Notre Dame Law Review

Volume 42 | Issue 2 Article 1

1-1-1967

Labor Board Unsettles the Scales

Harry L. Browne

notre dame lawyer

THE LABOR BOARD UNSETTLES THE SCALES

*Harry L. Browne**

I. Introduction

Much is heard these days about free collective bargaining and whether it can survive in our advanced technological society. In the context of increasing strikes and industrial strife, unless something is done to make collective bargaining work without prejudice to the national interest, it may not survive for long. The National Labor Relations Board, the chief administrator of our labor policy, should lend a helpful hand and advance the cause of free collective bargaining. It may be seriously questioned, however, whether the Board has fulfilled this responsibility. A look at the record will disclose the extent of the Board's fulfillment.

The labor policy of the United States is founded upon the principle of free collective bargaining: voluntary labor contracts voluntarily negotiated. This principle is firmly recognized by our labor laws. The Norris-LaGuardia Act of 1932,[1] curtailing the use of the injunction by federal courts in labor disputes, was to assure free interplay between labor on the one hand and management on the other, with "the government . . . occupy[ing] a neutral position, lending its extraordinary power neither to those who would have labor unorganized nor to those who would organize it . . . ."[2] The Wagner Act of 1935,[3] the first comprehensive federal labor statute, embodied the "practice and procedure of collective bargaining."[4] Later amendments in the Taft-Hartley Act of 1947[5]

* Member, Missouri Bar; B.S., Indiana University, 1934; J.D., Indiana University, 1936; partner, *Spencer, Fane, Britt & Browne,* Kansas City, Missouri, specializing in the practice of labor law; former attorney, National Labor Relations Board, 1938-1948; former Chief Legal Officer, National Labor Relations Board, 1949. Mr. Browne is the author of numerous labor-law articles, some of which directly concern the NLRB.

1 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1964).
2 Remarks by Senator Robert Wagner, 75 CONG. REC. 4915 (1932).
3 49 Stat. 449 (1935), 29 U.S.C. §§ 151-58 (1964).
4 49 Stat. 449, 29 U.S.C. § 151 (1964).
5 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-59 (1964).

and the Landrum-Griffin Act of 1959[6] reaffirmed a congressional intent to retain free collective bargaining as our basic aim in labor-management relations. "The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace."[7]

Given a national labor policy of free collective bargaining, labor legislation must provide a statutory framework wherein free collective bargaining in the public interest can take place — a structure for bargaining between management and labor on an equal footing. Experience in labor relations has shown that excessive power inevitably results in a demonstration of that power in industrial conflict, whereas equality of bargaining power between management and unions leads to a realization of each side's legitimate interests. Labor legislation, therefore, has been designed to promote substantial equality in bargaining power so that the competing interests of employers vis-à-vis organized labor can be fairly balanced. Abuses must be curtailed in those areas of the labor-management complex where excessive power by one side or the other can lead to labor contracts not in the public interest. As Senator Robert Taft stated in the congressional debates on the Taft-Hartley Act, unreasonable power leads to the exercise of power "to accomplish ends which are not reasonable," and where there is a balance of power, "neither side feels that it can make an unreasonable demand and get away with it."[8] This, indeed, was the view expressed many years prior to specific labor legislation, when the Supreme Court in *American Steel Foundries v. Tri-City Central Trades Council*[9] declared the need for organized or group action by workers to "deal on equality with their employer."[10] This need for promoting equality is the scheme behind the Railway Labor Act governing railroads and airlines,[11] and the purpose behind the Wagner Act governing other industries affecting commerce. The Court, in *NLRB v. Jones & Laughlin Steel Corp.*,[12] sustained the constitutionality of the Wagner Act and declared that "union was essential to give laborers the opportunity to deal on an equality with their employer,"[13] thus affirming congressional policy as set forth in the statute's preamble: "inequality of bargaining power" is inimical to public welfare,[14] "equality of bargaining power" is essential to industrial peace.[15] Twelve years later, believing that an imbalance had arisen in favor of organized labor, Congress legislated again, in the Taft-Hartley Act, "to equalize legal responsibilities of labor organizations and employers."[16] Congress thus attempted to provide the framework for free and democratic collective bargaining. It was believed that

6 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964).
7 Local 774, Teamsters Union v. Lucas Flour Co., 369 U.S. 95, 104 (1962); see also NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).
8 93 CONG. REC. 3835 (1947).
9 257 U.S. 184 (1921).
10 *Id.* at 209.
11 Virginia Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937).
12 301 U.S. 1 (1937).
13. *Id.* at 33. See NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952), wherein the Court stated that the theory of our labor laws "is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively." *Id.* at 402.
14 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).
15 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).
16 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-59 (1964).

by equalizing bargaining power, collective bargaining would be an "instrument of peace rather than of strife."[17]

The Landrum-Griffin Act of 1959[18] is the latest legislation designed to equalize the bargaining power between the two parties. That act was the outgrowth of a hearing by the Senate Select Committee on improper activities in the labor field, popularly known as the McClellan Committee. In his message to Congress on January 23, 1958, President Eisenhower had urged that the secondary boycott provisions of the Taft-Hartley Act be overhauled to remove "ambiguities and inequities"[19] and to foreclose arbitrary union action by limiting organizational and recognition picketing. The Landrum-Griffin Act, therefore, placed statutory controls on certain union activities that Congress believed objectionable. The act limited "blackmail picketing," where a union seeks exclusive representation rights although it does not represent a majority of employees; restricted "hot cargo" agreements, which permit unions to compel contracts barring one employer from doing business with another employer whom the union deemed "unfair"; and eliminated secondary boycott practices, which allow unions to exert great economic pressure on disinterested secondary employers. The whole scheme of the act was to equalize the power balance.

The National Labor Relations Board, as before, was the administrative agency entrusted to implement the policies of Congress; it was to be guided not by an individual sentence taken out of context, but by the provisions read as a whole in accordance with the statute's object and policy.[20] However, shortly after the passage of the Landrum-Griffin amendments and the advent of a new national administration in 1960, the complexion of the Board members changed, and by 1962 new appointees constituted the majority.[21] An examination of Board decisions since that time reveals a recurring failure to carry out congressional policy. The Board has ignored its duty to "look to the reason of the enactment . . . [to] inquire into its antecedent history and give it effect in accordance with its design and purpose. . . ."[22] The new Board, instead of keeping the labor-management equation in balance, has served to upset the balance that had recently been reaffirmed in the Landrum-Griffin Act.

II. Free Collective Bargaining at the Crossroads

Industrial strife has increased to a point where many now question whether collective bargaining can long remain free, at least in those disputes directly affecting the national interest. Within the past few years, strikes have increased in defense, maritime, transportation, and other industries affecting the public welfare so that the heavy hand of the Government is already being felt in collective bargaining. In 1962, Ambassador Arthur Goldberg, then Secretary of

17 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34 (1937).
18 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964).
19 104 Cong. Rec. 818 (1958).
20 Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956).
21 Frank W. McCulloch and Gerald A. Brown, together with John H. Fanning, a holdover member, constituted the new majority. Chairman Boyd Leedom and Philip Ray Rogers constituted the minority.
22 Takao Ozawa v. United States, 260 U.S. 178, 194 (1922).

Labor, questioned the very concept of labor contracts emerging from a power struggle between management and labor, and asserted that disputes affecting the public interest could no longer be resolved on the "old testing grounds of force and power."[23] The Advisory Committee to the President on Labor-Management Policy, in its report of May 1, 1962, declared that "the emergency dispute provisions in the present law can and should be improved" and "there was a clear need for more effective government action . . . ."[24] This view was shared by the then Undersecretary of Labor, Willard Wirtz.[25] Legislative proposals were introduced dealing with labor disputes in critical industries,[26] and Senator John L. McClellan, Chairman of the Senate Permanent Investigations Subcommittee, asserted that the time was "at hand for Congress to consider whether legislative changes are needed, whether strikes that are harmful to the public interest and which cause undue suffering and hardship to the people should be curbed, limited, or completely prohibited."[27] Even such an advocate of free collective bargaining as Secretary of Labor Wirtz has stated:

> We stand today at what history will mark as a clear fork in the development of labor-management relations in this country. Neither the traditional collective bargaining procedures nor the present labor dispute laws are working to the public satisfaction.[28]

The most recent annual Bureau of Labor Statistics figures give cause for concern, since more strikes were called in 1965 than in any year since 1955.[29] Particularly militating against the public welfare in 1965 and 1966 were prolonged strikes in the maritime industry and in the transit and newspaper industries of New York City. An airline strike of forty-three days involved five major airlines and was prolonged when, after acceptance by the carriers, the union rejected proposals for arbitration made by the National Mediation Board, contract proposals suggested by a Presidential emergency board, and later a

23 Arthur Goldberg, speech before the Executives Club in Chicago, Feb. 23, 1962, 49 L.R.R.M. 25 (1962).

24 Report of Advisory Committee on Labor-Management Policy, *Free and Collective Bargaining and Industrial Peace.* 50 L.R.R.M. 11, 14, 15 (1962).

25 Address by then Undersecretary of Labor, W. Willard Wirtz, before the American Management Association Personnel Conference Midwinter Meeting, 1961-1962, 49 L.R.R.M. 53 (1961).

26 *E.g.,* in the 87th Congress, six bills and one concurrent resolution were introduced in the Senate affecting the right to strike in the space and missile and transportation industries. These bills were: S. 87, 87th Cong., 1st Sess. (1961); S. 1114, 87th Cong., 1st Sess. (1961); S. 2292, 87th Cong., 1st Sess. (1961); S. 2401, 87th Cong., 1st Sess. (1961); S. 2631, 87th Cong., 1st Sess. (1961); S. 3442, 87th Cong., 2d Sess. (1962); S. Con. Res. 85, 87th Cong., 2d Sess. (1962). In the 1963 Congress, additional bills were introduced to curb or restrict strikes, *e.g.,* S. 87, 88th Cong., 1st Sess. (1963); S. 288, 88th Cong., 1st Sess. (1963). Noting that the maritime industry was responsible for approximately eight of the twenty-two Taft-Hartley injunctions that had been issued against national emergency strikes, industry spokesmen, in March 1963 hearings on H.R. 1897, expressed misgivings that anything short of compulsory arbitration would be effective to prevent disputes in that industry. 52 LAB. REL. REP. 240 (1963).

27 52 LAB. REL. REP. 22 (1962).

28 WIRTZ, LABOR AND THE PUBLIC INTEREST 49 (1964).

29 In all, 3,963 strikes involving 1,550,000 workers were started in 1965 as compared with 3,655 stoppages and 1,640,000 workers in 1964. Idleness resulting from 1965 strikes totaled 23.3 million man days, while 22.9 million man days were lost in 1964. There were 21 major stoppages of 10,000 workers or more begun in 1965, as opposed to 18 strikes of such magnitude in 1964. 89 MONTHLY LAB. R. 749, 838 (1966).

White House settlement offered for ratification. This led to a proposed Joint Resolution by Congress for settlement of the dispute. *Inter alia,* it directed the Secretary of Labor to conduct "a complete study of the operations and adequacy" of our labor laws on settlement of labor disputes.[30]

Although settlement of the airline strike ended the necessity for emergency action, the failure of collective bargaining has been exposed. There are several causes for this failure, and they must be examined, so that appropriate corrective measures may be taken. Recent years have witnessed a rapid growth and expansion of defense industries, and disputes in this area have a greater and more direct impact on the public interest. Moreover, the causes giving rise to potential labor strife have multiplied. Subjects once considered outside the realm of collective bargaining, such as pensions, profit-sharing, bonuses, insurance plans, subcontracting, and plant removal, have now found their way onto the bargaining table,[31] creating new sources of division between the parties. Furthermore, the dynamic nature of labor relations generates a greater national interest in the peaceful settlement of labor disputes within a bargaining framework. Consequently, terms such as those relating to automation, increased mobility of the work force, and the "reconciliation of high standards of living and free trade as coordinate national objectives"[32] must be resolved by collective bargaining.

III. The Responsibility of the National Labor Relations Board

Although the issues are complex, any study in depth of the root causes of labor strife necessitates an appraisal of Board doctrine as a point of departure. The Board is the administrator of our national labor policy, and it has a responsibility for how it functions — good or bad. It can accept credit for the successes, and it must assume responsibility for the failures. While the jurisdiction of the Board does not extend to all industry, each decision of the Board is neither isolated nor *sui generis.* Each decision has a pervasive impact on collective bargaining and becomes a part of the whole, affecting not only industries under Board jurisdiction, but all industry, including the railroad and air transportation industries.[33] Experience indicates that patterns and attitudes developed in collective bargaining in one segment of our economy affect the whole industrial complex.[34] If Board decisions have canted the

30 62 LAB. REL. REP. 119; 62 LAB. REL. REP. 259; Collective Bargaining Negotiations and Contracts, The Bureau of National Affairs, Inc., No. 551, Part I.

31 *E.g.,* NLRB v. Katz, 369 U.S. 736 (1962); Order of R.R. Telegraphers v. Chicago No. W. Ry., 362 U.S. 330 (1960); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960 (1949); Town & Country Mfg. Co., 136 N.L.R.B. 1022 (1962).

32 Secretary of Labor W. Willard Wirtz, address to Rubber Mfrs. Ass'n, 51 L.R.R.M. 78 (1962).

33 Indeed, it would appear to be in order for the Secretary of Labor, in carrying out the proposed Joint Resolution, to examine the impact of the Board's doctrine in these respects. See text accompanying note 30 *supra.*

34 However, strikes in industries under the National Labor Relations Act have more than held their own. The increase in strike incidence in 1965 was concentrated in manufacturing industries, subject to the NLRA. These industries suffered 2,080 stoppages in 1965, compared to 1,794 stoppages in 1964. Significant increases in strike idleness occurred in the paper, chemical, leather, machinery, stone, clay, and glass industries. The construction industry recorded 4.6 million man days of work stoppages in 1965. *A Review of Work Stoppages During 1965,* 89 MONTHLY LAB. R. 749, 751, 752 (1966).

sensitive balance — structured by federal labor statutes to make free collective bargaining work in the public interest — the Board has, to the extent of the imbalance, weakened the vitality and fabric of a precious bargaining system. The viability and effectiveness of that system rest upon maintaining the proper balance between the competing interests of labor and management.

How the Landrum-Griffin Act was designed to rectify union abuses has been seen. The act attempted to create a statutory cantilever, so to speak, balancing the power of labor and management. A new Board majority, however, established new doctrines, and within three years after the passage of that act, Congressman Griffin, its chief architect, decried the Board's "strained and tortured reasoning," stating: "The pattern of recent decisions by the NLRB gives rise to a serious concern that policies laid down by Congress, in the Taft-Hartley and Landrum-Griffin Acts, are being distorted and frustrated, to say the very least."[35]

These criticized decisions, creating new immunities for unions in the exercise of power and imposing new restrictions on management rights, have fomented industrial strife, resulted in unreasonable solutions,[36] and jeopardized the continued acceptability of free collective bargaining. The new doctrines, moreover, cover the entire spectrum of labor-management relations — the organizational stage and the determination of representation issues; the establishment of the bargaining relationship, as well as subsequent negotiations; and finally, the interpretation of labor contracts after execution.

IV. The Creation of the Imbalance

A. Picketing

1. Organizational and Recognitional Picketing

Section 8(b)(4) prohibits strikes and secondary boycotts where an object is:

> (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9. . . .[37]

In *Calumet Contractors Assn.*,[38] a case literally falling within the prohibition of section 8(b)(4)(C), the Board held that picketing of a construction project, allegedly to inform the public that prevailing pay and working conditions were not being met on the job, was so-called "area standards" picketing and lawful. The Board reasoned:

---

35 108 CONG. REC. 6194, 6191 (1962).

36 *E.g.*, The New York Herald Tribune, a long-established newspaper in New York City, was forced to close down by a combination of strikes by different unions, lasting 114 days.

> Now that The Herald Tribune has followed The Daily Mirror to the grave, it must be plain to everyone on both sides of the bargaining table that a lasting formula for labor-management peace has to replace the present suicidal course — and quickly.

N.Y. Times, Aug. 16, 1966, p. 36M, col. 1.

37 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4)(C) (1964).

38 133 N.L.R.B. 512 (1961).

> A union may legitimately be concerned that a particular employer is undermining area standards of employment by maintaining lower standards. It may be willing to forgo recognition and bargaining provided subnormal working conditions are eliminated from area considerations.[39]

However, the dissent believed that

> despite the disclaimer of interest in recognition or bargaining by the Respondent, picketing for a change in the prevailing rates of pay and conditions of employment agreed upon between a certified bargaining agent and an employer constitutes an attempt to obtain conditions and concessions normally resulting from collective bargaining.[40]

The Board reached its result although the union had just lost a representation election, another union had been certified, and the picketing union would not have been able to eliminate any of the alleged subnormal working conditions without first gaining the right to represent the employees. In a radical departure from legislative purpose,[41] the Board created a loophole by which the union could picket with impunity, furthering the abuse of economic power by unions in representation disputes. Since the "area standards" concept is erroneous *per se,* it is no answer for the Board to say that it examines the genuineness of the union claim before providing immunity.[42]

Calumet involved a dispute between unions. The power confirmed in *Calumet* was soon extended to recognitional picketing under section 8(b)(7).[43] In *Claude Everett Constr. Co.*[44] the Board held that there was no violation of section 8(b)(7)(C), because the union was picketing, according to the legend on its sign, to protest "substandard wages and conditions."[45] The Board found that the union's objective was to induce the company to raise its wage scale to that prevailing in the area. Thus, the picketing was protected, despite its interference with pickups and deliveries on the project.

The Board, in *Texarkana Constr. Co.*,[46] again relied on the absence of an organizational or recognitional objective, holding that picketing for these purposes only is forbidden.[47] Before picketing, the union asked the employer

39 *Id.* at 512.
40 *Id.* at 513.
41 With respect to this decision, Congressman Griffin asserted the decision did "not support the intent of Congress . . . [that the Board had seized upon a proviso in the Act] to protect a purpose directly contrary to the spirit and letter of the law — namely, forcing an employer to recognize one union while another is already certified." 108 CONG. REC. 6192, 6194 (1962).
42 Local 903, IBEW, 154 N.L.R.B. No. 10, 1965 CCH LAB. L. REP. ¶ 9,600; Centralia Bldg. & Constr. Trades Council, 155 N.L.R.B. No. 80, 1966 CCH LAB. L. REP. ¶ 20,025.
43 Section 8(b)(7) prohibits picketing "where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization" (a) where the employer has lawfully recognized another labor organization and a question of representation may not appropriately be raised, (b) where a valid election had been held within the preceding twelve months, and (c) where picketing has been conducted without a petition being filed within a reasonable period of time not to exceed thirty days. The section contains a proviso permitting publicity picketing for the purpose of truthfully advising the public that an employer does not employ members of, or have a contract with, a labor organization if the picketing does not interfere with deliveries or other services. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(7) (1964).
44 136 N.L.R.B. 321 (1962).
45 *Id.* at 322.
46 138 N.L.R.B. 102 (1962).
47 *Id.* at 103.

whether "union men" were to be employed on the project. Receiving a negative answer, the union commenced picketing with signs stating that the employer was "Not Paying Prevailing Wage Rate."[48] Because the employer was paying wages lower than the ratio determined under the Bacon-Davis Act[49] and lower than the picketing union's scale, the Board brushed aside the union's initial inquiry regarding the hiring of union men and held that the union's picketing was not for organization or representation purposes. In *Keith Riggs Plumbing & Heating Contractor*,[50] picketing was held to be a legitimate protest of substandard conditions, even though the union had solicited membership from the employer's employees several weeks before the picketing began and several of the employees had joined the union as a result of the picketing.[51]

In *Sullivan Elec. Co.*,[52] the Board further reduced the section 8(b)(7) proscriptions of the act by holding them applicable only where the picketing was for initial recognition. The Board found no violation of section 8(b)(7) where the unions, which had first picketed against the employer's failure to adhere to area standards, after learning there had been a contract with their district council, picketed protesting a breach of contract. The contract had been executed four years before, and in the intervening period the employer had had no work in the area. But the Board stated:

> [W]e are convinced that the words "recognize or bargain" [in 8(b)(7)] were not intended to be read as encompassing two separate and unrelated terms. Rather, we believe they were intended to proscribe picketing having as its target forcing or requiring an employer's initial acceptance of the union as the bargaining representative of his employees.[53]

This standard was thereafter applied in *Whitaker Paper Co.*,[54] where the employer had charged a violation of section 8(b)(7)(C) on the ground that a strike undertaken by a recognized union in support of a contract dispute had been converted to unlawful recognitional picketing because the employer had replaced the strikers. In *Frank Wheatley Pump & Valve Mfr.*,[55] the same situation was presented, except more than a year had elapsed from the beginning of the economic strike when the employer withdrew recognition from the bargaining representative. In both cases, the Board relied on the rationale of *Sullivan* and dismissed the complaint, holding that where the picketing is not directed to initial acceptance as a bargaining representative, it is not proscribed.

It is submitted that Board decisions in this area simply promote industrial strife, for they place the imprimatur of the Government on the exercise of raw power and encourage a disregard for the peaceful procedures provided by the

48 *Ibid.*
49 49 Stat. 1011 (1931), as amended, 40 U.S.C. § 276a (1964).
50 137 N.L.R.B. 1125 (1962).
51 The Board has also ruled that picketing to compel reinstatement of a discharged employee where another union has been certified does not violate § 8(b)(4)(C) as it is not for a recognitional purpose. Fanelli Ford Sales, 133 N.L.R.B. 1468 (1961). *Fanelli* overruled Lewis Food Co., 115 N.L.R.B. 890 (1956), in which the Board had held that such picketing necessarily constituted a request to bargain on that matter.
52 146 N.L.R.B. 1086 (1964).
53 *Id.* at 1087.
54 149 N.L.R.B. 731 (1964).
55 150 N.L.R.B. 565 (1964).

Taft-Hartley Act. This result is particularly unfortunate, because from the time of the original Wagner Act to the latest amendatory legislation the object of Congress was to remove "sources of industrial strife and unrest."[56] Implicit in the statutory scheme was the premise that contests by unions or between unions for recognition would no longer be settled by resort to strikes, boycotts, or the picket line, because the employees themselves could determine such issues at the ballot box. Although impasses in collective bargaining might occur that could lead to strikes or lockouts, such stoppages would be limited to the boundaries of the appropriate bargaining unit established by the Board. Decisions of the Board have rendered these statutory provisions illusory.

2. Secondary Boycotts

The same decisional pattern is followed in other areas. In the *Plauche Elec., Inc.* case,[57] the *Washington Coca-Cola*[58] doctrine, a rule of eight years' standing on secondary boycotts, was reversed. The history of federal labor legislation reflects a pattern of increasing restrictions on secondary boycotts to protect neutral and disinterested employers from being enmeshed in labor disputes. For eight years, in keeping with this policy, the Board had interpreted the act as making unlawful a union's engaging in common-situs picketing, that is, picketing at a construction site where employees of many contractors are on the job, thus stopping the work of neutral contractors when the struck employer is doing business within the picketed area. In the 1959 Congress, an effort had been made by organized labor to legalize such picketing. Congress rejected the effort, intending to retain the Board's ban on common-situs picketing.[59] Yet shortly after the passage of the Landrum-Griffin Act designed to restrict picketing in these areas, the Board opened up a new source of union power by overruling this precedent, again thwarting congressional policy. The new rule is that the Board will

> not automatically find unlawful all picketing at the site where the employees of the primary employer spend practically their entire working day simply because . . . they may report for a few minutes at the beginning and end of each day to the regular place of business of the primary employer.[60]

B. Changes in the Bargaining Unit

There have been other reversals by the Board within two or three years after the passage of the Landrum-Griffin Act, all of which tended to enhance union power. In *Great Western Sugar Co.*,[61] the Board reversed *Whitmore Labs.*[62] on the question of seasonal supervisors being included in a bargaining unit. "Seasonal supervisors" are those who exercise supervisory authority full time for a portion of the year and perform rank-and-file functions for the remainder. The Board held: "[T]hey had supervisory status, excluding them

56 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).
57 135 N.L.R.B. 250 (1962).
58 107 N.L.R.B. 299 (1953).
59 105 CONG. REC. 17900 (1959).
60 Plauche Elec., Inc., 135 N.L.R.B. 250, 253 (1962).
61 137 N.L.R.B. 551 (1962).
62 114 N.L.R.B. 749 (1955).

from the bargaining unit, during the period they acted as supervisors; they were to be included for the period in which they perform rank-and-file duties."[63] Both the majority and dissent referred to congressional intent to exclude supervisors from bargaining units because of the need for supervisor loyalty to the employer. The Board's decision undermines Congress's determination that supervisors should stay on one side of the bargaining table. In *Rocky Mountain Phosphates, Inc.*,[64] the Board reversed an established policy and held that a certification was defeasible within a year when a certified independent union presumably lost its majority to a national union. The Board, in *Greenspan Engraving Corp.*,[65] reversed *Tampa Sand & Material Co.*,[66] enabling strike replacements to vote in an election. Where strike replacements were not employed on the eligibility date, it was held they had no right to vote. The previous rule permitted replacements for economic strikers to vote in a representation election, provided only they were employed on the date of the election. *Pacific Tile & Porcelain Co.*[67] reversed a rule of twenty years' standing, which had been set forth in *Dura Steel Prods. Co.*,[68] following the precedent established by *American Nat'l Co.*[69] The rule had been "that in determining voter eligibility a discharge will be presumed to have been for cause, unless a charge alleging a violation of Section 8(a)(3) has been filed with this Agency."[70] In *Food Haulers, Inc.*,[71] the Board reversed *Pilgrim Furniture Co.*,[72] finding that even if a "hot cargo clause" prohibited by section 8(e) were in a contract, it would not void the contract allowing new election.

C. Other Reversals

The highlight of Board reversals, however, occurred on February 20, 1962, when the Board majority reopened and reconsidered four landmark cases decided one year earlier by a four to one majority, Mr. Fanning dissenting.[73] Messrs. McCulloch and Brown had just been appointed to the Board. They had not participated in the earlier Board decisions, but they reopened the cases ostensibly in order to avoid the "criticism that inadequate deliberation or lack of clarity attended our interpretation of the critical statutory provision."[74] The asserted justification for reopening, hardly borne out by the record of care and consideration previously given to the issues involved, appears rather to have

63 137 N.L.R.B. 551, 553 (1962).
64 138 N.L.R.B. 292 (1962).
65 137 N.L.R.B. 1308 (1962).
66 129 N.L.R.B. 1273 (1961).
67 137 N.L.R.B. 1358 (1962).
68 111 N.L.R.B. 590 (1955).
69 27 N.L.R.B. 22 (1940).
70 Pacific Tile & Porcelain Co., 137 N.L.R.B. 1358, 1368 (1962).
71 136 N.L.R.B. 394 (1962).
72 128 N.L.R.B. 910 (1960).
73 C. A. Blinne Constr. Co., 130 N.L.R.B. 587 (1961), *aff'd as modified*, 135 N.L.R.B. 1153 (1962); Stork Restaurant, Inc., 130 N.L.R.B. 543 (1961), *aff'd as modified*, 135 N.L.R.B. 1173 (1962); Crown Cafeteria, 130 N.L.R.B. 570 (1961), *rev'd*, 135 N.L.R.B. 1183, *enf'd*, 301 F.2d 149 (9th Cir. 1962); Charlton Press, Inc., 130 N.L.R.B. 727, *rev'd*, 135 N.L.R.B. 1178 (1962). It would appear that the majority's action in voluntarily reopening previous board decisions in order to permit the new personnel to reconsider the decisions, weakened the fabric of administrative law and the right of litigants to expect rulings according to law, not according to men.
74 C. A. Blinne Constr. Co., 135 N.L.R.B. 1153, 1155 (1962).

been designed to give the Board's new majority an opportunity to examine and redetermine important issues on recognitional and organizational picketing covered by the Landrum-Griffin amendments. The Board's majority, consisting of the two new members and member Fanning, proceeded to reverse two of the four cases outright[75] and dilute the remaining two by recognizing broad exceptions to the statutory prohibitions under the permissible publicity proviso of section 8(b)(7)(C).[76] The Board ruled that a meritorious unfair labor practice charge under section 8(a)(5) will excuse a violation of section 8(b)(7)(C). The latter requires that a union seeking representation not picket beyond a reasonable period of time, not to exceed thirty days, without filing a representation petition.

These decisions were in the pattern enunciated by the majority of the Board which has relaxed the legal restraints on the exercise of union power. According to Congressman Griffin, they extended to unions an "astounding invitation . . . to circumvent the law. The very theory suggested by a majority of the Board was considered and flatly rejected in the conference on the Landrum-Griffin Act."[77]

D. The Bargaining Relationship

1. The Extent of Organization as Determinative of the Unit

The Board's acceptance of such picketing pressures is regrettable. The practice not only does not contribute to industrial peace, but the decisions are contrary to national policy and can only undermine free collective bargaining. Additionally, however, the Board has rendered interpretations not concerned directly with picketing, but that have nevertheless contributed greatly to the power of unions. The Board now appears to establish bargaining on the basis of a union's organizational ability rather than on other relevant factors previously used. It will be recalled that prior to the Taft-Hartley Act, the Board frequently relied on "extent of union organization" as a basis for determining bargaining units. The Taft-Hartley Act changed the rule, providing in section 9(c)(5) that "the extent to which the employees have organized shall not be controlling."[78] Yet in *Quaker City Life Ins. Co.*,[79] another Board reversal, fault was found with well-established criteria for bargaining units of insurance agents. For a period of seventeen years, the Board had consistently held that state-wide or company-wide units were appropriate for insurance agents.[80] The new Board, however, reflecting the viewpoint of its current personnel, discarded the old principles on the ground that the unions had been unable to organize on such a basis and found smaller units to be appropriate. As stated by the Board, "[S]tate-wide or company-wide organization has not materialized, and the result of the rule has been to arrest the organizational development of insurance

75 C. A. Blinne Constr. Co., 135 N.L.R.B. 1153 (1962); Stork Restaurant, 135 N.L.R.B. 1173 (1962).

76 Charlton Press, Inc., 135 N.L.R.B. 1178 (1962); Crown Cafeteria, 135 N.L.R.B. 1183, *enf'd*, 301 F.2d 149 (9th Cir. 1962).

77 108 CONG. REC. 6194 (1962). The Congressman had reference to the majority holding that any unfair labor practice picketing would be a "publicity" defense to picketing under § 8(b)(7) of the act, when the act specifically limited the defense to a § 8(a)(2) unfair labor practice, as provided in § 10(*l*).

78 61 Stat. 136 (1947), as amended, 29 U.S.C. § 159(c)(5) (1964).

79 134 N.L.R.B. 960 (1961).

80 *E.g.*, Metropolitan Life Ins. Co., 56 N.L.R.B. 1635 (1944).

agents. . . ."[81] *Quaker City* thus revived the outlawed rule;[82] the practice continues. In *Sav-On Drugs, Inc.*[83] and *Dixie Bell Mills, Inc.*,[84] the Board again reversed a long line of cases that established the criteria for bargaining units in chain stores. In *Frisch's Big Boy Ill-Mar, Inc.*,[85] the Board disregarded a retail unit embracing all stores in an administrative division of a chain or in a geographic area, on the presumption that a single-store unit or less was appropriate, notwithstanding all established criteria pointing to a broader unit as appropriate. In all these cases, the unit found appeared to be based on the union's extent of organization.[86] In *Stern's, Paramus*,[87] *Arnold Constable Corp.*,[88] and *Lord & Taylor*,[89] the Board departed from its prior policy under which store-wide units were considered the appropriate unit in the retail field. It now permits separate units of selling and nonselling personnel. Finally, in *Montgomery Ward & Co.*,[90] the Board reversed a prior policy in order to permit a separate unit of automotive service employees.

2. Union Communication With Employees

It goes without saying that if unions are permitted to establish bargaining units coextensive with their ability to organize, there can be little doubt of their success. But now further assistance is given. Recently, the Board in *Excelsior Underwear, Inc.*[91] imposed a new rule on employers, requiring them to furnish unions with the names and addresses of employees for the purpose of facilitating union organization, whether or not the employees wish such information disclosed. Ever since the passage of the Wagner Act, normal communication devices available to unions were considered sufficient to enable unions to organize employees, but in *Excelsior* the Board suddenly "discovered" that such means were inadequate. The Board rejected the argument that employees would be subject to the dangers of harrassment and coercion in their homes, refusing to "assume" that the union "will engage in conduct of this nature."[92] This is hardly an evenhanded application of presumption, insofar as the Board has presumed otherwise in the case of employers interrogating their employees in

81 134 N.L.R.B. at 962.

82 The detection in any one case in which controlling effect is given to extent of union organization is difficult, at best, since in bargaining unit cases the Board has broad discretion and asserts that its findings are based on factors other than extent of organization. However, in NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965), the Supreme Court had occasion to consider the issue as reflected in *Quaker City* and "raised an eyebrow" at the Board's practice. The Court considered three different bargaining unit cases involving insurance agents in which it appeared that the unit requested by the union was consistently certified by the Board, whether it was state-wide, district-wide, or parts of each. The Court remanded the case to the Board to "disclose the basis of its order" and to give "clear indication" that it had properly exercised its discretion.

83 138 N.L.R.B. 1032 (1962).

84 139 N.L.R.B. 629 (1962).

85 147 N.L.R.B. 551, 554 (1964) (dissent).

86 This case was reversed on appeal, Frisch's Big Boy Ill-Mar, Inc. v. NLRB, 356 F.2d 895, 896 (7th Cir. 1965), holding that all ten of the stores, which the employer claimed comprised the appropriate units were "alike . . . as peas in a pod." It flatly disagreed with the Board, which upheld the union's view that a single store was appropriate.

87 150 N.L.R.B. 799 (1965).

88 150 N.L.R.B. 788 (1965).

89 150 N.L.R.B. 812 (1965).

90 150 N.L.R.B. 598 (1964).

91 156 N.L.R.B. No. 111, 1966 CCH LAB. L. REP. ¶ 20,180.

92 *Id.* at 25,406.

plant offices.[93] Moreover, while denying the union's request for reconsideration of a Board rule prohibiting unions from talking to employees on company time and property, the Board asserted it was interested, but would defer such reconsideration "until after the effects of *Excelsior* become known."[94]

3. Management Communication With Employees

At the same time, the Board appears to restrict employers in their communications with the employees during union organization, banning discussions that have always been regarded as protected free speech, notwithstanding section 8(c) of the act.[95] Thus, reversing its earlier decisions, the Board now holds that many previously privileged communications concerning statements of fact and expressions of opinion are coercive and may be unfair labor practices or grounds for upsetting an election.[96] In cases of employers with a "privileged" no-solicitation rule forbidding solicitation during nonworking hours where the public has access, e.g., the selling floor of a retail store, the Board now asserts that the union may have an opportunity to reply to the employees on company premises if the employer engages in pre-election communications to the employees.[97]

4. Bargaining Without Election

In addition to thus facilitating union organization, the Board has with increasing frequency ordered employers to bargain with labor organizations without an election and has imposed on employees a union that may not be of the employees' own choosing. The practice strikes at the heart of the representation procedures under section 9 of the act. In the early days of the Wagner Act, "card checks," the practice of checking union authorization cards against the employer's payroll, were justified by the Board under the language of the Wagner Act that permits the Board, in determining bargaining representatives, to "take a secret ballot of employees or utilize any other suitable method to ascertain such representatives."[98] In the Taft-Hartley amendments of 1947, Congress withdrew the Board's authority to "utilize any other suitable method." Yet the Board, under a patent distortion of the doctrine of *Joy Silk Mills, Inc.*,[99] has held that where an employer commits alleged unfair labor practices, even though they be insubstantial, he demonstrates a lack of good faith doubt on a union's claim for recognition and can be ordered to bargain with the union without an election. *Joy Silk*, decided in 1949, was an exception to the general

93 S. H. Kress & Co., 137 N.L.R.B. 1244 (1962).
94 General Elec. Co., 156 N.L.R.B. No. 112, 1966 CCH LAB. L. REP. ¶ 20,181.
95 Section 8(c) provides:
> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit. 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1964).

96 Lord Baltimore Press, 142 N.L.R.B. 328 (1963); Dal-Tex Optical Co., 137 N.L.R.B. 1782 (1962); Trane Co., 137 N.L.R.B. 1506 (1962).
97 May Dep't Stores, 136 N.L.R.B. 797, *enforcement denied*, 316 F.2d 797 (6th Cir. 1964). The Board, however, still adheres to its announced rule. It does not consider a decision of a court of appeals as binding on the issue.
98 Wagner Act, ch. 312, § 9c, 49 Stat. 453 (1935).
99 85 N.L.R.B. 1263 (1949).

rule requiring elections, for there the employer successfully engaged in a willful and calculated effort to destroy the union's unquestioned majority status. The doctrine was applied to remedy outrageous and exceptional unfair labor practices. What was once the exception, however, is now rapidly becoming the rule with the doctrine's arbitrary extension to factual situations totally unlike the original *Joy Silk* case. This practice was further extended by the *Bernel Foam Prods. Co.* holding,[100] under which the Board may order an employer to bargain with a union that lost a representation election if, according to the Board, the employer had no "bona fide doubt"[101] of the union's alleged majority at the time of the union's original request for recognition. *Bernel Foam* overruled *Aiello Dairy Farms*,[102] which had required the union to make a choice of remedies between either an election or an unfair labor practice proceeding, instead of having "two bites on the apple." To show a union majority under *Bernel Foam*, the Board often relies on union authorization cards, which are unreliable in showing employees' true desires.[103] The vice of these Board decisions is not in the *Bernel Foam* principle as such, or in the original *Joy Silk* doctrine, but in the Board's denial of the right of free choice to employees who may have foisted upon them a bargaining agent not necessarily of their own choosing, thus flouting the election procedures provided by the law.[104] In *Garwin Corp.*,[105] the Board appeared to go even further. Finding that the employer committed unfair labor practices when it moved from New York to Florida, the Board ordered the company to bargain with the union in Florida even though there was no evidence that the union had the support of any employees at the new location. The rights of the employees were brushed aside.

5. Codetermination

Once the bargaining relationship has been established, the pattern of advancing union power reappears in the doctrine of codetermination, an intrusion by unions into decision-making that had always been regarded as within the discretion of management. Before 1961, determining whether an employer's subcontracting of bargaining unit work was an unfair labor practice turned mainly on whether the employer's purpose was to discriminate against employees or to avoid bargaining with a union. If economic factors prompted the subcontracting, there was no unfair labor practice.[106] The Board, however, in *Town*

100 146 N.L.R.B. 1277 (1964).
101 *Id.* at 1283.
102 110 N.L.R.B. 1365 (1940).
103 Purity Food Stores, 150 N.L.R.B. 1523 (1965), *enforcement denied*, 354 F.2d 926 (1st Cir. 1965). The court questioned the Board's not giving as pervasive effect to union unfair labor practices in the consideration of union cards as it imposes on the company.
104 The Board's rule has been roundly condemned. See *Hearings Before the House Subcommittee on Labor*, 89th Cong., 1st Sess. 417 (1965); *Hearings on S. 256 Before a Subcommittee of the Senate Committee on Labor and Public Welfare*, 89th Cong., 1st Sess. 180 (1960); Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LAB. L.J. 434 (1965); Comment, *Refusal-To-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387 (1966). There is hope, however, that the Board may reconsider the doctrine of these decisions. Aaron Bros. Co., 158 N.L.R.B. No. 108, 1966 CCH LAB. L. REP. ¶ 20,437. It remains to be seen whether this case will be followed in practice.
105 153 N.L.R.B. No. 59, 1965 CCH LAB. L. REP. ¶ 9503, 41 NOTRE DAME LAWYER 267 (1965).
106 NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954).

& Country Mfg. Co.[107] and *Fibreboard Paper Prods. Co.*,[108] established the doctrine that section 8(d) of the act requires an employer to bargain about an economic decision to subcontract bargaining unit work before subcontracting takes place. In applying the *Town & Country* principle, the Board has not limited itself to subcontracting situations but has expanded the theory to encompass decisions to automate certain operations and terminate others,[109] to close a plant and cease business,[110] to terminate a sole remaining operation in a particular area after a loss of clients,[111] and to sell all or part of a business.[112]

6. Board Intervention to Dictate the Bargain

More recently, there seems to be a disturbing Board tendency to dictate the bargain for the parties through broad remedial orders requiring employers to agree to substantive terms of a collective contract. This tendency is in direct contravention of the policy of free collective bargaining our labor legislation seeks to promote. In *NLRB v. Jones & Laughlin Steel Corp.*[113] the Supreme Court declared that "the Act does not compel agreements between employers and employees. It does not compel any agreement whatever."[114] Again, in *NLRB v. American Nat'l Ins. Co.*,[115] the Court reiterated: "The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement."[116]

Arguing in favor of passage of the Taft-Hartley Act in 1947, the House Committee, citing instances of contrary tendencies of the Board, was careful to point out "that unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements."[117] Congress then adopted a provision that the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."[118] This language, the Conference Report said, rejected the test of making a concession as a factor in determining good faith, thus seeking to prevent "the Board from determining the merits of the positions of the parties."[119]

The cases illustrate, however, that the Board considers refusals of employers to agree to proposals or to make concessions the basis for finding refusals to bargain. In *General Elec. Co.*,[120] the Board held that it was an unfair labor practice for the employer to make "a 'fair and firm offer' to the unions without

107 136 N.L.R.B. 1022 (1962).
108 138 N.L.R.B. 550 (1962), *aff'd*, 379 U.S. 203 (1964).
109 Renton News Record, 136 N.L.R.B. 1294 (1962).
110 Royal Plating & Polishing Co., 148 N.L.R.B. 545 (1964), *reconsidered*, 152 N.L.R.B. 619 (1965), *enforcement denied and remanded*, NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965).
111 William J. Burns Int'l Detective Agency, Inc., 148 N.L.R.B. 1267 (1964), *modified*, NLRB v. William J. Burns Int'l Detective Agency, Inc., 346 F.2d 897 (8th Cir. 1965).
112 Weingarten Food Center, 140 N.L.R.B. 256 (1962).
113 301 U.S. 1 (1937).
114 *Id.* at 45.
115 343 U.S. 395 (1952).
116 *Id.* at 402.
117 H.R. REP. No. 245, 80th Cong., 1st Sess. 20 (1947).
118 61 Stat. 136 (1947), as amended, 29 U.S.C. § 58(d) (1964).
119 H.R. REP. No. 510, 80th Cong., 1st Sess. 34 (1947).
120 150 N.L.R.B. 192 (1964).

holding anything back for later trading or compromising."[121] In *Fitzgerald Mills Corp.*,[122] the Board used the employer's "adamant refusal" to enter into a contract "except on its own terms" and its "uncompromising attitude" in rejecting the union's demands as "evidence" of its failure to bargain in good faith. In *H. K. Porter*,[123] the Board found a refusal to bargain where the employer denied the union's request for a checkoff of union dues. The next logical step followed in *Roanoke Iron & Bridge Works, Inc.*,[124] where, over vigorous dissent, a Board majority ordered that an employer incorporate a checkoff clause into a labor contract even though the employer bargained on it to an impasse.

An offshoot of government intervention lies in the decisions of the Board finding employer unfair labor practices on the grounds that the contract was incorrectly interpreted by the employer. The Board thus imposes its own construction of a contract, instead of permitting the parties to decide the contract's meaning.[125] The Board operates in this manner in the teeth of a labor policy favoring voluntary adjustment of disputes.[126] The Board's justification is that it has exclusive jurisdiction to decide unfair labor practices. This reasoning is invalid because disputes essentially concerning the interpretation of a contract are outside the proper province of the Board.[127]

Thus, what should be free from government intervention has come under government control, a tendency the Board should abjure. Not only are the decisions contrary to our basic labor policy; they upset the balance of power needed for free bargaining to survive.

E. Union Control Over Members

1. More Power to Unions

In addition to dealing with the immediate relationship between the union and employer, Board decisions also concern the exercise of control by unions over their members. In this latter area, the union's control has been increased so that the exercise of union power cannot be diluted by dissident members. The Board has freed unions from liability for fining employees who exceed union-prescribed production quotas,[128] cross picket lines in violation of union policy,[129] file a decertification petition with the Board,[130] or file a request to withdraw a union's

121 *Id.* at 195.
122 133 N.L.R.B. 877 (1961).
123 153 N.L.R.B. No. 119, 1965 CCH LAB. L. REP ¶ 9556.
124 160 N.L.R.B. No. 17, 1966 CCH LAB. L. REP. ¶ 20,652.
125 C & C Plywood Corp., 148 N.L.R.B. 414, *enforcement denied*, 351 F.2d 224 (9th Cir. 1965), wherein the court quoted the language in another case with approval: " 'It seems to us that what the Board has done, under the guise of remedying unfair labor practices, is to attempt to bestow . . . benefits which it believes the Union should have obtained but failed to obtain . . . as a result of its collective bargaining with the respondent . . . .' " *Id.* at 228. The Board, however, continues to adhere to the doctrine. Anaconda Aluminum Co., 160 N.L.R.B. No. 7, 1966 CCH LAB. L. REP. ¶ 20,629.
126 United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).
127 Hercules Motor Corp., 136 N.L.R.B. 1648 (1962); Perry Norvell Co., 80 N.L.R.B. 225, 240 (1948); H.R. REP. No. 510, 80th Cong., 1st Sess. 41-42 (1947); *cf.* Speilberg Mfg. Co., 112 N.L.R.B. 1080 (1955).
128 Wisconsin Motors Corp., 145 N.L.R.B. 1097 (1964).
129 Allis-Chalmers Mfg. Co., 149 N.L.R.B. 67 (1964), *rev'd*, 358 F.2d 656 (7th Cir. 1965).
130 Tawas Tube Prods., Inc., 151 N.L.R.B. 46 (1965).

authority to execute a union shop agreement.[131] Although in the last two cases the discipline imposed was expulsion from the union, the Board's rationale would apply equally were the union to impose fines for the exercise of these statutory rights.

In passing the Landrum-Griffin Act in 1959, Congress recognized that federally insured rights given to unions carried commensurate union responsibilities and obligations to act in the public interest. The act placed procedural and substantive duties on unions enforceable by private litigation and the Labor Department. The Board, however, has since proceeded on an opposite course. It has immunized union discipline of its members short of fining them for filing unfair labor practice charges against the unions.[132] Apparently, the power to fine union members may subject employees to oppressive and frequently unlimited liability. This power is particularly unjust where the employee must join the union against his will because of a union shop agreement permitted by section 8(a)(3). Abuse of this power is at odds with the goal of democratic unions and the right to dissent. The Board should adhere to the philosophy stated by the Supreme Court in *Radio Officers' Union v. NLRB*,[133] where the Court said, "The policy of the Act is to insulate employees' jobs from their organizational rights."[134]

2. Less Power to the Employer

One phase of Board doctrine dramatically illustrates a tendency of the Board both to disregard congressional policy and to cant the power balance between management and labor. This tendency is in an area where power can be most effective and where each party seeks to exercise all available means in pursuit of its bargaining objectives. In *John Brown*,[135] the Board restricted the right of employers to defend against a union "whipsaw" strike directed against one of several members of an employers' association. In that case, five retail food operators made up a multi-employer bargaining unit. The union struck one store and the other employers locked out their employees to prevent the whipsawing tactic of the union, that is, to prevent the defeat of all employers by applying economic pressure against each one successively until the union's goals were realized. The Board held the lockout illegal. On appeal, the tenth circuit denied enforcement,[136] noting that the Board had no right to "choose sides"; that it was not "common sense" to require the companies to "aid and abet the success of the whipsaw strike"; and that it would render "largely illusory" the right of lockout which the Supreme Court had declared lawful.[137] The Supreme Court affirmed the court of appeals decision, admonishing the Board "that the Act does not constitute the Board as 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.' "[138]

131 Pittsburgh-DesMoines Steel Co., 154 N.L.R.B. No. 54, 1965 CCH LAB. L. REP. ¶ 9641.
132 Charles S. Skura, 148 N.L.R.B. 679 (1964).
133 347 U.S. 17 (1954).
134 *Id.* at 40.
135 137 N.L.R.B. 73 (1962).
136 NLRB v. Brown, 319 F.2d 7, (10th Cir. 1964), *aff'd*, 380 U.S. 278 (1965).
137 NLRB v. Truck Drivers Union, Local 449, 353 U.S. 87 (1957).
138 NLRB v. Brown, 380 U.S. 278, 283 (1965).

The Board's authority was similarly misdirected in *Darlington Mfg. Co.*,[139] where the Board found an employer had committed unfair labor practices by permanently closing its plant after a union election because its competitive position "had diminished as a result of the election."[140] The Supreme Court,[141] in remanding the case to the Board to obtain evidence on the purpose and effect of the closing, stated that the employer had the absolute right to terminate his entire business for any reason he pleases and admonished the Board not to apply such a "startling innovation . . . without the clearest manifestation of legislative intent or unequivocal judicial precedent . . . ."[142]

In *Hawaii Meat Co. v. NLRB*[143] and *NLRB v. Robert S. Abbott Publishing Co.*,[144] the courts of appeals reversed Board findings of unfair labor practices where employers subcontracted their work to maintain business during a strike without first notifying or consulting with the union. The court in *Abbott* declared what should have been obvious to the Board:

> It would be a startling doctrine indeed . . . to tell companies and employers faced with extinction because of a strike, that before they can make economic business decisions to contract out work in order to continue operations, they must first consult the union that caused the threat of extinction.[145]

In *American Ship Bldg. Co.*,[146] the Board found illegal a lockout utilized by an employer to enhance his bargaining position after good-faith negotiations resulted in an impasse. The Supreme Court reversed.[147] The language of the Court, which in essence is the theme of this article, included the following:

> The Board has justified its ruling in this case and its general approach to the legality of lockouts on the basis of its special competence to weigh the competing interests of employers and employees and to accommodate these interests according to its expert judgment. . . . However, we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management . . . . Indeed, the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act . . . .[148]

Despite the Supreme Court's pronouncement in *American Ship Bldg.*, the Board nevertheless seems to be bent on whittling away the lockout powers of employers. In *David Friedland Painting Co.*,[149] the Board held that an employer who operated in the territorial jurisdiction of one local union violated the act when he locked out his employees who were members of a sister local. The latter local was on strike against an area employer association, where the em-

139 139 N.L.R.B. 241 (1962).
140 *Id.* at 243.
141 Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).
142 *Id.* at 270.
143 321 F.2d 397 (9th Cir. 1963).
144 331 F.2d 209 (7th Cir. 1964).
145 *Id.* at 213.
146 142 N.L.R.B. 1362 (1963), *aff'd*, 331 F.2d 839 (D.C. Cir. 1964).
147 American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).
148 *Id.* at 315, 316, 318.
149 158 N.L.R.B. No. 59, 1966 CCH LAB. REP. ¶ 20,389.

ployer also performed work and had an economic interest in supporting other struck employers. In denying the company's legitimate interest in the dispute, the Board said:

> To allow this collateral or indirect interest in a labor dispute to be deemed a legitimate business interest sufficient to serve as justification for a lockout of Respondent's own employees is to arrive at a far-reaching result never intended by the Supreme Court in American Ship Building. It would lead to a proliferation of the use of the lockout so as to render it lawful in any situation where the employer making use of it against members of a certain union could arguably be affected economically by the outcome of particular negotiations between that union and another employer. It would be an invitation to industrial chaos rather than to industrial stability which the Act is designed to foster.[150]

It is difficult to reconcile the rationale of the Board in this case with the Board's holding in *Television & Radio Artists* (*Westinghouse Broadcasting, Inc.*),[151] where the "shoe was on the other foot." There it was in the union's interest to protect the standards of another union. The Board held that a hot-cargo agreement was not rendered unlawful because the union sought to protect the wage standards of another union in another area. The Board did not raise the apprehensions it found in *David Friedland*. In approving the union conduct the Board stated:

> The fact that the Respondent's representative admitted that the Union also desired to protect the wage standards of union members not working for WINS [the employer] does not, by itself, affect the lawfulness of such conduct. This is true because whenever a union also represents other units of employees doing the same type of work, its conduct aimed at setting the wage rates and protecting the work of unit employees will necessarily have the additional and incidental effect of protecting the wage standards of such other employees. To find that because of this additional object the Union's conduct is secondary would mean that in most cases it would not be permissible for a union to take action to obtain a "work-standards" clause.[152]

What was sauce for the goose in *David Friedland* was not sauce for the gander in *Television & Radio Artists*. Thus, the Board has again reduced the effect of the counterbalance recognized by the Supreme Court in the *American Ship Bldg.* case. Even though the two cases involved dissimilar provisions of the act, it is submitted that the rationale of the two decisions cannot be squared.[153]

V. Conclusion

In the interest of free collective bargaining, the Board should reconsider its decisions augmenting the power of organized labor. The answer frequently

150 *Id.* at 25,843-44.
151 160 N.L.R.B. No. 24, 1966 CCH LAB. L. REP. ¶ 20,654.
152 *Id.* at 26,453.
153 The Board has also removed the right to lock out where the employer allegedly committed unfair labor practices prior to the lockout. Tonkin Corp., 158 N.L.R.B. No. 110, 1966 CCH LAB. L. REP. ¶ 20,445.

made by Board spokesmen that Board decisions are subject to review and can be reversed when inappropriate begs the fundamental issue, because it is the Board that has been established as the tribunal to administer our national labor policy. As such, the Board is given wide latitude in making its findings of fact and in fashioning remedies; and although courts may disagree,[154] they are admonished not to interfere where Board decisions may have support in the record.[155] Instead, the answer lies within the Board's own capacity. It must not succumb to the temptation to rewrite portions of our national labor law, but must only interpret it.

As a member of the Board majority unofficially asserted, the Board is not a "policymaking tribunal."[156] In January 1963, this writer observed: "The present National Labor Relations Board has relied on its own policy rather than congressional policy in interpreting the law."[157] The Supreme Court admonished the Board[158] in 1965 that it "construes its functions too expansively when it claims general authority to define national labor policy. . . ."[159] Mr. Justice Holmes, sitting as circuit justice in *Johnson v. United States,*[160] stated: "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."[161] It is the duty of the Board to "look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."[162] As the decisions of the Board demonstrate, however, this duty has not been fulfilled.

Congress has established the policy that equality of bargaining power is a condition for collective bargaining in a free society, and it has legislated to that end. Into this highly sensitive labor-management complex, Board decisions, it must be conceded, have given immunity to the abuse of union power in our industrial life. Today, free collective bargaining is on trial. Strikes affecting the national welfare are on the rise. The causes are many, but one of the most significant may be traced to Board decisions that have not been in accord with congressional intent and have given unions excessive power to impinge upon the national interest. If the Board fails to reconsider its decisions in the light of congressional policy, Congress must act to insure a balanced structure within which there can be a fair interplay of collective bargaining. Only then can the bargaining process be free to achieve peaceful and rational solutions undisturbed by the unilateral power plays resulting from an imbalance created by the Board's distortion of the law.

---

154 *E.g.,* NLRB v. Signal Mfg. Co., 351 F.2d 471 (1st Cir. 1965), where the court affirmed 150 N.L.R.B. 1162 "with considerable reluctance." See also Caribe General Elec., Inc. v. NLRB, 357 F.2d 664 (1st Cir. 1966), 61 L.R.R.M., 2513, *affirming* 149 N.L.R.B. 1541 (1964).

155 Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1950).

156 Address of Gerald A. Brown before Labor Law Section, Institute on Labor Law, Duke University Law School, Feb. 9, 1962, entitled "The NLRB on the New Frontier."

157 Browne, *The National Labor Relations Board: Labor Law Rewritten,* 49 A.B.A.J. 64 (1963).

158 American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

159 *Id.* at 316.

160 163 Fed. 30 (1st Cir. 1908).

161 *Id.* at 32.

162 Takao Ozawa v. United States, 260 U.S. 178, 194 (1922).