Labor Management Relations Act (Taft-Hartley Act). Statutes at Large, Vol. 61 (1947). U.S. Code, Vol. 39 (1952).

La Dame, Mary. The Filene Store. Industrial Relations Series. New York: Russel Sage Foundation, 1930.

Lee, Lung-Fei. "Unionism and Wage Rates: a Simultaneous Equations Model with Qualitative and Limited Dependent Variables." International Economic Review, 19 (June, 1978), 415-432.

Levinson, Harold M. "Unionism, Concentration, and Wage Changes: Toward a Unified Theory." Industrial and Labor Relations Review., 20 (January, 1967), 198-205.

Lewis, H. G. Unionism and Relative Wages in the United States. Chicago: The University of Chicago Press, 1963.

Livernash, E. R. "The Relation of Power to the Structure and Process of Collective Bargaining." The Journal of Law and Economics, 6 (October, 1963), 10-40.

Miller, Ronald L. "Professional Associations and Supervisors Members: When Does an Employer Dominate and Interfere?" Labor Law Journal, 30 (January, 1979), 31-37.

Millis, Harry A., and Emily Clark Brown. From the Wagner Act to Taft-Hartley. Chicago: University of Chicago Press, 1950.

National Labor Relations Board. Decisions and Orders of the National Labor Relations Board, vols. 88-216. Washington, D.C.: Government Printing Office, 1950-1974.

National Labor Relations Board. First Annual Report of the National Labor Relations Board to Forty-Second Annual Report of the National Labor Relations Board. Washington, D.C.: Government Printing Office, 1936-1977.

Parsley, C. J. "Labor Union Effects on Wage Gains: A Survey of Recent Literature." Journal of Economic Literature. 18 (March, 1980), 1-31.

Rayback, Joseph G. A History of American Labor. New York: MacMillan Company, 1959.

Reeder, M. W. "Unions and Wages: the Problems of Measurement." The Journal of Political Economy, 73 (April, 1965), 188-196.

Rees, Albert. The Economics of Work and Pay. New York: Harper and Row, 1973.

Rosen, Sherwin. "Unionism and the Occupational Wage Structure in the United States." International Economic Review, 11 (June, 1970), 269-285.

Rosenfarb, Joseph. The National Labor Policy and How It Works. New York: Harper and Brothers Publishing, 1940.

Sangerman, Harry. "Employee Committees: Can They Survive Under the Taft-Hartley Act?" Labor Law Journal, 24 (October, 1973), 684-91.

Schmidt, Peter and Robert P. Strauss. "The Effect of Unions on Earnings and Earnings on Unions: a Mixed Logit Approach." International Economic Review, 17 (February, 1976), 204-212.

Segal, Martin. "The Relation Between Union Wage Impact and Market Structure." The Quarterly Journal of Economics, 78 (February, 1964), 96-114.

Selekman, Ben M. Employees' Representation in Steel Works. Industrial Relations Series. New York: Russel Sage Foundation, 1924.

Selekman, Ben M., and Mary Van Kleeck. Employees' Representation in Coal Mines. Industrial Relations Series. New York: Russel Sage Foundation, 1924.

Stafford, Frank P. "Concentration and Labor Earnings: Comment." The American Economic Review, 58 (March, 1968), 174-180.

Taylor, Benjamin J., and Fred Witney. Labor Relations Law. Englewood Cliffs: Prentice-Hall, Inc., 1979.

Ulman, Lloyd. "Marshall and Friedman on Union Strength." The Review of Economics and Statistics, 38 (February, 1955), 384-401.

U.S. Congress. Senate. Committee on Labor and Public Welfare. Legislative History of the Labor Management Relations Act, 1947. 93d Cong., 2d Sess., 1974.

U.S. Department of Labor, Bureau of Labor Statistics. Characteristics of Company Unions 1935. Bulletin no. 634. Washington, D.C.: Government Printing Office, 1938.

Weiss, Leonard. "Concentration and Labor Earnings." The American Economic Review, 56 (March, 1966), 96-117.

Weiss, Leonard W. "Concentration and Labor Earnings: Reply." The American Economic Review, 58 (March, 1968), 181-184.

Wright, David McCord, ed. The Impact of the Union. New York: Kelley and Millman, Inc., 1956.