



Cornell University  
ILR School

Cornell University ILR School  
**DigitalCommons@ILR**

---

Federal Publications

Key Workplace Documents

---

September 1994

## Statement of William B. Gould IV Before the Commission on the Future of Worker-Management Relations

William B. Gould IV  
*National Labor Relations Board*

Follow this and additional works at: [https://digitalcommons.ilr.cornell.edu/key\\_workplace](https://digitalcommons.ilr.cornell.edu/key_workplace)

Thank you for downloading an article from DigitalCommons@ILR.

**Support this valuable resource today!**

---

This Statement is brought to you for free and open access by the Key Workplace Documents at DigitalCommons@ILR. It has been accepted for inclusion in Federal Publications by an authorized administrator of DigitalCommons@ILR. For more information, please contact [catherwood-dig@cornell.edu](mailto:catherwood-dig@cornell.edu).

If you have a disability and are having trouble accessing information on this website or need materials in an alternate format, contact [web-accessibility@cornell.edu](mailto:web-accessibility@cornell.edu) for assistance.

---

## Statement of William B. Gould IV Before the Commission on the Future of Worker-Management Relations

### Comments

#### Suggested Citation

Gould, W. B. (1994). *Statement of William B. Gould IV before the Commission on the Future of Worker-Management Relations*. Retrieved [insert date], from Cornell University, School of Industrial and Labor Relations site: [http://digitalcommons.ilr.cornell.edu/key\\_workplace/345/](http://digitalcommons.ilr.cornell.edu/key_workplace/345/)

Hot Topic "Future Worker Management"



# NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

**FOR IMMEDIATE RELEASE**  
1:45 p.m., September 29, 1994

Property of  
MARTIN P. CATHERWOOD LIBRARY  
NEW YORK STATE SCHOOL  
INDUSTRIAL AND LABOR RELATIONS  
Cornell University

(R-2019)  
202/273-1991

## STATEMENT BEFORE THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS

DELIVERED BY:

WILLIAM B. GOULD IV  
CHAIRMAN  
NATIONAL LABOR RELATIONS BOARD  
CHARLES A. BEARDSLEY PROFESSOR OF LAW  
STANFORD LAW SCHOOL (ON LEAVE)

SEPTEMBER 29, 1994  
U.S. DEPARTMENT OF LABOR  
WASHINGTON, DC

Good afternoon. It is a pleasure to have the opportunity to present my views to the Commission on the Future of Worker-Management Relations, which has come to be popularly known as the Dunlop Commission.

I am grateful to Chairman John Dunlop for inviting me to speak here today. I take this occasion to state how much I enjoyed my service on this Commission, from the date that I was appointed by Secretary of Labor Robert Reich on March 24, 1993 until my confirmation as Chairman of the National Labor Relations Board on March 2, 1994. I am certain that this Commission will play a valuable role in the debate about labor law reform that will take place in the coming years.

I wish to reiterate the views which I articulated in my confirmation hearing testimony before the United States Senate Labor and Human Resources Committee on October 1, 1993. My views about labor law policy reforms -- views which I express again today -- are those that I have stated in books, articles and speeches as an academic, impartial arbitrator and labor law practitioner during these past 33 years. And, of course, my views about policy are mine alone and not necessarily those of other Board Members or the General Counsel.

As Chairman of the National Labor Relations Board my role is both to administer the National Labor Relations Board and interpret the National Labor Relations Act. In that connection, I have attempted to identify cases and issues which are or may be before the agency. I am sure that you appreciate the fact that I cannot comment in any way upon matters that are sub judice or which, in my judgment, may come before the Board in future cases.

\* \* \* \* \*

Almost 60 years ago Congress and President Roosevelt formulated a significant policy change through the adoption of the National Labor Relations Act of 1935 creating an unfair labor practice and representation election system which remains intact today. The Act, creating a kind of Bill of Rights for workers throughout most of the private sector and a system of conflict resolution for certain disputes between management, unions and individual employees has been emulated in much of this country's public sector and, at least through the '60s, was regarded as model for a rule of law which would foster good labor management relations.

The starting point for any consideration of changes in the National Labor Relations Act must be the preamble of the statute itself. The public policy of the United States remains rooted in the promotion of the practice and procedure of collective bargaining and the freedom of association of all workers. The Taft-Hartley and Landrum-Griffin amendments make clear and, in my judgment appropriate, the view that union as well as employer abuses are in need of regulation. All future revisions of existing policy must be sufficiently evenhanded so as to gain both the confidence and involvement of labor, management and individual employees.

Today an enormous number of problems have emerged under the statute. At the Board we have noted the Commission's examination of the number of employees who are dismissed during union organizational campaigns in its Fact Finding Report. Regrettably, we do not have

statistics which shed light on this issue but we are presently attempting to enhance our statistical capabilities so that we can determine the full extent of this problem and obtain accurate and precise data.

Similarly, we have noted the Commission's reference to the Federal Mediation and Conciliation Service statistics on the number of instances in which collective bargaining agreements are concluded subsequent to certification. Again, this is a matter which I have instructed our statistical gathering unit to examine and to include in future data.

Nonetheless, there are significant problems which exist, principally due to both the period of time and the way in which representation proceedings are pursued as well as in the delays inherent in unfair labor practice litigation.

Some of the problems in these areas can be dealt with and are being addressed by the Board itself. I have convened a rulemaking committee which is placing its primary attention on ways in which the entire representation process can be streamlined. The objective is to eliminate wasteful delay and litigation. Our principal problem is that representation cases which are litigated can take three or four months or more. This means that a party desiring delay holds the whip hand in negotiations about a stipulation on eligibility, the unit, the question of whether the ballot will be by post or on plant premises, etc.

The committee, composed of Board representatives from both Washington and the regional offices, is concerned with the ways in which specific periods of time can be set for a joint conference, hearing, election and any post-election hearing that may result from the conduct of election itself. The committee is also concerned with the ways in which the hearing process itself can be expedited through such vehicles as subpoenas with the service of the petition, a rule to Show Cause why the petition for a unit is inappropriate, and offers of proof about the position that a party wants to take on unit issues. In Bennett Industries, Inc.<sup>1</sup> we have already determined that a party cannot go to hearing on an issue about which it refused to take a position.

Additionally, we are examining the extent to which unit presumptions can be imposed. On June 3 of this year, we issued an advance notice of intent to engage in rulemaking in connection with disputes about whether a single or multiple facility unit is appropriate. We are now reviewing commentary that we have received in June and July.

As some of the members of this Commission may know, the Board has employed a presumption that where a union petitions for one facility that that facility will be appropriate as a bargaining unit. The difficulty has been that by virtue of the numerous criteria which the Board purports to use in adjudication, the volume of litigation on this issue seems to have grown because parties are encouraged to believe that one or two of the criteria may carry the day for them in a hearing.

---

<sup>1</sup> 313 NLRB 1363 (1994).

Currently the Board is examining the question of whether in retail, trucking and manufacturing the use of a relatively explicit rule, e.g., whether a second facility is within one or two or three miles of the facility petitioned for, could resolve the issue. That is to say, if there was no facility within the geographical radius established by the rule, the petition would be granted as appropriate with almost complete automaticity.

The rulemaking committee will also look at the question of whether it is appropriate to have two separate full-fledged appeals to the Board in Washington in the form of both a pre-election request for review as well as post-election objections to the conduct of elections. Similarly the question of the circumstances under which the Board can order an election without resolving eligibility issues, saving this matter for post-election review should the number of employees in dispute turn out to be outcome determinative, is another issue that is before the Board.

On the election itself, the Board has expanded the use of postal ballots to situations where call-in employees may not be present, at the employer's facility on the date of the election, Shepard Convention Services, Inc., 314 NLRB No. 115 (1994), as well as situations where employees are not able to vote at plant premises because, for instance, they are on strike and have other jobs.<sup>2</sup>

Under consideration is the question of whether the postal ballot will be used where, in the Regional Director's determination, it is cost effective to do so because of a substantial distance between the plant premises and the regional office and the costs involved in sending Board personnel to such offices. Similar consideration is being given to the more frequent use of alternate sites, other than plant premises, for elections in the interest of neutrality.

On unfair labor practices, through my office, the Chief Administrative Law Judge has instituted timetables for Administrative Law Judges to handle such cases. I have convened a case management committee which will meet for the first time next week. It will ultimately recommend to the Board both timetables for the period of time that it takes the Board to hear unfair labor practice cases as well as other mechanisms designed to expedite our procedures. Currently it takes the Administrative Law Judges five to six months to issue a decision after the hearing has been convened and it takes the Board, on average, 242 days to process the case subsequent to the time that the case comes here.

Furthermore, the Board has issued a proposed rule which would allow Administrative Law Judges to issue, under appropriate circumstances, bench decisions, based upon the oral summation of the parties, within 72 hours after the conclusion of the hearing without requiring briefs. This would take place where: (1) the issue was exclusively or primarily one of credibility; (2) the law and facts were not in dispute; (3) the case involved a single issue record of relatively short duration, i.e., not more than a day or so.

---

<sup>2</sup> Lone Star Northwest, Inc., 36-RD-1434 (unpublished decision May 18, 1994).

Again, in order to diminish wasteful and time consuming litigation -- the purpose of many of our initiatives described above -- settlement judges<sup>3</sup> would be available if they are deemed to be appropriate by the Chief Administrative Law Judge or one of his associates. Such judges, from our own Administrative Law Judge corps, would attempt to mediate the dispute without the authority to adjudicate. The theory here is that if the parties have the expert assistance of a third party, they will be willing to discuss a possible compromise when they know that the party will not use any concessions or compromises against them in the adjudication process. Information produced and positions taken will be confidential. Meanwhile, in addition to the proposed rule itself, we are attempting to use pre-hearing settlement conferences by the Administrative Law Judge in the ordinary course of casehandling.

In cooperation with the General Counsel, we have authorized a record number of Section 10(j) injunctions. As of this date we have authorized 64 cases for 10(j) relief in the six-and-a-half months that we have been here in Washington. This, along with our contempt authority, is a most important part of the law enforcement features in our statutory scheme.

Finally, the question of whether the Res-Care doctrine under which the Board may not assert jurisdiction over certain entities which have contracts with the government is being reconsidered in Management Training Corporation, 27-RC-7374. Similarly, I have stated that I would like the Board to reconsider its current policy of excluding contingent, or as the Europeans characterize them, atypical employees, from existing bargaining units when they have been referred by another employer. Amongst the issues that the Board will be called upon to address in future cases are: (1) the precise standard to be employed in defining a joint employer; (2) the circumstances, if any, under which joint liability can be imposed; (3) the circumstances under which a community of interest can be found between contingent employees and permanent employees; (4) the legal standard applicable to secondary pressure against one of a number of employers that may be regarded as joint employers or about which there is some debate relating to their neutrality. As you may know, with regard to (3) my colleague, former Chairman James Stephens, has indicated that it may be appropriate for the Board to reexamine its existing precedent<sup>4</sup> -- and I agree with him.

While it may be that full and complete remedial relief for illegal aliens, who are employees within the meaning of the Act by the virtue of the Supreme Court's Sure Tan decision,<sup>5</sup> can only be accomplished by statutory amendment, the issue of reinstatement and backpay involving illegal aliens is currently before the Board in A.P.R.A. Fuel Oil Buyers Group, Inc., 29-CA-15446.

The statute excludes agricultural employees. However, the question of the precise demarcation line between agricultural and non-agricultural workers has been recently addressed in Produce Magic, 311 NLRB 1277 (1993). Even if your Commission recommends that our jurisdiction be extended to cover farm workers, -- and there is no logical reason for that exclusion

<sup>3</sup> A decade ago I noted that our system is relatively deficient in settling post-complaint unfair labor practices. See W.B. Gould, Japan's Reshaping of American Labor Law, (MIT Press 1984), pp. 44-62.

<sup>4</sup> The Brookdale Hospital Medical Center, 313 NLRB 592, n. 4 (1993).

<sup>5</sup> 104 S.Ct. 2803 (1984).

-- the question of an appropriate accommodation between California's comprehensive legislation and federal law needs to be addressed. We are currently considering the extent to which we might enter into an agreement with the Agricultural Labor Relations Board through which our jurisdiction could be ceded to it in certain areas.

Penultimately, we have pending before us the question of whether corporations which are engaged in both air and trucking are within our jurisdiction or the jurisdiction of the National Mediation Board and the question of what kind of deferral, if any, is appropriate on an inter-agency basis.<sup>6</sup>

Finally, it may be that this Commission will wish to reconsider the jurisdictional yardsticks frozen by Congress through the 1959 Landrum-Griffin amendments. My judgment is that no change is warranted because: (1) such revisions would deny the opportunity to bargain collectively to a large number of workers in states without mini-NLRBs and, (2) as my colleague, Professor Robert Flanagan has shown, the jurisdiction assumed does not seem to have caused a large increase in the Board's caseload since 1970.<sup>7</sup>

#### UNION ACCESS TO PRIVATE PROPERTY

The Supreme Court in Lechmere<sup>8</sup> held that, in most cases, non-employee union organizers who wish to communicate with employees for the purpose of organization may be excluded from private property by the employer. My judgment is that Lechmere is an erroneous interpretation of our statute but it is the law and any policy designed to provide employees with maximum amount of communication and information provided by both unions and employers must come from Congress and not the Board.<sup>9</sup> Meanwhile, however, the question of whether: (1) union organizers may have access to private property for the purpose of publicizing a labor dispute to the public under standards different than Lechmere; and (2) the question of whether, under the Board's representation procedures, union access of some kind may be fashioned, are both open issues not explicitly resolved by Lechmere.

#### UNION RECOGNITION

Two avenues for reform exist here. The first is a pre-hearing election which would expedite our procedure enormously. The question of whether this is authorized under the statute or our Rules and Regulations is now before the Board in Angelica Healthcare Services Group, Inc. As you may know, from 1945 through 1946 pre-hearing elections were used with great

<sup>6</sup> Federal Express, 4-RC-17698-S and United Parcel, 8-CA-24212.

<sup>7</sup> R. Flanagan, Labor Relations and the Litigation Explosion, (The Brookings Institute 1987) pp. 31-32 (1987).

<sup>8</sup> 112 S.Ct. 841 (1992).

<sup>9</sup> See W.B. Gould, Agenda for Reform: The Future of Employment Relationships and the Law, (MIT Press 1993), p. 158.



success in terms of a dramatic decline in the cases which required formal Board action. The assumption has been that the Taft-Hartley amendments reversed this practice. See, for instance, Twelfth Annual Report of the National Labor Relations Board, n. 48. Chairman Boyd Leedom advocated pre-hearing elections at the time of the Landrum-Griffin amendments but subsequent to a statement by Senator Barry Goldwater on the pending legislation on July 24, 1959, the conference committee stated that:

[T]he right to a formal hearing before an election can be directed is preserved without limitation or qualification.

A second measure which the Commission might want to consider is the practice prevailing in Canada, i.e., recognition on the basis of authorization cards with evidence of a promise to pay union dues (the latter feature has been abandoned in Canada) where a super-majority of 60 percent or more support the union and pay dues. Such an approach would be based upon the voluntary choice of those who are serious enough to obligate themselves financially and would expedite the electoral process.<sup>10</sup>

#### THE DUTY TO BARGAIN

Under the National Labor Relations Act, as amended, both unions and employers have a duty to bargain in good faith. But one of the difficulties with the administration and enforcement of the statute lies in the fact that there is no duty to consummate a collective bargaining agreement. Indeed, the Supreme Court has advised us in H.K. Porter v. NLRB<sup>11</sup> that the Board is precluded from imposing any substantive term upon the parties.<sup>12</sup> This means that in most cases the only remedy to a duty to bargain violation is a simple cease-and-desist order which requires the parties to bargain in good faith in the future or to "go thou and sin no more."

The question of whether a party may be compensated for lost expenses incurred in the negotiation process is a matter which is before the Board now. But, as noted above, the Board cannot impose an agreement. Legislation of the kind which has been adopted by some of the Canadian provinces to impose first-contract arbitration would be a first step towards filling this vacuum.

<sup>10</sup> The Supreme Court in Linden Lumber Div. Summer & Co. v. NLRB, 419 U.S. 301 (1974) has approved the use of secret ballot box elections rather than the authorization cards as a basis for determining recognitional issues absent unfair labor practices which erode employee free choice.

<sup>11</sup> 90 S.Ct. 821 (1970).

<sup>12</sup> See W.B. Gould, Agenda for Reform, supra, p. 220. The statute is deeply flawed remedially, as interpreted by the Supreme Court. See Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940); Phelps Dodge v. NLRB, 313 U.S. 177 (1941). Note "NLRB Power to Award Damages in Unfair Labor Practice Cases," 84 Harvard L. Rev. 1670 1684 (1971). This makes reform necessary in the area of unlawful discharges as well as the duty to bargain.

I wish to make clear that I do not advocate first contract arbitration as a remedy for bad faith bargaining. This would be ill advised because: (1) of the time-consuming nature of litigation before the use of arbitration; (2) the relatively poor prospects for success where the parties have, by definition, been poor partners. The most appropriate circumstance for first contract arbitration would be to trigger it, most probably subsequent to mediation, after a certain period of time subsequent to the Board's certification had elapsed.

### PLANT CLOSURES AND THE DUTY TO BARGAIN

The Supreme Court held in First National Maintenance v. NLRB,<sup>13</sup> that the employer did not have a duty to bargain about its decision to partially close an operation. Quite clearly, however, the conditions of employment of the employees were affected because they lost their jobs altogether. My judgment is that the statute should be amended so as to provide that there is a duty to bargain wherever the conditions of employment are arguably affected by the policy about which the one party seeks to bargain.<sup>14</sup> It is anomalous to preclude bargaining about decisions which affect the job security of workers.

### DISCLOSURE OBLIGATION

The Supreme Court held in NLRB v. Truitt<sup>15</sup> that management has a duty to open its books to the union where it pleads poverty or an inability to pay which will force it to the wall. (A disclosure obligation where inability to pay is based upon competitive consideration remains open for the Board to resolve.) However, there is no duty to disclose relevant information where the position taken by the employer is allegedly based upon other considerations.

The effect of the Truitt decision has been that employers, which do not wish to disclose the basis for their economic positions, will simply refuse to assert an inability to pay, but rather an unwillingness to do so -- or take the position that their decision is based upon what are alleged to be comparable conditions elsewhere. Accordingly, this rule like that set forth in First National Maintenance, inhibits dialogue when it should be promoted. Again, the rule should be, as in connection with organizational disputes, that employees should have the maximum amount of information that is available.<sup>16</sup>

Employees ought to be able to know the economic facts of life which affect them and their job and financial security. Unless the data sought is confidential in the sense that its disclosure would injure the employer's competitive position, the union should have automatic access to all

13 101 S.Ct. 2573 (1981).

14 See W.B. Gould, Agenda for Reform, supra, p. 173.

15 76 S.Ct. 753 (1956).

16 See W.B. Gould, Agenda for Reform, supra, pp. 173-4.

information which might arguably affect the employer's capability to offer wages and conditions of employment at the bargaining table.

### SUCCESSORSHIP

A major factor in the increase of some non-union facilities are the rules relating to successorship. In the first place, absent contractual limitations in the collective bargaining agreement itself, under no circumstances can the collective bargaining agreement negotiated between the seller and the union be imposed upon the purchaser. Moreover, the purchaser (or new merged operation) is less likely to be identified as a successor if it does not rehire employees previously employed by the predecessor. This means that unless it can be shown that the decision was instigated for anti-union reasons, there is an incentive to deprive employees of their jobs so that the employer can be free of any kind of bargaining obligation with the union. This is an extraordinary and anomalous result in a society which is concerned about both preserving bargaining and job security policies. And there is little, if anything, that the Board can do here about the general rule.

Congress should, therefore, reverse the relevant Supreme Court authority and: (1) impose a collective bargaining agreement upon the successor operation -- and a duty to bargain about appropriate modifications; (2) explicitly establish the irrelevance of the number of employees hired to the successorship definition.

### THE ESTABLISHMENT OF MORE COOPERATIVE AND LESS ADVERSARIAL RELATIONSHIPS THROUGH EMPLOYEE COMMITTEES OR WORKS COUNCILS

Again, consistent with both my approach to both union organizational activity under Lechmere and the duty to bargain issues arising under H.K. Porter, First National Maintenance, and Truitt, my view is that communication between employees and employers must be enhanced in both the union and non-union environment. Accordingly, my view is that Section 8(a)(2) should be amended as it relates to both unionized and non-union establishments. With regard to the former, the statute should resolve all ambiguities by allowing employers to provide unions with access to plant facilities, desks, secretarial help, xeroxing, office space and the like without fear of offending the statutory prohibition against unlawful assistance and support.

Similarly, communication between employees and employers where there is no union present should be enhanced as well. The new members of the Board have not yet had an opportunity to address the Electromation issue and it would therefore be inappropriate for me to comment on the existing Board interpretation as well as the recent decision by the Court of Appeals for the Seventh Circuit.

However, as a matter of policy, it seems appropriate for Congress to allow financial and other forms of support to committees composed of employees or employee and management representatives which address conditions of employment as well as so-called managerial concerns

such as the quality of the product, sales problems and the like. The fact of the matter is that, as in the duty to bargain area, there is no appropriate demarcation line between employment conditions and so-called management prerogatives which, in fact, affect such conditions. Employees and employers ought to be encouraged to communicate and participate with one another through the provision of information and involvement in the decision making process in all such areas. So long as the committee is not hierarchical in the sense that its employee representatives are selected or imposed by the employer or others and the mechanism has not been instituted in response to union organizational campaigns, the statute should allow it.

This same approach governs my advocacy of representation through unions on a "members only" basis, where they do not represent a majority of employees within the bargaining unit. As you know, the statute permits relationships between consenting employers and unions on a "members only" basis where the union does not represent a majority of employees. There is no reason why a duty to consult and notify cannot be imposed where it is on a limited number of issues such as discharge or discipline, health and safety, where a significant number of employees, e.g., 20 to 30 percent in the establishment, desire such representation. An amended statute could impose a limit on the number of such relationships or require that, where more than one union seeks such limited representation, it must be done at the same table with another. The rule should allow a union that seeks representation on an exclusive basis through majority status to displace and eliminate other such relationships in the establishment.

These forms of representation, voluntarily established employee committees and limited representation by unions on a non-exclusive basis, where no other representation exists, would be infinitely preferable to a works council or employee representation system mandated by a statute. The conundrum involved in such an approach lies in the fact that if it is prescribed only for non-union establishments, the works council becomes a rival to the union, promoted by public policy itself, in any union organizational campaign. On the other hand, if it is mandated in all establishments, it represents an incursion upon the unions' exclusive bargaining representative status -- particularly under an amended statute which would mandate the parties to bargain for all matters that arguably affect employee conditions.

Foreign experience, particularly of successful countries, like Germany and Japan, is useful and appropriate. But partial transplantation from a different system is a dangerous thing. This Commission and Congress should tread warily about adopting fully systems which have been devised in the context of other legal frameworks and cultures. It must be remembered that the system of exclusive bargaining representative status based upon majority support is peculiar to North America and, particularly the United States and Canada. A transplanted works council system would create difficulties for our system of exclusive bargaining representative status.

But the overriding point is that for some representation, voluntarily adopted or mandated by statute, should be part of an amended statute.

## ECONOMIC PRESSURE AND DISPUTES

The issue of permanent replacement for economic strikers is a matter that is beyond the Commission's scope and one that has been recently considered by the House of Representatives and the Senate. However, other areas would be properly before the Commission and, accordingly, I have included some comments upon such issues.

As a matter of policy, my view is that the law relating to lockouts should remain as it is presently fashioned. A lockout, in the context of an established relationship where substantial bargaining has taken place, is an appropriate response by the employer to perceived union economic pressure. From a policy perspective -- I have not yet had the opportunity to express myself on this subject under existing law -- the employer should be permitted to use temporary replacements under such circumstances as the law provides at present. While the law should actively intervene to promote both freedom of association and the collective bargaining process, there is no need to interfere with the ability of the parties to inflict economic pressure and indeed pain upon one another through the normal rules of combat.

The collective bargaining process promotes autonomy and the parties must be left to their own resources to fashion their own weapons of economic pressure. This is my view about strikes and a principal part of my reasoning for promoting an effective right to strike. This means that employers should be prohibited from making use of permanent replacements, thus depriving workers of their jobs when engaged in the strike. Similarly, employers ought not to be inhibited in their right to continue the production process both during the strike or a lockout.

I am of the view that, as a general proposition, the law on secondary economic pressure, in the form of strikes or picketing, should remain as it presently exists. New problems have emerged which are important to a number of industries such as the use of double-breasted operations and industries which use contingent workers -- but these present issues which either are or will be before the Board and conceivably may not require statutory amendment depending upon the way the Board resolves these issues.

I believe that the Supreme Court's Buffalo Forge<sup>17</sup> decision which precludes employers from obtaining injunctions against a union's violation of a no-strike clause where the stoppage is a sympathy strike rather than one which arises out of the alleged violation of the collective bargaining agreement by the employer is wrong. A principal part of the employer's bargain is its ability to obtain industrial peace and where the union has voluntarily entered into a no-strike pledge in the collective bargaining agreement, the employer ought to be able to get its side of the bargain through the most effective remedy available, i.e., the injunction, whether the cause of the stoppage is the fact that the employees are in sympathy with others or whether they seek to obtain their position on the collective bargaining agreement itself through economic pressure. Accordingly, the Buffalo Forge decision should be overruled and I would hope that this Commission would make such a recommendation to both the Congress and the President.

---

17 Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

Finally, as I have previously written, I would recommend that strike votes on a decision to strike be mandated by statute, as is the case in Canada.<sup>18</sup> That would mean that an unauthorized strike -- in this case one undertaken without the consent of the majority through internal union procedures would be unprotected.<sup>19</sup>

### UNION SECURITY DUES PROBLEMS, ISSUES

Two major Supreme Court decisions have exaggerated the confusion that exists in the law of union security. In NLRB v. Allis-Chalmers<sup>20</sup> the Court held that unions could impose disciplinary sanctions upon strikebreakers but that their ability to do so is determined by the degree of membership possessed by the worker. Where the worker is a "full member" the union may discipline the worker. In Pattern Makers v. NLRB<sup>21</sup> the Court held that the union could not impose sanctions upon strikebreakers who had resigned from the union because they were at the other end of the continuum, i.e., they possessed no membership at all!

The problem with this area of the law is that the average worker, let alone union and management representatives, knows very little about the gradations in membership for which the law provides, as interpreted by the Supreme Court. The Board can oblige the union to advise employees of their right under the statute to be less than a full member<sup>22</sup> -- or the Board might consider providing advice to the employees which could emanate from the agency itself.<sup>23</sup> A contrary policy simply invites employers to promote the distribution of such information in a garbled or anti-union form and, in the absence of the information being provided by others, the employer will be called upon by dissident workers who may anticipate union sanctions.

However, the better approach would be for Congress, or the Court, to eliminate the distinction between the limited and full membership. Again, the area is one which promotes confusion and an area which is little understood by unions and management, let alone individual employees.

The law should remain unamended insofar as the right to resign articulated in Pattern Makers is concerned. But it should be amended in other respects. The flaw in Pattern Makers was the unwillingness of the majority to strike a balance between the competing right to engage in concerted activity on the one hand and the right to refrain on the other. Under a statute which provides for the right to refrain, it seems appropriate that there is a right to resign -- but not a right to resign at any time under any circumstance. Because both Justice White's opinion, -- which provided the majority with its majority -- and in part, the Court's majority opinion by

18 See W.B. Gould, Agenda for Reform, supra, pp. 230-32.

19 See W.B. Gould, "The Status of Unauthorized and 'Wildcat' Strikes Under the National Labor Relations Act," 52 Cornell Law Quarterly 672 (1967).

20 388 U.S. 175 (1967).

21 105 S.Ct. 3064 (1985).

22 Cf. Paramax Systems Corporation, 311 NLRB 1031 (1993).

23 See W.B. Gould, "Solidarity Forever - or Hardly Ever: Union Discipline, Taft Hartley and the Right of Union Members to Resign," 66 Cornell L. Rev. 74 (1980).

Justice Powell itself relied upon the Board's expertise, it may be open to the Board or the courts to reconsider this rule. But Congress could provide the most immediate and least controversial resolution of this matter through simple amendment of the statute. It could provide that the right to resign be exercised at a reasonable period of time, i.e., when a worker would be likely to have knowledge of union policies prior to the expiration of the collective bargaining agreement which the union could designate through its constitution and advise employees through formal notice.

\* \* \* \* \*

It is a pleasure to be with you here today. I welcome your interest in and your questions on our work and the future of national labor policy.

###

)  
)

)  
)