Buffalo Law Review

Volume 17 | Number 2 Article 18

1-1-1968

Labor Law—NLRB's Lack of Remedial Power in a Runaway Plant Situation

Charles J. Scibetta

other courts of the state. Presumably a standard by which the court may determine if the Commissioner had adequately shown a state decision to be inaccurate, thus requiring the federal court to determine state law itself, will have to be developed through case law. Abstract, theoretical characterizations of a standard such as this are of little value without concrete examples of its application to facts from which guidelines may be drawn by the courts.

Ideally, this "presumption" favoring a state court determination would protect and consider both interests involved here. Inaccurate state court determinations would not be followed by the federal court, but the advantages of using the state court decision would not be ignored without good reason. The expertise of the state court vis-à-vis state law would be utilized, there would be as little federal interference with the administration of state law as possible, and the uniformity between federal and state law would increase. In addition, knowledge that an *inaccurate* state court determination can be ignored would have a two-fold effect on persons contemplating an action in a state court: first, it would *discourage* actions brought solely to avoid taxes which have no rational basis in state law, and second, it would *encourage* those with sound cases, since the federal court would not ignore the state decision unless it was shown to be clearly inaccurate under relevant state law.

Thus, it would seem that a presumption favoring the accuracy of state court determinations would, by slightly limiting the *Bosch* rule, result in an approach that better protects all the interests involved.

MICHAEL R. MCGEE

LABOR LAW—NLRB'S LACK OF REMEDIAL POWER IN A RUNAWAY PLANT SITUATION

Finding adequate remedies to effectuate the policies of the National Labor Relations Act[1] is one of the major problems facing the National Labor Relations Board. A recent case, *Local 57, Garment Workers v. NLRB (Garwin Corp.)*[2] focuses sharply on one aspect of this problem. The employer, Garwin Corporation, was found by the Board to have moved its operations from New York to Florida to avoid dealing with the union representing its employees in New York. The Board ordered the employer to offer the New York employees, either reinstatement with back pay and moving expenses (if the employer remained at the Florida location), or reimbursement of income lost from the date of discharge until similar employment was found. The employer was also required to bargain with the union irrespective of the location chosen and the union's

1. National Labor Relations Act, § 10c, 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964) empowers the Board "to take such affirmative action . . . as will effectuate the policies of the act."
2. 374 F.2d 295 (D.C. Cir. 1967).

re-establishment of majority support. However, should the union fail to gain majority support at the new plant, any contract negotiated between the employer and the union would bar a representative petition by the employees for only one year, as opposed to the normal three year period.[3] In denying enforcement to that portion of the Board's order which required the employer to bargain with the union at the new plant, even though the union did not have majority support, the Court of Appeals for the District of Columbia, one member dissenting, *held*, the Board had exceeded its authority because such an order was punitive rather than remedial, and impinged upon the right of the Florida employees to select their own bargaining agent.[4]

When an employer relocates his operations for the purpose of undermining unionization, he commits an "unfair labor practice."[5] In *Textile Workers v. Darlington Mfg. Co.*,[6] where an employer terminated his operations due to anti-union motivation, the Supreme Court held that an employer had a right to terminate his business for any reason, including anti-union bias, but his rights are limited when his action is less than a complete termination of business. For example, an employer would violate the Act if, due to anti-union motivation, he were to terminate part of his business, transfer work to another plant, or open a new plant to replace the closed facility.[7] In determining whether an employer's action went beyond the protected scope of termination, the prime consideration is whether the employer had any business interests, whether or not in the same line of business, which would benefit as a result of his action discouraging unionization.[8] When such action is found to be other than a complete termination, the employer will have violated the Act if he had anti-union

3. The contract-bar rule is a principal by which a contract negotiated between the employer and the union is held to bar a petition challenging the majority status of the union for a given period. Originally the period was one year but it has now been extended to three years. The basic policy of the rule is to insure stability, at the cost of complete representativeness.

4. Local 57, Garment Workers v. NLRB, 374 F.2d 295 (D.C. Cir. 1967).

5. Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965); NLRB v. Winchester Electronics, Inc., 295 F.2d 288 (2d Cir. 1961); NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961); Sidele Fashions, Inc. v. NLRB, 133 NLRB 547 (1961), *enforced sub nom.*, Garment Workers v. NLRB 305 F.2d 825 (3d Cir. 1962); Industrial Fabricating, Inc., 119 NLRB 162, 41 LRRM 1038 (1957), *enforced sub nom.*, NLRB v. MacKenish, 272 F.2d 184 (6th Cir. 1959); California Footwear Co., 114 NLRB 765, 37 LRRM 1037 (1955), *enforced in part sub nom.*, NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957); Brown Truck Trailer Mfg. Co., 106 NLRB 999, 32 LRRM 1580 (1953).

See also: Daykin, *Runaway Shops: The Problem and Treatment*, 12 Lab. L.J. 1025 (1961); Comment, *Labor Problems in Plant Relocation*, 77 Harv. L. Rev. 1100 (1964).

6. Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 270 (1965).

7. *Id.* at 272.

8. *Id.* at 275-76:

> If the persons exercising control over a plant that is being closed for anti-union 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 to give 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 forseeable 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.

rather than economic motivations.[9] However, the mere existence of economic justification will not always absolve the employer, for "when interference with section 7 rights [to organize] outweighs the business justification for the employer's action"[10] section 8(a)(1) will be held to have been violated. Other cases establish that while an employer has the right to relocate for economic reasons, he has a duty to give the union sufficient notice of such plans and to bargain with the union over the relocation and its effect on the employees at the original location.[11]

In dealing with unfair labor practices, the Board has been given the power "to take such affirmative action . . . as will effectuate the policies of"[12] the National Labor Relations Act. The courts have recognized that in order to achieve a unified national labor policy, the Board must be given broad discretion, and the choice of remedies to effectuate these policies are the special province of the Board, subject only to limited judicial review.[13] The presumption favoring the Board's choice of remedy is strong: "[I]t should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the act."[14]

Judicial interpretation of the Act has established that this power is solely remedial and does not extend to punitive action.[15] The main reasons suggested for this limitation are, first, the words "affirmative action," which in themselves suggest that Congress intended that the action taken was to be remedial rather than punitive,[16] and second, that were Congress to delegate so drastic a power to the Board, it would have been more specific and would have more closely defined the nature and scope of such power.[17] The remedial power can be defined as the power to issue an order seeking to effectuate the national labor policy by restoring the status quo ante, *i.e.*, to recreate as nearly as possible

---

9. *Id.* at 275.

10. *Id.* at 268-69.

11. NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961); NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957); Brown Truck & Trailer Mfg. Co., 106 NLRB 999 (1952); Fibreboard Paper Prod. Corp., 138 NLRB 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

12. National Labor Relations Act § 10c, 61 Stat. 147 (1947), 29 U.S.C. § 160c (1964).

13. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1952); Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943); NLRB v. Consolidated Mach. Tool Corp., 163 F.2d 376 (2d Cir.), *cert. denied*, 322 U.S. 824 (1947).

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

15. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940); National Licorice Co. v. NLRB, 309 U.S. 350 (1940); Local 60, Brotherhood of Carpenters v. NLRB, 365 U.S. 651 (1961).

16. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235 (1938) (Wherein the Court stated that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction," *Id.* at 235. "The Power to command affirmative action is remedial, not punitive." *Id.* at 236.).

17. Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940) (where the Court stated: "Had Congress been intent upon such a program [*i.e.*, of penal sanction] we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.").

the situation existing prior to the commission of the unfair labor practice.[18] Furthermore, even if the Board's order is found to be remedial, and not a patent attempt to achieve ends which do not effectuate national labor policies, the courts have retained the power to strike an order which so disregards the particular circumstances as to become oppressive.[19]

It has been very difficult to fashion a meaningful remedy in the "runaway plant" cases.[20] The clear policy is that an employer should not be allowed to undermine the collective organization of employees by relocating his operations for that sole purpose, or by refusing to bargain concerning the relocation and its effects.[21] However, once the relocation is made the Board is faced with the difficult task of fashioning a remedy which will make the injured parties whole, while at the same time removing the impetus for such illegal activities. While the Board has claimed the right to order an employer to return his operations to the original location,[22] it has never made such an order, and therefore it is difficult to determine how a reviewing court might react. In general, the Board has phrased its orders in the alternative, giving employers the option of returning to the original location or remaining at the new site.[23] If the employer chooses to remain at the new site, the standard remedy requires the employer to offer reinstatement plus back pay to the old employees, or, if they do not choose to relocate, to reimburse them for income lost from the time of discharge until they find similar employment.[24] Another aspect of the standard remedy, which was crucial in the *Garwin* case, is the order to bargain with the old union at the new plant. When it appears that the union would regain its majority status, there has been no difficulty in requiring the employer to bargain with the union.[25] A problem arises, however, when the union loses its majority support as a result of the employer's illegal relocation or his refusal to bargain concerning a justified relocation and its effects. Generally, where an

18. Jacob H. Klotz, 13 NLRB 746, 778 (1939), *modified*, 29 NLRB 14 (1941); The Supreme Court has recognized this principle. In Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938), the Court held that the Board's power was to be used "in aid . . . to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the act." *See also:* Justice Harlan, joined by Justice Stewart, concurring in Local 60, Brotherhood of Carpenters v. NLRB, 365 U.S. at 657, stating that the main purpose of Congress was to "enable the Board to take measures designed to recreate the conditions and relationships that would have existed had there been no unfair labor practice."

19. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940).

20. "Runaway plant" is a term generally used to designate a plant which has relocated either for the purpose of avoiding unionization or for economic reasons.

21. *See* text at *supra* note 5.

22. Schieber Millinery Co., 26 NLRB 937, 966-67, *modified by consent* in NLRB v. Schieber, 116 F.2d 281 (8th Cir. 1940).

23. *Id.;* Sidele Fashions, Inc. v. NLRB, 133 NLRB 547, 48 LRRM 1967 (1961), *enforced sub nom.* Garment Workers v. NLRB, 305 F.2d 825 (3rd Cir. 1962).

24. NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961); Sidele Fashions, Inc., v. NLRB, 133 NLRB 547, 48 LRRM 1679 (1961), *enforced sub nom.*, Garment Workers v. NLRB, 305 F.2d 825 (3rd Cir. 1962); California Footwear Co., 114 NLRB 765, 37 LRRM 1037 (1955), *enforced in part sub nom.*, NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957).

25. Die Supply Corp., 160 NLRB No. 99, 63 LRRM 1154 (1966).

employer's unfair labor practice causes the union to lose its majority status, the employer has been required to deal with the union regardless of the loss of support.[26] Such a rule has even been applied where none of the original employees remained in the bargaining unit.[27] In plant relocation cases involving an unfair labor practice, the employer has been ordered to bargain with the union at the new plant, regardless of majority status, when the move was of so short a distance that the union clearly could maintain its majority if the employer continued the bargaining relationship at the new location.[28] However, where the distance was so great that it seemed unlikely that a majority of employees would follow the union to the new plant, orders to bargain with the union, irrespective of majority status, have not been upheld.[29] While one reason given for this result has been the distance involved, it is important to note that in the long-distance cases prior to *Garwin* the relocation was not due to anti-union bias.[30] If a lack of anti-union bias in the original decision to relocate is an important element in the long-distance cases, the relocation cases fit within the general rule that where the employer's unfair labor practice causes the union to lose its majority, the employer will be required to bargain with the union,[31] since the unfair labor practice can not be said to cause the dissipation of the union's majority unless the relocation itself was the unfair labor practice. If the relocation was due to a proper motivation, the only unfair labor practice which could be involved would be a refusal to bargain regarding the relocation and its effects; such an unfair labor practice would only dissipate the union's majority when the move was of so short a distance that, absent the unfair labor practice, the employees would have followed the union to the new location.

26. Perhaps, the clearest example of the application of the rule is where the employer's unfair campaign tactics cause the union to lose an election in spite of prior evidence of majority support, NLRB v. Stow Mfg. Co., 217 F.2d 900 (2d Cir. 1954). *See also* Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944); NLRB v. Delight Bakery, Inc., 353 F.2d 344 (6th Cir. 1965); Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 941 (1951); NLRB v. Consolidated Mach. Tool Corp., 163 F.2d 376 (2d Cir.), *cert. denied*, 332 U.S. 824 (1947).

27. Sakrete of N. Cal., Inc. v. NLRB, 332 F.2d 902 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

28. California Footwear Co., 114 NLRB 765, 37 LRRM 1037 (1955), *enforced in part sub nom.* NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957).

29. Mount Hope Finishing Co., 106 NLRB 480, 32 LRRM 1492 (1953), *enforcement denied*, 211 F.2d 365 (4th Cir. 1954); NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).

30. The Board itself has refused to order an employer to bargain with a union which has lost its majority even though the employer was found to have relocated due to anti-union bias. *See* Industrial Fabricating, Inc., 119 NLRB 162, 41 LRRM 1038 (1957), *enforced sub nom.*, NLRB v. MacKenish, 272 F.2d 184 (6th Cir. 1959); Brown Truck & Trailer Mfg. Co., 106 NLRB 999, 32 LRRM 1580 (1953); Sidele Fashions, Inc. v. NLRB, 133 NLRB 547, 48 LRRM 1679 (1961), *enforced sub nom.*, Garment Workers v. NLRB, 305 F.2d 825 (3d Cir. 1962).

Where the Board has attempted to require an employer to engage in such bargaining the courts have refused to enforce the order, rejecting the Board's finding that the relocation itself was illegally motivated. *See* Mount Hope Finishing Co., 106 NLRB 480, 32 LRRM 1492 (1953), *enforcement denied*, 211 F.2d 365 (4th Cir. 1954); NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).

31. *See* text and cases cited at *supra* note 26.

Important in any consideration of remedies for illegal plant relocation is the right of the new employees to choose their own bargaining representative. Clearly, this right is an important policy of the Act,[32] but it is not absolute. Perhaps the clearest instance of allowing other considerations to override employee free choice is in the principal of the contract-bar rule. According to this rule, any contract negotiated between the union and the employer is held to bar an election petition by the employees, to challenge the union's majority status, for a given period (originally one year, now three years).[33] In such a case the employee's right to choose his own bargaining agent is considered subordinate to the interest in maintaining stable labor relations. This right has also been subordinated to other considerations. Thus, an employer is required to bargain with a union whose majority has been dissipated by the employer's unfair labor practice. Here the policy of preserving the collective bargaining relationship is thought to justify some infringement on the employees' section 7 rights.[34] In one such case, *Franks Bros. Co. v. NLRB*, the Supreme Court of the United States has said:

> Contrary to petitioner's suggestion, this remedy, as embodied in a Board order, does not involve any injustice to the employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. . . . But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it could be given a fair chance to succeed.[35]

In *Sakrete of N. Cal., Inc. v. NLRB*, the rationale of *Franks Bros.* was applied even though none of the original employees remained in the bargaining unit.[36]

In *Garwin*, Judge Burger, speaking for the majority, agreed that in moving to Florida to avoid the New York union, the employer had committed an unfair labor practice. However, the court denied enforcement to that portion of the Board's remedy which required the employer to bargain with the New York union without regard to its majority status. Relying heavily on *NLRB v. Rapid Bindery*,[37] the court held that such an order can be given only where the

32. National Labor Relations Act § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

33. For a general discussion of the contract bar rule *see* Leedom, Industrial Stability and Freedom of Choice in Collective Bargaining and the Law 36 (1959); *Contract Bar and Unite Determination at New or Relocated Plants*, 6 Stan. L. Rev. 513 (1954).

34. Franks Bros. Co. v. NLRB, 321, 702 (1944); NLRB v. Stow Mfg. Co., 217 F.2d 900 (2d Cir. 1954); NLRB v. Delight Bakery Inc., 353 F.2d 344 (6th Cir. 1965); Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); NLRB v. Consolidated Mach. Tool Corp., 163 F.2d 376 (2d Cir.), *cert. denied* 332 U.S. 824 (1947); Sakrete of N. Cal., Inc. v. NLRB, 332 F.2d 902 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965); NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957).

35. Franks Bros. Co. v. NLRB, 321 U.S. 702, 705-06 (1944).

36. Sakrete of N. Cal., Inc. v. NLRB, 332 F.2d 902 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

37. 293 F.2d 170 (2d Cir. 1961).

move was of such a short distance that, absent the employer's unfair labor practice, a majority of employees would follow the union to the new location. Judge Burger gave two reasons for this result. The order is a patent attempt to achieve ends which do not effectuate the policies of the Act, because it violates one of the most basic policies, *i.e.*, the employees' free choice of bargaining agent.[38] Also, the remedy is punitive rather than remedial: "The Board is indeed correct when it says that the purpose of a remedy must be restoration of the status quo . . . however, the basic purpose of restoring the status quo is to redress the injury done to employees."[39] Underlying both of these reasons is the policy of protecting employees' rights. Apparently the court felt that the balance which the Board struck between the policy of protecting the collective bargaining relationship and the right of employees to choose their own bargaining agent was so unreasonable that the order could not fairly be said to effectuate the Act.

Judge McGowan, dissenting, did not view the employees' interest as controlling. He argued that before the court can overturn the Board's decision, the decision must be clearly inconsistent with the Board's statutory responsibility to effectuate the Act. In his opinion, the balance struck in this case was not inconsistent with such responsibility.[40] In reaching this conclusion, Judge McGowan considered the difficulty of the task of forming a meaningful remedy for such practices, and the fact that the Board, because of its expertise and experience, is in the best position to weigh the policies involved and determine which remedies will best effectuate the Act.

The majority in *Garwin*, by denying enforcement of the Board's order to bargain with the New York union regardless of its majority status, renders the Board impotent in dealing with runaway plants. The order, which the majority upholds, reimburses the employees for losses of income, or for back pay and moving expenses if the employees relocate, and compels the employer to bargain with the New York union if it regains majority support. Such an order is completely ineffective since the availability of jobs in the area and the fact that most of the employees were married women and unwilling to move combine to virtually nullify the cost to the employer of compliance with the order and prevent the union from regaining its majority. An employer wishing to commit this unfair labor practice would merely include the inexpensive penalty in the cost of relocation. The Board's lack of remedial power presents a serious threat to the effectuation of a national labor policy. This has been recognized in the staff report to a special subcommittee on labor, which is currently engaged in a review of the National Labor Relations Act:

38. Local 57, Garment Workers v. NLRB (Garwin Corp.), 374 F.2d 295, 300, 301 (D.C. Cir. 1967).

39. *Id.* at 300. In footnote 22 of the majority opinion in Garwin (374 F.2d at 304) the court brings up the possibility of redressing an injury done the union, but makes no mention of it in the case.

40. *Id.* at 308.

> The problem of Labor Act enforcement lies in the fact that the penalties and remedies are inadequate. Most of the Labor Act violations are committed knowingly and without finesse. . . . The remedial order is no deterrent to the anti-union employer. . . . One union witness termed the NLRB back pay order nothing but a "hunting license fee" to kill the union.[41]

It is submitted that in light of this problem the courts should be careful to give the Board sufficient room to develop meaningful remedies, a task for which it is well suited because of its expertise and experience. The court in the instant case was unduly harsh on the Board. It apparently restricted the notion of status quo to a mere redressing of injury to employees.[42] It is impossible to believe that so narrow a view of the Board's remedial power will apply in the future. In fact, an allusion to union rights in footnote 22 of the opinion leads one to believe that even the *Garwin* majority would not adhere to so narrow a view of status quo. On the contrary, it recognized an injury to the union which should have been remedied. In addition, the court limited the application of the principle that an employer who dissipates a union's majority by an unfair labor practice will be required to continue bargaining with the union, by applying this principal only to those cases in which there has been no change in the basic bargaining unit. The court relies heavily on *Rapid Bindery*,[43] but discounts the fact that an important consideration in that case was the court's rejection of the finding that the employer had relocated for an illegal purpose. Such a decision was not mandated by prior case law.[44] The decision was guided rather by a determination that the right of employees to choose their own bargaining agent so outweighed the interest in protecting the bargaining relationship that any infringement on that right was an abuse of power by the Board. This seems an over-emphasis of the employee's right. It has been common practice in many areas of labor law to restrict employees' rights in favor of other policies of the Act.[45] Furthermore:

> The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it.[46]

In the instant case the restriction on employees' rights was to last for only one year, and none of the restricted employees challenged the order. It seems improper for the court to frustrate the efforts of the Board by allowing the employer to flout the policies of the Act in this way.

CHARLES J. SCIBETTA

41. *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 Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 2d Sess. 71 (1966).

42. 374 F.2d 295, 300.

43. NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).

44. Cooper Thermometer Co. v. NLRB, 65 LRRM 2113, 2118 (1967). (a recent case which discusses the *Garwin* decision).

45. *See* text at *supra* note 32.

46. Brooks v. NLRB, 348 U.S. 96, 103 (1954) cited by *Garwin* dissent, 374 F.2d at 308 n.4.