NOTES

NLRB REMEDIES—ATTORNEY'S FEES IN REFUSAL-TO-BARGAIN CASES

Tribunals in the United States have traditionally refrained from awarding attorney's fees and other litigation expenses to successful litigants, absent contractual or statutory authority.[1] The National Labor Relations Board (NLRB), although lacking express statutory authorization, recently has strayed from this policy by awarding attorney's fees as one aspect of its relief in certain unfair labor practice cases.[2] The justification for this departure is that the remedy is needed in these cases in order to effectuate the policies of the National Labor Relations Act (NLRA)[3] and is therefore within the Board's broad remedial authority under section 10(c) of the NLRA.[4]

This Note will examine the award of attorney's fees by the NLRB in the context of the refusal-to-bargain situation[5] involving extended frivolous litigation where conventional NLRB remedies have proven most inadequate. It will discuss the Board's present reluctance to take the more controversial step of adopting make-whole relief,[6] and it will consider those situations in which the Board is willing to make an attempt to partially cure the inadequacy of conventional remedies by as-

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1. *See* Hall v. Cole, 412 U.S. 1, 4 (1973); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931).

2. Principally, these have been cases arising under section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1970), although the issue also has been litigated under sections 8(a)(1) and 8(a)(3) of the Act, *id.* §§ 158(a)(1), (3). See note 49 *infra*.

3. *Id.* §§ 151-69.

4. *Id.* § 160(c). This section, which governs the remedial power of the NLRB, reads in pertinent part:

> [T]he Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and *to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act* . . . . *Id.* (emphasis added).

5. A refusal of an employer to bargain with a union which is the representative of his employees is made an unfair labor practice by section 8(a)(5) of the NLRA, *id.* § 158(a)(5).

6. A make-whole order requires the employer to reimburse his employees for the increased benefits they would have had during the period the employer illegally refused to bargain had a collective bargaining agreement been executed at the outset. See text accompanying notes 13-17 *infra*.

sessing litigation expenses against the defeated charged party. The scope of the Board's authority to award attorney's fees under section 10(c) of the NLRA will be probed in light of its effect in achieving the purposes of the NLRA as well as in light of the Act's legislative history and judicial interpretation. Although various arguments can be made in opposition to an NLRB remedy which includes litigation expenses—one such objection being the American judicial tradition against the awarding of attorney's fees—the countervailing considerations in favor of the remedy will be shown sufficient to overcome them. Finally, the Note will conclude that the award of attorney's fees to a successful party in a frivolous refusal-to-bargain case is within the remedial authority of the Board, while, on the other hand, an order directing reimbursement of the Board's own litigation expenses is not authorized.

THE INADEQUACY OF CONVENTIONAL NLRB REMEDIES

The ineffectiveness of conventional NLRB remedies in unfair labor practice cases, especially in refusal-to-bargain cases, has been the cause of increasing criticism in recent years.[7] The problem stems from the fact that the Board's orders cannot be enforced until an enforcement proceeding is held in a federal court of appeals.[8] Thus, a party guilty of an unfair labor practice can avoid compliance with the provisions of the NLRA for the long interval between the initial filing of a charge with the Board and the final decree of the appellate court,

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7. *See, e.g., Hearings on H.R. 7152 Before the Special Subcomm. on Labor of the House Comm. on Educ. & Labor*, 92d Cong., 1st Sess. (1971); Note, *NLRB Power to Award Damages in Unfair Labor Practice Cases*, 84 HARV. L. REV. 1670 (1971); Note, *An Assessment of the Proposed "Make-Whole" Remedy in Refusal-To-Bargain Cases*, 67 MICH. L. REV. 374 (1968).

8. 29 U.S.C. § 160(e) (1970). The relevant portion of this section provides the exclusive method by which the Board's orders may be enforced: "The Board shall have the power to petition any court of appeals of the United States . . . for the enforcement of such order . . . ." *Id.*

If temporary relief is found needed by the Board, it may petition a federal district court for a restraining order or other appropriate temporary relief at any time after a complaint has been issued by the Board or its designated agent. *Id.* § 160(j). But in practice, this relief is seldom used. *See* Note, *NLRB Power to Award Damages, supra* note 7, at 1671 n.12. Congress has considered the possibility of making NLRB orders self-enforcing. *See generally Hearings on H.R. 7152, supra* note 7. Self-enforcing Board orders would alleviate the problems caused by the delay inherent in the present system. See note 9 *infra*. Therefore, it would decrease the need for the Board to use the attorney's fees remedy as a means of discouraging litigants from taking advantage of current weaknesses in the system in order to nullify the guarantees of the Act.

notwithstanding intermediate NLRB orders.[9] Since there is no legal sanction for refusing to obey a Board order before it is enforced by a court of appeals, the only sanction the willful violator typically risks is the eventual enforcement of the conventional Board order directing him to cease and desist from his unlawful activities. Therefore, if the delay operates to the violator's advantage, he actually is encouraged to prolong this interval of noncompliance and to absorb the mild reprimand rather than end his unlawful practices pursuant to an intermediate Board order.

The problem is especially pronounced in refusal-to-bargain cases. In the typical refusal-to-bargain situation, the employer refuses to recognize a majority union, many times certified by the Board, as the collective bargaining representative of his employees and hence refuses to bargain with it. The refusal to bargain often is accompanied by other unfair labor practices designed to undermine union support during the resulting period of delay.[10] The conventional NLRB remedy in this situation is a cease and desist order coupled with an order directing the employer to bargain with the union.[11] The employer has

9. In practice, the minimum interval between the initial filing of a charge with the NLRB and the enforcement proceeding in a court of appeals is currently around two years. NLRB Release No. R-1297 (August 7, 1973) (Remarks of Edward Miller, then Chairman of the NLRB, before the Labor Relations Law Section of the American Bar Association), *reprinted in* R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, LABOR RELATIONS LAW 68, 69 (5th ed. 1974).

10. Obvious examples of tactics designed to undermine union support include the harassment and discharge of union supporters in violation of sections 8(a)(1), 29 U.S.C. § 158(a)(1) (1970), and 8(a)(3), *id.* § 158(a)(3), of the NLRA and retaliatory changes in the terms and conditions of employment in violation of section 8(a)(3) of the NLRA.

The *Heck's* string of cases, involving eleven different NLRB proceedings over the course of nine years, provides a classic example of resistance to union organization through extensive unlawful anti-union conduct. Heck's, Inc., 191 N.L.R.B. 886 (1971), *relief enlarged sub nom.* Food Store Employees Local 347 v. NLRB, 476 F.2d 546 (D.C. Cir. 1973), *rev'd and remanded,* 417 U.S. 1 (1974); Heck's, Inc., 174 N.L.R.B. 951 (1969); Heck's, Inc., 172 N.L.R.B. 2231 (1968), *enforced in part and remanded in part sub nom.* Food Store Employees Local 347 v. NLRB, 433 F.2d 54 (D.C. Cir. 1970); Heck's, Inc., 171 N.L.R.B. 777 (1968); Heck's, Inc., 170 N.L.R.B. 178 (1968), *enforced in part and remanded in part sub nom.* Food Store Employees Local 347 v. NLRB, 418 F.2d 1177 (D.C. Cir. 1969); Heck's, Inc., 166 N.L.R.B. 186 (1967) *and* 166 N.L.R.B. 674 (1967), *enforced as modified,* 390 F.2d 655 (4th Cir. 1968) *and* 398 F.2d 337 (4th Cir. 1968), *modified sub nom.* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Heck's, Inc., 159 N.L.R.B. 1331 (1966); Heck's, Inc., 159 N.L.R.B. 1151 (1966), *enforced per curiam,* 387 F.2d 65 (5th Cir. 1967); Heck's Inc., 158 N.L.R.B. 121 (1966), *enforced per curiam,* 387 F.2d 65 (4th Cir. 1967); Heck's, Inc., 156 N.L.R.B. 760 (1966), *enforced as modified,* 386 F.2d 317 (4th Cir. 1967); Heck's, Inc., 150 N.L.R.B. 1565 (1965), *enforced per curiam,* 369 F.2d 370 (6th Cir. 1966).

11. R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, *supra* note 9, at 592.

much to gain by delaying his compliance with this order until the final decree of the appellate court. In the first place, he does not have to bear the expense of the increased benefits his employees would likely have enjoyed during that period had a collective bargaining agreement been negotiated. Second, the union is likely to lose support among his employees because of his continued antagonism towards union supporters, which is designed to frighten them away, and because of the long interval during which the union seems to be accomplishing very little. Thus, when the employer finally has been forced to the bargaining table, the union may find that its bargaining strength has been eroded significantly.[12] Yet, with the conventional remedy there will be no restitution for these "losses" when the employer finally is forced to comply by the appellate court's enforcement of the Board's order.

NLRB Resistance to Make-Whole Relief

Faced with a lack of congressional action to cure the ineffectiveness of conventional remedies,[13] labor unions recently have begun pressing the Board for so-called make-whole relief in refusal-to-bargain cases.[14] With this type of relief the employees represented by the union are reimbursed by the employer for the increased benefits they presumably would have had during the period of delay if the employer initially had bargained with the union. In the case where the employer asserts frivolous objections[15] to the union's certification as the collective

12. *See* International Union of Elec. Workers v. NLRB, 426 F.2d 1243, 1249 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970); Note, *An Assessment of the Proposed "Make-Whole" Remedy*, *supra* note 7, at 328 n.16.

13. Although Congress has considered enacting legislation which would make NLRB orders self-enforcing, no action has yet been taken. See note 8 *supra*.

14. *See, e.g.*, San Luis Obispo County & N. Santa Barbara County Restaurant & Tavern Ass'n, 196 N.L.R.B. 1082 (1972), *aff'd sub nom.* Culinary Alliance Local 703 v. NLRB, 488 F.2d 664 (9th Cir. 1974); Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970), *enforced sub nom.* UAW v. NLRB, 449 F.2d 1058 (D.C. Cir.), *vacating* 449 F.2d 1046 (D.C. Cir. 1971).

15. Make-whole relief is inappropriate where the challenge is based on a "debatable question." USW v. NLRB, 430 F.2d 519, 521-22 (D.C. Cir. 1970). The distinction between "debatable" and "frivolous" objections stems from the fact that there is no direct judicial review of the legality of representation proceedings. The only way for an employer to obtain judicial review is to refuse to bargain, to be charged with an unfair labor practice, to be ordered to cease and desist, and ultimately to press his claims at the enforcement proceeding before a court of appeals. *See* 29 U.S.C. §§ 160(e), (f) (1970). Therefore, if the employer's defenses are legitimate, he should not be penalized by the imposition of the make-whole remedy merely for seeking an authoritative determination of the Board's decision in the court of appeals.

A challenge is "frivolous" when it "appears from a bare inspection to be lacking in legal sufficiency, and in any view of the facts does not present a defense." Black's Law Dictionary 795 (4th ed. 1968). For example, a challenge was found to be "frivo-

bargaining representative and refuses to bargain with the result that collective bargaining is delayed during the extended litigation period, the proponents of this extraordinary remedy argue that the employer ought to bear the cost of these "lost" benefits pursuant to a Board-imposed hypothetical collective bargaining agreement.[16] Furthermore, argue the proponents, since the employer will be discouraged from unjustifiably refusing to bargain, the policies of the NLRA will be effectuated through the encouragement of collective bargaining.[17]

Although the Court of Appeals for the District of Columbia has accepted this argument and has concluded that the Board may grant make-whole relief,[18] the Board remains unconvinced.[19] The Board's

lous" where an employer made the bald assertion that the Regional Director had acted "arbitrarily and capriciously" in certifying a union as the collective bargaining representative of the employees, where this certification was made pursuant to an agreement for a consent election which by its terms made the Regional Director's determination final and binding, and where the employer did not come forward with any evidence whatsoever to suggest that this determination should be questioned. Tiidee Prods., Inc., 174 N.L.R.B. 705, 707 (1969), *rev'd and remanded sub nom.* International Union of Elec. Workers v. NLRB, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970). On the other hand, a challenge was found to be "debatable" where an employer refused to recognize or bargain with a union which had obtained eleven of seventeen employee authorization cards because of its doubt as to actual majority support. Marsal Transp., Inc., 199 N.L.R.B. No. 89 (Oct. 12, 1972), 1972 CCH NLRB Dec. 31,810.

16. *See* Schlossberg & Silard, *The Need for a Compensatory Remedy in Refusal-to-Bargain Cases*, 14 WAYNE L. REV. 1059, 1063-65 (1968). The authors of this article were counsel for the union in the *Ex-Cell-O* case, 185 N.L.R.B. 107 (1970), *enforced sub nom.* UAW v. NLRB, 449 F.2d 1058 (D.C. Cir.), *vacating* 449 F.2d 1046 (D.C. Cir. 1971), a leading decision in the make-whole relief controversy.

17. *See* Schlossberg & Silard, *supra* note 16, at 1067-68.

18. International Union of Elec. Workers v. NLRB, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970). The Board first faced this argument in Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970), *enforced sub nom.* UAW v. NLRB, 449 F.2d 1058 (D.C. Cir. 1971), *vacating* 449 F.2d 1046 (D.C. Cir. 1971), and rejected it. A representation election was held in the Ex-Cell-O plant which resulted in the union being selected as the collective bargaining representative of the Ex-Cell-O employees. The company contested the results, but after a full hearing before an NLRB official, the union was certified. Seeking further review before the Board and the courts, the company refused to bargain. An unfair labor practice proceeding resulted. In the action before the Board, the union requested make-whole compensatory relief. While ordering the company to bargain with the union, the Board denied the request, reasoning that such relief amounted to compelling contractual agreement in contravention of section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1970), quoted in note 20 *infra*, that it was too speculative, and that it would constitute an illegal penalty. 185 N.L.R.B. at 109-10.

The Board's decision was appealed to the District of Columbia Circuit Court of Appeals, where the court reversed the Board and remanded the case for further consideration of the make-whole relief. UAW v. NLRB, 449 F.2d 1046 (D.C. Cir.), *vacated sub nom.* Ex-Cell-O Corp. v. NLRB, 449 F.2d 1058 (D.C. Cir. 1971). Citing its decision in International Union of Elec. Workers v. NLRB, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970), the *UAW* court noted that the Board had the authority

principal objections to the remedy are that it amounts to compelling contractual agreement in contravention of section 8(d)[20] of the NLRA and that, in any case, it is too speculative.[21] Insofar as no other circuits have decided the question,[22] the Board appears to be applying the remedy only to cases which can be appealed to the District of Columbia Circuit Court of Appeals.[23] Thus, in light of the unsettled nature of

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under section 10(c) of the NLRA to award this kind of relief for the harm caused by the employer's frivolous challenges to the certification proceeding and the accompanying unjustified refusal to bargain. It reasoned that because of the importance to the statutory scheme of the enforcement of the obligation to bargain and the desire to reduce frivolous litigation, the award would "effectuate the policies" of the Act by making an employer monetarily liable for his unreasonable delaying tactics. 449 F.2d at 1048.

19. In spite of the District of Columbia Circuit Court of Appeals' opinion in *Ex-Cell-O* and other cases, *see, e.g.*, International Union of Elec. Workers v. NLRB, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970), the Board has continued to maintain the position that it lacks the authority to award make-whole relief. *See* J.P. Stevens & Co., 205 N.L.R.B. No. 169 (Aug. 31, 1973), 1973 CCH NLRB Dec. 33,142. See note 23 *infra*.

20. Section 8(d) of the NLRA provides in part:

> For the purposes of this section, to bargain collectively is the performance of mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession* . . . . 29 U.S.C. § 158(d) (1970) (emphasis added).

The Supreme Court has cautioned the Board that it has no authority to "compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952). *See* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). For a discussion of *Porter*, see note 80 *infra*.

21. Ex-Cell-O Corp., 185 N.L.R.B. 107, 109-10 (1970), *enforced sub nom.* UAW v. NLRB, 449 F.2d 1058 (D.C. Cir.), *vacating* 449 F.2d 1046 (D.C. Cir. 1971). The relief is considered too speculative since there is no way of determining what the terms of the agreement might have been had there been one. *Id.* at 110.

22. *See* Culinary Alliance Local 703 v. NLRB, 488 F.2d 664 (9th Cir. 1974), where the Ninth Circuit affirmed a Board decision denying make-whole relief. Without deciding the question of the Board's authority to grant a make-whole remedy for loss of collective bargaining benefits, the court found that the misconduct of the employers' association involved was not so egregious as to justify the imposition of an extraordinary remedy. *Id.* at 666.

23. *See* J.P. Stevens & Co., 205 N.L.R.B. No. 169 (Aug. 31, 1973), 1973 CCH NLRB Dec. 33,143. The District of Columbia Circuit Court of Appeals had remanded the case to the Board for consideration of the make-whole remedy. Responding to the remand, the Board noted that in *Ex-Cell-O*

> we announced our view that the Board lacks statutory authority to grant a make-whole remedy for alleged loss of hypothetical collective-bargaining benefits. We note the [District of Columbia Circuit Court of Appeals'] disagreement with this view of the scope of the Board's statutory remedial authority in this area. Inasmuch as we have accepted the remand in the instant case, in deference to the court's view, we shall assume for the purpose of this case, that we possess the necessary authority to grant such relief in an appropriate case. *Id.* at 33,144.

the Board's authority to grant make-whole relief and of the selective and reluctant use of the remedy by the Board, the current usefulness of make-whole relief is marginal.

AWARD OF ATTORNEY'S FEES AND OTHER LITIGATION EXPENSES IN LIEU OF MAKE-WHOLE RELIEF

The NLRB has recently made an attempt to partially cure the inadequacy of its traditional remedies by assessing litigation expenses against the employer who has unjustifiably refused to bargain, rather than taking the more controversial step of awarding make-whole relief. In *International Union of Electrical Workers v. NLRB*,[24] the District of Columbia Circuit upheld the Board's decisions in the *Tiidee Products, Inc.* cases[25] which awarded attorney's fees to the union when the employer's conduct of the litigation had been characterized as "frivolous."[26] In an attempt to organize a plant belonging to Tiidee Products, Inc., a manufacturer of parts for mobile homes, the union filed an election petition with the NLRB Regional Office.[27] Pursuant to the petition, Tiidee entered into an agreement for a consent election with the union. The agreement provided for an election by secret ballot and also provided that any objections to the election would be submitted to the NLRB Regional Director, whose decision after investigation would be final and binding. The election was held and the union was selected to represent the Tiidee employees. Tiidee subsequently

24. 502 F.2d 349 (D.C. Cir. 1974), *enforcing* Tiidee Prods., Inc., 196 N.L.R.B. 158 (1972) (*Tiidee II* supp. decision), *and* 194 N.L.R.B. 1234 (1972) (*Tiidee I* supp. decision). *Tiidee I* and *Tiidee II* involved prosecutions for different unfair labor practices arising out of the same labor dispute. For the facts of this dispute, see text accompanying notes 27-30 and note 30 *infra*. The *Tiidee* litigation, which was consolidated on appeal for enforcement of the supplementary orders, can be summarized as follows:

Tiidee I: Tiidee Prods., Inc., 174 N.L.R.B. 705 (1969), *rev'd and remanded sub nom.* International Union of Elec. Workers v. NLRB, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970), *supplementary decision on remand*, Tiidee Prods., Inc., 194 N.L.R.B. 1234 (1972), *enforced sub nom.* International Union of Elec. Workers v. NLRB, 502 F.2d 349 (D.C. Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3390 (U.S. Jan. 14, 1975) (No. 842).

Tiidee II: Tiidee Prods., Inc., 176 N.L.R.B. 969 (1969), *rev'd and remanded sub nom.* International Union of Elec. Workers v. NLRB, 440 F.2d 298 (D.C. Cir. 1970), *supplementary decision on remand*, Tiidee Prods., Inc., 196 N.L.R.B. 158 (1972), *enforced sub nom.* International Union of Elec. Workers v. NLRB, 502 F.2d 349 (D.C. Cir. 1974).

25. Tiidee Prods., Inc., 196 N.L.R.B. 158 (*Tiidee II* supp. decision); Tiidee Prods., Inc., 194 N.L.R.B. 1234 (*Tiidee I* supp. decision).

26. 502 F.2d at 355. For an explanation of the "frivolous" characterization, see note 15 *supra*.

27. Representation questions are governed by section 9 of the NLRA, 29 U.S.C. § 159 (1970), and accompanying NLRB regulations, 29 C.F.R. §§ 101.17-.30 (1974).

challenged the election, claiming, among other things, that the union had violated the agreement for the consent election by distributing a leaflet to the employees on the day of the election.[28] In accordance with the agreement, the issue was submitted to the Regional Director, who, after an investigation, overruled the objections and certified the union as the employees' exclusive bargaining representative. Tiidee nonetheless refused to bargain with the union, claiming that the Regional Director had acted arbitrarily and capriciously and had denied the company due process.[29] It refused to meet with union representatives until all litigation had been completed.[30]

The case then came before the Board which, after consideration of the merits, adopted the trial examiner's decision finding Tiidee in violation of section 8(a)(5)[31] of the NLRA for its refusal to recognize and bargain with the union as the exclusive bargaining representative pursuant to the Regional Director's certification.[32] An order was entered requiring the company to bargain collectively with the union.[33]

The union appealed the Board's decision to the Court of Appeals for the District of Columbia Circuit, while the Board made application to the court for enforcement of its order against Tiidee.[34] Complaining that the remedies prescribed by the Board were inadequate, the union asked for a remand for further consideration of compensatory relief, including make-whole relief. The court found that Tiidee's refusal to

28. 174 N.L.R.B. at 707 (*Tiidee I*).

29. *Id.*

30. *Id.* Tiidee also refused union requests for information pertaining to existing wage and fringe benefits and engaged in such unfair labor practices as interrogation of employees to determine the identity of union adherents (a violation of section 8(a)(1), 29 U.S.C. § 158(a)(1) (1970)), increasing production quotas of employees who supported the union (a violation of section 8(a)(3), *id.* § 158(a)(3)), and discharging employees in order to retaliate against them for selecting the union (also violative of section 8(a)(3)). 174 N.L.RB. at 707-11.

31. 29 U.S.C. § 158(a)(5) (1970).

32. 174 N.L.R.B. at 714 (*Tiidee I*). The Board also found Tiidee in violation of both section 8(a)(1), 29 U.S.C. § 158(a)(1) (1970), for widespread interference with, coercion, and restraint of its employees, and section 8(a)(3), *id.* § 158(a)(3), for retaliatory changes in the terms and conditions of employment and for discriminatorily laying off and discharging employees in retaliation for union support. 174 N.L.R.B. at 714.

33. 174 N.L.R.B. at 707 (*Tiidee I*). After the Board hearing in this case, the company posted a set of work rules and regulations prohibiting solicitation and distribution on the premises. In *Tiidee II*, the Board found these rules and other company conduct in violation of sections 8(a)(1)-(4), 29 U.S.C. §§ 158(a)(1)-(4) (1970). 176 N.L.R.B. at 976.

34. International Union of Elec. Workers v. NLRB, 426 F.2d 1243, 1245 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970), *rev'g and remanding* Tiidee Prods., Inc., 174 N.L.R.B. 705 (1969) (*Tiidee I*).

bargain "was a clear and flagrant violation of the law,"[35] and that its objections to the election proceedings were "patently frivolous."[36] It concluded that the NLRB was authorized to grant a make-whole remedy in this kind of situation and remanded the case to the Board for further consideration of that remedy.[37] At the same time, the court specifically suggested that the Board should consider the assessment of litigation expenses as a means of advancing the policies of the Act if it was unwilling to take the more extreme step of awarding make-whole relief.[38]

The NLRB responded to the remand by adopting the less extreme remedy, and it ordered Tiidee to reimburse both the Board and the union for the litigation expenses incurred as a result of the frivolous objections Tiidee had asserted to the election and certification process in the ensuing litigation.[39] The Board concluded that it possessed the authority to grant this kind of relief, reasoning that industrial peace could best be achieved if "speedy access to Board and court dockets was available."[40] Relying on its decision in an earlier case,[41] the Dis-

35. *Id.* at 1248.

36. *Id.*

37. *Id.* at 1253.

38. *Id.* at 1251 n.11, 1253 n.15.

39. 194 N.L.R.B. at 1236 (*Tiidee I* supp. decision). *Tiidee II*, the case involving Tiidee's additional misconduct, was appealed in International Union of Elec. Workers v. NLRB, 440 F.2d 298 (D.C. Cir. 1970). This case was also remanded for the consideration of additional relief. See note 24 *supra*.

40. 194 N.L.R.B. at 1236 (*Tiidee I* supp. decision). The conclusion in the *Tiidee I* and *Tiidee II* supplementary decisions represented a shift in the Board's position as to its authority to award litigation expenses. It had earlier denied a request for this remedy in Heck's, Inc., 172 N.L.R.B. 2231 (1969), *rev'd per curiam sub nom.* Food Store Employees Local 347 v. NLRB, 433 F.2d 541 (D.C. Cir. 1970), a similar refusal-to-bargain case. Heck's resistance to unionization had already resulted in nine proceedings before the NLRB at the time of this proceeding. See note 10 *supra*. The Board concluded that Heck's did not entertain any good-faith doubt concerning majority support for the union, basing its conclusion on Heck's "flagrant repetition" of unfair labor practices. *Id.* at 2233. The union requested affirmative relief including reimbursement of litigation expenses. The Board denied that request, and formulated a conventional remedy including an order certifying the union as collective bargaining representative and directing Heck's to bargain with the union. The District of Columbia Circuit, in Food Store Employees Local 347 v. NLRB, 433 F.2d 541 (D.C. Cir. 1970), reversed and remanded the case to the Board for further consideration of other affirmative remedies in light of the court's then recent decision in the *Tiidee I* appeal, International Union of Elec. Workers v. NLRB, 426 F.2d 1243 (D.C. Cir. 1969). On *Heck's* remand, the Board added certain other supplementary remedies, for example, ordering the company to mail notices of the Board's amended order to the homes of employees, to provide the union with access to plant bulletin boards for one year, and to provide the union with the names and addresses of employees. Heck's, Inc., 191 N.L.R.B. 886 (1971), *relief enlarged sub nom.* Food Store Employees Local 347 v. NLRB, 476 F.2d 546 (D.C. Cir. 1973), *rev'd and remanded*, 417 U.S. 1 (1974). The

trict of Columbia Circuit upheld this supplementary decision.[42] However, it reversed the portion of the order directing reimbursement to the Board for the Board's own litigation expenses.[43]

The question of the NLRB's power to award litigation expenses is far from settled. The case on which the District of Columbia Circuit Court relied in enforcing the Board's orders in the *Tiidee* cases was subsequently reversed by the Supreme Court, though on other grounds.[44] Furthermore, the Supreme Court has reserved its opinion on the question,[45] and no other circuits have ruled on the matter.[46]

Board, however, again refused to award litigation expenses. It reasoned that the public interest in awarding the charging party litigation expenses did not outweigh the general prohibition against awarding these expenses. *Id.* at 889.

41. The *Tiidee I* court relied upon Food Store Employees Local 347 v. NLRB, 476 F.2d 546, 550-51 (D.C. Cir. 1973), *rev'd and remanded*, 417 U.S. 1 (1974). There is a striking circularity of approach involved in this line of decisions. The Board reacted to the court's strong remand in *Tiidee I* by imposing attorney's fees in the *Tiidee I* supplementary decision, 194 N.L.R.B. at 1236; the court then relied on this supplementary Board order in Food Store Employees Local 347 v. NLRB, 476 F.2d 546 (D.C. Cir. 1973), to justify the imposition of attorney's fees. Finally, the court relied on the *Food Store* precedent in the consolidated appeal of the *Tiidee I* and *Tiidee II* supplementary decisions to sustain the Board's orders imposing attorney's fees in the supplementary Board *Tiidee I* and *Tiidee II* decisions. 502 F.2d at 352.

42. International Union of Elec. Workers v. NLRB, 502 F.2d 349 (D.C. Cir. 1974), *enforcing* Tiidee Prods., Inc., 196 N.L.R.B. 158 (1972) (*Tiidee II* supp. decision), *and* 194 N.L.R.B. 1234 (1972) (*Tiidee I* supp. decision). The opinion in this case was written by Judge MacKinnon who had dissented in the earlier *Tiidee* decisions. Although Judge MacKinnon was of the opinion that section 10(c) of the NLRA did not authorize the Board to award attorney's fees, the *Food Store* opinion and the principle of stare decisis compelled him to affirm the Board's decision to award attorney's fees. In the *Tiidee I* appeal, the court had characterized the employer's refusal to bargain as a "clear and flagrant violation of the law" and had labeled its objections to the election and certification process "patently frivolous." 426 F.2d at 1248. This characterization put it within the category of cases where affirmative compensatory relief would be appropriate. 502 F.2d at 355.

43. For a discussion of this aspect of the decision, see text accompanying notes 120-32 *infra*.

44. NLRB v. Food Store Employees Local 347, 417 U.S. 1 (1974), *rev'g* 476 F.2d 546 (D.C. Cir. 1973). The Court reasoned that Congress had "invested the Board, not the courts, with broad discretion" to fashion remedies. *Id.* at 8. Thus, the court of appeals had exceeded its authority in expanding the remedy ordered by the Board. Consequently, the Supreme Court ordered the appellate court to remand the case to the Board if it felt the Board's remedy was inadequate. Notably, the Court left open the question of whether the Board's affirmative remedial powers included the power to order reimbursement of litigation expenses. *See id.* at 8 n.9.

45. *Id.*

46. The question reached the Eighth Circuit in Federal Prescription Serv., Inc. v. NLRB, 496 F.2d 813 (8th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3330 (U.S. Dec. 9, 1974). The court denied the union's request for the relief but did not need to decide whether or not the Board had the authority to order relief which included attorney's fees because it found that the employer's litigation was not frivolous. Frivolity has been the touchstone for the award of such relief by the Board. See note 15 *supra*.

Yet, unlike the issue of make-whole relief, the Board itself has decided that it has the authority to award litigation expenses in cases of frivolous litigation,[47] despite the unsettled status of the question in the courts. Even though the Board has not actually awarded attorney's fees to any other litigants, it has applied its reasoning in *Tiidee* to numerous cases subsequent to that decision.[48] Thus, this type of relief would seem to continue to be an important tool in the Board's remedial arsenal for refusal-to-bargain cases.[49]

COST OF LITIGATION IN NLRB PROCEEDINGS

At first glance, it would appear that a union which objects to an employer's unfair labor practice would incur little, if any, litigation expense since section 3(d) of the NLRA assigns the task of investigation and prosecution of unfair labor practice cases to the NLRB General Counsel.[50] After the filing of a charge by the union[51] and upon the

47. Tiidee Prods., Inc., 194 N.L.R.B. 1234, 1236 (1972) (*Tiidee I* supp. decision).

48. *See, e.g.*, Condon Transp., Inc., 211 N.L.R.B. No. 37 (June 10, 1974), 1974 CCH NLRB Dec. 34,483; Ameri-Crete Ready Mix Corp., 207 N.L.R.B. No. 79 (Nov. 21, 1973), 1974 CCH NLRB Dec. 33,498; South Hoover Hosp., 196 N.L.R.B. 1077 (1972). It is interesting to note, however, that the Board has apparently not actually awarded attorney's fees in any cases since *Tiidee*. It continues to find the relief inappropriate in each situation. Thus, in *South Hoover*, where the employer's defenses were patently frivolous, the relief was not appropriate because its conduct in this first violation of the Act was attributable to its gross ignorance. 196 N.L.R.B. at 1081. In *Ameri-Crete*, 1974 CCH NLRB Dec. at 33,499, and *Condon*, 1974 CCH NLRB Dec. at 34,485, the relief was not appropriate because the defenses asserted were not so insubstantial as to constitute frivolous objections.

49. The Board also apparently would apply the remedy to situations outside the refusal-to-bargain situation, *see* Walgreen Co., 206 N.L.R.B. No. 15 (Sept. 24, 1973), 1973 CCH NLRB Dec. 33,263, including against unions, *see* Teamsters Local 901, 210 N.L.R.B. No. 153 (May 29, 1974), 1974 CCH NLRB Dec. 34,392. *Walgreen* involved violations of sections 8(a)(1) and 8(a)(3), 29 U.S.C. § 158(a)(1), (3) (1970), for the employer's unlawful interference and discrimination in a representation proceeding but did not involve a refusal to bargain. *Local 901* involved union misconduct in violation of sections 8(b)(1)(A) and 8(b)(4), *id.* §§ 158(b)(1)(A), (4). The union had used threats and violence to induce employees to join a strike. The Board apparently considered the remedy applicable in both cases but refused to reimburse the litigation expenses of the charging party in either case on the ground that the charged party's defenses were not frivolous.

50. Section 3(d) provides in part:

> The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board . . . and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board . . . . 29 U.S.C. § 153(d) (1970).

51. In order for the NLRB to take action in a particnlar case, the aggrieved party must file an unfair labor practice charge with a regional office. The NLRB has no authority to begin proceedings itself:

issuance of a complaint by a Regional Office of the NLRB,[52] the General Counsel or his representative has the statutory duty to prosecute the case initially in a hearing before an administrative law judge; and if a proceeding before the Board or the courts eventually becomes necessary, the General Counsel will likewise prosecute the case before the appropriate tribunal.[53] Presumably, then, the union would not incur any legal expenses once the Board machinery had been set in motion by the filing of the charge.

In practice, however, this is not the case; in order for a charging party to adequately represent himself in extended litigation, especially in situations where the NLRB attorney takes a position different from his as to the merits of various aspects of the case, the party may incur substantial litigation expenses. To begin with, under the current procedure, the charging party must promptly submit supporting evidence once the charge has been filed, or the complaint will be dismissed.[54] Furthermore, the charging party may participate in the hearing before the administrative law judge, may submit a brief, and may make oral argument at the close of the hearing.[55] After the judge has made his decision, the charging party is given an opportunity to file exceptions with the Board in order to obtain review. In the Board proceeding, the charging party may again file a brief and petition for oral argument.[56] If an enforcement proceeding then is required in the courts, the charging party will again be entitled to participate. Thus, at every stage of an NLRB proceeding private legal counsel is permitted, and indeed the charging party may find private counsel necessary in order to insure that he is effectively represented. In cases where private counsel is required and which involve extended litigation, like the refusal-to-bargain cases, the litigation cost involved will obviously be substantial.

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, *the Board . . . shall have power* to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearings before the Board . . . . *Id.* § 160(b) (emphasis added).

52. After a charge has been filed in a Regional Office, the Office conducts an investigation and issues complaints in cases it deems meritorious. *Id.* § 153(d). See note 50 *supra.*

53. *Id.* For a more detailed summary of NLRB procedure in handling complaints and prosecuting unfair labor practice cases, see R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, *supra* note 9, at 63-68.

54. 29 C.F.R. § 101.4 (1974).

55. *Id.* § 101.11(b).

56. *Id.*

SCOPE OF NLRB AUTHORITY UNDER SECTION 10(c) OF THE NLRA

The power of the NLRB to award attorney's fees, if it has such a power, must come from its section 10(c) authority to "take such affirmative action, including reinstatement with or without back pay, as will effectuate the policies of this [Act]."[57] Of course it is well settled that the affirmative action authorized is not limited to reinstatement with or without back pay. This phrase is merely illustrative of the type of relief intended.[58] Yet, the ultimate extent of the Board's authority has never been clearly defined.

The legislative history of the NLRA,[59] although far from conclusive on the matter, lends support to the proposition that affirmative relief, such as the award of attorney's fees, was within the contemplation of the Wagner Act Congress. In fact, one commentator has concluded that the legislative history authorizes any form of compensatory damages.[60] The section 10(c) affirmative action clause of the NLRA was intended to give the Board broad discretionary authority in fashioning its remedies,[61] and it was enacted in spite of repeated criticism that it was "too indefinite and very dangerous."[62] Moreover, the cited precedent for the type of authority given by the clause was the corrective power of an equity court.[63] Since the court of equity, rather than the court of law, more often made exceptions to the general rule against the reimbursement of attorney's fees,[64] the fact that the equity powers were cited would suggest that such relief was within the contemplation of the draftsmen of the Act.

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57. 29 U.S.C. § 160(c) (1970). For a more complete quotation of section 10(c), see note 4 *supra.*

58. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). See text accompanying notes 77-79 *infra.*

59. For a complete collection of all pertinent legislative documents, see U.S. NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949).

60. Note, *NLRB Power to Award Damages, supra* note 7, at 1683-87.

61. *See* COMPARISON OF S. 2926 (73D CONG.) AND S. 1958 (74TH CONG.), 74th Cong., 1st Sess. 34 (1935), *reprinted in* 1 NATIONAL LABOR RELATIONS BOARD, *supra* note 59, at 1360. The author of the report noted, "An effort to substitute express language . . . necessarily results in narrowing the definition of restitution, which may include many other forms of action." *Id.*

62. *Hearing on S. 1958 Before the Senate Comm. on Educ. & Labor*, 74th Cong., 1st Sess., pt. 3, at 449 (1935), *reprinted in* 2 NATIONAL LABOR RELATIONS BOARD, *supra* note 59, at 1835.

63. COMPARISON OF S. 2926 (73D CONG.) AND S. 1958 (74TH CONG.), *supra* note 61, at 34.

64. See text accompanying notes 98-100 *infra.*

It is notable that Congress specifically has authorized the award of attorney's fees by the courts in many other statutes, including the Securities Exchange Act of 1934,[65] the Clayton Act,[66] the Communications Act of 1934,[67] and the Interstate Commerce Act.[68] This fact suggests that when Congress intends to permit federal courts to award attorney's fees in a particular situation, it will explicitly authorize it. Nevertheless, the Supreme Court has found congressional authority for this type of award in the absence of explicit legislation. In *Hall v. Cole*,[69] the Court upheld the award of attorney's fees by a court under a rather broad statute authorizing courts to grant "such relief . . . as may be appropriate."[70] In a suit brought under a section of the Securities Exchange Act, a section which did not specifically authorize the award,[71] the Court said in *Mills v. Electric Auto-Lite Co.*[72] that the inclusion of specific provisions for awarding attorney's fees in one section of the Act "should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when circumstances make such an award appropriate . . . ."[73] On the other hand, the detailed available remedies under the Lanham Act[74] led the Court in *Fleishmann Distilling Corp. v. Maier Brewing Co.*[75] to conclude that the congressional intent was to exclude litigation expenses

65. "[T]he court may . . . assess reasonable costs, including reasonable attorneys' fees, against either party litigant," 15 U.S.C. § 78i(e) (1970). Another provision of the Act also authorizes the award of attorney's fees. *Id.* § 78r(a).

66. "Any person . . . shall recover . . . the cost of suit, including a reasonable attorney's fee." *Id.* § 15.

67. "[S]uch common carrier shall be liable . . . for . . . a reasonable counsel or attorney's fee . . . ." 47 U.S.C. § 206 (1970).

68. "If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee . . . ." 49 U.S.C. § 16(2) (1970).

69. 412 U.S. 1 (1973). The case involved a suit brought by a union member against the union under section 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 102 (1970). The member had introduced a set of resolutions at a union meeting alleging instances of undemocratic actions and shortsighted policies of union officials. He subsequently was expelled from the union because his actions allegedly violated a union rule. This expulsion constituted a violation of the member's right of free speech secured by section 411(a)(2) of the Act. 412 U.S. at 3.

70. 29 U.S.C. § 412 (1970). The court found the case to fall within one of the exceptions to the traditional rule against the awarding of attorney's fees. This exception is discussed in the text accompanying note 98 *infra*.

71. 15 U.S.C. § 14(a) (1970).

72. 396 U.S. 375 (1970).

73. *Id.* at 390-91.

74. 15 U.S.C. § 1117 (1970). In actions brought to recover damages for patent infringement under the Lanham Act, "the plaintiff shall be entitled . . . to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." *Id.*

75. 386 U.S. 714 (1967).

as a form of recovery for the successful party, even where there had been "deliberate" trademark violations.[76]

Although these cases dealt with the power of a *court* and not the power of an *agency* to award attorney's fees without express statutory authorization, by way of analogy they tend to support the proposition that the proper interpretation of section 10(c) includes the power of the NLRB to award such fees. The fact that the remedy is explicitly authorized in other statutes does not preclude a finding that it also is authorized under section 10(c). Furthermore, consistent with these decisions, a broad grant of authority in fashioning relief, like that found in section 10(c), as opposed to a detailed listing of available remedies, would seem to include the power to award litigation expenses.

The broad and general authority of the NLRB to fashion relief under section 10(c) was established by the Supreme Court early in the Act's history. In *Phelps Dodge Corp. v. NLRB*,[77] the argument was made that the phrase "including reinstatement of employees with or without back pay" in section 10(c) limited the Board's affirmative action powers to this remedy.[78] The Court disagreed, holding instead that the phrase was not a limitation but a mere illustration of the type of relief intended. It went on to outline the nature of the power in a well-known passage:

> [I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaption of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.[79]

Subsequent to the *Phelps Dodge* case, various limitations were placed on the reach of the Board's remedial power. For example, the Board cannot "compel agreement when the parties themselves are unable to agree" because this contravenes section 8(d) of the Act.[80] An-

76. *Id.* at 716-17.

77. 313 U.S. 177 (1941).

78. *Id.* at 194.

79. *Id.*

80. H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970), *considering* 28 U.S.C. § 158(d) (1970). In this case, the company had refused to bargain with the union with respect to the inclusion of a "check-off" clause in the agreement. The purpose of the clause was to have the company deduct from the employees' payroll checks the dues owed to the union by its members. The NLRB had found that the refusal to bargain was not made in good faitb, but rather for the purpose of frustrating the negotiations. Accordingly, it ordered the company to grant the union a contract check-off clause.

other example is the restriction against granting punitive relief.[81] On the whole, however, the breadth of the Board's affirmative powers under section 10(c) remains substantially unimpaired by these decisions and has been consistently reaffirmed by the Court.[82]

THE AWARD OF ATTORNEY'S FEES AS A MEANS OF EFFECTUATING THE POLICIES OF THE ACT

The foregoing analysis suggests at most that the award of attorney's fees *may* be authorized by section 10(c) of the NLRA and at least that such relief has not been precluded. The question still remains, however, as to whether the remedy is one which will "effectuate the policies" of the Act.[83]

The purpose of the NLRA, as declared in section 1 of the Act, is to prevent interruptions of commerce caused by industrial disputes.[84] Congress found that one means of protecting commerce from the interruptions caused by labor disputes was to encourage "the practice and

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The Supreme Court reversed, holding that the order amounted to compelling the company to agree to specific terms which compulsion would "violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id.* at 108.

81. In Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), the Court said that the power of the Board

> to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. *Id.* at 236.

The company involved in this case was allegedly supporting a union of its own choosing without regard to the employees' preferences. This relationship resulted in several contracts between the union and the company. The company subsequently was found in violation of the Act for interfering with the right of its employees to join labor organizations of their own choosing in contravention of section 7 of the NLRA, 29 U.S.C. § 157 (1970). As one remedial measure, the Board invalidated the contracts. The Court reversed this part of the order, labeling it punitive because it could find no basis for the Board's finding that the contracts were a consequence of the unfair labor practices. *Id.*; *cf.* Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940).

82. *See, e.g.*, Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

83. 29 U.S.C. § 160(c) (1970). For quotation of the pertinent statutory language, see note 4 *supra*.

84. *Id.* § 151. The pertinent portion of the section reads:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. *Id.*

procedure of collective bargaining."[85] By assuring employees of the right to bargain collectively through representatives of their own choosing, and giving them the chance to enforce this right in a legal proceeding, Congress thought employees would be less inclined to resort to economic force with its resultant injury to commerce. The stated purpose of the Act has led the Supreme Court to conclude that the "[e]nforcement of the obligation to bargain collectively is crucial to the statutory scheme" of the NLRA.[86]

Yet, under the present scheme and with the conventional Board remedy applied in refusal-to-bargain situations—a prospectively oriented cease and desist order—a party wishing to avoid collective bargaining simply can refuse to bargain without risk of legal sanction until an enforcement proceeding is concluded in a court of appeals. There is no encouragement to bargain at any time before the Board's order is enforced with a judicial order, and, in fact, it will be advantageous in many cases for an employer to prolong delay as long as possible and to absorb the mild reprimand when the cease and desist order finally is enforced.[87] Not only does this result seem not to promote collective bargaining, an express purpose of the Act, but it is unjust to the union whose conduct in the matter has been entirely proper. In the first place, the union is forced to incur substantial litigation expense in vindicating fundamental employee rights guaranteed by the NLRA.[88] Furthermore, this cost may prove to be an excessive economic burden on some unions, in particular the small, under-financed union, and it may substantially impair their ability to conduct their affairs.[89] And yet with conventional NLRB remedies, there will be no restitution for these pecuniary losses when the litigation has finally ended.[90] Meanwhile, the employer has been rewarded for his recalcitrance through the reduced effectiveness of the union which has been attempting to organize his plant.[91] It seems unlikely that Congress would have sanctioned a result which is inequitable and which discourages good faith collective bargaining in contravention of the purpose of the NLRA.

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85. *Id.*

86. NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952).

87. See text accompanying notes 7-12 *supra.*

88. See text accompanying notes 50-56 *supra.*

89. *See* International Union of Elec. Workers v. NLRB, 502 F.2d 349, 356 n.24 (D.C. Cir. 1974).

90. It is permissible for the Board to seek to restore an injured party to the status quo ante through its remedial power. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); International Union of Elec. Workers v. NLRB, 502 F.2d 349, 356 n.24 (D.C. Cir. 1974).

91. See text accompanying note 12 *supra.*

Thus, some means of discouraging an employer's unjustified refusal to bargain and of restoring the injured party to the status quo ante at the end of the frivolous litigation is needed in order to fully effectuate the policies of the NLRA. While make-whole relief[92] would perhaps be the most effective remedy in this situation, at least the awarding of attorney's fees would help to return the union to its economic status prior to the unfair labor practice and hence permit it to function effectively after the close of litigation. The remedy also would serve to discourage the employer from engaging in frivolous litigation by pegging the size of the eventual relief assessed against him directly to the length of his unjustified delay.

The alternative award of litigation expenses as a partial curative in lieu of make-whole relief also has the advantage of avoiding the principal objections to make-whole relief. One such objection is that make-whole relief contravenes the rule against compelling the parties to agree.[93] Obviously no such problem exists in the case of awarding litigation expenses. A second objection to make-whole relief is that it is entirely too speculative since the Board has no way of determining what the terms of the agreement would have been had there been one.[94] It has been argued that this deficiency can be overcome simply by comparing similar collective bargaining agreements in similar situations.[95] Yet, the award of litigation expenses in lieu of the make-whole remedy can avoid the problem altogether since this amount is readily ascertainable.

Opposition to a Remedy which Includes Litigation Expenses

The award of attorney's fees to the charging party in cases where the charged party engages in frivolous litigation in order to delay compliance with the Act would seem entirely within the intent and spirit of the NLRA. But several arguments in opposition to this remedy can be made.

The General Rule Prohibiting the Award of Attorney's Fees

The principal objection to the remedy stems from the American rule which generally prohibits the award of attorney's fees to a success-

92. See text accompanying notes 13-17 *supra.*

93. See notes 18-20 *supra* and accompanying text.

94. *See* Ex-Cell-O Corp., 185 N.L.R.B. 107, 110 (1970), *enforced sub nom.* UAW v. NLRB, 449 F.2d 1058 (D.C. Cir.), *vacating* 449 F.2d 1046 (D.C. Cir. 1971).

95. *See* Note, *An Assessment of the Proposed "Make-Whole" Remedy, supra* note 7, at 382-84.

ful litigant absent statutory or contractual authority.[96] The primary rationale for the prohibition is that while the submission of rights to judicial determination is favored over self-help, parties will be discouraged from settling their disputes in judicial proceedings if the loser will be assessed with his adversary's litigation costs merely because he submitted the controversy to judicial determination.[97] However, there are well established exceptions to the rule, and a court may, in the exercise of its equitable powers, award attorney's fees in certain instances. For example, the court may award counsel fees to a successful party when the opposing party has exhibited bad faith in the conduct of the proceedings.[98] A second exception allows the award of attorney's fees when the plaintiff's successful litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them."[99] This exception is based on a theory of unjust enrichment, and it has its origins in the "common fund" cases where the plaintiff has secured a fund in which others may share. Awards of attorney's fees have been paid out of such funds.[100]

Although these exceptions to the general rule deal with the equitable powers of a court, they seem to be equally applicable to an agency like the NLRB which functions in essentially the same manner as a court. Arguably, an administrative agency possesses no equitable powers and possesses only those powers conferred on it by the statute

96. *See* Hall v. Cole, 412 U.S. 1, 4 (1973); McCormick, *supra* note 1, at 621-22.

97. McCormick, *supra* note 1, at 639-40.

98. Hall v. Cole, 412 U.S. 1, 5 (1973); 6 J. MOORE, FEDERAL PRACTICE ¶ 54.77(2), at 1709 (2d ed. 1972); *see, e.g.*, Vaughan v. Atkinson, 369 U.S. 527 (1962).

99. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393-94 (1970). Although the power to award attorney's fees under this exception is generally limited to cases involving a fund, such as creditor's suits or suits for the protection of a trust fund, 6 J. MOORE, *supra* note 98, ¶ 54.77(2) at 1705-06, it has been extended to cases where no fund was created by the litigation. For example, in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), a stockholder brought a derivative suit against his corporation under the Securities Exchange Act to set aside a corporate merger which allegedly was accomplished through the use of a misleading proxy statement. The stockholder succeeded and the defendant corporation was assessed with his litigation expenses. Although the suit created no fund out of which fees could be paid, the Court concluded that the litigation had conferred a substantial benefit on the other stockholders. The Court therefore reasoned:

> To award attorney's fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit. 396 U.S. at 396-97.

100. *See* Hall v. Cole, 412 U.S. 1, 5-7 (1973).

which created it.[101] But the broad remedial power of the NLRB pursuant to section 10(c) of the NLRA is essentially equitable in nature.[102] In fact, the Supreme Court in *Phelps Dodge*[103] said that the power extends beyond the "narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies."[104]

The award of attorney's fees in the refusal-to-bargain situation may possibly fit both of these exceptions to the general prohibition against the award of such fees to a successful litigant. The company which refuses to bargain and asserts frivolous objections throughout the proceedings merely for the purpose of delay has by definition exhibited bad faith in the conduct of the proceedings. Hence the bad faith exception to the rule is directly applicable. The application of this exception does present a problem, however. It has often been characterized as essentially punitive in nature.[105] Juxtaposed to this characterization are the numerous Supreme Court statements to the effect that the Board has no power to issue punitive orders.[106]

However, automatic application of this characterization to the situation where litigation expenses are awarded to a party who has been unreasonably forced to litigate would overlook the true nature of the relief. To characterize it as "punitive" in the sense that the term has been used by the Supreme Court in NLRB cases[107] would seem erroneous. The underlying rationale for the "punitive" restriction apparently has been that a Board remedy may not go beyond making the injured party whole.[108] Reimbursing the charging party for his litiga-

101. *See* International Union of Elec. Workers v. NLRB, 502 F.2d 349, 352-54 n.* (D.C. Cir. 1974). Although Judge MacKinnon, the author of the opinion, felt compelled to join the two other judges on the court in affirming the Board's decision to award litigation expenses, see note 42 *supra*, he expressed, in a series of footnotes, his own view that the Board lacked the authority to grant this kind of relief. *See id.* at 352-54 n.*, 354-55 n.**, 357 n.***.

102. *See* Brief for Respondent at 13-14, International Union of Elec. Workers v. NLRB, 502 F.2d 349 (D.C. Cir. 1974).

103. See text accompanying notes 77-79 *supra.*

104. 313 U.S. at 188.

105. "In [the bad faith] class of cases, the underlying rationale of 'fee shifting' is, of course, punitive . . . ." Hall v. Cole, 412 U.S. 1, 5 (1973).

106. *See, e.g.*, Carpenters Local 60 v. NLRB, 365 U.S. 651 (1961); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

107. One commentator has suggested that the "punitive" label has not been applied in its usual sense at all in NLRB litigation, but merely has been used to describe Board orders which have seemed particularly objectionable to the courts. Note, *NLRB Power to Award Damages, supra* note 7, at 1680.

108. In Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940), a leading case on the issue of punitive awards, the Court characterized as "punitive" a Board order compelling the

tion costs in the situation where the charged party resists compliance with the Act by engaging in frivolous litigation merely returns the union to its economic status quo ante; it receives nothing, nor is the employer required to pay anything, over and above the actual expenses the union has incurred in opposing the employer's dilatory actions.

The award of attorney's fees in the refusal-to-bargain situation also could be viewed as within the "common fund" exception to the rule.[109] The union has brought an action on behalf of the employees who have selected the union as their collective bargaining representative. The employees have benefited substantially by the successful litigation of the union through the enforcement of the obligation to bargain and resultant increased benefits. Hence, the union should be compensated for its efforts.

There are at least three problems with this last argument, however. To begin with, it proves too much. According to this rationale, the award would be appropriate in any situation where the union litigates on behalf of the employees. Second, there is obviously no fund involved from which reimbursement of attorney's fees can be made. Finally, although the exception has been extended to cases where no fund was created as a result of the litigation, the rationale has been that the award is one which imposes the expense on the class benefited rather than on the unsuccessful party.[110] In this case, the reimburse-

employer to repay public agencies the amounts the agencies had paid to discriminatorily discharged employees as wages on work relief projects during the period of their unemployment. The award obviously had nothing to do with restoring the union or the employees to their respective positions prior to the unfair labor practice. It merely increased the size of relief assessed against the employer.

In Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), the Court labeled as "punitive" the Board's invalidation of several contracts entered into between the company and a company-supported union. The Court found no basis for the Board's conclusion that the contracts were a result of the unfair labor practice, so again the remedy did not make the union whole because the contracts had nothing to do with the company's unlawful conduct toward the union. For a more complete discussion of *Consolidated Edison*, see note 81 *supra*.

In NLRB v. Coates & Clark, Inc., 241 F.2d 556 (5th Cir. 1957), the court took the position that an order would not be punitive if it either made the injured party whole or prevented the violator from benefiting from his misdeed. *Id.* at 561.

109. *See* Brief for Respondent, *supra* note 102, at 17-18. See notes 99-100 *supra* and accompanying text.

110. See note 99 *supra*. *See also* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939). In *Sprague*, the plaintiff and fourteen other settlors had made trust deposits in the bank. The bank closed and went into receivership. The plaintiff brought an action against the bank and the receiver to establish a lien for her trust deposit. The district court entered a decree establishing the lien and also directed payment of attorney's fees to the plaintiff. The Supreme Court upheld the award of attorney's fees, reasoning that for all practical purposes, a fund was established since the plaintiff had established the claims of the fourteen other trusts by stare decisis.

ment of the union's litigation expenses would, on the contrary, seem to saddle the employer with the expense.

Procedural Aspects of the NLRA Which Indicate that the Relief is Inappropriate

Certain procedural features of the NLRA tend to indicate that this form of affirmative relief is inappropriate. First of all, there is no direct judicial review of the certification process. The only way the employer can obtain judicial review of the legality of the union election and certification procedure is to refuse to bargain,[111] and yet in refusing to bargain he risks being assessed the union's litigation expenses as well as bearing his own costs. After proceedings before an administrative law judge, the Board, and finally the courts, the costs could be substantial.[112] Of course, the remedy is not applicable in cases where the employer's objections to the certification process are debatable, as opposed to frivolous.[113] Obviously, the employer who refuses to bargain for frivolous reasons has no reasonable doubt as to the legality of the election. Yet, as a practical matter and without the benefit of hindsight, at the margin it may be difficult to distinguish between "debatable" and "frivolous" claims.[114] Thus, the employer with marginally debatable claims will be unjustly discouraged from obtaining review of the union's certification by refusing to bargain with the union.

The argument, however, has been stripped of its forcefulness in application. The Board apparently has taken this factor into consideration in applying the *Tiidee* rule to subsequent cases, and it is extremely reluctant to find an employer's defenses "patently frivolous."[115] Evi-

111. 29 U.S.C. § 160(e), (f) (1970); *see* AF of L v. NLRB, 308 U.S. 401 (1940). For an outline of NLRB procedure in representation proceedings, see 29 C.F.R. §§ 101.17-.24 (1974).

112. See text accompanying notes 50-56 *supra.*

113. See note 15 *supra.*

114. See note 15 *supra.*

115. *See, e.g.,* Orion Corp., 210 N.L.R.B. No. 71 (May 16, 1974), 1974 CCH NLRB Dec. 34,308; Ameri-Crete Ready Mix Corp., 207 N.L.R.B. No. 79 (Nov. 21, 1973), 1974 CCH NLRB Dec. 33,498. In *Ameri-Crete,* the union had obtained a majority of authorization cards from the employees in an organizational campaign at the employer's plant. The employer refused to recognize or bargain with the union and engaged in other unfair labor practices, including the questioning of employees as to why they had signed the cards. The Board refused to order reimbursement of the union's legal expenses because the employer's defense—that the union did not actually command a majority—was not meritless on its face. 1974 CCH NLRB Dec. at 33,499. A similar result was reached in *Orion,* where the employer withdrew recognition of a union and refused to bargain based on its "objective belief" that at least twenty-four of forty-four unit employees did not support the union. 1974 CCH NLRB Dec. 34,309. See note 48 *supra.*

dently the rule will be applied in only the most flagrant cases and not in cases where the employer's objections are in any sense arguably reasonable. Thus, the employer with marginally debatable objections should not fear the award of litigation expenses against him if he presses his objections in litigation.

One further argument exists against the award of attorney's fees under section 10(c). The charging party as well as the charged party may seek to avoid compliance with the Act by engaging in frivolous litigation. The former may file charges which are totally without merit in order to harass the latter party by causing a complaint to be issued against him. For example, an employer may file frivolous charges against a union for the purpose of disrupting an organizational campaign, thereby delaying or avoiding unionism in his plant. Yet, the broad affirmative action clause, and hence the remedy, applies only to the *charged* party. The only sanction the charging party risks is to have his complaint dismissed.[116] Thus, the charged party who engages in frivolous litigation is held liable for these expenses, whereas the charging party who engages in the same conduct escapes liability. Assuming that even-handed treatment was intended, this result suggests that Congress never intended to give the Board the power to award litigation expenses.[117]

But this argument overlooks the assigned task of the General Counsel and his representatives in investigating the charges made prior to the issuance of a complaint.[118] Indeed, the NLRB has established a procedure in which stringent requirements of proof must be met to keep the charges from being dismissed immediately.[119] Even if the complaint was issued, it would surely become readily apparent at the initial hearing that the case lacked any merit. The charges could still be dismissed before the charged party had incurred any substantial costs.

Reimbursement of the Board's Own Litigation Expenses

In *Tiidee*,[120] the Board first asserted its authority to order reim-

116. *See* 29 U.S.C. § 160(c) (1970). The statute provides:

> If upon the preponderance of the testimony taken the Board shall not be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint . . . . *Id.*

117. *See* International Union of Elec. Workers v. NLRB, 502 F.2d 349, 352 n.* (D.C. Cir. 1974).

118. See notes 50-52 *supra* and accompanying text.

119. *See* 29 C.F.R. § 101.4 (1974).

120. 194 N.L.R.B. 1234 (1974) (*Tiidee I* supp. decision). For a discussion of this case and those related to it, see note 24 and text accompanying notes 24-43 *supra.*

bursement to itself for its own costs in the investigation, preparation, and presentation of cases where the charged party's defenses to the complaint are frivolous. The Board's assertion of authority was soon after confirmed in an unrelated opinion of the District of Columbia Circuit Court of Appeals in *Food Store Employees Local 347 v. NLRB*.[121] The scope of the power was later limited by the same court in *International Union of Electrical Workers v. NLRB*.[122] That opinion, which considered the Board's ruling in *Tiidee*, limited the power to those situations like the one present in *Food Store*—where the employer had conducted a "comprehensive pattern of illegal resistance to any form of unionism" with repeated violations of the NLRA.[123] The Board's reasoning in *Tiidee* for awarding litigation expenses to itself was the same as the reasoning it used to justify the award of these expenses to the charging party—to discourage frivolous litigation in order to insure "speedy access to uncrowded Board and court dockets,"[124] and thus to effectuate the purposes of the Act.

The Board's award in this situation is roughly analogous to the power of federal courts to assess an appellant with the counsel fees and other litigation expenses of the appellee in cases where the appellant takes a frivolous appeal for the purpose of delay.[125] The fact-finding hearing before the administrative law judge is the functional equivalent of a trial court and the Board is the reviewing body.[126] The reimburse-

121. 476 F.2d 546, 550-51 (D.C. Cir. 1973), *rev'd on other grounds and remanded*, 417 U.S. 1 (1974).

122. 502 F.2d 349 (D.C. Cir. 1974).

123. *Id.* at 357.

124. 194 N.L.R.B. at 1236 (*Tiidee I* supp. decision).

125. *See In re* Midland United Co., 141 F.2d 692 (3d Cir. 1944) (per curiam) (where an appeal was wholly frivolous and was taken for purposes of delay, appellees were awarded as damages $1000 for counsel fees); 28 U.S.C. § 1912 (1970) ("Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay and single or double costs."); FED. R. APP. P. 38 ("If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."); Brief for Respondent, *supra* note 102, at 15.

126. Pursuant to section 8(a) of the Administrative Proeedure Aet, 5 U.S.C. § 557(b) (1970), the fact that the administrative law judge may make an initial or recommended decision does not withdraw power from the agency to review the case *to whatever extent* the agency chooses:

> The agency may still make its own findings under the Act, which provides in [section 8(a)] that even though [administrative law judges] make initial or recommended decisions, "the agency shall . . . have all the powers it would have in making the initial decision." The words "all the powers" clearly include determinations of law, fact, policy, and discretion. The agency is clearly free to substitute judgment . . . on any or all questions. 2 K. DAVIS § 10.04, at 18.

The rules and regulations of the NLRB, 29 C.F.R. § 102 (1974), recognize the discretion of the Board to institute de novo proceedings upon the filing of exceptions to

ment under this rationale would be for the expenses of the General Counsel in prosecuting the case before the appellate-type tribunal, the Board.

However, the considerations involved in determining whether it is proper for the Board to order reimbursement to itself for its own litigation expenses differ from those which justify such an award to a charging party who is forced to bear litigation costs because of the frivolous litigation of the charged party. Unlike the charging party who must incur the unnecessary litigation costs in order to protect his rights under the Act, the Board's express statutory function is to enforce those rights, especially in situations where the opposing party is acting in an unreasonable manner. The Board is an administrative agency established and funded for the purpose of settling the rights of parties in labor disputes. It seems only reasonable, then, that it should not, without explicit statutory authorization, be reimbursed for the expenses it incurs in the discharge of its statutory duties.

Furthermore, it is difficult to see how returning the Board to its status quo ante would effectuate the policies of the NLRA in a permissible manner. Of course, the award would have the effect of discouraging frivolous litigation and hence would facilitate the accomplishment of the purposes of the Act by keeping Board and court dockets clear. But assessing the charged party with the Board's litigation expenses would not in itself seem to have any affirmative policy effects beyond deterrence.[127] Yet, the objective of pure deterrence was held to be improper by the Supreme Court in *Republic Steel Corp. v. NLRB*:[128]

> [I]t is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to

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the administrative law judge's decision: [T]he Board may decide the matter forthwith upon the record, or after oral argument, or *may reopen the record and receive further evidence . . . .*" *Id.* § 102.48(b) (emphasis added). These rules also add that "[w]here exception is taken to a factual finding of an administrative law judge, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief." *Id.* § 102.48(c). Apparently the latter course is most frequently adopted, leading one group of commentators to state unequivocally that "the Board will consider the case on the record." R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, *supra* note 9, at 66. *See also* L. SILVERBERG, HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD (3d ed. K. McGuiness, 1967). Therefore, the functional analogy drawn in the text is appropriate.

127. *See* International Union of Elec. Workers v. NLRB, 502 F.2d 349, 357 n.*** (D.C. Cir. 1974).

128. 311 U.S. 7 (1940).

> sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.[129]

Moreover, since the award is not one which makes the injured party—the union in this case—whole, it also may fall prey to the Court's doctrine that the Board has no power to issue punitive relief.[139] Therefore, under either the rule forbidding pure deterrence or that proscribing punitive relief, a Board order directing reimbursement of itself for its own litigation expenses is an unauthorized means of advancing the policies of the Act.

On the whole, then, it would seem that the Board's award of litigation expenses to itself in the absence of express statutory authority is improper in any case. There are substantial reasons why a *party* in an NLRB proceeding should be reimbursed,[131] but none of these reasons apply to the Board. A party is vindicating his own rights, while the Board is executing a statutory duty. In light of the Board's statutory assignment to settle labor disputes whether or not such disputes involve frivolous litigation, the need to keep the Board's dockets clear is simply not a sufficient justification for abandoning the rule prohibiting tribunals from awarding attorney's fees.[132]

CONCLUSION

In light of the inadequacy of conventional NLRB remedies in refusal-to-bargain cases, it is clear that new remedies must be developed if the policies of the NLRA are to be fully effectuated. So long as Congress fails to act on the matter, it is the responsibility of the Board and the courts to develop new forms of relief within the scope of existing NLRB remedial authority. One alternative—make-whole relief—has been offered by the District of Columbia Circuit. Yet, while the make-whole remedy is probably the most effective remedy in this situation, the Board arguably lacks the authority to grant this kind of relief. Moreover, the Board's present reluctance to adopt the remedy makes its current usefulness marginal.

The award of attorney's fees, on the other hand, has been adopted

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129. *Id.* at 12. For a discussion of *Republic Steel,* see note 108 *supra.*

130. See text accompanying notes 105-08 *supra.*

131. See text accompanying notes 84-92 *supra.*

132. Of course it is an entirely different situation when the Board must seek enforcement of one of its orders in a court of appeals. In this case, when a statute expressly authorizes such an award, it would be entirely proper for the *court* to award the Board its expenses in preparing for the enforcement proceeding since an appellate court has the authority to award attorney's fees and other litigation expenses when an appeal is frivolous. See note 125 *supra.*

by the Board and appears to be within the remedial authority of the NLRB. Unless and until the make-whole remedy is accepted by the courts, the attorney's fees remedy can and should be used to compensate partially for this weakness in the NLRA. Furthermore, if make-whole relief eventually is determined to be within the Board's remedial power, the award of attorney's fees would still be a useful additional remedy in appropriate cases.

Reimbursing the union for the expenses it incurs in the investigation, preparation, and presentation of cases where an employer refuses to bargain for patently frivolous reasons cannot, of course, be viewed as an equivalent substitute for make-whole relief. Moreover, the relative effectiveness of the remedy will depend upon the amount of involvement required by the union's private counsel, the length of the employer's unjustified delay, and the financial strengths of the parties involved. Nevertheless, the remedy should not be overlooked as a means of effectuating the purposes of the NLRA, whether it is used in lieu of or in addition to make-whole relief. The award of attorney's fees and other litigation expenses is a necessary and authorized addition to the NLRB's remedial arsenal.