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Recent Developments in the Creation of Effective Remedies under the National Labor Relations Act

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COMMENTS

RECENT DEVELOPMENTS IN THE CREATION OF EFFECTIVE REMEDIES UNDER THE NATIONAL LABOR RELATIONS ACT

INTRODUCTION

Section 10(c) of the National Labor Relations Act[1] provides that the National Labor Relations Board[2] may order a party guilty of an unfair labor practice "to take such affirmative action . . . as will effectuate the policies of [the] Act."[3] Some have criticized the lack of effectiveness of remedies fashioned under this rather broad congressional mandate.[4] The ineffectiveness of remedial orders in the past seemed due to the failure of the Board to be creative and imaginative in fashioning orders. Recently, however, the Board appears to have recognized the inadequacy of traditional remedies in certain labor-management situations.[5] This recognition has resulted in the Board's creation of orders designed to more adequately redress the harms suffered. For example in the past the Board would have remedied all pre-election coercion cases by a cease and desist order accompanied by a rerun election. Today it will look more closely at the effects of the coercion and if it finds that a majority was destroyed by the coercion an order to bargain with the union might be included in the remedy. Reluctance of the courts to accept and enforce these and other novel orders, however, may well be the greatest obstacle to achieving the goal of more effective remedies.[6]

The Board is not alone in its concern. Congress also has been considering the problems of inadequate remedies and has generally suggested increasing the power of the Board by adding particular new powers to its arsenal, such as allowing the Board to impose double or treble damages or to remove the tax deductibility of payments of certain awards granted by the Board.[7] Thus the Board, limited by its delegated authority, is beginning to operate imaginatively within these limitations albeit hampered by a reluctant judiciary. The legis-

1. 49 Stat. 454 (1935), *as amended*, 29 U.S.C. § 160(c) (1964) [hereinafter cited as the NLRA or the Act] which provides:

> If . . . the Board shall be of the opinion that any person named in the complaint has engaged or is engaging in any such unfair labor practice, then the Board shall issue and cause to be served on such person an order to take such affirmative action including reinstatement of employees, with or without back pay, as will effectuate the policies of this subchapter.

2. Hereinafter cited as the Board.

3. 49 State. 454 (1935), *as amended*, 29 U.S.C. § 160(c) (1964).

4. *See Hearings on H.R. 667, H.R. 976, H.R. 1134, H.R. 1548, H.R. 2038, H.R. 3355, H.R. 4278, H.R. 5918, H.R. 6080 Before the Special Subcom. on Labor of the House Comm. on Education and Labor*, 89th Cong., 2d Sess., 71 (1966) [hereinafter cited as the Thompson Report]; McCulloch, *An Evaluation of the Remedies Available to the NLRB*, 15 Lab. L.J. 755 (1964); McCulloch, *Address to the Federal Bar Association Convention*, 39 U.S.L. Week 2133 (Sept. 19, 1961).

5. *See* notes 28-85 and accompanying text.

6. *See* notes 8-27 and accompanying text.

7. *See* Thompson Report 68-79.

lature, on the other hand, is considering broadening these confines. The question is whether the efforts of both are necessary to fulfill the desire for more effective remedies.

I. The Courts: A Need for Judicial Cooperation

The Board's efforts to create orders which effectively remedy particular situations will necessarily be in vain without the cooperation of the reviewing courts.[8] Almost from the inception of the Act, the courts became involved in limiting the scope of the Board's section 10(c) remedial authority. While early cases decided under the Act made the Board's power very broad,[9] the courts have set certain limitations on the Board. It is clear that the courts construe the Act to be remedial in nature and not punitive, and where the courts have found the Board's remedy to be punitive the remedy has not been upheld.[10]

It has been established that deterring the violation of the Act is not by itself a proper basis for a remedy.[11] This disallowance of deterrence as a basis of remedial orders is not in keeping with the public interest aspect of the Act. The ends of labor-management tranquility are certainly better served if the unfair labor practice never occurs.

A. *A Need for Recognition of Multiple Interests*

The field of labor-management relations is characterized by the many interests involved. The basic encounter between labor and management presents the collective interests of the individual employees against the collective interests of the owners of industry. Decisions reached in the accommodation of these interests have effects beyond the parties involved. There is an ever present public interest in reaching results which preserve a commercial tranquility. The basic

8. Board orders come before the court of appeals whenever the Board seeks enforcement of a decision or a party petitions for a review. NLRA § 10(e)-(f), 49 Stat. 454-55 (1935), *as amended*, 29 U.S.C. § 160(e) (1964).

9. *See, e.g.*, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). The Supreme Court indicated that the Board's affirmative orders would be upheld unless arbitrary and capricious because "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." *Id.* at 348. *See also* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) in which the Supreme Court stated that "attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow cannons for equitable relief deemed suitable by chancellors in ordinary private controversies." *Id.* at 187.

10. *See, e.g.*, Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940), where the Supreme Court refused to enforce an order by the Board which in addition to providing for back pay, directed the employer to deduct from the payments to reinstated employees the amounts the employees had received for work performed on "work relief projects" and to pay over such amounts to the appropriate governmental agencies.

11. Coats & Clark, Inc., 113 N.L.R.B. 237 (1955), *modified*, 241 F.2d 556 (5th Cir. 1957). There was no finding of discriminatory discharge where an employee quit her job. There was, however, a finding by the Board that the employer had harassed the employee in the past. The Board ordered reinstatment as a remedy for the harassment. The reinstatement order was denied enforcement by the court bcause it neither made some one whole who had been deprived of a right protected by the Act, nor did it prevent the employer from benefiting from his misdeed. The court characterized the reinstatement order as serving as an example—deterrent in nature and therefore unenforceable.

policy statement introducing the Act[12] emphasizes that the NLRB is a *public* agency enforcing *public* rights.[13] Congress apparently hoped to free commerce from labor-management strife through the workings of the Board, and the workings of the Board itself attest to the public orientation of the Act.[14] Nevertheless, the actual recognition of the public interest is often subordinated to the private interests of the litigating parties.[15] It would be preferable for the courts to balance the respective public and private interests before reaching a decision.

The Supreme Court itself has rendered decisions which tend to restrict the Board to the adjudication of private rights. In *Nathanson v. NLRB*,[16] the Court, in denying that a Board back pay award against a bankrupt employer was a debt to the United States, characterized the Board as an "agent for the injured employees," collecting for the benefit of private persons.[17] The position of the Court in this respect is difficult to accept in that it seems to insist that if the public interest is to be protected then a private party also benefiting from the order must act as a conduit to the public. This position is even more bothersome in light of other pronouncements by the Supreme Court. Eleven years before its decision in the *Nathanson* case, the Court in *Phelps Dodge Corp. v. NLRB*[18] stated that the Board

> does not exist for "adjudication of private rights"; it "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstruction to interstate commerce by encouraging collective bargaining."[19]

In most situations there are *both* private and public interests involved. Every affirmative action directed toward redressing a private harm is but a step toward the ultimate goal of industrial peace. Perhaps the courts have become so accustomed to seeing the private interest coupled with public interest that they are reluctant to consider the public aspect without its private counterpart. However, failing to consider seriously the public interest in the absence of

12. NLRA § 1, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. § 151 (1964).

13. *See* H.R. Rep. No. 1147, 74th Cong., 1st Sess. 8 (1935); NLRB v. Fant Milling Co., 360 U.S. 301, 307-08 (1959); NLRB v. Pease Oil Co., 279 F.2d 135, 137 (2d Cir. 1960); Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 426 (1950).

14. Although the Board cannot act until a private party files a charge, the General Counsel, rather than the private parties, must pursue complaints, direct the inquiry and present the ultimate issues in the case. *See* NLRA § 10(b), 49 Stat. 453 (1935) as amended, 29 U.S.C. § 160(b) (1964); NLRA § 3(d), added by 61 Stat. 139 (1947), *as amended* 29 U.S.C. § 153(d) (1964).

15. *See, e.g.*, NLRB v. Coats & Clark, Inc., 241 F.2d 556 (5th Cir. 1955).

16. 344 U.S. 25 (1952).

17. Nathanson v. NLRB, 344 U.S. 25, 27-28 (1952) (dictum). Commentators appear to accept the court's language. *See, e.g., The Supreme Court, 1952 Term*, 67 Harv. L. Rev. 91, 163-64 (1953).

18. 313 U.S. 177 (1941).

19. *Id.* at 193. *See also* National Licorice Co. v. Labor Bd., 309 U.S. 350, 362 (1940); Amalgamated Util. Workers v. Edison Co., 309 U.S. 261 (1940).

a private interest being protected ignores one of the basic policies of the Act.[20]

The problem is not limited to the public-private dichotomy. It is becoming increasingly difficult to predict what interests and whose rights within the private sector will be protected by the courts. In *NLRB v. Darlington Mfg. Co.*,[21] the Supreme Court was confronted with a multi-plant employer's closing of one of his plants and a discharging of employees in that plant because of their union activity. The court set up certain criteria for finding an unfair labor practice when an employer closes one of his plants.[22] Among other factors it must be shown that the discharge of the employees in the one plant was done to "chill" unionism in the other plants.[23] Ignored are the interests of the employees who were in fact discriminatorily discharged for participating in supposedly protected activities.[24]

One positive factor in the decision is that it perceived a legitimate interest in protecting union activity in the other plants. However, even that interest has not been fully appreciated by the Court of Appeals when found in a slightly different context. In *J.P. Stevens & Co. v. NLRB*,[25] the second circuit refused to enforce that part of the order which required the employer to read a statement reciting the findings of the Board to the employees in *all* of his plants. The court without explanation modified the order to require the reading only in the plants where the unfair labor practice took place.[26] Thus, if *Darlington* hinted at the existence of an interest to be protected, it apparently has gone partially unappreciated in the second circuit.

Evident in these cases is a reluctance on the part of the judiciary to recognize the existence of multiple interests in a given situation. While the Board is undoubtedly more sensitive to competing interests, the presence of such interests is rarely so subtle as to elude all but the expert eye. Nevertheless, as these decisions indicate, many interests go unrecognized.

The courts should re-examine the restrictions they have placed on the

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20. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 193 (1941).

21. 380 U.S. 263 (1965).

22. *Id.* at 275. "If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality it gives promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out."

23. *Id.*

24. For a critical discussion of the *Darlington* decision, *see* Summer, *Labor Law In the Supreme Court: 1964 Term*, 75 Yale L.J. 59, 63-67 (1965).

25. 380 F.2d 292 (2d Cir.), *cert. denied*, 385 U.S. 1005 (1967). The Board had found that the employer had discriminatorily discharged 71 employees because of union activity.

26. *Id.* at 305. The court did enforce that part of order requiring that notice be sent to *each* plant and to *each* employee. They modified the part requiring the employer to read the notice to the employees to allow the employer at his option to have a representative of the Board read it. The reading however was limited to the plants in which the unfair labor practice had taken place. The Supreme Court denied certiorari, 389 1005 (1967).

Board in this regard. Essential to insuring that the Board provide adequate remedies is a recognition and consideration by the courts of *all* the interests involved in the cases before them.

B. *A Need for More Meaningful Standards*

A broader perspective on the part of the courts when dealing with Board remedies will itself be hampered unless an attempt is made to define more meaningful standards. The courts presently will strike down Board remedies found to be "punitive."[27] Every order requiring inconvenience or expense punishes the guilty party and is thus "punitive" in a broad sense of the word. Hence the term "punitive," when used as a standard, is overly broad and seems to lend itself to constant redefinition to suit the position of the reviewing court. However, it is not impossible to define the term in such a way as to be useful. If, for instance, the Board is permitted by the courts to order violators to take certain actions designed to remove the fruits of the violation, then "punitive" might be defined as requiring the violator to do more than give up his ill-gotten gains. However the term is defined, it ought to afford some degree of definiteness as to what the court will accept of the Board in the latter's formulation of remedies. Thus, whatever other steps are taken to provide for more effective remedies one most crucial to success concerns the courts' reevaluation of the problem of standards with a view toward the general goal of more meaningful remedies.

II. Development of Effective Remedies by the Board

A discussion of some of the more recent applications of specific remedies at the Board's disposal should indicate what can be accomplished by the Board if imagination is employed.

A. *The Bargaining Order As a Remedy for the Runaway Shop:* Garwin, A Case in Point

The Board has attempted to create imaginative remedies recently to cope with the "runaway shop."[28] Essentially the runaway shop involves a plant relocation motivated in part or completely by a desire to avoid bargaining with a union,[29] and is considered an unfair labor practice.[30] The standard remedy

27. *See, e.g.*, Local 60, United Brotherhood of Carpenters v. NLRB, 365 U.S. 651, 655 (1961); Morrison-Knudsen Co. v. NLRB, 276 F.2d 63, 76 (9th Cir. 1960) *cert. denied*, 366 U.S. 910 (1961); NLRB v. Local 85, Sheet Metal Workers, 274 F.2d 344, 347 (5th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961).

28. *See* Local 57, Garment Workers v. NLRB (Garwin Corp.), 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967), *enforcing and rev'g in part sub nom.* Garwin Corp., 153 N.L.R.B. 664 (1965).

29. Actually the plant relocation often presents another distinct labor relations problem—that of interpreting and applying a collective bargaining agreement. Involved in that area are the contract rights of the parties. This Note deals only with the unfair labor practice aspects of the plant relocation.

30. It has long been held by the Board that an employer commits an unfair labor

granted by the Board orders the employer at his option either to reinstate his operation at the old site or, alternatively, to permit reinstatement at the new site with reasonable moving expenses for the employees and their families.[31] In addition the Board's order is usually accompanied by a conditional bargaining order requiring the employer to bargain at the new location as soon as the union establishes a majority there.[32] Under some circumstances this type of order would be an effective remedy, *e.g.*, the situation in which the employees would in fact be likely to follow the plant in relocation. Such is the case in short distance moves.[33]

However, in the recent case of *Local 57, Garment Workers v. NLRB (Garwin Corp.)*,[34] the Board was confronted with a situation involving the relocation of a New York plant to Florida. The move left behind employees, many of whom were married women, and substantially all of whom could be absorbed in other jobs in their home locale because of a general labor shortage.[35] Upon a finding of a violation of the Act by the employer, the Board's trial examiner recommended the standard order, giving the employer the option of either returning his business to New York or alternatively offering to reinstate the New York employees in his Florida plant.[36] The Board, recognizing the ineffectiveness of applying this remedy, broadened the order suggested by the trial examiner.[37] The Board reasoned that since few if any of the New York employees would go to Florida even with a guaranteed reinstatement, the traditional remedy would not serve to deter the employer who wished to escape the union by distant relocation.[38] In an effort therefore to fashion a meaningful remedy the Board ordered the employer to bargain on request, at the new site *without regard to majority status*.[39] Thus the Board hoped to deprive the employer of the "fruits" of his illegal action of moving the plant to Florida to avoid dealing with the union.[40] The Board concluded that "on balance," the statutory right of the Florida employees to choose their own bargaining representative "must

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practice under sections 8(a)(1) and 8(a)(2) of the Act when he closes his plant at one location and moves to another to avoid his obligations under the Act. *See, e.g.*, NLRB v. Winchester Electronics, Inc., 295 F.2d 288 (2d Cir. 1961); Rome Prods. Co., 77 N.L.R.B. 1217 (1948); Jacob H. Klotz, 13 N.L.R.B. 746 (1939).

31. *See, e.g.*, NLRB v. Winchester, Inc., 295 F.2d 288 (2d Cir. 1961); Rome Prods. Co., 77 N.L.R.B. 1217 (1948); Schieber Millinery Co., 26 N.L.R.B. 937 (1940). *But see* NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir. 1938).

32. *See, e.g.*, Mount Hope Finishing Co., 106 N.L.R.B. 480 (1953).

33. *See, e.g.*, Rapid Bindery, Inc. v. NLRB, 293 F.2d 170 (2d Cir. 1961); California Footwear Co., 114 N.L.R.B. 765, *enforced*, 246 F.2d 886 (9th Cir. 1957); Brown Truck & Trailer Mfg. Co., 106 N.L.R.B. 999 (1953).

34. 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967), *enforcing and rev'g in part sub nom.* Garwin Corp., 153 N.L.R.B. 664 (1965).

35. Garwin Corp., 153 N.L.R.B. 664, 666 (1965).

36. *Id.* at 683.

37. *Id.* at 668.

38. *Id.* at 666.

39. *Id.* at 668.

40. *Id.* at 666.

yield to the statutory objective of fashioning a meaningful remedy for the unfair practices found."[41]

The District of Columbia Court of Appeals, in reviewing the decision of the Board, held that the provision requiring the employer to bargain with the union without regard to majority status was an infringement upon the Section 7 rights of the new employees by depriving them of the opportunity to select their own bargaining representative.[42] The court conceded that the Section 7 rights were not absolute to the exclusion of all others but held that infringement upon those rights must be justified by showing a protection of equally or more vital interests.[43] The other interest that the Board was trying to protect was the general interest of *deterring* this type of employer conduct. The court characterized the Board's order as "punitive" since it aimed at deterring certain employer actions without relation to redressing grievances of the New York workers.[44] While it must be admitted that the Board's remedy did little for the New York workers left behind by the runaway plant, it at least made an attempt to prevent a recurrence of the violation by other employers. The result is that the employer can protect himself in a relocation case by moving far enough so that his help will not follow him. Under such circumstances the right given the employees by the NLRA is non-existent because there is no effective remedy to protect it. The standard remedy is posited in the alternative requiring the employer to either return his plant or reinstate those employees who so desire at his new site.[45] Thus where the employees are unable to move because of the great distance involved, the entire remedy is meaningless since the employer can offer this option and thereby discharge his responsibilities under the Board order.

The District of Columbia Court of Appeals remanded the case to the Board for further consideration of the remedy. Pursuant to this reconsideration, the Board ordered the employer to furnish the union with the names and addresses of the employees at its Florida plant. In addition they ordered that the union have access to the plant bulletin boards. Furthermore, the Board ordered the employer to bargain upon a showing that a majority of the employees at the Florida plant have designated the union as their representative.[46]

41. *Id.* at 666.

42. Local 57, Garment Workers v. NLRB (Garwin Corp.), 374 F.2d 295, 301 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967). For a criticism of the decision see Note, 17 Buff. L. Rev. 559 (1968).

43. *Id.* at 302. Employee's free choice has been sacrificed in the past in the workings of NLRB. The Act itself contains provisions for certification elections and provides that after a valid certification or decertification election has been held the Board cannot hold a second election until one year has elapsed. 61 Stat. 144 (1947), *as amended*, 29 U.S.C. § 159(c)(3) (1964). Even if after the election the overwhelming majority wants another election to change their choice the one year period still applies. *See, e.g.*, Brooks v. NLRB, 348 U.S. 96 (1954).

44. *Id.* at 303.

45. *See, e.g.*, NLRB v. Winchester, Inc., 295 F.2d 288 (2d Cir. 1961); Rome Prods. Co., 77 N.L.R.B. 1217 (1948); Schieber Millinery Co., 26 N.L.R.B. 937 (1940).

46. Garwin Corp., NLRB, 67 LRRM 1296 (1968). It is quite possible that the court

It is questionable as to whether another circuit will decide differently on facts similar to *Garwin*.[47] Nevertheless the original *Garwin* order represents a promising effort on the part of the Board to use imagination in fashioning its remedies. At the same time, however, *Garwin* points up the problem that is going to be encountered when the remedial orders of the Board depart from standard orders, *i.e.*, the reluctance of the courts to become involved in serious balancing of interests.[48] Indeed this problem may have to be resolved by leaving the balancing process to the Board. As was pointed out by the Supreme Court in *Fibreboard Paper Products Corp. v. NLRB*,[49] the formulation of affirmative orders to remedy unfair labor practices is "peculiarly a matter for administrative competence."[50] Perhaps, therefore, the courts in reviewing the Board orders should allow wide discretion and base its decision on whether or not the Board recognizes the particular facts before it and adequately explains the considerations that shaped the order.[51]

B. *Retroactive Compensation as a Remedy for Refusal to Bargain*

Imagination in the fashioning of orders is also occurring at the Board trial examiner level. In two recent cases[52] (the *Ex-Cell-O* cases) as yet undecided by the Board, the trial examiners have recommended orders which if accepted by the Board and enforced by the courts would represent a most dramatic impact on the area of collective bargaining. Basically the examiners in the *Ex-Cell-O* cases have recommended that the NLRB direct payment of retroactive compensation to workers who as a result of the employer's refusal to bargain have

of appeals will not enforce the names-and-addresses part of this order. To date the Board has been successful in applying a names-and-addresses rule to representation cases. In Excelsior Underwear, Inc., NLRB 156 N.L.R.B. 1236 (1966), the Board ruled that where a representation election has been scheduled, the employer must file with the Board a list of names and addresses of all employees eligible to vote in the election. The Board was unsuccessful in convincing a federal district court to enforce this rule through subpoena proceedings. On appeal the Fourth Circuit Court of Appeals, however, upheld the subpoena in NLRB v. Hanes Hosiery Division, 384 F.2d 188 (4th Cir. 1967). On the other hand, the Second Circuit refused to enforce the names-and-addresses rule as a remedy for an unfair labor practice in Textile Workers Union v. NLRB [J. P. Stevens & Co., Inc.], 388 F.2d 896 (2d Cir. 1967).

47. The District of Columbia is one of the Board's "friendliest" in terms of percentage of reversals; thus, reversal here may portend reversal elsewhere. And the Supreme Court's denial of certiorari tends to strengthen the precedent.

48. *See supra* notes 12-26 and accompanying text.

49. 379 U.S. 203 (1964).

50. *Id.* at 214. The current standards of review for Board orders are discussed in Flannery, *The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act*, U. Pa. L. Rev. 69, 91-92 (1963). The standards range anywhere from treating the remedies as facts and subjecting them to the "substantial evidence on the record as a whole" standard; to only requiring that no patent attempt to achieve ends other than those effectuating the policies of the Act are present.

51. *See* Flannery, *supra* note 50, at 94.

52. In July, 1967 the Board heard oral argument in a group of three cases identified as the *Ex-Cell-O* cases. The respective unions in these cases requested that the Board add a monetary award to its usual 8(a)(5) order to bargain in an effort to compensate the employees for wage increases or other economic benefits they might have gained had the bargaining occurred when it should have. Two of the examiners acquiesced in the request. One did not. The cases are presently pending before the Board.

suffered economic loss.[53] In the past when the Board found that an employer was guilty of refusing to bargain with a majority representative of his employees in an appropriate unit the Board ordered the employer to cease and desist from such refusal and to bargain with the union upon request.[54] The Board also has in appropriate cases used its authority to require an employer to sign a written contract containing the terms agreed upon during negotiations.[55] The significant characteristic of the traditional remedies however has been that they take effect as of the time of the order by the Board or its enforcement by the courts. Under the present system it is argued that the employer is tempted to violate the act and refuse to bargain because immediate collective bargaining probably will result in a contract which raises the employer's wage bill.[56] By refusing to bargain, the employer sets into operation the procedure designed to force him to bargain—a procedure which will delay bargaining for up to two or more years.[57] Such a delay provides the employer with a short-term saving on wages and most likely results in a weakening of organizational impetus.[58] Thus there is much for the employer to gain and little if anything for him to lose by his refusal to bargain with a union which has won an election and is certified to bargain.

In effect the remedy recommended is designed to make employees whole for the wages and fringe benefits they *might have received but for the employer's refusal to bargain.* While the foregoing seems predicated on intentional frustrations by the employer, the trial examiner in one of the *Ex-Cell-O* cases went so far as to indicate that a finding of hostility to the collective bargaining process was not necessary to allow the imposition of the suggested remedy. The trial examiner stated that since

> [t]he encouragement of collective bargaining is the central objective of the Act . . . [t]he detriment to collective bargaining occurs whether the employer in good faith believes that the Board has made a serious error of law in the representation proceeding or whether the employer, as a deliberate maneuver to stall bargaining, raises spurious objections and thereafter pursues them to the utmost.[59]

Probably the greatest objection to the use of this "make whole" type of order from an administrative point of view is that it will entail speculation as to what terms the union and company might have agreed. In most situations, however, facts necessary to make a sufficiently accurate appraisal would be available in the surrounding conditions as presented in testimony. For instance, the examiner in *Ex-Cell-O* found that there were significant differences between

53. Ex-Cell-O Corp., Trial Examiner's Dec. No. 80-67, at 15 (Elwood, Ind. 1967) [hereinafter cited TXD No.].
54. *See, e.g.*, Burgie Vinegar Co., 71 N.L.R.B. 829, 830-31 (1946).
55. *See* H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).
56. *See* Ex-Cell-O Corp., TXD No. 80-67, at 11 (1967).
57. *Id.*
58. *Id.*
59. *Id.* at 12.

conditions of employment in the plant in question and those in other plants in the same industry owned by the employer.[60] The differences, he stated, represented a "sound basis" for finding the minimum additional benefits the company's employees would have received.[61]

If it can be assumed that both the employer and the union would prefer to work out their own agreements, the effect of the use of the "make-whole" order in the refusal-to-bargain cases which arise might have the effect of encouraging collective bargaining from the outset. The degree to which such encouragement will in fact result will depend on the circumstances. An employer who is sufficiently certain that the courts will not enforce the particular bargaining order will not bargain under it. Where, on the other hand, the employer is relatively sure that the bargaining order will be enforced by the court along with the "make whole" order, he may well bargain from the start. Those are extreme cases. Problems arise when employers are uncertain as to the court's response to his position, *e.g.*, in situations where the employer has a well founded argument that the Board has made an error in the representation proceeding. He would have to choose between having control over the agreement by bargaining at the outset on the one hand or losing his control over the terms by refusing to bargain and letting the case go to the Board for decision on the other. Nor is it altogether clear that the Board wants to assume the role of "term-maker" for union-management agreements. One can visualize the amount of testimony that would be involved if labor and management were to argue before the Board what the terms *would have been* two years prior. Nevertheless it must be admitted that the employee loses something in the period between the employer's initial refusal to bargain and the final enforcement of a bargaining order by a court.

Any solution to the problem would be more attractive if it avoided the immense added burden on the Board which would result from requiring it to decide what the agreement would have been. One possible alternative is that of ordering the present agreement arrived at by the parties under the bargaining order to be retroactive to the date of original refusal to bargain. While labor and management may agree between themselves to make certain terms retroactive, forcing such a term upon an employer would seem to go beyond what is needed. In all probability the contract agreed to today will include higher wages than that of two years ago. If the contract is given a retroactive effect, to the extent that its terms *exceed* those that *would have been agreed upon*, it penalizes the employer for his refusal to bargain. In cases where the employer was intentionally stalling, such an effect might be justified as having been brought on the

60. After comparing data regarding employer's organized plants in neighboring states with the plant in question, the trial examiner concluded that the benefits of the subject plant did not "measure up to those accorded the employees of the Respondent's organized plants." *Id.* at 14.

61. *Id.*

employer by his own bad faith. But what of the good faith refusal to bargain? The employer there should not be penalized.

A second alternative to the order suggested by the examiner in *Ex-Cell-O* might arguably avoid the problem of added administrative work loads as well as not penalizing the employer who in good faith refused to bargain. The bargaining order could be accompanied by an order directing the parties in their collective bargaining sessions to bargain about a cash settlement for the loss sustained by the employees during the period of refusal to bargain. Not only would this keep the Board from having to make the decision but it would allow the parties to decide the terms for themselves.[62]

There is no question that the examiner's recommendations if adopted will have a very significant impact on the refusal to bargain area. While the Board might fairly reject the recommendation solely on the basis of its work load ramifications, it is hoped that the Board will consider alternatives to remedy the harm suffered by the employees. In the final analysis, the examiner in *Ex-Cell-O* has done no more than attempt to place the parties in the same position in which they would have been had it not been for the violation. It would seem that no other approach would do more to "effectuate the policies of the Act."

C. *The Bargaining Order as a Remedy for Pre-Election Coercion*

The Board has traditionally exercised great control over activities during an NLRB election campaign.[63] All effort is afforded to assure that elections take place in an atmosphere which not even faintly threatens the exercise of free choice on the part of employees.[64] The Board has at its disposal two sources of remedial authority: primarily, the Board has the authority to order a rerun election which is no more than an exercise of the Board's general power to conduct elections.[65] In addition to this general power, the Board has 10(c) remedial powers where an unfair labor practice has been committed, that is the Board may give a cease and desist order as well as ordering the guilty party to perform affirmative actions which will "effectuate the policies of the Act."[66] Unless an unfair labor practice is present the Board is without power to issue a cease

62. The Board might ultimately become involved where the employer refused to bargain in good faith with regard to the cash settlement. Leaving the parties to make their own decision wherever possible however would substantially obviate overburdening the Board.

63. *See, e.g.*, Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966); Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

64. *See, e.g.*, General Shoe Corp. 77 N.L.R.B. 124, 126 (1948). Furthermore, the Board when overturning an election does not consider itself bound by the § 8(c) speech rights. 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1964). *See* Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1787 (1962); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 103 (1964).

65. NLRA § 9(c), 49 Stat. 453, *as amended*, 29 U.S.C. § 159(c) (1964).

66. *Id.* § 10(c), 49 Stat. 454, *as amended*, 29 U.S.C. § 160(c) (1964). Where the activity rises to the level of an unfair labor practice such as a violation of section 8(a)(1), the Board may order a cease and desist order as well as other affirmative actions.

and desist order or to take any other affirmative action with the exception of ordering a new election, which the Board may do in the absence of an unfair labor practice where it finds that the actions of one of the parties created an atmosphere inconducive to a fair election.[67] It is, however, in the area where employer election activities go beyond disruption of laboratory conditions and become substantive violations of the unfair labor provisions of the Act, that the imagination of the Board should be called into play.[68] The traditional Board remedy for pre-election employer activities which rise to the level of unfair labor practices is a combination of a re-run election and a cease and desist order accompanied by a notice to the employees regarding the Board's finding.[69] Where the unfair labor practice has not substantially effected the organizational impetus, a standard cease and desist order along with an order for a new election may be an adequate remedy.

Problems arise with regard to the adequacy of the standard remedy when there has been significant damage to the organizational potential as a result of the unfair labor practice.[70] The Board has recently recognized that certain employer unfair labor practices have such an impact on organizational activity that the standard order will not serve as an adequate remedy.[71] In *Scott's, Inc.*, the employer was found guilty of several unfair labor practices including the discharge and layoff of a significant number of employees because of their union activities.[72] Viewing these violations as an attempt on the part of the employer to destroy all organizational potential in the unit, the Board declared "that the serious violations [require] something more than the usual remedial action."[73] Therefore the Board augmented its orders with provisions requiring that letters be sent to each employee advising him of his organizational rights, that the union be given access to the plant bulletin boards for a period of three months and that the employer be required to provide for a union official to deliver

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67. *See, e.g.*, Des Moines Glove Co., 146 N.L.R.B. 225 (1964); Claussen Baking Co., 134 N.L.R.B. 111 (1961); Myrna Mills, Inc., 133 N.L.R.B. 767 (1961); Bonita Ribbon Mills & Brewton Weaving Co., 87 N.L.R.B. 1115 (1949).

68. Where the employer has threatened that he will not bargain with any union, a cease and desist order will perhaps prevent a reiteration of the statement by the employer but its original impact on organizational potential may well remain.

69. *See, e.g.*, Lufkin Rule Co., 147 N.L.R.B. 341 (1964).

70. Actions by the employer, such as discharging and laying off of employees who are involved in union activities, have a significant effect on union organization. While these actions are violative of the Act, they are remedied some time after the fact and under the present law, cost the employer very little. The discharged or laid off employee is obliged by law to mitigate the damages he has suffered by attempting to obtain employment elsewhere. Thus, where this is done the employer must only pay what the employee has lost. Even if the Board orders reinstatement with back pay, other employees are not likely to forget their co-worker's dismissal—a result of his attempt to exercise his section 7 rights.

71. Scott's Inc., 159 N.L.R.B. 1795 (1966).

72. *Id.* at 1543.

73. *Id.* at 1806, *citing* Frank Bros. Co. v. NLRB, 21 U.S. 702. The Board stated: "It would be an anomaly to preclude an employer's benefiting from misconduct which destroy's a union's majority but to allow it to act with comparative impunity to prevent such status from ever being attained."

a speech to the employees on company time.[74] It is to be noted however that the Board has limited the *Scott's* type remedy to serious employer violations.[75]

It is questionable whether the *Scott's* type remedy will itself suffice in the extreme cases where, because of the employer's unfair tactics, the damage done to the organizational potential cannot be corrected.[76] Probably the most powerful weapon available to the Board in the area of pre-election coercion as in other areas is the bargaining order.[77] The rationale behind the bargaining order in this context is that but for the unfair labor practice, the union would have won the election. The use of the bargaining order as a remedy for pre-election unfair tactics has been limited to situations where the union had a majority before the unfair labor practice took place.[78] The question arises as to whether the bargaining order should be implemented where the union did not actually have a majority but was developing one at the time of the employer's unfair tactics.[79] It has been suggested that under certain circumstances the bargaining

74. *Id.* at 1549.

75. 159 N.L.R.B. 1795 at 1808. *See* also J.P. Stevens & Co., 157 N.L.R.B. 869 (1966). H.W. Elson Bottling Co., 155 N.L.R.B. 714 (1965).

This remedy requiring that the employer give time for a union official to give a speech can only be appreciated when viewed in perspective of the history of the "captive audience" rule. The issue which has been debated concerns the right of a union to reply where the employer has given an anti-union speech. In *Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951) the Board announced a doctrine of equal opportunity, *i.e.*, the employees in their exercise of section 7 rights to organize have a right to hear both sides of the issue under equal circumstances. The "equal opportunity doctrine" of *Bonwit Teller* was rejected in Livingstone Shirt Corp., 107 N.L.R.B. 427 (1953) where weighing heavily the employer's section 8(c) right to give non-coercive speeches to employees the Board concluded that to make such a right contingent upon his granting the union the same opportunity would negate the right itself. In place of the "equal opportunity" approach the Board seems willing to find an unfair labor practice where the employer who is enforcing a broad no-solicitation rule speaks and denies the union opportunity to reply. *See, e.g.*, May Dep't Stores Co., 136 N.L.R.B. 797 (1962). The courts on the other hand have insisted that the Board base its decision on the presence or absence of adequate alternative channels open to the union to rebut the employer's statements. *See, e.g.*, May Dep't Stores Co., 316 F.2d 797 (6th Cir. 1963).

Thus giving the union the right to speak on company time is in this context an extraordinary remedy.

76. *See* Pollitt, *NLRB Re-run Elections: A Study*, 41 N.C.L. Rev. 209 (1963) in which the author reports that in the 267 rerun elections conducted from 1960-1962, a different result was obtained in nearly a third of the cases. *But see* Bok, *supra* note 65, at 124. Dean Bok points out that since unions will not normally seek a rerun election without a good chance of winning, the sample of cases is special and the percentage of reversals must be viewed accordingly.

77. *See* Franks Bros. v. NLRB, 321 U.S. 702 (1944) in which the Supreme Court affirmed a ruling of the Board ordering the employer to bargain with the union, without benefit of an election, where the union lost its majority support after the employer's illegal refusal to bargain. *See also* Note, *Refusal-to-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. Chi. L. Rev. 387, 388 nn.7-8 (1966): "The Board conducted 7,355 elections in fiscal year 1962, 7,240 in fiscal year 1963, 7,309 in fiscal year 1964, and 7,824 in fiscal year 1965." During that same period the Board issued 157, 165, 175 and 236 bargaining orders respectively. *Id.* at 388 n.8.

78. *Compare* Franks Bros. v. NLRB, 321 U.S. 702 (1944), *with* Scott's, Inc., 159 N.L.R.B. 1795; J.P. Stevens & Co., 157 N.L.R.B. 869 (1966); H.W. Elson Bottling Co., 155 N.L.R.B. 714 (1965).

79. The distinction requiring the actual existence of a majority prior to the unfair labor practice makes the effectiveness of the remedy turn on point in the organizational drive that the employer commits the act. The employer is thus encouraged to commit unfair labor practices at the earliest observation of union activity within his plant.

order should be issued without regard to the existence or non-existence of a prior majority status.[80] Again, as in the case of the runaway shop, the Board is faced with a balancing problem. On the one hand there is the interest involved in protecting organizational activities of the employees. On the other, is the Section 7 right of the employee to free choice.[81] Any time the Board considers bargaining orders without regard to majority status these interests must be reweighed in their new and current context. Among those who favor the use of the bargaining order in the pre-election unfair tactics situations, there seems to be consensus that it ought to be used in a limited number of cases. The use ought to be confined to the serious violation cases where no other remedy is suitable because the violation may have adversely effected the union's acquisition of a majority.[82] Since it would be difficult to show in most cases that the violation prevented the attainment of a majority, perhaps the Board should be allowed to infer this from the seriousness of the violation and the closeness of the election. Furthermore, in deference to the organizational rights of the current majority, the order should provide for a reasonable time for which the order is to run and a limitation on the period during which any contract negotiated under the bargaining order may act as a bar.[83]

It is not certain just how the courts would react to a bargaining order without a showing of majority status in the area of pre-election coercion. The court in *Garwin* refused to enforce the bargaining order because they felt that the Florida employee's Section 7 rights should be preserved where none of the injured employees were being redressed.[84] However, the use of the bargaining order in instances of pre-election coercion could be justified in that there would be injured employees who would be receiving direct benefit of the remedy. If *Garwin* could be taken as a judicial guideline for disallowing bargaining orders

80. *See* Bok, *supra* note 65, at 132-39. *See also* Comment, *Employer Pre-Election Coercion: A Suggested Approach for Effective Remedial Action*, 116 U. Pa. L. Rev. 1112, 1124-32.

81. *See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 697-98 (1944) (dissenting opinion). Justice Rutledge said the issuance of bargaining orders without showing a majority "would be to force men into unions and into dealing with their employers through unions contrary to the employees' own wishes." Professor Bok points out however that this argument is not dispositive of the question since unions already often maintain bargaining rights without the support of a majority of the employees. Such is the case where the union loses a majority during the term of a valid agreement. Bok, *supra* note 65, at 134.

82. *See, e.g.*, Bok, *supra* note 65, at 137-38. "It would seem inappropriate to issue a bargaining order in the absence of a preexisting majority, unless the unfair labor practice involved were serious and deliberate. Unions should not be permitted to seize upon trivial violations in order to obtain bargaining rights without an election. . . . As a general rule . . . the order to bargain might well be restricted to cases involving discriminatory discharges or clear threats of retaliation."

83. The Board in *Garwin* provided for a one-year contract bar for any collective bargaining agreement negotiated by the parties if the union were unsuccessful in attempts to achieve a majority at the new plant. This represents a modification of the existing contract bar rules which generally provide a maximum three-year contract bar. *See* General Cable Corp., 139 N.L.R.B. 1123 (1962).

84. Local 57, Garment Workers v. NLRB (Garwin Corp.), 374 F.2d 295, 302 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967).

in general, perhaps the Board would apply with optimism the bargaining order in the area of pre-election coercion where no other remedy would be effective.

There is little doubt that using the bargaining order in these cases will require careful analysis of the factual situation by the Board in its weighing process. But if it is applied with care and accepted by the courts, the remedy of the bargaining order can go far in alleviating the most flagrant forms of pre-election violations without undue risk of harm to the employees or to the employer.[85]

III. Legislative Action to Broaden the Authority of the Board

An independent consideration of the problems related to remedies to effectuate the policies of the NLRA is and has been taking place in the legislative branch of the Federal Government.[86] Generally the investigation is aimed at determining whether the Board is doing all that it can do to assure fairness to all parties in labor-management disputes. In addition those assigned to the task are determining whether or not the NLRA itself has imperfections or deficiencies.[87] Several specific suggestions have been made and an examination of some of them may lend perspective to what is being attempted.

A. *Treating Strikers Protesting Unfair Labor Practices as Constructive Dischargees*

Traditionally an employee who has been discharged by his employer because of union membership or activity was entitled to reinstatement to his old job with back pay.[88] In addition, under the doctrine of "constructive discharge"[89] this particular remedy has been ordered by the Board where it finds that the employee left his job as a result of the difficulties given him by his employer because of his union affiliation or activity.[90] On the other hand, employees who strike in protest of an unfair labor practice are entitled only to reinstatement upon request if the Board determines that the employer is guilty of violating an unfair labor practice provision.[91] The Board orders have not contained any

85. *See* Bok, *supra* note 65, at 139.

86. *See generally* The Thompson Report; *see also* Subcommittee on NLRB, House Comm. on Education and Labor, 87th Cong. 1st Sess., Administration of the Labor Management Relations Act by the NLRB (Comm. Print. 1961).

87. Thompson Report 1.

88. NLRA § 8(a)(3), 29 U.S.C. § 158(a) (1964) makes it unlawful for an employer to discharge an employee with the intent of encouraging or discouraging labor organization membership or activity. *Id.* § 10(c), 29 U.S.C. § 160(c) (1964) provides authority for the Board to order reinstatement with or without back pay so as to "effectuate the policies of the Act."

89. An employee is constructively discharged where his employer makes working conditions so unbearable that the employee is forced to resign. *See* NLRB v. Chicago Apparatus Co., 116 F.2d 753 (7th Cir. 1940). *See also* Elliott-Williams Co. (Sheet Metal Workers, Local 503), 149 N.L.R.B. No. 107 (1964).

90. *Id.*

91. *See* Walsh-Sumpkin Wholesale Drug Co., 129 N.L.R.B. 294 (1960), *enforced by consent decree*, 291 F.2d 751 (8th Cir. 1961); National Furniture Mfg. Co., 130 N.L.R.B. 712 (1961).

provision for back pay in these situations. Since the Board is not allowed to levy penalties or punitive damages in the guise of back pay, the entire amount of the award has to represent wages actually lost solely because of an unfair practice.[92] Nevertheless the general remedy for employer violations which characteristically make the employees' existence on the job very unpleasant is a Board order coming a year or more after the infraction ordering the employer to "cease and desist" from the unlawful conduct.[93] Such an order does little if anything to right the wrong done by the unfair labor practice. Nor does it deter the employer from engaging in such practices.

It has been suggested that the Board be given the authority to broaden the doctrine of "constructive discharge" so as to strengthen the sanctions for violations of the Act.[94] Specifically, it is suggested that the Board be given authority to exercise discretion to consider the "wilfullness and impact of the unfair labor practice" and to provide that where the violation was intentional and of significant impact that it would be considered a "constructive discharge" and entitle the employee to back pay for the time spent in the protest strike.[95] In the situation where the violation was not willful or the impact not serious the Board would not find a "constructive discharge" and the strikers would only be entitled to the ordinary remedy of reinstatement upon request without back pay.[96]

The reason for establishing the doctrine was to protect the employee who, instead of being discharged for his union activity, is "drummed" out by the employer's harassment. Each employee, so treated, upon quitting becomes a constructive dischargee. What is contemplated in the new application is that any unfair labor practice striker will be treated as a constructive dischargee. It is one thing to say that the individual employee who is being harassed ought to be in the same position whether he quits or goes on strike. It is quite another thing to say that all those striking for reasons less than unbearable harassment are also "constructively discharged." The suggestion goes even further since the anticipated application of the constructive discharge doctrine would take place in a much different context than that in which it developed. The doctrine grew up to protect those who were driven to resign as a result of their union interests during the organizational period in the plant. Once the union is well established in a plant there would not be such impetus for the employer to commit such offenses. The contemplated extension of the doctrine would no doubt have its major effect in the well organized plants. Specifically, it would be aimed at those

92. *See, e.g.*, Leach d.b.a. Brookville Glove Co., 116 N.L.R.B. 1282 (1956); Aronson Printing Co., 13 N.L.R.B. 799 (1939); Remington Rand, 2 N.L.R.B. 626 (1937).

93. Such is the power given the Board by NLRA § 10(c), 49 Stat. 454 (1935), *as amended*, 29 U.S.C. § 160(c) (1964).

94. *See* Thompson Report 72.

95. *Id.*

96. *Id.*

employers and employer violations which exploit the delay inherent in the Board processes as a means to frustrate the aims of the Act.

Those who favor adoption of the doctrine argue that practically speaking the striking employees have been wronged from the time of the unfair labor occurrence. The employees should not be punished because the system does not respond immediately. Nor should the employer gain because of the delay inherent in the administrative process. Furthermore, it is argued that if the employees cannot obtain redress in a reasonable amount of time by pressure on the employer and by filing a charge they should be allowed to strike without loss of pay.

While on its face this suggestion seems to be directed toward effectuating the policies of the Act, it may in fact be contrary to one major policy, *i.e.*, the interest in avoiding strikes.[97] In the present circumstances an unfair labor striker has to weigh the loss of wages in his decision to go on strike. To the extent that the wage loss deters employees from striking in the first place and to the extent that it encourages him to work for a quick settlement of the differences when he is on strike, the wage loss itself effectuates the policies of the Act. If the employees could strike with a guarantee of back pay he may well drag his feet in reconciliation. In addition it should be noted that the unfair labor practice striker already has preferential treatment over the economic striker. The unfair labor striker's job is secure while he is on strike and any replacement is temporary.[98] On the other hand, the economic striker must risk his job since the employer may hire permanent replacements.[99]

B. *Additional Sanctions*

Congress has considered other sanctions having a more economic flavor—as one of those making the suggestions stated: "hitting [the employer] in the pocket book."[100]

1. *Double or Treble Damages*

It has been suggested that section 10(c) be amended so as to permit the Board to order reinstatement with double or treble back pay,[101] in certain situations involving intentional violations and anti-union animus.[102] The reason given to support the suggestion is that under the present system the party contemplating the unfair labor practice can weigh the gains against the back pay he will have to pay if he is found guilty of a violation, and plan his actions accordingly.[103]

97. One of the underlying purposes of the NLRA was to provide mechanisms by which employees, unions and management could work out their differences with the least effect on the free flow of commerce. *See* 49 Stat. 449 (1935).

98. *See, e.g.*, Walsh-Lumpkin Wholesale Drug Co., 120 NLRB 294, *enf'd by consent decree*, 291 F.2d 751 (8th Cir. 1961).

99. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

100. Thompson Report 71.

101. *Id.*

102. *Id.*

103. *Id.*

To the extent that this is true, the imposition of double or treble damages does no more than add dollars and cents to one side of the scale in the weighing process. Furthermore, just as the employer absorbs or passes on the cost of his violation, under the straight back pay approach he can do it when the back-pay assessment is double or treble. It probably is fair to assume that as the cost gets higher the likelihood that it will be passed on to the public also increases. While there is no doubt that such a damage approach would have some inhibiting effect, the impact would necessarily be haphazard. The added cost may or may not overcome the gains to be derived from the unfair labor practice in a given case. The size of the offending firm may become determinative; *e.g.*, the small business would feel the pressure under many circumstances where the larger business would scarcely notice the difference.[104] The result would not seem to be altogether fair nor would it, without deterring the larger business, be an effective remedy if used in lieu of any other remedy.[105] The net effect would be "to allow disproportionate recoveries to employees with only a speculative possibility of reducing the number of violations."[106] In addition, any appraisal of this proposal must take into consideration the obligation of the employee to mitigate his losses by obtaining or attempting to obtain other employment.[107] To the extent that the employees are successful, the losses are minimized. Multiples of the minimized damage are thus less and the effectiveness of the proposed remedy as a deterrent is accordingly lessened.

2. *Removal of Tax Deductibility of Board Awards*

Many of those most concerned with making NLRB remedies more effective have suggested that certain indirect pressure be brought to bear on the employer who violates the unfair labor laws. Among the suggestions is a removal of the present tax deductibility of NLRB awards.[108] Currently, the employer is allowed to deduct such costs as business expenses.[109] The holdings in the area of tax deductions for certain payments of awards seem to turn on whether the payment is a "penalty" and whether the allowance of the deduction would frustrate the policy of the law.[110] A semantic dilemma is present when these criteria are applied to the question of whether a payment pursuant to the Board order is deductible. If the payment is characterized as a penalty perhaps the remedy

104. Bok, at 127.
105. *Id.*
106. *Id.*
107. *See* NLRB v. Bishop, 288 F.2d 68 (6th Cir. 1955).
108. Thompson Report 72.
109. *See* Rev. Rul. 10430, 1940-2 Cum. Bull. 174, in which the Commissioner held that since the back pay award of the NLRB represented what the employees would have earned had they not been absent from work as a result of labor difficulties such award was in the nature of compensatory damages and therefore deductible as an ordinary and necessary business expense.
110. *See, e.g.*, Hoover Motor Express Co., Inc., 135 F. Supp. 818 (M.D. Tenn. 1955). The fine paid by an interstate truck operator for violation of maximum weight limitation was not deductible from operator's gross income as an ordinary and necessary business expense because to do so would frustrate the policy behind the law.

itself is punitive and thus ultra vires. However, if the payment is not punitive can a deduction be denied? Apparently a denial of a deduction can be based solely on whether or not the granting of such deduction would frustrate the policies of the Act.[111] While it is clear that the allowance of a deduction is a benefit to the employer, the degree of the benefit would probably not be so great as to frustrate the policies of the Act. Since the awards themselves are greatly reduced by the employee's obligation to mitigate the damages by finding employment elsewhere,[112] the tax benefit resulting from the deduction would itself be small. Thus, while multiple damages would be of questionable effectiveness because of the small unit of damages being multiplied,[113] the denial of a deduction for damages paid would have an even smaller impact on the employer for the same reason.

The economic pressures posited for legislative consideration have some merits. Undoubtedly were they to be applied in the proper cases the policies of the Act would be effectuated. However, some problems would remain unremedied, just as some violations are presently unremedied such as the "runaway shop" in the *Garwin* case.[114] In addition, it is not altogether clear that the legislation is needed. It is entirely possible that the courts would view legislation of this nature as an implicit congressional approval of the court's restrictions of the Board under the latter's present mandate. Thus the legislation could be viewed as a measured expansion of the Board's *judicially* defined power and consequently a barrier to imaginative remedies. In the interest of more effective remedies, Congress may not have to do more than state that the broad mandate of the NLRA leaves much room for expansion by the Board in the area of remedies. Thus the proper legislative action would amount to a committee suggestion to the Board that it use more imaginatively the power it already has. In areas where the Board is already creating new remedies, the suggestion would operate as an encouragement. With regard to the reviewing courts, the suggestion would represent a statement of legislative intent that the Board's power is broader than the Board has realized and the courts in general have allowed.

Conclusion

There is little that can be done to protect the rights created under the National Labor Relations Act without the use of effective remedies. The Board, in recognition of this basic premise, has done much in attempting to fashion remedies which correct the wrongs committed. Broader uses of the bargaining order in the areas of the "runaway shops" and pre-election employer coercion

111. *See* Jerry Rossman Corp. v. Commissioner, 175 F.2d 711 (2d Cir. 1949) in which Judge Hand pointed out that "there are 'penalties' and 'penalties' and ruled that the real test in the case of a penalty is whether its allowance as a deduction would frustrate the sharply defined policy of the statute, the question being decided in every case ad hoc."

112. *See* NLRB v. Bishop, 288 F.2d 68 (6th Cir. 1955).

113. *See supra* note 107 and accompanying text.

114. *See supra* notes 34-46 and accompanying text.

are but examples of creativity on the part of the Board. These efforts are encountering a somewhat reluctant judiciary. The courts have generally failed to view all the interests in a given situation. In addition they have applied unhelpful standards in passing on the orders created by the Board. Nevertheless, the courts remain the key to more effective remedies if such remedies are to come from the Board within its present powers and the cooperation of the courts is therefore essential. An alternative to that means of attaining the goal of more effective remedies is a broadening of the Board's power through legislative action. The result of such legislative action is not altogether predictable since its effectiveness would depend on how the Board would use the new power and ultimately how the courts would restrict that use. It would seem that Congress could best contribute to the desired end of effective remedies by encouraging the Board to continue its efforts under its present mandate. That is, the Board should be encouraged to continue to fashion remedies which in fact "effectuate the policies of the Act."

MICHAEL H. STEPHENS

THE KEETON-O'CONNELL PLAN: A CATALYST IN THE SEARCH FOR A WORKABLE SOLUTION TO THE AUTOMOBILE ACCIDENT COMPENSATION PROBLEM

I. INTRODUCTION

Since its advent on the American scene, the automobile has had a profound impact in the areas of socio-economics and law. In more recent times, the ubiquitous automobile invades most aspects of normal daily living. Our dynamic society has grown to consider such means of transportation an almost absolute necessity. In our cities, houses are being demolished every day so that new roads can be built to accommodate the increasing automotive traffic burden. And as more vehicles appear on our highways, the somber prospect is that more accidents will occur. When this happens, inevitably one's thoughts turn to liability and insurance.

The general rule of common law liability in most American jurisdictions compensates victims of automobile accidents based on the concept of fault, *i.e.*, any loss incurred by the victim is recoverable against the party at fault. The rule of contributory fault imposes the added requirement that an injured party must be free from culpability in order to recover against a wrongdoer. The validity of the fault and contributory fault principles have withstood formidable challenges in the past, but the ground swell of dissatisfaction has never been more pronounced than in the last three years. One catalyst of this increased dialogue between the proponents and the opponents of the fault system has been the proposal formulated by Professor Robert E. Keeton and Professor