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The Inaugural Kenneth M. Piper Lecture: The NLRB: Challenges of the Next Decade

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THE INAUGURAL KENNETH M. PIPER LECTURE: THE NLRB: CHALLENGES OF THE NEXT DECADE

HONORABLE JOHN H. FANNING*

DEAN COLLENS: Good afternoon. I'd like to welcome you officially to the first Kenneth M. Piper Lecture. We are very pleased that you could all be with us today.

Before I introduce our speaker, there are two people who have been particularly responsible for helping to make this program a reality whom I would like to introduce.

The first is Mr. Foorman Mueller, a graduate of the class of 1932, who has been an active supporter of Chicago-Kent for many years and who has been very instrumental in helping us to put this program together.

The other person whom I would like to introduce is Mr. Alex Barbour, the Regional Director of the National Labor Relations Board. Mr. Barbour also has been quite helpful to us, not only in the labor law program, but in regard to this particular program.

Our speaker today is certainly one of the most respected public officials in the country. Chairman Fanning has had a long and distinguished career in labor law and with the National Labor Relations Board. His many accomplishments are listed in the program, and I am not going to read them all to you.

* Mr. Fanning has a long and distinguished career as a lawyer in the labor law field. He is a 1938 graduate *cum laude* of Providence College, Providence, Rhode Island and received his law degree in 1941 from Catholic University of America School of Law, Washington, D.C. He engaged in the private practice of law after graduation from law school and from 1942 to 1957 served in legal and industrial relations in the Departments of Labor, Army and Defense. Since December, 1957 he has served as a Presidential Appointee as a Member of the National Labor Relations Board.

In October, 1977 he was appointed by President Carter to a fifth five year term as a Member of the Board. He is the only Board Member to be appointed to five successive terms by five Presidents of different political parties. From December 1974 through February 1975, he served as Acting Chairman by appointment of President Ford. He was appointed Chairman by President Carter in April, 1977 and re-appointed Chairman in December, 1977.

Mr. Fanning has received numerous awards for his professional achievements. In October, 1975, the annual John H. Fanning Conference on Labor Management Relations was established by the Quirk Institute of Labor Relations of Providence College and Mr. Fanning was the recipient of the first Quirk Institute Award. He has also received the Catholic University of America and Providence College Alumni Association Awards. Mr. Fanning has participated as a guest speaker or lecturer at a variety of programs at law schools, bar associations and management groups. In addition, Mr. Fanning has authored articles appearing in the publications of numerous colleges and universities, bar associations, and journals.

Before this program began, Chairman Fanning mentioned that he had been advised as a young lawyer that he should head to Phoenix—this was when he was practicing in the Northeast—and that he had seriously considered it. I think we are all fortunate that he decided to shun that advice and, instead, to go to Washington.

Chairman Fanning will be speaking to us today on *The NLRB: Challenges of the Next Decade*.

At the conclusion of his speech, Professor Doppelt will introduce the rest of the panelists to you. Mr. Fanning.

CHAIRMAN FANNING: Thank you very much, Dean Collens. After 20,000 cases, you never know which pair of glasses is going to be working on any particular day, so I have to always experiment a bit. It depends on the height of the dais, and so forth, and so on. I have four pairs of glasses. These are what I would call my driving glasses, or my television glasses. And, then, I have a pair of pure reading glasses for the “close-up stuff” and reading at my desk. And, then, I have a pair of bifocals, which vanity doesn’t permit me to wear. Finally, I have a pair that, strangely enough, have one long-range lens, and one short-range lens. Some of my critics say that that’s the pair I wear when I make some of my controversial decisions. They may be right.

I must apologize, first of all, for a shorter visit than I had intended to make, but I was informed last week by the House of Representatives Appropriations Committee that at 10:00 o’clock tomorrow morning they want me to present myself to justify the NLRB budget for not next year but for two years down the road. It’s a difficult job.

So, I am going to have to go back to Washington on a relatively early plane this afternoon. But, if I don’t have a chance to answer your pet question, write me a letter. You will get an answer. In any event, I am happy to be here.

Historically, Chicago and the National Labor Relations Board seem to have a special relationship. Chicago gave the Board Frank McCulloch and Ed Miller, two of the ablest Board chairmen, and certainly two of the finest public servants I have had the opportunity to work with.

For many years, our Chicago office was headed by Ross Madden, who, upon his retirement, was the senior employee and who, throughout his tenure, exemplified the best traditions of the NLRB.

Now the office, given its workload, is the home away from home of one of our youngest and most capable regional directors, Al Barbour,

who has just been introduced to you. So, it is always good to come to the Windy City.

I must tell you, of course, that I was a little disappointed. I left cherry blossoms in Washington this morning. And, on the plane coming in, the pilot said, "It's snowing in Chicago." I am told that pilots on planes coming to Chicago have a recording to that effect because people expect it to be the case. Despite the weather, which is not so terrible in any case, it is particularly good to come to Chicago in circumstances such as these. I always look upon the opportunity to address an inaugural seminar on labor relations or, in this case, to deliver the first of a series of distinguished lectures, as a very special honor.

On more than one occasion, the United States Supreme Court has recognized that the National Labor Relations Act¹ is the result of conflict and compromise between strong contending forces and deeply held views on both the role of organized labor in the economic life of this country, and the appropriate balance to be struck between the power of management and labor to further their respective interests. Whether it be before the Board, the courts of the land, or in the legislative halls of the nation, those strong contending forces are ever at work in an effort to have the delicate statutory balance struck on their behalf.

From time to time, the balance gets struck largely as a result of the persuasive impact one interest has been able to marshal along the way. And, ultimately, the capacity to strike that balance in your favor lies in the capacity to convince. That is why the always vigorous, sometimes ingenious debate, which is the hallmark of labor-management relations in this country, is much more than a function of strategy. It is the lifeblood of labor law. And, that is why no one interested in labor law should underestimate the importance of occasions such as this.

From forums like this, from the discussion and debate they engender, quite often come the ideas which eventually arm one side of the labor-management equation and which, by virtue of that, help shape the contours of labor-management life in this country. So, again, let me commend you on this undertaking and express to you my thanks for the opportunity to play a part in it.

Now, what part I should play has, of course, its limitations. Lawyers, and students of the law, tend to be favorably disposed to hypotheticals. Pick up the next labor law conference brochure that comes your way and you can be sure to find a program in which "crystal ball gazing" features prominently. To the extent that the hypotheticals can

1. 29 U.S.C. § 151 (1976) [hereinafter referred to as the NLRA or the Act].

become reality later on, participating in such discussions can be hazardous for someone like me who has the responsibility of deciding cases.

A long time ago, I gave a speech in Dallas in which I merely mentioned that one of the issues the Board would have to confront in the future was the lawfulness of "Boulwarism,"² the collective bargaining technique developed by Lemuel Boulware, a very good friend of mine, then of the General Electric Company.³ Subsequently, G.E. moved for my disqualification in the famous G.E. case,⁴ alleging that I had obviously prejudged the matter by utilizing the term "Boulwarism" which G.E. took to be a pejorative, as opposed to a merely descriptive term. However, if you go back to footnote 18 of the Second Circuit's decision in enforcing the Board's order in the G.E. case, you will find that my refusal to disqualify myself was upheld.⁵ The point here is that talking about the future is not without its risks for a sitting NLRB member or chairman.

On the other hand, there is my topic for today—*The NLRB: Challenges of the Next Decade*. When it was originally discussed, it was my intention to talk with you, at least for awhile, about the major problem that awaits the Board in the 1980's—a case load that may well be unmanageable without greater resources, improved case handling techniques and, possibly, some statutory refinements.

Unfortunately, after the topic was agreed upon, I was told that many, if not most, in this audience would be students and not too familiar with internal Board procedures. The discussion of so-called administrative matters might well turn an otherwise lively gathering into a virtual siesta. Thus, a discussion of matters more substantive was suggested, although I question whether anything is more substantive than the case load crisis that inevitably awaits us.

Perhaps you can invite me back next year and I will tell you more about that problem at that time. But I am, in the final analysis, an agreeable fellow; at least all the people whom I hire tell me that. So, I will try to dance between the raindrops, so to speak, and discuss with you two areas which I believe will be prominent themes of Board decisionmaking in the 1980's, being mindful at the same time, of unex-

2. "Boulwarism" refers to the bargaining technique of making a "fair, firm offer" to the employees on a "take it or leave it" basis and communicating with the employees to convince them of the fairness of management's position and the unreasonableness of the union's position.

3. The General Electric Company is hereinafter referred to as G.E.

4. General Elec. Co., 150 N.L.R.B. 192 (1964), *enforced sub nom.* NLRB v. General Elec. Co., 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

5. 418 F.2d at 763 n.18.

pected hazards that can accompany such crystal ball gazing. Selecting those areas of discussion is, itself, no mean feat. Certainly there are, as there have always been, more than enough areas to choose from.

In the years ahead, for example, I am confident that the extent of Board jurisdiction, the scope of the duty to bargain *Westinghouse* type issues, and the lawful parameters of super-seniority provisions will continue to be sources of so-called elucidating litigation. There are many others I could name. But, for today's purposes, I will focus on two others, the first of which I have selected because it at least bears upon our case load problem, and that is the Board's remedial authority.

There is, no doubt, a variety of factors that account for the fact our unfair labor practice case load increases at a rate between six and eight percent every year. In fact, since 1970, it has increased eighty percent, and, this year, it is expected to exceed 40,000 brand new cases. From one standpoint, an increase in case load is not undesirable, for it implies an increasing awareness of the protections the Act affords. But, there are less desirable factors at work, too.

We receive far too many discriminatory discharge cases—charges filed against employers constitute over two-thirds of all charges filed. There were over 8,000 employer refusal to bargain charges filed last fiscal year. Obviously, not all of those had merit and, fortunately, a lot of those cases did not require consideration. But, section 8(a)(3)⁶ and section 8(a)(5)⁷ complaints, that is, the discriminatory discharge and employer refusal to bargain charges found by the General Counsel to have merit, constituted a percentage of all complaints comparable to the percentage of charges they represented.

The types of charges filed, the kinds of complaints issued, and the forms of our remedial actions, therefore, do lend support to the proposition that the case spiral is partly the result of remedial deficiency. The Board's authority to remedy unfair labor practices, of course, is a broad one, entitled to great deference by the reviewing courts⁸ and subject to the one basic limitation that the remedy not be a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."⁹

6. 29 U.S.C. § 158(a)(3) (1976).

7. *Id.* § 158(a)(5).

8. *See, e.g.,* *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) in which the Court noted that "[i]n fashioning its remedies under the broad provisions of § 10(c) of the Act . . . [t]he Board draws on a fund of knowledge and expertise all its own and its choice of remedy must therefore be given special respect by reviewing courts." *Id.* at 612 n.32 (citation omitted).

9. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

Our remedies are, however, just that—remedial. They cannot amount to punishment of the wrongdoer¹⁰ but, instead, are designed to eliminate the effects of the unfair labor practice and, to the extent possible, restore the status quo ante. We may question, as some have, whether the status quo ante is enough in certain circumstances. The status quo ante, a refusal to bargain, is the obligation to bargain so that a remedy for the unlawful refusal cannot compensate employees for the benefits that might have flowed from collective bargaining had the bargaining occurred when it should have. But, *Excello Dry Wall Co.*¹¹ and *H. K. Porter Co.*¹² have established that only the parties could write a contract covering those things. We cannot. But, I do not wish to focus on perceived remedial infirmities inherent in the statute. That is a matter for congressional review.

I do think it is fair to state, however, that the Board has not exhausted the remedial potential open to it. The authority to remedy unfair labor practices, typically thought of as emanating from section 10(c), which requires us to order a violator “to take such affirmative action as will effectuate the policies of [the] Act,”¹³ exists alongside the Board’s section 10(a) authority to “prevent any person from engaging in any unfair labor practice.”¹⁴ Remedies designed to deter violations need not run afoul of the requirement that our remedies be nonpunitive. I believe that our expanded remedies in the recent *J. P. Stevens & Co.* cases¹⁵ are an example of that.

As I indicated earlier, discussing the future can easily lead to a charge that matters eventually the subject of litigation have been prejudged, so, in a perhaps excess of caution, I want to emphasize that my views on the matter are far from fixed. But, I do believe that the future will see at least some further exploration in one particular remedial area, and that is in the area of litigation expenses. We must take the “proper” out of unfair labor practices—at least to the extent we can.

The Board has occasionally awarded a charging party reasonable litigation fees, but, with one exception, all such awards were designed to reimburse the charging party for legal fees incurred, not in connection with the Board’s proceedings but, rather, in connection with the non-Board litigation caused by a respondent’s unlawful activity. For

10. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940).

11. 145 N.L.R.B. 663 (1963).

12. 153 N.L.R.B. 1370 (1965).

13. 29 U.S.C. § 160(c) (1976).

14. *Id.* § 160(a).

15. 240 N.L.R.B. No. 75 (1979); 239 N.L.R.B. No. 95 (1978).

example, in *Baptist Memorial Hospital*,¹⁶ an employee, while handbilling, was ordered by one of the respondent's security guards to cease the handbilling or face suspension. The employee refused, was apprehended and turned over to the police, charged with disorderly conduct, and, subsequently, convicted of the charge.

We found that respondent's distribution rules were unlawful and that respondent undertook the course of action to chill employee organization. Because the arrest and conviction were the direct result of the unfair labor practice, we ordered the respondent to pay the employee's court fine and to reimburse the employee for attorney's fees incurred in connection with his arrest and conviction.

But, if we focus on reimbursement for attorney's fees incurred in connection with Board litigation, the only case in which such expenses were awarded is the famous *Tiidee Products* case.¹⁷ *Tiidee* itself was the result of a United States Court of Appeals for the District of Columbia decision¹⁸ enforcing a refusal to bargain finding, but remanding the proceeding to the Board for the purpose of further consideration of extraordinary remedies which were requested by the charging party and viewed by the court as justifiable in light of the respondent's "clear and flagrant" violation of its statutory duty to bargain.¹⁹ On remand, the Board declined to grant most of the extraordinary remedies requested, but we did award the charging party its litigation expenses.²⁰

Our basic policy in this area was set forth in *Heck's, Inc.*²¹ where, in declining to award the charging party attorney's fees generated by the respondent's refusal to bargain, we alluded to the general American rule that a prevailing litigant is not ordinarily entitled to its attorney's fees. In *Heck's, Inc.*, we did note that the participation of a charging party in Board proceedings can serve public interests, but that whatever protection of such interests might result from the charging party's liti-

16. 229 N.L.R.B. 45 (1977). See also *United Parcel Serv.*, 203 N.L.R.B. 799 (1973), *enforced and remanded sub nom. Teamsters Local Union 396 v. NLRB*, 509 F.2d 1075 (9th Cir. 1975), *cert. denied*, 421 U.S. 976 (1975), *modified*, 220 N.L.R.B. 35 (1975).

17. *Tiidee Prods., Inc.*, 194 N.L.R.B. 1234 (1972). See also the Board's original decision in *Tiidee, Tiidee Prods. Inc.*, 174 N.L.R.B. 705 (1969), *enforced and remanded*, 426 F.2d 1243 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950 (1970).

18. *International Union of Electrical, Radio & Mach. Workers v. NLRB*, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970). The extraordinary remedies which the D.C. Circuit asked the Board to consider included lost wage increases, interest, litigation costs, and excess union organizing costs as possible components of a "make-whole" remedy. 426 F.2d at 1250-53.

19. *Id.* at 1248.

20. 194 N.L.R.B. 1234, 1236-37 (1972). The Board rejected the other extraordinary remedies as "not practicable." *Id.* at 1235.

21. 191 N.L.R.B. 886 (1971). This decision supplemented an earlier case involving the same employer. *Heck's, Inc.*, 172 N.L.R.B. 2231 (1968).

gation was only incidental to its effort to vindicate its own personal interests.²²

Tiidee acknowledged that the public interest can override, however, the general principle barring recovery of attorney's fees by a prevailing litigant, and it can when the litigation can fairly be characterized as "frivolous." Frivolous litigation, we said, must be discouraged in order to effectuate the Act's fundamental aim—namely, industrial peace through good faith collective bargaining—an aim requiring that meritorious cases be given the speediest possible resolution by the Board and courts. I might add that the reimbursement of both the charging party and the Board included reasonable counsel fees, salaries, witness fees, transcript and record costs, and travel expenses, including per diem. In short, it was truly an extraordinary remedy.

There are substantial policies, as well as practical considerations at work, in an expanded application of such a remedy. Expanded use of the remedy can fairly be expected to have some deterrent effect on recalcitrants who invoke Board processes for any delay that may inhere in them. But, what inhibiting effect, if any, will it have on litigation motivated by loftier concerns?

While I do not believe the remedy can fairly be characterized as "punitive," is the public interest underpinning it served only by application of a "frivolous defense" standard? Board decisions contrast "frivolous" defenses with "debatable" ones.²³ As far as lawyers are concerned, I suppose even the time of day is debatable. But, if the remedy is to be employed in the recognition that the public interest is served by weeding out litigation sparked solely by the knowledge that there is delay in our proceedings, should not a different standard be employed—one which perhaps provides clearer guidelines but more assuredly acknowledges that litigation instituted to delay a day of reckoning should be discouraged, even though it might raise, along the way, valid "debatable" points?

By the same token, however, a more expansive use of the *Tiidee* remedy, if it is to be undertaken at all, must be coupled with relatively clear limitations upon its employment to guard against the possibility that it will be applied more out of a sense of administrative convenience than with due regard for the industrial system envisioned by the

22. 191 N.L.R.B. at 889. The refusal to award attorney's fees was upheld by the United States Supreme Court, *NLRB v. Food Store Employees Union Local 347*, 417 U.S. 1 (1973), but the Court specifically left open the question of "whether the Board's broad powers under § 10(c) . . . include power to order reimbursement of litigation expenses." *Id.* at 8 n.9.

23. See, e.g., *Winn-Dixie Stores, Inc.*, 224 N.L.R.B. 1418, 1421 (1976).

Act's drafters. The Act presumes continuing adversarial roles for labor and management.

An imposition of remedies designed to dissuade parties from coming to the agency whose basic mission is to keep those adversaries within peaceful bounds may be difficult to defend as a truly "remedial" course of action. The *Tiidee* remedy is not, obviously, the only area likely to undergo some reevaluation in the years ahead.

Although reimbursement for organizational costs can be looked upon, by some, as a loss more collateral to an unfair labor practice than litigation expenses, there doubtless will be occasions for the Board to reevaluate its approach in that area as well. But, the next area of discussion is a multifaceted one which suggests we move from remedy to the duty of fair representation.

When I first came to the Board in 1957, sixty-two percent of all charges filed against labor organizations were filed by individuals as opposed to employers or other labor organizations. Last fiscal year the figure was over eighty-two percent. The difference, I believe, is partly the result of the duty of fair representation, an area of law which lends itself to discussion about as readily as Einsteinian physics but which, nonetheless, will continue to be a dominant theme of Board decision-making in the years ahead, and, for that reason, must be discussed.

How it should be discussed can be a problem. There are significant procedural, as well as substantive, components to it. It has different implications for unfair labor practice proceedings and representation cases. And, an understanding of it hinges on an appreciation for its origins, again, both procedural and substantive.

In the interests of time, I will put to the side, to the extent possible, the procedural aspects of the doctrine which will enable us to avoid the questions of federal preemption implicated in the duty of fair representation. As for its substantive aspects, note initially that there is no explicit reference to a duty of fair representation to be found anywhere in the NLRA. The word just does not appear.

It is, for the most part, a judicially-created doctrine, viewed as a corollary to a union's exclusive representative status. Nevertheless, Board employees like to think of it as arising out of an earlier Board decision, *Bethlehem-Alameda Shipyard, Inc.*,²⁴ decided in 1943, and prior to the United States Supreme Court case which is generally credited with establishing the doctrine, *Steele v. Louisville & Nashville*

24. 53 N.L.R.B. 999 (1943). See Fanning, *The Duty of Fair Representation*, 19 B.C. L. REV. 813, 821 n.62 (1978).

Railroad,²⁵ decided in 1944.

Because the doctrine was, if not created by the courts, at least raised by them, I will, by way of background, briefly describe the evolution of the doctrine at the Supreme Court level, before turning to the Board's application of the doctrine. *Steele* was a Railway Labor Act case in which the Court held that an exclusive bargaining representative must represent nonunion or minority union members "without hostile discrimination, fairly, impartially and in good faith."²⁶

The union in *Steele* excluded blacks from membership and had negotiated seniority provisions designed to place black employees at the bottom of the seniority ladder. Although a union is not prohibited from negotiating contracts which have an adverse impact on some unit employees, the *Steele* Court indicated that provisions doing so had to be based on differences relevant to the authorized purposes of the contract and not on irrelevant or invidious considerations such as race.²⁷ The same day that *Steele* was decided, the Court, in *Wallace Corporation v. NLRB*,²⁸ alluded to the duty of fair representation in the context of a Board discriminatory discharge case and indicated that a bargaining representative chosen under the NLRA had a duty to represent all unit employees, not merely union members, in a fair and impartial manner.²⁹

It was not, however, until nine years later, in *Ford Motor Co. v. Huffman*,³⁰ that the Court specifically applied the duty as formulated in *Steele*, and other Railway Labor Act cases following *Steele*,³¹ to unions covered by the NLRA. And, it was not until eleven years later still, in *Humphrey v. Moore*,³² that a union's contract administration, as opposed to contract negotiation, role was encompassed by the duty. But, from *Steele* to *Humphrey*, the parameters of the duty were largely undefined by the United States Supreme Court; breaches of the duty to fairly represent employees being limited to discrimination on the basis of race or prior union affiliations.

In fact, up until 1962, or two years before *Humphrey*, there was no

25. 323 U.S. 192 (1944).

26. *Id.* at 204.

27. *Id.* at 203.

28. 323 U.S. 248 (1944).

29. *Id.* at 255-56.

30. 345 U.S. 330 (1953).

31. *See, e.g.*, *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944).

32. 375 U.S. 335 (1964).

authority, United States Supreme Court or otherwise, for the proposition that a breach of the duty of fair representation, standing alone, amounted to an unfair labor practice. Rather, this conclusion was first reached by the Board in *Miranda Fuel*,³³ a conclusion which, to this day, has not been upheld by the United States Supreme Court.

But, before turning to *Miranda* and other Board cases applying the doctrine, one final United States Supreme Court case in the area should be discussed and that is the Court's landmark decision in *Vaca v. Sipes*.³⁴ *Vaca* is a truly remarkable opinion, reaching out into areas as diverse as federal preemption and the General Counsel's authority to issue complaints. But, for today's purposes, and in the interests of time, we should limit ourselves to the discussion in *Vaca* of the scope of the duty of fair representation.

Vaca involved an employee discharged for medical reasons, despite the fact that his family physician had certified him as able to work. He sought his union's help to secure reinstatement, but, at the final prearbitration step of the grievance machinery, the union demanded another doctor's report.

When the report conflicted with the family physician's, the union refused to go to arbitration. The employee sued in a state court on a theory that the union had "arbitrarily, capriciously, and without just or reasonable . . . cause"³⁵ refused to take the grievance to arbitration. Although the employee was victorious at the highest state court level,³⁶ the union's refusal to arbitrate was upheld by the United States Supreme Court. In so holding, the United States Supreme Court stated: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."³⁷

In light of *Vaca*, the critical inquiry in unfair representation cases becomes the union's good faith, a question wholly unrelated to the specific union action under attack. Thus, the issue is not whether the union should have acted differently, but rather whether its decision not to act differently was reached in good faith. And, there are some very difficult, fine line distinctions that we have had to make in this area. Although the *Vaca* standard is, nonetheless, a subjective one, it must be

33. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

34. 386 U.S. 171 (1967).

35. *Id.* at 173.

36. *Sipes v. Vaca*, 397 S.W.2d 658 (Mo. 1965).

37. 386 U.S. at 190 (citations omitted).

emphasized that what is at work in an unfair representation inquiry is a balancing of employee and union interests.

The selection of a union implies the forfeiture of a degree of individual leverage in return for a more equitable balance of bargaining power. In a sense, what the duty of fair representation is about is an effort to determine what rights are or should be retained by individuals who either have chosen to unionize or, short of that, are subject to unionization by virtue of majority rule principles. Strict guidelines governing that kind of inquiry not only should not be expected, but, more importantly, might well upset the equality of bargaining power that is so fundamental to the statutory scheme of things.

I do not think the future of the duty of fair representation holds much in the way of standards. But, the standards are not the problem. What I anticipate, or at least hope for, is final resolution of two particular questions which arise out of the doctrine: first, whether the Board can properly refrain from resolving allegations of union racial and sex discrimination in precertification representation proceedings—and my view is that it can; and, second, whether all breaches of the duty of fair representation are remediable under the unfair labor practice provisions of the statute—and I happen to think that not all are.

Ever since *Steele*, it has been clear that the duty of fair representation inhered in the Act. It derived, after all, from a union's section 9(a)³⁸ exclusive representative status. And, for about half its life, the duty of fair representation was considered by the Board exclusively in section 9 proceedings and, more importantly, exclusively in the context of an already certified representative. This was not representing everyone in the unit the same way. Those pre-*Miranda* decisions, as exemplified by *Hughes Tool I*,³⁹ were premised on the belief that because the duty derived from section 9, which is the representation section of the Act and reflects the Board's power to police its certifications, this section was the appropriate conduit for claims that a union had breached the duty.

It was not until 1962, in *Miranda*,⁴⁰ that the Board, over the dissent of then Chairman McCulloch and me, concluded that a breach of the duty was remediable under section 8(b)'s unfair labor practice provisions. Section 8(b) was deemed applicable because if a union owed employees a duty to represent them fairly, as was by now settled, the

38. 29 U.S.C. § 159(a) (1976).

39. *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953).

40. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

duty had to be “read into” the section 7 right of employees “to bargain collectively through representatives of their own choosing.” A union’s breach of its fair representation duty therefore constituted the infringement of a section 7 right and since interference with such a right was an unfair labor practice, a breach of the duty was an unfair labor practice. Former Chairman McCulloch’s and my dissent questioned the assertion that the duty had to be “read into” other rights expressly guaranteed employees in the Act.⁴¹

When Congress added section 8(b) to the Act in 1947, it did not mention the duty of fair representation, although *Steele* and *Wallace* had been issued at least three years earlier. We would have adhered to the express provisions of the statute and found a breach of the duty to constitute an unfair labor practice only when the breach could be said to restrain or coerce employees in the exercise of those rights expressly granted in section 7, and not, as the *Miranda* majority held, when a union took any action against an employee based upon “irrelevant, invidious, or unfair” considerations.⁴²

The expansion of the doctrine that *Miranda* represented was enlarged upon in *Hughes Tool II*⁴³ by the addition of a constitutional gloss to such inquiries. *Hughes Tool II* was a combined representation and unfair labor practice case and, in the representation case, the Board held that its rescission of the union’s certification was mandated by a constitutional proscription against our “rendering aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative.”⁴⁴

Former Chairman McCulloch and I agreed that the certification should be revoked, but considered it unnecessary, and possibly inappropriate, to couch the issue in terms of constitutional limitations on our role under section 9. The contracts negotiated by the certified union in *Hughes Tool II* were patently discriminatory and violated the duty of fair representation under section 9. That, in our view, was enough.⁴⁵

If nothing else, superimposing the Constitution onto the duty of fair representation did serve to heighten interest in the work of the NLRB during the early and middle part of this decade. It was a short

41. 140 N.L.R.B. at 191-202.

42. *Id.* at 185.

43. Independent Metal Workers Union Local 1, 147 N.L.R.B. 1573 (1964).

44. *Id.* at 1577.

45. *Id.* at 1585.

jump from *Hughes Tool II* to the so-called *Handy Andy*⁴⁶ line of cases.

In the early 1970's, employers began to challenge election petitions on the ground that the union seeking representation discriminated or had a tendency to discriminate, either on the basis of race, sex, or national origin, against employees in the bargaining unit which they had not yet acquired the right to represent. Such challenges represented a twofold shift away from the Board's earliest approach to unfair representation inquiries, in that the union challenged was not yet certified and had no bargaining responsibility. In addition, the challenge was being raised by an employer, as opposed to an individual unit or union member. *Hughes Tool II's* constitutional approach was a logical invitation to such a dramatic shift. The Board's initial response to such challenges, as you probably know, was to reaffirm the *Hughes Tool II* approach.

In *Bekins Moving & Storage Co.*,⁴⁷ two Board members concluded that the Constitution required precertification investigation into allegations that a union has shown a propensity to engage in unfair treatment of its constituents.⁴⁸ Two other Board members, Member Penello and I, saw certification as required by the statute provided election procedures were not irregular, and as not raising constitutional infirmities.⁴⁹

Strangely enough, Member Kennedy cast the decisive vote in a separate opinion which became the common ground of *Bekins*. He viewed constitutional considerations at work only in situations in which the discrimination alleged was on the basis of the inherently suspect classification of race, alienage, or national origin. The *Bekins* allegation met that test.⁵⁰

In the same year, we issued our original *Bell & Howell*⁵¹ decision. The alleged discrimination in *Bell & Howell* was sex discrimination, a classification which the United States Supreme Court has refused to denominate as "inherently suspect." Member Kennedy, accordingly, cast his vote with Member Penello and me, in refusing to order a precertification investigation into the allegations of discrimination with respect to sex.

I have, of course, left much unsaid about these cases, but that is only because, as many of you know, they were relatively short-lived,

46. *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977).

47. 211 N.L.R.B. 138 (1974).

48. The two board members were Chairman Miller and Member Jenkins.

49. 211 N.L.R.B. at 145-49.

50. *Id.* at 143-45.

51. *Bell & Howell Co.*, 213 N.L.R.B. 407 (1974).

and unfortunately so. After the union was certified in *Bell & Howell*, we issued a summary judgment order to bargain against *Bell & Howell*⁵² but then recalled the case for oral argument along with *Handy Andy*. Read together, these cases, which adopted the dissenting opinions of Member Penello and me in *Bekins*, held that the Board would investigate allegations of union discrimination only in post-certification proceedings exclusive of summary judgment certification test cases. The conclusion flowed from the view that certification itself was not only a facially neutral act falling short of the kind of governmental action posing potential constitutional problems, but also an act mandated by statute in those situations where a fair election has resulted in a majority vote for representation.

Bell & Howell was recently enforced by the United States Court of Appeals for the District of Columbia⁵³ but the process of elucidating litigation in this area is, obviously, far from complete. And, the impact of *Handy Andy* may reach out to the second unfair representation question which I alluded to earlier—whether all breaches of the duty of fair representation are remediable under the unfair labor practice provisions of the statute.

My basic difficulty with *Miranda* and its “irrelevant, invidious, or unfair” standard, by which breaches of the duty of representation are measured, is that it permits too broad an intrusion by the Board into internal union affairs and transforms the Board into an instrument for policies far broader than those to which it is committed by statute. But it is, as I indicated in *Handy Andy*,⁵⁴ only superficially correct to say that I have never endorsed *Miranda*. Oftentimes, the Board’s *Miranda* policy and the more traditional approach which I advocate will overlap.⁵⁵

In one respect, the *Handy Andy* cases emphasize the Board’s traditional statutory responsibilities—for example, the speedy resolution of questions concerning representation. In another sense, however, the cases indicate a procedural preference for the resolution of allegations of discrimination in unfair labor practice proceedings. Both of these tug *Miranda* in different directions, I suppose. I do not want to leave you with the impression that either the Board majority’s or my respective *Miranda* positions are in a process of transformation, but merely

52. *Bell & Howell Co.*, 220 N.L.R.B. 881 (1975), *reaffirmed*, 230 N.L.R.B. 420 (1977).

53. *Bell & Howell Co. v. NLRB*, 598 F.2d 136 (D.C. Cir. 1979).

54. *Handy Andy, Inc.*, 228 N.L.R.B. 447, 456 n.72 (1977).

55. *See id.*

wish to note that the future will surely provide enough room for further reflection.

I know that, at the outset, I indicated an intention to discuss only two areas of Board law likely to be dominant themes of our decision-making in the year ahead. I must confess, however, that it always has been my intention to discuss two and a half issues. But, I don't want to give you the impression that, at this point, you still had far to go in this obvious demonstration of patience on your part. I promise to be brief, but I cannot resist talking with you about a rather significant decision of the United States Supreme Court in the last few weeks.

Not too long ago, I gave a speech before a nonprofit foundation which opened with the sentence, "Four score and seven years ago, Pope Leo XIII gave the world *Rerum Novarum*." I thought that was a really cute sentence. That speech was about the irony of addressing, eighty-seven years after Pope Leo's famous encyclical endorsing collective bargaining, the question of the Board's jurisdiction over lay teachers employed by parochial grammar and secondary schools.

As all of you know, the United States Supreme Court recently showed me just how ironic the matter was when it issued its 5-4 decision in *NLRB v. Catholic Bishop of Chicago*.⁵⁶ That decision may generate a good deal of litigation in the next few years, once the ingenuity of the labor-management bar is applied to it; a process I am fairly confident is already under way.

There are, I think, two ways of looking at *Catholic Bishop of Chicago*—its literal holding and its unspoken meaning. The Court's basic conclusion was that because the Board's assertion of jurisdiction, to the extent it encompassed lay faculty at the schools, posed serious first amendment questions, it was first necessary to look to the Act's legislative history for a clear expression of affirmative congressional intention to have the Board exercise jurisdiction over that relationship. That was so, the Court stated, because, and I quote, "[a]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available."⁵⁷

Facially, then, the impact of the decision may not be far-reaching. You must first establish a serious constitutional question before the "affirmative intention of the Congress clearly expressed"⁵⁸ jurisdictional inquiry is applied. Short of that constitutional hazard, the Act's broad

56. 440 U.S. 490 (1979).

57. *Id.* at 500.

58. *Id.* at 501.

jurisdictional reach, "the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause,"⁵⁹ remains arguably undisturbed. Assume, however, as we well may, that at least a plurality of the Justices were prepared not only to find or reach the constitutional question, but, further, to find the Court's assertion of jurisdiction constitutionally infirm.

Catholic Bishop of Chicago, to the extent the assumption is shared and tested by others, may generate a good deal of litigation questioning both the extent of Board jurisdiction over religious health care institutions, and the extent of Board jurisdiction over all institutions operated by religious entities, including colleges, universities, and so forth, opposed, as a matter of dogma, to unionization. For example, Seventh Day Adventists have consistently refused to admit the coverage of the Act. I do not mean to suggest that these attacks on Board jurisdiction will be successful. I rather doubt they ultimately will be, but then again, I thought we would win the *Catholic Bishop of Chicago* case. But, in the case of religious health care institutions, many hospitals, for example, are operated by orders of religious nuns. Fortunately, there is a clear expression of legislative intent to cover that grouping in the 1974 health care amendments.⁶⁰ That, coupled with the substantial body of opinion which views an administrative agency as not competent to question the constitutionality of legislative enactments entrusted it, could result in protracted litigation of these questions in the courts.

In closing, let me again thank you for this opportunity. I am looking forward to the ensuing discussion, which I am sure will be a lively one, even if my opinions will be subject to an unaccustomed degree of scrutiny. But, long ago, I learned the obvious: no Board member can guarantee to any person or group that his decisions will meet with their approval. What he can do is pledge to point his decisions in the direction of the twin cardinal policies of the Act. The first policy is to encourage the practice and procedure of collective bargaining which is a bulwark of democracy and freedom in our industrial society. I sometimes hesitate to think about what the political consequences of this might have been if in 1935 the Congress had decided not to enact the National Labor Relations Act, but rather had let labor-management continue in a relationship which was deteriorating very rapidly at that

59. *NLRB v. Reliance Fuel Corp.*, 371 U.S. 224, 226 (1963) (citations omitted).

60. Congress amended the National Labor Relations Act to extend coverage to nonprofit hospitals. See Pub. L. No. 93-360, §§ 1(a)-1(b), 88 Stat. 395 (codified at 29 U.S.C. §§ 152(2), (14) (1976)). For the legislative intent, see S. REP. NO. 93-766, 93d Cong., 2d Sess. 120, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 3946.

time. It is a safety valve—more than some of us realize. The second thing we have to do is protect the workers' exercise of the fullest freedom of association and free selection of a union to act as their representative if they wish one, which is the necessary cornerstone of the institution of collective bargaining in this country.

Disagreements will not be precluded, of course, by that approach. It is only that I have never been persuaded that a better approach exists for achieving the peaceful labor-management relations all of us seek. Again, thank you for inviting me to share some time with you. I repeat: It's a great honor for me to have kicked off this program of the Kenneth M. Piper Lecture series. I shall always remember that I was invited to do that and, if I can ever be of any help in the future to the people who are administering this program, you have my complete endorsement and support. Thank you again.

PROFESSOR DOPPELT: Thank you very much, Chairman Fanning. We appreciate your being with us, and your remarks, and your offer. You will definitely get a call.

Our first panelist is Gilbert Feldman of the law firm of Cornfield and Feldman. Their law firm and Mr. Feldman represent a number of labor organizations in a wide variety of industrial relations matters. Gil is also a member of our LL.M. Labor Program Advisory Council and we appreciate his help.

MR. FELDMAN: Chairman Fanning, Professor Doppelt, ladies and gentlemen. Given the unions that I represent, one might assume that I spend a great deal of my time before the National Labor Relations Board. As I think about it, that is not the case.

As the years have gone by, I have spent less and less of my time representing unions before the National Labor Relations Board, and that was brought to bear upon me when I saw this afternoon many of my old friends from the Board, and the accompanying realization how we are all getting older, and I haven't seen much of them in recent years.

The basic reason for this is that my experience has brought me to believe, over the years, that I cannot effectively achieve the goals of the unions I represent before the National Labor Relations Board. There are cases where the duty to engage in collective bargaining, I believe, is enforceable before the National Labor Relations Board. In most instances, they involve either an arrogant employer or an uninformed employer. The arrogant employer is the one who says, "I am going to

do what I want to do, and nobody is going to tell me anything differently." The uninformed employer is the one who is not sufficiently astute to hire one of the many superb management labor lawyers in this town.

But unfortunately, more and more, that is not the case. And, in my experience, if you have a sophisticated labor lawyer representing a company, one who reads the cases, who is imaginative, I think it is very possible to sit down at a bargaining table and talk to a union and use loopholes between the cases, and not in any real sense to bargain with a union. And so, although I find the subjects which Chairman Fanning is discussing to be provocative and academically interesting, from the point of view of my clients, I don't find them very meaningful.

As a matter of fact, I spend more of my time today in the representation of public employer unions engaged in the active pursuit of bargaining and obtaining union goals than I think I do in the representation of private employers subject to the NLRB. Now, why is this? I have my own theory, which I would like to present briefly. The Wagner Act⁶¹ was adopted in the 1930's. It had two basic purposes: one was to achieve industrial stability, and the other was to state a public policy in favor of collective bargaining and to provide an agency to enforce that public policy. At that time, a question was presented to unions as to whether this approach was preferable to an approach where a much higher sense of consciousness would be developed between workers; a much closer sense of identification of workers whereby they would see the common interest they had with respect to issues facing workers.

There were options available, at that time, and the option selected was the National Labor Relations Act and the National Labor Relations Board. To a certain extent, I think, this became an opiate because people tend to accept government and accept somebody to do something for you, rather than doing it for yourself. And, if something else is available, I think that people tend to develop a dependency upon it. The promise was there, and for a certain period of time, I think, it worked.

Immediately following World War II, however, I believe that the initial promise of the National Labor Relations Act began to be cut back. The first thing that happened was the Taft-Hartley Act,⁶² which in my opinion permitted both employers and employees to severely cut

61. 29 U.S.C. § 151 (1976).

62. *Id.* § 141.

into union activities related to collective bargaining, and most importantly, prevented unions from engaging in boycotts to further their objective through the use of muscle.

The second thing that happened, and Chairman Fanning has discussed this, was the development of the doctrine of unfair representation. That is, a union was deemed to be the exclusive representative of employees, had to represent them, and employees had a direct claim against their union if the union did not do so. Now, although I think the doctrine is perfectly sound, I think the effect of it was very adverse in terms of unions, because it further set the member against the union, and the member sought his rights, not so much against the employer in terms of the employer who he is working for, but against the union which was supposed to be representing him.

I have no complaints with the Board with respect to the doctrine of fair representation because in its great sophistication, the Board has handled the doctrine quite well. In fact, each time you get a lawsuit involving unfair representation, you find the employee involved has already gone to the Board, and the Board has refused to issue a complaint because the charges which the employee has made are unfounded. In my experience, I have never yet lost an unfair representation case, but, unfortunately, unions must spend a great deal of their funds in defending them, because you eventually have to go to trial with them and it is very, very expensive.

The next cutback which once again philosophically separated the union and its members was the Landrum-Griffin Act,⁶³ which had very laudable purposes. There were great improprieties which had been engaged in by some unions, and so this law set up rights in union members to act with respect to its union dealing with internal union matters. But, once again, it set the union apart from the employee whom it represents.

Next came the whole series of anti-discrimination laws,⁶⁴ which also set union members, as an association seeing a common objective in terms of improving their hours, wages, and working conditions, against the individual union member. Union members began to find that they could sue both unions and employers and this individual right of working people became even more significant. Thus, it became more and more difficult for unions to emphasize the joint, overall interest of workers. I am not saying I am against anti-discrimination statutes, but

63. 29 U.S.C. § 411 (1976).

64. *See id.* §§ 158(a)(3), (b)(2).

I am trying to get across the impact of these statutes. Now, when you put it all together, I don't think most working people today who belong to unions really see their problems in terms of unions solving them, and I don't think they see themselves as part of a working class, because of all of their individual rights.

In terms of the Board, I think that, as I indicated in the beginning, I don't see any sophisticated bargaining. In fact, I might say that of all the decisions which have come down recently, the one that to me is the most significant is the recent United States Supreme Court decision which said that the State of New York could constitutionally legislate so as to provide unemployment compensation benefits to strikers.⁶⁵ I am very sorry to be a protagonist here, but I simply do not see in the next ten years that the interest of unions and working people are going to be significantly served through proceedings before the NLRB.

PROFESOR DOPPELT: Thank you, Gil. The next panelist is Richard Laner of the law firm of Dorfman, Cohen, Laner & Muchin. The firm and Mr. Laner are devoted exclusively to representing management in labor relations. Dick is a former chairman of the Chicago Bar Association Labor Law Committee. He, too, is on our LL.M. Labor Law Program Advisory Council.

MR. LANER: Thank you, Professor Doppelt. Mr. Chairman, what a wonderful opportunity to come and be critical of your remarks and not have to worry about the interest of a client who may be appearing before the Board. I would like to make a comment and ask a question about one aspect of your remarks, and make a second comment on the other major subject of your discussion.

In considering the reimbursement of legal expenses, I suggest that a finer line might be drawn than you suggest. I have no problem with using the standard that there must be some clear and flagrant violation of the Act to cause the Board to come up with such an extraordinary remedy because when there is a pattern of resisting unions unlawfully by repeated violations of the Act, obviously, something must be done. And, your concern regarding frivolous defenses is well-founded. As a practical matter, however, these concerns are very difficult to swallow for a pragmatic person who advises and counsels employers daily about complying with the Act.

Let me suggest why that is: The Act, and the entire American ju-

65. *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979).

dicial system, places a premium on a lawyer's ingenuity to develop reasonably debatable defenses when there are no obvious ones. I believe you referred to that yourself, in discussing the impact of the *Catholic Bishop of Chicago* case. Yet, I believe frivolous defenses will virtually be unknown, if you have any kind of a competent counsel; and, if you start to develop that as a standard, there will be a chill on the ingenuity of the lawyer in following his profession.

Further, I think that the Act encourages the delay more than any employer or union does because the only way that you can effectively appeal the decision in our case is through a refusal to bargain. In such an instance, the very congested Board and court calendars cause the delay far more than the employer who acts in a few days to file his objections and certainly can, within thirty days or less, present all of the evidence pleaded to support those objections. From that point, it is usually the Board's or the court's fault if there is a delay. So, my conclusion is that a clear and flagrant violation, which results in litigation expenses and maybe even in some cases organizational reimbursement expenses to the labor organization, can be a substantial deterrent for such violations of the Act, in and of itself.

The question I have is: Are not the considerations for awarding litigation expenses, as in *Tiidee*, where an employer did clearly and flagrantly violate its statutory duty to bargain, equally applicable to a union's picketing which is shown to be in flagrant violation of section 8(b)(4)⁶⁶ or section 8(b)(7)⁶⁷ or, for that matter, any other clear and flagrant violation of the Act? Typically, these sections, in and of themselves, encourage delay of the resolutions of the dispute, and do in fact result in frivolous proceedings.

The second comment I have is that I question whether the United States Supreme Court ultimately is going to agree with the position that charges of racial discrimination in unions may not be made in a precertification procedure. Although Judge Bazelon in the United States Court of Appeals for the District of Columbia recently agreed with you,⁶⁸ I wonder whether this view can really prevail in the 1980s.

Assume, if you will, a local union that refuses to accept blacks, or in the words of the court, has a propensity to do so. No matter how one tries to avoid it, the fact is that a labor Board certification is a federal agency approval of a labor organization action. That is the action to

66. 29 U.S.C. § 158(b)(4) (1976).

67. *Id.* § 158(b)(7).

68. *See Bell & Howell Co. v. NLRB*, 598 F.2d 136, 148 (D.C. Cir. 1979).

seek recognition. Moreover, I just don't see how you can avoid the fifth amendment protection if the National Labor Relations Board is allowed, at least tacitly, to approve and assume illegal racial policy by accepting a local union that is guilty as charged.

The Act encourages collective bargaining, as you correctly pointed out. Union membership, therefore, must be a good thing for those employees who want it, so when a union discriminates on the basis of race, it denies an employee's right to membership, and in a union shop situation, may even deny the employee's right to work. Why should the NLRB give its stamp of approval to such a situation in certifying a union and then letting that certification be attacked thereafter? The fact that the Equal Employment Opportunity Commission or other government contract agencies also have similar responsibilities, is not, in my judgment, an effective answer. In sum, so long as the charge of discrimination in a local union organization is made in good faith and there is available an expedited procedure to settle such, as there is currently, I don't believe that there can be in 1980, or thereafter, a quasi-judicial sanction of private discrimination by a local union.

PROFESSOR DOPPELT: Our next panelist is Mr. Gittler, who is with the law firm of Asher, Greenfield, Goodstein, Pavalon, and Segall, Ltd. Mr. Gittler's firm represents labor organizations. He is also former chairman of the Chicago Bar Association Labor Law Committee. Mr. Gittler is also on our Advisory Council of the LL.M. program and serves on the faculty of our LL.M. program.

MR. GITTLER: Thank you. I have several problems which I would like to discuss and unfortunately very limited time. Thus, I will respond to the Chairman's remarks without passing upon a few of the bon mots expressed by Dick Laner. Professionalism and time constraints require, at this point, even though Laner is wrong, to proceed with the assigned task. But, as far as available remedies, Dick, I am glad nobody has told you about section 303.

Chairman Fanning has said in his address two things which I think are significant and, if there is any truth to his representation that forums, such as this one, engender ideas and debates which might influence the thoughts of someone like Chairman Fanning, let me take an opportunity to do so.

About four years ago, a federal district judge who gave the commencement address at Loyola University stated that he was seeking immortality. The way he was going to find immortality was to join the

ranks of Murphy, Peterson, and those other famous and infamous men, who formulate laws; laws not based upon what is perceived to be necessary for the common good, but laws based upon practical experience such as Murphy's Law—if anything can go wrong, it will—and the Peter Principle—an individual rises to the level of his incompetency and stays there—which is certainly not applicable here.

The commencement speaker then formulated what is known as McGarr's Law. McGarr's Law states that whatever the federal government does, it does more or less poorly. And, I stated at the outset—just as the Chairman had to qualify his thought processes—if anyone takes what I am about to say about the Board or the Thirteenth Region in particular as commentary, I must deny it. The three individuals I mentioned are the individuals who have made the Thirteenth Region what it is today, and we will leave it at that.

I would like to suggest a proviso to McGarr's Law. This proviso would state that while we have our problems with federal agencies, on balance and on the whole, those of us who have and do practice labor law, whether as extensively as we used to or in a more limited capacity as Gil Feldman suggested, generally agree that of those federal agencies with whom we deal, the Board probably does a better job than any other federal agency. This does not mean that they are doing everything they should. I think the reason for this was unintentionally stated by the Chairman when he cited the case load crisis which inevitably awaits us.

If this is a shorthand version of saying that the Board, as with any federal agency, must make some priority determinations as to the allocation of its resources, I would suggest that an analysis of the duty of fair representation, and what the Board has been doing with it—here I respectfully disagree to some extent with my brother Feldman—is not calculated to serve the best interest of the labor management community in general or of the trade union movement in particular. Gil Feldman has alluded to the conflicts which are being created as between the individual and his concerted institution, the union. This is the institution which, by law, and in most cases, by choice, the individual has chosen as the means to better his working life.

The kinds of conflicts that arise on a day-to-day basis, I submit, are not the kind of conflicts that the Board ought to get involved in, contrary to what they are doing. This is not to suggest, Mr. Chairman, that the duty of fair representation is not a viable forum, to a limited extent, for Board consideration. The standards that have been em-

ployed, which we all agree are subjective, nevertheless have some articulable functions. Race discrimination, sex discrimination, union activities, the motivation which leads a union to act or not to act, as you indicate in your address, are subjects which should be addressed.

Interestingly enough, Board Member Truesdale, about four weeks ago in another speech, considered the duty of fair representation. Board Member Truesdale's conclusion was that the Board was going too far into internal union matters. While the Chairman has acknowledged that a too broad intrusion by the Board is an intrusion into internal union affairs not warranted by the statute, I suggest that such an intrusion, with some very limited exceptions, is expressly denied to the Board by the statute.

The Congress has stated, in the proviso to section 8(b)(1)(A),⁶⁹ that the Board is not competent to judge internal union regulatory affairs. There had been some exceptions which in my judgment have swallowed up the rule. Exceptions to the point where the NLRB, given its limited resources, is now "second guessing" along with the alphabet soup of federal regulatory agencies and the federal and the state boards. The NLRB thus is becoming a built-in step to negotiate contractual grievance procedures.

Neither myself, nor any attorney on this panel, would have difficulty limiting the Board's intrusion into employment matters to those kinds of standards, which can be readily defined. Race discrimination is the foremost example. Union attorneys have been dealing with concepts of race discrimination for almost four decades, as the *Steele* case shows. Management attorneys are new to the matter. They are all learning the hard way, but they are learning.

The statute shows an examination of internal union regulations and their enforcements. Yet, the most recent cases to come down on the subject shows, not as urged by Board Member Truesdale, and not as alluded to by Chairman Fanning, that the motive is not whether the union should have acted differently, but whether its decision not to act was reached in good faith. This is not what the Board is doing. The Board is substituting its judgment for decisions made by union representatives. They are sitting in the ivory tower that all decision makers have to sit in and I submit that this is not healthy.

For example, in a very recent case in which the Chairman did not participate, the Board found, without considering the proviso, that the duty of fair representation had been violated by a union whose local

69. 29 U.S.C. § 158(b)(1)(A) (1976).

union president felt, as a matter of policy, that a decision made by an employer in favor of an employee was not in the best interest of the union.⁷⁰ The Board majority did this, cavalierly, by taking the union president's expression and couching it in terms of his personal preference. It was not a personal preference; it was the union leader's perception of what was necessary to serve the best interest of the majority in his unit. It was expressly found that there was no indication of any bad faith.⁷¹

In another recent case, with the Chairman concurring, it was found that a union decision to invoke internal union discipline against the union members violated the statute.⁷² I am referring to the *Local 39* case where an individual was fined by a union after his union at the bargaining table had agreed to amnesty. There is no question here but that the amnesty provision negotiated between the employer and the union was violated.

Nevertheless, remedies do exist. Remedies which Congress has charged to forums other than the Board to effect a remedy on behalf of the individual, if such a remedy is warranted. Given the limited resources that the Board has, and given the crisis which the Board will face in the future, I submit, Mr. Chairman, that your organization could be better devoted to areas which are less subjective.

PROFESSOR DOPPELT: Thank you, Mr. Gittler. Our final panelist is Richard Ostrow. He is with the firm of Seyfarth, Shaw, Fairweather & Geraldson—certainly one of the biggest law firms representing management in the United States. Mr. Ostrow has wide experience in the area, and he is also a member of our LL.M. Labor Law Program Advisory Council.

MR. OSTROW: I would like to discuss trends which might well threaten the viability of the Board and its claimed expertise in labor-management relations. To the extent that courts become less enamored with that claimed expertise, the very existence of the Board, I submit, is in jeopardy.

In the context of discussing the case of *NLRB v. Catholic Bishop of Chicago*,⁷³ the Chairman referred to "a substantial body of opinion which views an administrative agency as not competent in questioning the constitutionality of legislative enactments entrusted it." The D.C.

70. United States Postal Serv., 240 N.L.R.B. No. 178, 100 L.R.R.M. 137 (1979).

71. *Id.*

72. Stationary Engineers Local 39, 240 N.L.R.B. No. 131 (1979).

73. 440 U.S. 490 (1979).

Circuit also overruled the Board in not taking jurisdiction over hospital house staffs in *Physicians National House Staff Association v. Murphy*⁷⁴ and questioned Board competency in interpreting the law itself, as well as the Board's ability to distinguish between employees and students. Thus, the courts are not only questioning the Board's ability in questioning the constitutionality of the statutes entrusted to it, but also the Board's competency in interpreting the statute itself. But, court examination of Board competency in statute interpretation has gone even further, for the Board's own claimed expertise in labor-management relations has been severely questioned.

It would appear that issues concerning that expertise have been raised due to the Board's flip-flopping on long standing precedents; flip-flops seemingly dependent upon the makeup of Board panels or dependent on the change of one member, causing a majority switch. It would appear that when the Board reverses itself and long-standing precedent, the courts will question a claimed expertise and no longer yield to the agency. This would appear particularly so when a reversal takes place due to a change in the majority makeup of the Board. New facts or startling new revelations play no part in such reversals, thus bringing a claimed expertise into question. This, I believe, is a real threat to the Board in this next decade.

Just recently, Professor James Oldham, at the New York University conference on labor law⁷⁵ noted that the 1962 case of *Hollywood Ceramics Co.*,⁷⁶ where the Board established the doctrine that material misrepresentations by either party during an organizational campaign under circumstances precluding the other party from effectively replying, would be sufficient grounds for invalidating an election. Professor Oldham then noted the 1977 case of *Shopping Kart Food Market, Inc.*,⁷⁷ a decision in which the Board scrapped fifteen years of the *Hollywood Ceramics* doctrine and stated it would no longer probe into the truth or falsity of the parties' campaign statements. Chairman Fanning and Member Jenkins dissented. Professor Oldham noted: "In short, Member Jenkins continues to discredit the Getman, Goldberg and Herman study. It will be fascinating to see what Member Truesdale thinks."⁷⁸ None of us had long to wait, for in December 1978 in

74. No. 78-1209 (D.C. Cir. Apr. 2, 1979).

75. Oldham, *New Problems in Labor Law*, in PROCEEDINGS OF NEW YORK UNIVERSITY THIRTY-FIRST ANNUAL NATIONAL CONFERENCE ON LABOR (R. Adelman ed. 1978) [hereinafter referred to as Oldham].

76. 140 N.L.R.B. 221 (1962).

77. 228 N.L.R.B. 1311 (1977).

78. Oldham *supra* note 75.

General Knit, Inc.,⁷⁹ the Board scrapped *Shopping Kart* and went back to *Hollywood Ceramics*. The majority? Chairman Fanning and Members Jenkins and Truesdale. The dissent? Members Penello and Murphy.

Recently, in *Abilities & Goodwill, Inc.*,⁸⁰ the Board majority of Chairman Fanning and Members Jenkins and Truesdale scrapped thirty years of Board precedent in holding that unlawfully discharged strikers should be treated the same as illegally discharged employees and will no longer be required unconditionally to request reinstatement in order to trigger an employer's back pay liability. For thirty years, such a striker's back pay claim kicked in from the date unconditional offers of reinstatement were made. The dissent accused the majority of ignoring the "cumulative administrative experience"⁸¹ represented by the thirty-year old, abandoned policy. The changes in long-standing Board policy in *Hollywood Ceramics*, *Shopping Kart*, *General Knit*, and *Goodwill* were not based on any significant fact or changes in circumstance. Rather, the changes were the result of Board makeup.

As Professor Oldham speculated on the outcome of *Shopping Kart*, I suggest it will also be fascinating to see what the Board does with the *Collyer* doctrine;⁸² a deferral doctrine consistently opposed by Chairman Fanning and Member Jenkins. Again, one awaits the proclivities of Member Truesdale. It has been suggested that such changes in policy and abandonment of administrative experience caused by panel makeup or majority mix can only serve to undermine confidence in Board expertise. And, as I suggested, the courts now openly question that expertise.

Two court cases deserve mention. In the recent case of *Detroit Edison Co. v. NLRB*,⁸³ the United States Supreme Court reversed the Board and held that it abused its discretion when it ordered the company to disclose directly to the union copies of aptitude tests, scores, and answer sheets used in job promotions. The Court noted that the Board does not carry a blank check for arbitrary action. The Board's decision was characterized by the Court as naive and one not adequately designed to protect the security of the tests.⁸⁴

The Court in *Detroit Edison* credited company psychologists with

79. 239 N.L.R.B. No. 101 (1978).

80. 241 N.L.R.B. No. 5 (1979).

81. *Id.*

82. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

83. 440 U.S. 301 (1979).

84. *Id.* at 314-16.

a greater knowledge of, and familiarity with, industrial behavior than that claimed by Board expertise. As the dissent noted, “the Court, in fact, refused to recognize the Board in this case as the expert in applying the Act to the complexities of industrial life or in weighing the interest of both sides in this labor-management controversy.”⁸⁵

And, in *Yellow Cab Co.*,⁸⁶ the United States Court of Appeals for the District of Columbia reversed a finding by the Board that Chicago Yellow/Checker Cab drivers were employees and not independent contractors. The court pronouncements are revealing, speak for themselves, and pose, I think, the greatest challenge to the Board in this decade:

Not only has the NLRB repeatedly reached diametrically opposite conclusions on the basis of virtually identical fact situations . . . but moreover, it has done so in a series of opinions (*without offering rationale or reason*).⁸⁷

. . . .

This process of ad hoc and inconsistent judgments—in which the only determinative elements seem to be the composition of the NLRB panel which happens to hear the case—has descended in the instant case almost to the point of absurdity.⁸⁸

. . . .

In sum, because of the Board’s history of vascillation and the basically legal nature of the question before us, it is inappropriate for this court to extend any great amount of deference to the Board’s disposition of the problem⁸⁹

How much will the courts defer to Board expertise in the future? Again, my appreciation for the opportunity to participate in this distinguished lectureship series.

PROFESSOR DOPPELT: Chairman Fanning, would you care to comment?

CHAIRMAN FANNING: Well, I feel right at home. You know, when you litigate a case, somebody wins and somebody loses. Now, the party that won says: “Well, of course I should have won. I was right from the beginning. Why the hell did it take him so long to decide I was right?” On the part of the loser: “How stupid can that Board be?” And that, unfortunately, is the predicament that the Board is in. Now, if I had an hour, I could probably answer everything that’s

85. *Id.* at 330 (White, J., dissenting).

86. Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862 (D.C. Cir. 1979).

87. *Id.* at 869.

88. *Id.* at 869-70.

89. *Id.* at 872.

been said. It wouldn't persuade anybody, but I'd get it out of my system.

First of all, I want to tell you that last year in the United States Supreme Court, which has been quoted so extensively today, the Board won all five cases that were before the Court. You can't have a better batting average in the United States Supreme Court.

I also want to tell you that the Board won eighty-four percent of the cases in the United States Courts of Appeals. True, we lost sixteen percent and my brother correctly quotes the cases he quotes. I don't mean to suggest otherwise. Of course, some of the quotes that he is talking about were also from panels of the Court, as distinguished from panels of the Board. I just want to correct one case.

You forgot to mention—I'm sure, it was inadvertent—that in *Cedars-Sinai* my dissent was sustained by the D.C. Circuit.⁹⁰ I thought that house staff people were employees right from the very beginning. Simply because the American Medical Association says they are employees, why my colleagues don't read the English language, I don't know. I am only the chairman, and most of the time my colleagues tell me that that just gives me the right to chair the meetings.

In any event, I am very happy to have won that dissent because I think it was right. True, it was a 2-1 decision. But, when you are dissenting and there are four votes against you, the courts have a habit sometimes of going with the majority. I lose enough that I like to brag when I win.

Flip-flops due to changes in Board membership do occur—it is regrettably true. But, let me point out to you the difference between the Board and the United States Courts of Appeals, or almost any court, for that matter. When you are appointed to a United States District Court, United States Court of Appeals, or the United States Supreme Court, you are appointed for life. You take your positions during the first few years that you are on the court, and you don't very often change because you are the same person; you have the same mental processes; you react to the same stimuli; and you have a certain built-in stability that comes with lack of turnover.

The Board is quite different. Board members are appointed for five years. Thus, there is quite a bit of turnover. Now, you have a new Board member like John Truesdale whose name has been mentioned and who is only going to have two and one-half years on his term because he was appointed to replace Board Member Pete Walther. In

90. *Physicians Nat'l House Staff Ass'n v. Murphy*, No. 78-1209 (D.C. Cir. Apr. 2, 1979).

two and one-half years, Board member Truesdale's stewardship will be examined by members of the labor-management bar who may decide not to recommend reappointment. How I ever survived for five terms, twenty-two years on the Board, is a mystery to me.

My point is that you cannot expect Board members to act like judges in the sense that I am talking about, because they are not judges. They are temporary appointees who express themselves. Would you want them to be mute? Would you want them only to follow the lead of the chairman? That, I am sure you wouldn't want them to do, because I have been told that some of my decisions are not desirable. You have to put up with the fact that part of the administrative process is getting new blood periodically, getting new ideas, and making new efforts to keep the NLRB up to date.

Now, if you are unhappy with the quality of people on the Board, it's your fault. You should tell the president of the Labor-Management Bar. You should tell the President of the United States to get rid of whomever it is you find distasteful or who is producing distasteful decisions.

I can tell you, and nobody can prove me wrong, that I have never known a Board member to slant a decision because of previous association, or previous background, or previous experience. The facts of life are that the President appoints the Board members and the General Counsel whom the President thinks reflect his philosophy of government. The great protection that you have is the United States District Courts, the United States Courts of Appeals, and the United States Supreme Court since they review literally everything we do—from a simple election to a new legal principle. And that, I think, is the wisdom of an administrative system. Lord knows, courts don't run elections. Courts don't act as fast as we do. Courts don't have 53,000 brand new cases a year like we have had this past year.

I happen to feel very strongly about *Cedars-Sinai*. Since 1976, I waited very patiently to have *Cedars-Sinai* reversed. I have heard that my colleagues on the Board are now going to ask for the D.C. Circuit to review the case *en banc*. And, frankly, if it is reviewed *en banc*, I don't know what will happen.

I can tell you of another case involving Illinois Bell⁹¹ where I dissented on the right of a union to fine a supervisor for crossing a picket line. In that case, the same court, the D.C. Circuit, in one panel sustained my dissent, on a 2-1 basis, and another panel in the same court

91. *International Bhd. Elec. Wkrs. v. NLRB*, 487 F.2d 1143 (D.C. Cir. 1973).

sustained the majority on a 2-1 basis. Same court, same issue, two different results. I suggested that we have a hearing *en banc* because the state of the law was very confused on that basis. In the hearing *en banc*, my dissent was sustained.

The question about *Hollywood Ceramics*—*Hollywood Ceramics*⁹² had been on the books for fifteen years. I thought it worked pretty well. We tried to keep our elections clean. We tried to avoid misrepresentations by either side. I don't happen to agree with the Getman Report.⁹³ I think it is a very poor report on a small segment of the election population here in the Midwest, not that Midwesterners have any peculiar ways of returning elections. With *Hollywood Ceramics*, it was generally accepted by the labor-management bar that if you made misrepresentations, the election might be set aside. You get a new Board member and the Board comes up with *Shopping Kart*. I think *Shopping Kart* just opened the door to bad elections. And, when we got another new member, we went back to *Hollywood Ceramics*. What's so wrong with that? Sustaining a policy and a program that had been in effect for fifteen years.

Regarding *Abilities & Goodwill, Inc.*, I always thought it was wrong to tell a striker involved in a labor dispute that he had to call off the strike and ask an employer to reinstate him in order to set up the back pay claim. I just don't think that's right. I never had the votes up to now. It's as simple as that. All we are saying now is that if an employer fires an unfair labor practice striker, the employer is liable for back pay until he offers to reinstate the employee. Since the employer created the discharge situation, why should he be protected from financial liability? I don't see anything bad about that decision.

The concerns regarding *Collyer* are valid ones. I think *Collyer* is a monstrosity, much more than when it was started because now, if it's an 8(a)(3),⁹⁴ *Collyer* doesn't apply; if it is an 8(a)(5),⁹⁵ *Collyer* does apply. Yet, they are both unfair labor practices as far as I am concerned. One Board member, Betty Murphy, created this dichotomy. I told her it would be better to wipe out *Collyer* and join the majority. I don't know whether we are ever going to get *Collyer* cleaned up. I think we should as an obligation to the labor-management community.

With regard to *Tiidee*, we are not expanding the *Tiidee* remedy. I

92. *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962).

93. J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976).

94. 29 U.S.C. § 8(a)(3) (1976).

95. *Id.* § 8(a)(5).

am not as sanguine as others may be about financial remedies of this kind. I think when you have a situation—particularly an 8(a)(5) situation like we have had for twenty years in *J. P. Stevens* paying counsel fees—it's nothing. The best way to remedy an 8(a)(5) is to tell the employer he has got to let the union come in the plant. You have got to have access to the bulletin boards. The employer has got to address all of his employees by letter, or orally, saying, "I made a mistake. I won't do it again." And, the employer has got to do it for all his employees, not just the ones in the affected plant. We can do a lot more with remedies in that situation. Fundamentally, what is involved here is whether you respect the Act and want to make it work in the interest of the country and the labor-management community or whether you want to be able to find pinholes and oppose the Act.

I have been a lawyer for forty years. I know the responsibilities that counsels have to their clients, but I also know the responsibility that lawyers should have to the public. And, I also know the effects that some of these counsels are having. We know them. I can identify those who will always utilize all the time in the world to avoid collective bargaining. Why? It is profitable. I know lawyers who will give you a formula, who say, "You have got a 500-man plant. I can delay bargaining for a year. The payroll will be such and such. My fee is a third."

We have tried to get some of those people, but we haven't had much luck. All I can fundamentally say is this: I don't expect labor or management to be completely happy with the Board. I am not completely happy with the Board. There are a lot of things that I wish the Board could do that I can't persuade my colleagues to go along with. And, there are a lot of things that I don't think we have the legal authority to do such as the *Excello Dry Wall Co.*⁹⁶ and the *H.K. Porter Co.*⁹⁷ situations. I might add that I cast the deciding vote in *Excello*, a 3-2 decision. The Board had no authority to write a contract for the parties. I still believe that.

I can say that I think the Board is doing a hell of a job. We are willing to work, first of all, for \$50,000 a year, which I suspect most of my peers are exceeding. Secondly, we disposed of 53,000 cases last year. We expect 58,000 next year, over 60,000 the year after. We ran 9,000 elections last year and established a basis for collective bargaining, or decided that there was no basis for collective bargaining. Yet,

96. 145 N.L.R.B. 663 (1963).

97. 153 N.L.R.B. 1370 (1965).

we are not a court. We have limitations on resources. We also have statutory mandates to do certain things that even some of my Board members—fortunately, they are in the minority—think we shouldn't do. For example, some of my Board members tell the General Counsel that a certain case is not important enough to issue a complaint. All I know is that the statute under section 3(d)⁹⁸ says that the General Counsel shall have independence to issue complaints to those cases which he considers meritorious.

In sum, there isn't a word in the statute—at least in section 7—that says we should protect unions or employers. Rather, the statute says that we should protect the rights of individuals. That is fundamentally what we are in business to do and what I think we are doing.

So, I welcome all this banter. I must say that I expected as much and if I had much more time, I could talk like this for a couple of hours. But, unfortunately, I have got to go back to Washington and try to persuade the House of Representatives Appropriations Committee tomorrow morning to give us enough resources to do the job that we are doing.

I thank you all very much.

PROFESSOR DOPPELT: Chairman Fanning, we do want you to get your budget because if you don't have money, I don't teach labor law. Again, we thank the Chairman very much for being with us. And, we again thank each of the panelists.

98. 29 U.S.C. § 153(d) (1976).