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1964-1965 Annual Survey of Labor Relations Law

William J. McDonald

Robert M. Steinbach

STUDENT COMMENTS

1964-1965 ANNUAL SURVEY OF LABOR RELATIONS LAW

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INTRODUCTION

This comment marks the fourth attempt of the Review to summarize and explain the year's developments in the complex and protean field of federal labor relations law.* The subject matter comprises, for the most part, recent decisions of the Supreme Court, the lower federal courts, and the Labor Board.

If any discernible trend in federal labor relations policy appears in the past year's decisions, it is this. Organized Labor and Management should settle their differences at the bargaining table, without resort to administrative processes. In bargaining, the parties are free to use all economic weapons at their command, so long as they do not transgress the specific prohibitions of the National Labor Relations Act. Perhaps, this trend manifests a federal policy of intruding no further into the private relationships of employer and union than is authorized by a literal reading of the act. Perhaps, also, this trend reflects increasing maturity and a growing sense of responsibility on the part of both Labor and Management in their dealings with each other and the general public.

* The prior comments are: Recent Developments in Labor Law, 5 B.C. Ind. & Com. L. Rev. 629 (1964); Recent Developments in Labor Law, 4 B.C. Ind. & Com. L. Rev., 661 (1963); Labor's New Frontier: The End of the Per Se Rules, 3 B.C. Ind. & Com. L. Rev. 487 (1962).

JURISDICTION

A. Board Preemption of State Libel Suits

Since the Supreme Court's landmark decision in *San Diego Bldg. Trades Council v. Garmon*,[1] state and federal courts have deferred to the exclusive jurisdiction of the National Labor Relations Board when an activity is arguably subject to section 7 or section 8 of the act.[2] One recently preempted area is that of libel arising out of the labor-management relationship and its related activities. The leading state court decision finding preemption is *Blum v. International Ass'n of Machinists, AFL-CIO*,[3] while the principal federal court case is *Linn v. Local 114, United Plant Guard Workers*.[4] Both cases declared that the activity in question is within one of the areas of conduct which must be free from state regulation if national policy is to be left unhampered.

Shortly after the *Blum* and *Linn* decisions, however, there appeared a trend away from preemption in the defamation area. One of two recent decisions finding no preemption is *Brantley v. Devereaux*.[5] There, the union's vice-president sued the employer for slanderous statements made during a collective bargaining session. The federal district court held that the action was not preempted. *Blum* was distinguished on the ground that it involved libelous material distributed by the union during an organizational campaign. The *Blum* court had held that whether a union has abused its right under section 7 to distribute printed matter rests within the exclusive jurisdiction of the Board.

The *Brantley* court pointed out that while the activity in *Blum* was arguably subject to sections 7 and 8 of the act, slanderous statements by an employer during a collective bargaining session could only be regarded as evidence of a violation of the good faith bargaining duty imposed by section 8(a)(5), or evidence of illegal coercion in violation of section 8(a)(1). Or they might be protected by the free speech guarantee of section 8(c).[6]

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[1] 359 U.S. 236 (1959).

[2] Section 7 of the Act, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958), reads in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Section 8 of the Act, 61 Stat. 140-43 (1947), 29 U.S.C. § 158 (1958), defines certain employer and union unfair labor practices, in addition to providing for free speech as follows:

> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

[3] 42 N.J. 389, 201 A.2d 46 (1964).

[4] 337 F.2d 68 (6th Cir. 1964), petition for cert. filed, 33 U.S.L. Week 3247 (U.S. Jan. 9, 1965) (No. 819).

[5] 237 F. Supp. 156 (E.D.S.C. 1965).

[6] Brantley v. Devereaux, id. at 159, 160. Whether section 8(c), supra note 2, protects such statements (in so far as they may not constitute evidence of an unfair

The court drew another distinction between statements occurring during an organizational campaign and remarks made during the course of collective bargaining. In the former situation, the "employer and union are permitted to use biased propaganda to publicize their respective positions . . . whereas in a collective bargaining session both union representatives and employer are charged by law with the duty of bona fide, good faith bargaining. . . ."[7]

Therefore, the court concluded that it was not bound by *Blum* or the other cases cited by the employer advocating preemption.[8] The court then made an independent determination of the preemption issue. It found that the libelous conduct was not arguably subject to sections 7 and 8 of the act, and held that the libel action was not preempted because it did not involve regulation of labor relations, or concern the merits of a labor dispute.

Even if the libel was "arguably subject" to the act, the court found that it came within the first of two exceptions enunciated in *Garmon*. Speaking for the Supreme Court in *Garmon*, Mr. Justice Frankfurter had declared that

> due regard for the presuppositions of our embracing federal system . . . has required us not to find withdrawal from the states of power to regulate where [1] the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958). Or where [2] the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.[9]

In finding the first exception applicable, the court in *Brantley* analogized the libel action to a suit for damages arising out of violence in a labor dispute. If the state court has jurisdiction there,[10] then it should have it in a libel suit where the damage to reputation can be more extensive than a physical injury.[11]

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labor practice) apparently is for the Board to decide in the first instance. This is opposed to what the court in *Brantley* seemed to feel, and contra to the argument in note 8, infra.

[7] Id. at 160.

[8] The court never referred to Schnell Tool & Die Corp. v. United Steelworkers, 200 N.E.2d 727 (Ohio C.P. 1964), where the employer sued a union member for libelous statements made during a collective bargaining session. The Ohio court had found that the suit was preempted, despite the argument that section 8(c), supra note 2, surrendered the Board's exclusive jurisdiction by guaranteeing that the expression of any opinion would not be evidence of an unfair labor practice.

[9] San Diego Bldg. Trades Council v. Garmon, supra note 1, at 243-44. Mr. Justice Frankfurter cited for the second exception United Automobile Workers v. Russell, 356 U.S. 634 (1958); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); United Automobile Workers v. Wisconsin Board, 351 U.S. 266 (1956); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954). He explained that in these cases the states had been allowed to award damages and injunctions for "conduct marked by violence and imminent threats to the public order . . . because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." Id. at 247.

[10] Brantley v. Devereaux, supra note 5, at 161. The court cited Hall v. Walters, 226 S.C. 430, 85 S.E.2d 729, cert. denied, 349 U.S. 953 (1955).

[11] Ibid. In Linn v. Local 114, United Plant Guard Workers, supra note 4, at 71, the Sixth Circuit admitted the existence of extensive damage:

Although the reasoning of the *Brantley* court sounds more like the second exception to the *Garmon* rule, the court purported to discuss only the first exception. The second exception, however, was the basis for jurisdiction in the other recent libel case holding no preemption. *Meyer v. Local 107, Int'l Bhd. of Teamsters*[12] involved a suit by union officers for damages arising from the printing of libelous material in another union's newspaper. The tabloid was specially issued during a campaign preceding an NLRB representation election.

The Pennsylvania Supreme Court had no difficulty in reaching "the conclusion that our state courts are not precluded from exercising jurisdiction over libel actions arising from labor activities."[13] The court made no attempt to distinguish *Blum* and the other libel cases, as did the court in *Brantley*. Indeed, it would have been quite difficult to distinguish *Blum* and *Linn* on their facts, since the suit in *Meyer* arose from the same kind of labor activity, *i.e.*, an organizational campaign prior to a Board election.

Rather than distinguish the cases holding preemption of libel suits, the *Meyer* court relied directly on the second exception to the *Garmon* rule. It held that even if "the activities of the defendants in the present case are arguably subject to Section 7 or 8 of the Act, . . . there is a compelling state interest, especially in the maintenance of domestic peace, upon which state jurisdiction over a libel suit can be predicated."[14]

The court noted that libel is a crime at common law because of its potential for inciting to violence and consequent breach of the peace.[15] Therefore, the "interest of the state in providing a peaceful forum to which individuals whose reputations have been damaged by false and injurious statements can bring their claims should not be frustrated in the absence of a clear expression of congressional intent."[16] And the court could discover no clear expression of a congressional desire to deprive the states of this important jurisdiction to redress individual wrongs. Furthermore, the Board cannot adequately protect the state's interest, because libelous utterances may often be deemed insignificant in relation to the labor issues involved. Accordingly, they may not cause an election to be set aside.

Even if the libelous statements did persuade the Board to set aside an

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> It is indeed clear that physical assault and battery and libelous assault upon a citizen's good name are both torts that cannot be compensated by a "cease and desist" order of the NLRB. An individual might quickly recover from the bruises and wounds of a physical assault and at little expense have a crumpled fender bumped out, but a lifetime may not be sufficient to restore a reputation hurt by the circulation of a vicious libel.

Nevertheless, the court held itself foreclosed from giving redress, stating: "We are persuaded, however, that Garmon has drawn the distinction which permits the one to be remedied by traditional court action and limits the other to the relief, if any, that may come from an order of the NLRB." Id. at 71-72.

[12] 206 A.2d 382 (Pa. 1965).

[13] Id. at 385.

[14] Id. at 384-85.

[15] Id. at 386 n.11, where the court quoted from the dissent of the three justice minority in Blum, supra note 3.

[16] Id. at 386.

election, the court pointed out that the Board could do nothing to restore the reputation of the defamed individual. The Board has no interest in protecting reputation; its task is to guarantee that the employees' freedom of choice is not impeded by coercion, falsehood, or emotion. "On the other hand, the state jurisdiction is not directed at regulation of labor relations as such. The state concern is with injury to reputation and the discouragement of violent reprisals."[17]

One of the three dissenting justices in *Meyer* argued that a particular state's interest in defamation occurring during a labor dispute is not great enough to warrant submersion of the vital need for uniformity of federal regulation of labor relations. But the majority reasoned that the only possibility of friction and conflict arising from the coexistence of state and federal jurisdiction is in the area of free speech. And the Supreme Court in *Beauharnais v. Illinois*[18] has already recognized that the right of free speech does not preclude state jurisdiction to punish for libel.

Certainly, if the drastic state action of criminal libel is permissible under the fourteenth amendment, a civil action for libel should not be preempted merely because there is also a right of free speech. Of course, the delicate balance between free speech and libel must be maintained, and it is possible that justified criticism may be stifled under the guise of a libel action. Nevertheless, abuses can be avoided by the exercise of judicial authority.[19]

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[17] Id. at 387. The court distinguished Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690 (1963), and Local 207, Int'l Ass'n of Bridge Workers v. Perko, 373 U.S. 701 (1963). In both cases the worker sued his union in a state court for damages for tortious interference with his right to have employment. In finding preemption, the Supreme Court distinguished International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), as involving equitable relief directed at reinstatement in the union of an illegally expelled member, rather than an interference with the individual's *employment opportunity*.

The Meyer court distinguished *Borden* and *Perko* as follows:

> In both these cases the state was attempting to protect a worker's interest in his job. This is obviously a matter of labor relations and is to be governed exclusively by federal law. In libel actions, however, the state is affording protection of a citizen's interest in his reputation. The fact that the reputation was injured in a labor dispute is merely incidental. In vindicating this compelling interest—an interest close to its police power—the state is not responding to considerations of labor policy at all.

Id. at 387 n.16. Accord, Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, 1321 (1954), and Michelman, State Power to Govern Concerted Employee Activities, 74 Harv. L. Rev. 641, 667 (1961).

[18] 343 U.S. 250 (1952).

[19] Beauharnais v. Illinois, id. at 263-64. The *Meyer* court pointed this out, supra note 12, at 389. It also compared the libelous use of material in the organizational campaign to a smear campaign in an election for public office.

> In neither instance is there a purposeful social or public need to encourage such irrelevant and harmful activity by granting absolute protection against deliberate libel at the expense of fundamental state interests by withdrawing state jurisdiction so that intentional libel may be privileged and unrestrained.

Id. at 387 n.13.

The court did not consider the point raised in *Brantley*, that an employer and a union are allowed to use biased propaganda in an organizational campaign (referred to at note 7, supra). However, there is undoubtedly a distinction between propaganda and

The majority in *Meyer* then quickly disposed of the remaining issue of whether the plaintiffs should have exhausted internal union remedies before seeking judicial relief. They affirmed the rule that, in the absence of any real internal remedy, an individual need not exhaust intra-association appeals and procedures.[20]

The result in *Meyer* appears to be not only the most equitable, but also the most logical. The problem that the preemption doctrine seeks to avoid *"is conflicting regulation of labor disputes by the State and Federal governments."*[21] It is difficult to see how the existence of state jurisdiction over a libel suit arising from labor activities can have serious effect on federal labor policy.[22] Truly, libel is "merely a peripheral concern of the Labor Management Relations Act," as urged in *Brantley*. In addition, it is an area that deeply touches state concern, as advocated by *Meyer*. Thus, without compelling congressional direction, it should not be inferred that the federal labor laws allow an individual to libel with impunity.

Whether the *Brantley-Meyer* position will become the majority rule will soon be determined by the growing number of decisions on this question. In any event, the issue is ripe for Supreme Court clarification.[23]

B. NLRA Preemption of Section 303 Suits

In *Local 20, Teamsters Union v. Morton*[1] the Supreme Court has declared that damage suits for conduct covered by section 303[2] are subject to

libel. And state regulation of the latter does not mean prevention or control of the former in contravention of any federal labor policy.

[20] Meyer v. Local 107, Teamsters Union, supra note 12, at 389-90.

[21] Brantley v. Devereaux, supra note 5, at 160. (Emphasis in original.)

[22] At most, the parties involved in labor activities would be constantly aware that if they committed a libel they would be held to answer in a state court. It cannot be argued that this minimal limitation on speech affects any federal labor policy. If an accommodation between state and federal policies in the areas of speech and labor relations must be reached, it can be achieved by according participants in labor relations a qualified privilege. Thus, an alleged defamer would not be liable even for false statements of fact if made for valid union or employer objectives, with an honest belief in their truthfulness. See, Prosser, Torts § 110, at 811 n.34 (1964 ed.).

[23] The circuits conflict. Opposed to the Sixth Circuit's decision in Linn v. Local 114, United Plant Guard Workers, supra note 4, is the Fourth Circuit's decision in R. H. Bouligny, Inc. v. United Steelworkers, 336 F.2d 160, 164-65 (1964), where the court held that "the National Labor Relations Act is concerned only with the coercive effect of an alleged libel and not with its character as a common law tort." As indicated in note 4, supra, certiorari has been applied for in *Linn*.

[1] 377 U.S. 252 (1964).

[2] The suit in *Morton* was brought under Section 303 of the Labor Management Relations Act of 1947, 61 Stat. 158 (1947), 29 U.S.C. § 187 (1958), since the alleged illegal conduct occurred prior to the 1959 amendment by the Labor-Management Reporting and Disclosure Act, 73 Stat. 545 (1959), 29 U.S.C. § 187 (Supp. V, 1964).

While "these amendments are not germane to the questions presented in [Morton] . . ." (Local 20, Teamsters Union v. Morton, supra note 1, at 253-54 n.1), the amended version is quoted as a matter of convenience:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity

the total sweep of federal labor law preemption. In light of the delicate balance struck by section 303 in prohibiting only certain forms of secondary pressure, the Court found a congressional intent to preclude all remedies except the federal ones.[3] As a result, it reversed the district court's allowance[4] of punitive damages and damages for conduct proscribed by Ohio law, although permitted under federal law. The Court found that section 303 provides for no recovery beyond that of actual damages sustained.

> Punitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute [see note 2] and in its legislative history [93 Cong. Rec. 4872-73 (1947)], that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages. And insofar as punitive damages in this case were based on secondary activities which violated only state law, they cannot stand, because, as we have held, substantive state law in this area must yield to federal limitations.[5]

It should be pointed out that the secondary pressure applied by the union was peaceful, thereby taking the case out of "the line of precedents which have permitted state law to be applied in situations where union activities involving violence were present."[6]

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or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties and shall *recover the damages by him sustained* and the cost of the suit. (Emphasis supplied.)

[3] Local 20, Teamsters Union v. Morton, supra note 1, at 258-59. The Court said: This weapon of self-help [secondary pressure], permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. . . . If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy.

Id. at 259-60.

[4] Morton v. Local 20, Teamsters Union, 200 F. Supp. 653 (N.D. Ohio 1961), aff'd, 320 F.2d 505 (6th Cir. 1963).

[5] Local 20, Teamsters Union v. Morton, supra note 1, at 260-61.

[6] Id. at 257. It should also be noted that one item of damage on which the Supreme Court reversed the district court's allowance of recovery involved the direct persuasion of a secondary employer to cease doing business with the primary employer. This form of secondary pressure was permitted under the controlling 1947 version of section 303; under the present version of section 303(a) (by way of section 8(b)(4)(ii)(B)), it would be illegal if it involved economic or physical threats, coercion, or restraint. See the section on secondary boycotts, infra p. 878.

ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS UNDER SECTION 301

A. Obligations Imposed on the Employer

Since 1957, when the Supreme Court decided *Textile Workers v. Lincoln Mills*,[1] state and federal courts have been fashioning a body of federal law to govern actions under section 301.[2] An important part of this federal law is the "specific performance of promises to arbitrate grievances under collective bargaining agreements."[3] This aspect represents a reversal of the common law rule of contracts, prohibiting the specific enforcement of arbitration provisions. The philosophy behind this change is that "it will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."[4]

Yet, prior to 1960 the courts were very reluctant to compel arbitration. That year the Supreme Court in the *Steelworkers* trilogy[5] decreed that "a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement," and that, accordingly, apart from matters specifically excluded by the parties, all disputes must be held to come within the scope of the grievance and arbitration provisions of the contract.[6]

When the parties have agreed to submit all questions of contract interpretation to the arbitrator, the court's function is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.[7] When the parties have not so agreed, the question whether one of them must arbitrate, "as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."[8] However, the interpretation of the collective bargaining agreement is a question for the arbitrator; a court has no right to overrule his construction of the contract merely because its interpretation differs from his.[9]

The federal policy favoring arbitration, as a means of promoting industrial peace, moved another step in *John Wiley & Sons, Inc. v. Livingston*,[10]

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[1] 353 U.S. 448 (1957).

[2] 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[3] Supra note 1, at 451.

[4] S. Rep. No. 105, 80th Cong., 1st Sess. 17-18 (1947).

[5] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[6] United Steelworkers v. Warrior & Gulf Nav. Co., supra note 5, at 578, 581.

[7] United Steelworkers v. American Mfg. Co., supra note 5, at 567, 568.

[8] Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962).

[9] United Steelworkers v. Enterprise Wheel & Car Corp., supra note 5, at 598, 599.

[10] 376 U.S. 543 (1964). For an extensive discussion of the case, see Note, 6 B.C. Ind. & Com. L. Rev. 344 (1965).

where the Supreme Court once again abrogated traditional contract theory to promote arbitration. In that case, Wiley had merged with a much smaller corporation before the latter's collective bargaining contract had expired. The contract did not expressly bind successors of the corporation, but the union sued under section 301 to compel arbitration of grievances concerning such subjects as seniority rights, severance and vacation pay, and the pension plan. The Supreme Court held[11]

> that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in *appropriate circumstances*, present here, the successor employer may be required to arbitrate with the union under the agreement.[12] (Emphasis supplied.)

In light of this abrogation of the privity of contract rule, the unanimous Court carefully pointed out that the rights allegedly subject to arbitration would have to arise from the original contract with the old employer, and that the union could not use arbitration to acquire new rights against Wiley.[13]

The Court also emphasized that a new employer would not in all circumstances be bound by the arbitration provisions of the original contract. Where a lack of any "substantial continuity of identity" existed in the business enterprise before and after a change, the employer would not be bound. Further, a union might abandon its right to arbitration by failing to make its claims known. Neither situation obtained here, where the union made its position known well before the merger, and where the "similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of [employees] . . . without difficulty."[14]

Subsequent cases provide a fuller answer to the question of what circumstances will require the new employer to arbitrate under its predecessor's

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[11] The Court prefaced its holding with an affirmance of *Atkinson*, supra note 8, on the issue of who is to decide whether the arbitration provisions survived the merger—the court or the arbitrator. In choosing the former, the Court reasoned that

> The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.

Supra note 10, at 547.

At a later point, the Court made it clear that the question of "procedural arbitrability," i.e., whether procedural conditions to arbitration have been met, must be decided by the arbitrator and not the courts. To hold otherwise "would thus not only create the difficult task of separating related issues, but would also produce frequent duplication of effort." Id. at 558.

[12] Id. at 548. The Court observed that the federal policy of settling labor disputes by arbitration would certainly be hurt if a change in the ownership of a business

> had the automatic consequence of removing a duty to arbitrate previously established. . . . The objectives of national labor policy . . . require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.

Id. at 549.

[13] Id. at 555.

[14] Id. at 551.

contract. Since *Wiley*, three circuit courts of appeals handled this question within a single month.

The Third[15] and Ninth Circuits[16] directed arbitration where the sale of all the assets of the predecessor to the successor resulted in a change of ownership that had negligible impact on the workers. In both cases there were no geographical shifts of employees, and the employment remained substantially unchanged. These factors placed both cases within the *Wiley* syndrome, where there is a *substantial continuity of identity in the business enterprise* after the change. Although the *Wiley* Court did not specifically call this criterion[17] the sole determinant of arbitrability, the briefs of all the parties agreed that it should be the test.[18] The only other eventuality listed by the Court, where arbitration would not be imposed, occurs where "a union might abandon its right to arbitration by failing to make its claims known."[19]

Arguably, the latter is an estoppel-laches type of rule for the union, and has no bearing on whether the initial test of *substantial continuity of identity in the business enterprise* is met. In fact, the Third Circuit in *Reliance* did not even consider the union's failure to make known its claims until after the change in ownership.[20] This is probably the right approach: the successor employer certainly must be aware of the existence of the collective bargaining agreement, and it can reasonably expect the union to demand that it honor provisions relating to settlement of grievances, even if it entails arbitration.

Under the *substantial continuity of identity* test, both *Reliance* and *Wachenhut* presented clearer cases for imposing a duty to arbitrate than *Wiley* itself. In the former there were no geographical shifts of workers to the successors' plants, as in *Wiley*.

A much closer situation confronted the Seventh Circuit in *Piano Workers v. W. W. Kimball, Co.*, a plant-removal case.[21] Here, ownership did not change, but the court discussed *Wiley* because the employer argued the lack of an arbitrable difference with the union over the lay-off provisions, since

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[15] United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (1964).

[16] Wachenhut Corp. v. International Union, United Plant Guard Workers, 332 F.2d 954 (1964).

[17] The Court said:

> there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved.

Supra note 10, at 551.

[18] Wiley's reply brief agreed with the union when it stated:

> whether Wiley can be bound by the obligation to arbitrate contained in the . . . collective bargaining agreement turns on whether the "industrial community has remained substantially intact, or whether the change in ownership has been accompanied by so many other changes in the nature of the enterprise that the industrial community cannot be said to have survived." (Amicus Br., p. 13).

Reply Brief for the Petitioner, p. 10.

[19] John Wiley & Sons, Inc. v. Livingston, supra note 10, at 551.

[20] United Steelworkers v. Reliance Universal, Inc., supra note 15. This latter point has increased importance since the successor employer in the contract for sale expressly disclaimed any liability under the prior collective bargaining contract.

[21] Piano Workers v. W. W. Kimball Co., 333 F.2d 761 (1964).

the contract had terminated. The court disagreed, quoting *Wiley* to the effect that seniority and lay-off provisions may create rights realizable after the termination of the contract, and that, therefore, arbitration over these rights may be ordered even after the contract has ended.[22]

The court then applied the *Wiley* test of *substantial continuity of identity in the business enterprise*, and denied arbitration. In so doing, the court indicated that in *Wiley* the geographical shift of workers was only from one part of New York City to another, while *Piano Workers* involved a shift from a Chicago suburb to southern Indiana. In addition, the operation at the new plant "was relevantly dissimilar from the operation in Chicago."[23]

The court also relied on the union's refusal to give the employer a list of the thirty-nine laid-off employees desirous of jobs at the new Indiana plant. Without the list, the employer argued, it could not comply with the contract's seniority and lay-off provisions, because it did not know who wanted jobs.[24]

Although the court used this factor as a supporting reason, it appears that it was swayed by the equities of a situation where the union refused to cooperate. Had the union cooperated, the court might have had a more difficult time distinguishing *Wiley*, and might have decided that an inter-city shift of workers did not necessarily fail to meet the *substantial continuity of identity in the business enterprise* test.

It is highly questionable whether geography becomes an important factor in a plant removal with no change of employer. In determining whether the employer should be held to arbitrate claims under an expired contract, the court should not consider whether he has moved one or a thousand miles away. The matter involves interpretation of the expired contract—not a consideration of whether the privity rule of contracts should be abrogated. Privity already exists. Furthermore, if one of the claims is that the employer should offer jobs to its former employees, the distance between locations should not be relevant in determining whether he should make the offer, even though it may be relevant to the employee's consideration of the offer.

On the other hand, with a successor employer, the geographical factor is more important in determining sufficient *continuity of identity in the business enterprise* to compel the employer to arbitrate claims under the predecessor's contract.

The court in *Piano Workers* seems to have erred in applying the *Wiley* test to a case lacking a new employer. The test was created by *Wiley* to decide only whether traditional contract theory should be abrogated by compelling an employer to arbitrate under a contract to which he was not a party. By applying the *Wiley* test to a case not involving a new employer, the court treated a party to the collective bargaining contract as though he were a stranger. Instead of interpreting the contract and applying contract law, it permitted the employer to avoid the continuing obligations that he

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[22] Id. at 764.

[23] Id. at 765.

[24] The court did not consider whether or not the employer should have offered jobs solely on the basis of seniority, as the contract provided, without first determining whether the individual employee desired employment. This is probably what the union desired, and why it refused to tender the list.

might have had under the expired contract, merely because he moved his plant.

Left unanswered by *Wiley* and its successor cases is the important question whether the subsequent employer must not only submit to arbitration, but must also assume the whole contract. *Reliance* and *Wachenhut* suggest in dicta that where the successor takes over intact the entire operation of his predecessor, he should be bound by the whole contract.

The *Reliance* court pointed out that *Wiley* recognized that new circumstances created by the acquisition of the business may make it inequitable and unreasonable to require the parties to adhere strictly to every term of the prior collective bargaining contract. Nevertheless, the court added, the contract should remain the basic charter of labor relations. Within this framework, an arbitrator might consider any new circumstances "in achieving a just and equitable settlement of the grievance at hand."[25]

The court in *Wachenhut* went further and viewed *Wiley* as holding that with a substantial continuity of identity in the business enterprise, "a collective bargaining agreement containing an arbitration provision, entered into by the predecessor employer is binding upon the successor employer."[26]

Although *Wiley* did not so hold, it can be the basis for such a result. The better approach, however, is that taken by *Reliance*, which gives the arbitrator discretion to reach an equitable solution, using the prior collective bargaining agreement only as a guideline.

B. Obligations Imposed on the Employee

While the courts have been developing the doctrine of compulsory arbitration under section 301, they have increasingly recognized the individual worker's rights under the collective bargaining contract.[1] The two areas, however, are not mutually exclusive. Employee rights are bound to clash at

[25] United Steelworkers v. Reliance Universal, Inc., supra note 15, at 895.

[26] Wachenhut Corp. v. International Union, United Plant Guard Workers, supra note 16, at 958. In doing so, the court recognized that it had alternative grounds upon which to base its opinion; i.e., it could have required arbitration on the grounds of novation and estoppel. The trial court had found that, subsequent to the sale, the successor agreed to fulfill its predecessor's obligations under the collective bargaining contract. Id. at 958.

[1] The increasing volume of articles on this subject illustrates this concern, e.g., Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 730 (1950); Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957); Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631 (1959); Hanslowe, Individual Rights in Collective Labor Relations, 45 Cornell L.Q. 25 (1959); Aaron, Some Aspects of the Union's Duty of Fair Representation, 22 Ohio St. L.J. 39 (1961); Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U.L. Rev. 362 (1962); Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532 (1962); Kovarsky, Unfair Labor Practices, Individual Rights and Section 301, 16 Vand. L. Rev. 595 (1963); Summers, Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law, 72 Yale L.J. 421 (1963); Rosen, Individual Worker in Grievance Arbitration: Still Another Look at the Problem, 24 Md. L. Rev. 233 (1964).

some point with the arbitration rights of the union and management. This clash finally occurred in *Republic Steel Corp. v. Maddox*,[2] with the union and management winning the first round.

To understand the *Maddox* decision, it is necessary to review briefly the evolution of employee rights under section 301. The starting point is *Smith v. Evening News Ass'n*,[3] which overruled *Employees v. Westinghouse Corp.*[4] as "no longer authoritative as a precedent."[5] Having decided in *Westinghouse* that section 301 did not grant jurisdiction to hear individual complaints of contract breaches, the Supreme Court reversed itself in *Evening News*, holding that such jurisdiction existed, regardless of whether the contract rights were those of management, of union, or of an individual employee.[6] Still, the court held open the question of which breaches of contract are actionable by an employee, declaring:

> we need not consider the question of federal law of whether petitioner, under this contract, has standing to sue for breach of the no-discrimination clause nor do we deal with the standing of other employees to sue upon other clauses in other contracts.[7]

The Court partially answered this question the following year in *Humphrey v. Moore*.[8] Moore sought, in a state court, to enjoin implementation of a joint grievance committee's decision to dovetail the seniority list of his company with that of another company leaving the area. He alleged that the committee decision, which would result in loss of his job, breached the collective bargaining contract between his union and employer, because the committee exceeded its authority in making the decision and because the union dishonestly influenced the decision in violation of its duty of fair representation.

In denying relief, the Supreme Court unanimously held that Moore had failed to prove his case on the merits. All the Justices agreed that the committee had not exceeded its authority and that the union had not breached its duty of fair representation. But the Court split sharply on the jurisdictional issue whether under these circumstances an employee could bring a breach of contract action under section 301.

A majority of five Justices summarily disposed of this issue by refusing to discuss it and proceeding directly to the merits. Mr. Justice White, writing for the majority, stated: "if we *assume* with Moore and the Courts below that . . . [the committee's] interpretation of the section is open to court review, Moore's cause is not measurably advanced."[9] (Emphasis supplied.)

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[2] 379 U.S. 650 (1965).

[3] 371 U.S. 195 (1962), noted, 4 B.C. Ind. & Com. L. Rev. 766 (1963).

[4] 348 U.S. 437 (1955).

[5] Smith v. Evening News Ass'n, supra note 3, at 199.

[6] Id. at 200. That elements of unfair labor practices were present which would ordinarily be within the exclusive jurisdiction of the NLRB was irrelevant. Id. at 197.

[7] Id. at 200, 201 n.9.

[8] 375 U.S. 335 (1964), noted 5 B.C. Ind. & Com. L. Rev. 848 (1964).

[9] Id. at 345. Mr. Justice Harlan, in agreeing with the majority, directly treated the issue. He argued that when the union is charged with departing from the collective

Mr. Justice Goldberg, on the other hand, speaking for a minority of three, strongly disagreed that Moore had stated a cause of action arising under section 301. Rather, "Moore's claim must be treated as an individual employee's action for a union's breach of its duty of fair representation—a duty derived not from the collective bargaining contract but from the National Labor Relations Act. . . ."[10] Mr. Justice Goldberg also thought that a dissenting employee could not challenge a mutually acceptable grievance settlement between an employer and a union, even if the settlement interpreted or amended the contract.[11]

Nevertheless, the majority in *Moore* permitted an individual employee to sue under section 301. He, however, had first exhausted the grievance procedure. What would have happened if he had ignored the grievance machinery entirely, and proceeded on his own to sue the employer under section 301? Would the Court still have recognized the employee's suit?

Smith v. Evening News suggested that it would not. There, the employee sued for wages lost when the company allegedly violated the non-discrimination clause of the contract. The Court noted initially that "there was no grievance arbitration procedure in this contract which had to be exhausted before recourse could be had to the courts. Compare *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238; *Drake Bakeries, Inc. v. Local 50, American Bakery Workers*, 370 U.S. 254."[12] It is doubtful that the Court would have mentioned the absence of contractual provision for exhaustion of grievance procedures, had it not considered the availability and use of such procedures determinative of the question of individual procedural standing under section 301, at least where the parties designated the grievance machinery the exclusive means of redress. Further, the Court's citation of *Sinclair Refining* and *Drake Bakeries* indicated that it would, in a proper case, hold an employee precluded from maintaining a suit under section 301 until he has exhausted his internal remedies, whether or not the contract provides for the grievance machinery as the exclusive mode of redress for employee grievances.[13]

The Court so held this year in *Republic Steel Corp. v. Maddox*. Maddox, who lost his job when the employer closed down one of its mines, ignored the contract grievance procedure and brought a state court suit against the employer for severance pay allegedly due him under the terms of the collective bargaining agreement. The Court held:

> federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance

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bargaining agreement, "I can see no reason why an individually affected employee may not step into the shoes of the union and maintain a § 301 suit himself." Id. at 359.

[10] Id. at 351. Mr. Justice Goldberg stated: "I read the decisions of this Court to hold that an individual employee has a right to a remedy against a union breaching its duty of fair representation. . . ." Id. at 355-56.

[11] Id. at 353.

[12] Smith v. Evening News Ass'n, supra note 3, at 196 n.1.

[13] *Drake* and *Sinclair* held that where the employer and union intend a subject to be appropriate for arbitration, they must exhaust the arbitration procedure before bringing a section 301 suit.

procedure agreed upon by employer and union as the mode of redress. [Emphasis in original.]

. . .

[But this] rule would not of course preclude Maddox' court suit if the parties to the collective bargaining agreement *expressly agreed that arbitration was not the exclusive remedy.*[14] (Emphasis supplied.)

The holding in *Maddox* is analogous to the Court's arbitration doctrine that, apart from matters that the parties specifically exclude, all questions on which the parties disagree must come within the scope of the contractual grievance arbitration procedure. It also comports with the obligation, under *Drake Bakeries* and *Sinclair Refining*, of the employer and union to exhaust internal remedies before maintaining a section 301 suit. *Maddox*, then, places an aggrieved employee in the same position, for purposes of procedural standing, as an aggrieved employer or union.

The Court's strivings towards legal symmetry under section 301 appear in this case to contravene the proviso to section 9(a) of the act.[15] Read literally, this proviso indicates that the employee has the right to present his grievance individually to the employer without interference from the union.[16] The legislative history of the proviso, moreover, supports this strict interpretation.[17]

The Court, however, thought that requiring the employee to attempt to use the grievance procedure was not contrary to the section 9(a) proviso.

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[14] Supra note 2, at 652, 657-58.

[15] LMRA § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958), states:

Representatives . . . selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have *such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment. (Emphasis supplied.)

[16] This is so, unless the word "adjustment," as used in section 9(a), refers to the whole procedure that the employee goes through, rather than to the results of the negotiations with the employer. The latter interpretation is the more probable.

[17] The congressional reports and debates reveal an intent to allow the individual employee to present his grievance directly to the employer. S. Rep. No. 105, 80th Cong., 1st Sess. 24 (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess. 7, 34 (1947); H.R. Rep. No. 510, 80th Cong., 1st Sess. 47 (1947); 93 Cong. Rec. 3624-25, 4904 (1947).

Congress' fear that Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945), decided under the Wagner Act, had denied the employee direct access to the employer lends further support to a literal interpretation of the proviso. Moreover, Congress was aware of the Supreme Court's decision on the Railway Labor Act in Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711 (1945), aff'd on rehearing, 327 U.S. 661 (1946), where the union was denied the right to settle the grievances of a group of employees without their authorization.

Its only reason for this view was a citation to *Black-Clawson Co. v. International Ass'n of Machinists.*[18]

In *Black-Clawson,* a discharged employee, who had completed the preliminary steps of the grievance procedure, demanded that the employer submit to arbitration. The Court of Appeals for the Second Circuit held that the collective bargaining agreement (typical in language and structure of many such agreements) gave the employee no right to compel arbitration.[19] Not content to stop here, the court proceeded to discuss the right of grievance. It reasoned that

> despite Congress' use of the word "right" [in the section 9(a) proviso] . . . we are convinced that the proviso was designed merely to confer upon the employee the privilege to approach his employer on personal grievances when his union reacts with hostility or apathy.[20]

It pointed out that the proviso was meant to be a buffer between the employee and his union, so that the employer *may* hear the individual's grievances without running afoul of section 9(a), which makes the union the exclusive bargaining agent.[21]

Accordingly, the employee does not have the *right* to present his own grievance to the employer. He may have that privilege, if the union and employer "deem it consonant with the efficient handling of labor disputes to repose power in the individual employee . . . [and they incorporate] such a provision in clear language in the collective bargaining agreement."[22]

In *Maddox,* the Supreme Court appears to have ratified *Black-Clawson* and extended its reasoning to the situation where the individual worker attempts to completely by-pass the grievance machinery and sue on the contract. The Court's logic is unassailable. Grant the premise that the individual worker has no unqualified right to press his own grievance against the employer and no personal standing to invoke the contract grievance machinery, including arbitration, then it follows that he cannot, without at least attempting to exhaust his internal remedies, sue the employer for a

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[18] 313 F.2d 179 (2d Cir. 1962).

[19] Id. at 184. The court continued: ". . . this conclusion must be reached by applying federal law and by resorting to reasoned state precedent for guidance." Ibid.

[20] Id. at 185. Note that it has also been ruled that the act does not make it an unfair labor practice for the employer to refuse to entertain grievances from individual employees. Adm. Ruling, Gen. Counsel, Case No. 317 (1952), 30 L.R.R.M. 1103.

[21] The court added a policy reason to its decision when it argued that: "Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure. . . ." Supra note 18, at 186.

[22] Ibid. It has been assumed in the above discussion that an individual's seeking "arbitration" of his grievance is no different from his merely presenting his grievance to the employer for redress. This assumption is based on the concept of arbitration, as evolved in labor law (see preceding section), and on the Supreme Court's decision in United Steel Workers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960), where the Court held that, apart from matters which the parties specifically exclude, all questions on which the parties disagree must come within the scope of the grievance and arbitration procedure of the collective bargaining contract.

breach of contract on a claim that falls within the contract grievance procedure. The only quarrel one might have with the Court's treatment of the problem in *Maddox* is that it gives short shrift to the problem of employee rights under collective bargaining agreements and Congress' attempt to deal with this problem in the proviso to section 9(a). The meaning and proper scope of this proviso, one would have thought, was far from settled.[23] Yet, considering the facts in *Maddox*—a suit for severance pay after the employee had been permanently discharged—a full appreciation of what the Court has done emerges: every conceivable contractual claim that an employee may have against his employer is swept into the contract grievance procedure unless the contract expressly provides otherwise. Absent apathetic or hostile treatment at the hands of his union, the employee is remitted to his internal remedies and turned away from the courts.

The reason for the decision in *Maddox* is familiar: the promotion of harmonious and stable industrial relations by means of collective bargaining. True, Maddox was no longer an active citizen of the industrial community governed by the collective bargaining agreement, but "it does not follow that the resolution of his claim can have no effect on future relations between the employer and other employees."[24] A contrary rule, the Court reasoned,

> would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."[25]

While the majority of the Court was obviously more concerned with the rights of the union and employer, Mr. Justice Black, the sole dissenter, argued that the individual employee was being denied his day in court. He did not think that the severance claim was a "grievance."[26] Even assuming

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[23] For an excellent discussion of section 9(a), see Comment, Federal Protection of Individual Rights Under Labor Contracts, 73 Yale L.J. 1215 (1964).

[24] Republic Steel Corp. v. Maddox, supra note 2, at 656. The Court added that even if the claim arose out of the plant's permanently shutting down, "the inability of the union and employer at the contract negotiation stage to agree upon arbitration as the exclusive method of handling permanent shutdown severance claims in all situations could have an inhibiting effect on reaching an agreement." Ibid. The Court also pointed out that the union's status as exclusive bargaining representative is enhanced by allowing it to participate actively in the continuing administration of the contract, and that its prestige with the employees will increase if it handles grievance claims conscientiously. At the same time, the employer's best interests are served by limiting the choice of remedies available to aggrieved employees. Id. at 653.

[25] Id. at 653.

[26] Although "grievance" is a word that has many meanings in many contexts, the collective bargaining contract will usually define it and provide how a grievance is to be processed under the grievance procedure. Mr. Justice Black failed to note this, although he did quote the contract, part of which read: "Any Employee who has a complaint may discuss the alleged complaint with his Foreman in an attempt to settle it. Any complaint not so settled shall constitute a grievance within the meaning of this Section, 'Adjustment of Grievances.'" Id. at 660-61 n.2.

that it was a grievance, to say that the employee freely chose the grievance machinery as the mode of settling his contractual claims would be a "transparent and cruel fiction." Further, even if the employee had agreed to such a procedure, it should not be enforced against him.[27] Finally, Mr. Justice Black felt that requiring the employee to submit his claim to the grievance procedure would not promote industrial peace.[28]

Under the exclusive remedy doctrine, the employee is not deprived of all his rights. If the union wrongfully refuses to press his claim or only goes through the motions of the grievance procedure, the individual has available at least two forms of redress. He may sue the employer and his union under section 301, alleging a breach of contract.[29] Or he may cause an unfair labor practice charge to be brought against the union for a breach of its duty of fair representation.[30]

C. Obligations Imposed on the Union

Concurrent with the expansion of the employer's obligation to arbitrate and the employee's obligation to follow the established grievance procedure is the increasing responsibility of the union not to strike over a grievance dispute. A recent case guaranteeing that the union will meet its contract obligation not to strike is *American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs.*[1] In a 2 to 1 decision, the Third Circuit held, *inter alia*, that the employer could bring a state court action to enjoin, under state law, the union's violation of a no-strike provision of the collective bargaining contract.

The court's decision represents an attempt to give the employer his due. In 1957, *Textile Workers v. Lincoln Mills* declared that the employer's agreement to arbitrate grievance disputes was the *quid pro quo* for the union's agreement not to strike.[2] In *Lincoln Mills*, the Supreme Court held that a union could specifically enforce the employer's agreement to arbitrate. It also implied that the employer could specifically enforce the union's promise not to strike, *i.e.*, that he could obtain an injunction against a union that violated the no-strike provision of the contract.[3]

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[27] Id. at 665. At this point, Mr. Justice Black drew an analogy to the inability of an insurance company to enforce a contract made with its insured to arbitrate all disputes which might arise in the future. He cited Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386 (1868).

[28] Id. at 666.

[29] Humphrey v. Moore, supra note 8.

[30] See the discussion of the union's duty of fair representation, as developed by the Board in Miranda Fuel, 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962), and Hughes Tool, 147 N.L.R.B. No. 166, 56 L.R.R.M. 1289 (1964). Infra p. 890.

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[1] 338 F.2d 837 (3d Cir. 1964), cert. denied, 33 U.S.L. Week 3296 (U.S. March 8, 1965). For an extensive discussion of this case, see Note, 6 B.C. Ind. & Com. L. Rev. 957 (1965).

[2] 353 U.S. 448, 455 (1957).

[3] Ibid. The Court said:

> [T]he [section 301] legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses as federal policy that federal courts *should enforce* these agreements on behalf of *or against labor organizations* and that industrial peace can be best obtained only in that way. (Emphasis supplied.)

In 1960, the Supreme Court, in the *Steelworkers* trilogy,[4] reaffirmed its *quid pro quo* doctrine. But, by expanding the employer's obligation to arbitrate, the Court disturbed the balance.[5] The balance was restored in 1962 in *Local 174, Teamsters Union v. Lucas Flour Co.* There, the Supreme Court held, in effect, that it is not necessary to have an express contractual prohibition of the right to strike. A no-strike provision will be implied as the necessary equivalent to an agreement to arbitrate.[6]

This equilibrium was short-lived, however: in *Sinclair Ref. Co. v. Atkinson*, decided three months later, the Supreme Court held that an employer, who sued in a federal court to enforce a no-strike provision of a collective bargaining agreement, was barred from obtaining an injunction by Section 4 of the Norris-LaGuardia Act.[7] Left unanswered, as Mr. Justice Brennan pointed out, writing for the three dissenting Justices, was the question whether the prohibition against injunctive relief should be carried over to state courts as a part of the federal law governing collective bargaining contracts.[8]

Mr. Justice Brennan explained that in attempting to answer this question, the Court would be caught on the horns of a dilemma. If the Norris-LaGuardia Act's prohibition of injunctive relief were carried over to the state courts, section 301 would have an effect opposite to that intended. Section 301 was "plainly designed to *enhance* the responsibility of unions to their contracts, [but it] will have had the opposite effect of depriving employers of a state remedy they enjoyed prior to its enactment."[9] On the other hand, if state courts remained free to grant injunctions under the above circumstances,

> the development of a uniform body of federal contract law is in for hard times. . . . Ironically, state rather than federal courts will be the preferred instruments to protect the integrity of the arbitration process, which *Lincoln Mills* and the *Steelworkers* decisions forged into a kingpin of federal labor policy. Enunciation of uniform doctrines applicable in such cases will be severely impeded. Moreover, the type of relief available in a particular instance will turn on fortuities of locale and susceptibility to process—depending upon which States have anti-injunctive statutes and how they construe them.[10]

The obvious solution of this dilemma is congressional amendment to

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[4] United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[5] See the preceding section on "Obligations Imposed on the Employer."

[6] 369 U.S. 95, 105 (1962). The Court said: "a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement." See Mr. Justice Black's dissent, id. at 110.

[7] 370 U.S. 195, 203 (1962).

[8] Id. at 226.

[9] Ibid. (Emphasis in original.)

[10] Id. at 226-27.

the Norris-LaGuardia Act, permitting federal courts to enjoin breaches of the union's no-strike agreement. But the likelihood of such amendment in the near future is slight. Besides the difficulty of getting a majority of Congressmen to agree what the amendment should do, Congress would be justifiably chary of tampering in any way with the body of law that the Supreme Court has built up.

A less desirable, but more realistic, solution is to decide a policy as between the two alternatives. Should the employer be returned part of his *quid pro quo* by allowing a state court to grant an injunction against a union's violation of its no-strike promise? Or, should the states be prohibited from enjoining, in order to prevent forum-shopping and to preserve the uniform character of the national labor law?

In choosing the first alternative, the Third Circuit, in *American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs*, held that an employer's state court action to enjoin a breach of a no-strike provision of a collective bargaining contract was not removable to the federal district court. The district court had accepted removal from a Pennsylvania court, and had refused to remand on the ground that it had original jurisdiction under section 301.[11] Thereafter, the district court refused injunctive relief to the employer on the ground that Section 4 of the Norris-LaGuardia Act[12] de-

[11] Section 1441 of the removal statute allows removal of a civil action of which a federal district court has original jurisdiction under a law of the United States. 28 U.S.C. § 1441 (1958) reads as follows:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States of the district and division embracing the place where such action is pending.
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> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
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> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

[12] Section 4 of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958), reads as follows:

> *No court of the United States shall have jurisdiction to issue* any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
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> . . .
>
> (i) Advising, urging, or otherwise causing or inducing *without fraud or violence* the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act. (Emphasis supplied.)

prived it of the power. But the district court did not think that the act divested it of general jurisdiction.

On appeal, the Third Circuit gave section 4 a more literal reading.[13] It interpreted the term "jurisdiction" in the Norris-LaGuardia Act to mean authority to entertain the suit, rather than power to grant equitable relief.[14] It therefore concluded that the case should have been remanded to the Pennsylvania court since the only relief sought by the employer's amended complaint was an injunction.[15]

This conclusion is hard to reconcile with Professor Chafee's argument that, since the Norris-LaGuardia Act does permit the issuance of injunctions under certain circumstances,[16] the court must have jurisdiction in order to determine whether those circumstances are present.[17] The majority of courts, however, hold that removal to the federal courts should be denied because "jurisdiction" means authority to take cognizance of the suit.[18]

Even if the district court were not deprived of jurisdiction by the Norris-LaGuardia Act, the Third Circuit had another reason for denying removal. The court argued that *American Dredging* did not arise under federal law, but was brought to enforce a state created right, and to obtain a state remedy. Therefore, it was not removable.[19] The dissenting judge contended, however, that a suit of this type must necessarily arise under federal law, because section 301 has superseded state law, and is the "exclusive determinant of rights such as are asserted here between labor and management under a collective bargaining contract in an industry affecting commerce."[20]

On this point the dissent is clearly right. The Supreme Court in *Local 174, Teamsters Union v. Lucas Flour Co.* held that "suits of a kind covered by section 301" are to be decided by federal labor law, because the subject

[13] Mr. Justice Brennan in Sinclair Ref. Co. v. Atkinson, supra note 7, at 227, suggested that this literal reading was possible. He recognized that removal might be a method of avoiding state injunctions, but he pointed out that it would not be allowed if section 4 was read literally.

[14] The court cited several Supreme Court cases for its proposition that jurisdiction is the power to take cognizance of a suit and render a binding decision. American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs, supra note 1, at 840-42.

[15] Before the employer amended his complaint he had asked for "such other relief as the Court may deem appropriate." This would have been sufficient by itself to give the district court jurisdiction, apart from any consideration of the Norris-LaGuardia Act. It is therefore essential for the employer to sue only for injunctive relief, so that the case will not be removed to the federal court.

[16] See the italicized part of section 4 (i), quoted, supra note 12. Section 7, 47 Stat. 71 (1932), 29 U.S.C. § 107 (1958), also permits the issuance of injunctions under certain circumstances.

[17] Chafee, Some Problems of Equity 373 (1950).

[18] Direct Transit Lines, Inc. v. Starr, 219 F.2d 699 (6th Cir. 1955); National Dairy Prods. Corp. v. Heffernan, 195 F. Supp. 153 (E.D.N.Y. 1961); Swift & Co. v. United Packinghouse Workers, 177 F. Supp. 511 (D. Colo. 1959); contra, Direct Transit Lines, Inc. v. Local 406, Int'l Bhd. of Teamsters, 199 F.2d 89 (6th Cir. 1952).

[19] American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs, supra note 1, at 842.

[20] Id. at 857.

matter covered by section 301 requires uniform law.[21] The Court thereby extended the holding of *Charles Dowd Box Co. v. Courtney*, which had held that, since section 301 provides that suits "may" be brought in federal courts, there is concurrent jurisdiction in the state and federal courts.[22] In *Dowd Box* there was no contention that the state law differed from the federal, and therefore the question of which contract law the state court should apply—state or federal—was left unanswered. *Lucas Flour* supplied the answer by giving priority to the concept of uniformity. Thereafter in suits for violation of a contract between employer and union (which are "suits of a kind covered by section 301"), state courts would have to interpret and apply federal law.

The Third Circuit assigned a third and final alternative ground for its decision in *American Dredging*. The court argued that if it permitted removal to the federal court, the employer would be deprived of the injunctive relief available in the state court.[23] This assumes, of course, that the state would regard the Norris-LaGuardia Act as not part of the federal labor policy which has been fashioned since *Lincoln Mills*, and which must be applied to suits under section 301.

On this point, the Third Circuit reasoned extensively that the Norris-LaGuardia Act is not part of the federal labor policy. Its principal argument was that, since Congress intended that the act apply only to the federal courts, it would be an act of judicial legislation to hold that the state must apply Norris-LaGuardia when it enforces federal labor policy. The court then discussed the decisions which have held that Section 4 of the Norris-LaGuardia Act does not extend to the states.[24] It concluded that, in any event, "the question of limitation of state court jurisdiction here is appropriately one for the decision of the Pennsylvania court and can be presented and determined there, subject, of course, to the ultimate reviewing power of the Supreme Court of the United States."[25]

Opposed to the Third Circuit's decision is *Independent Oil Workers v. Socony Mobil Oil Co.*, where the New Jersey Superior Court held that it had concurrent jurisdiction of section 301 suits, but that the Norris-LaGuardia Act was part of the federal labor policy.[26] The better result, however, appears to have been reached by the court in *American Dredging*. The Third Circuit's argument that the Norris-LaGuardia Act is not part of the federal labor policy, but is instead a jurisdictional statute, denying the federal courts any right to take cognizance of suits for injunctive relief, is plausible. Further-

[21] Supra note 6, at 103.

[22] 368 U.S. 502, 506-08 (1962).

[23] Supra note 1, at 846-48.

[24] Id. at 853. The court listed as "post-Sinclair" cases Curtis v. Tozer, 374 S.W.2d 557 (Mo. Ct. App. 1964); C. D. Perry & Sons, Inc. v. Robilotto, 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1963). Several "pre-Sinclair" cases listed were: McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal.2d. 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958); Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, 382 Pa. 326, 115 A.2d 733, cert. denied, 350 U.S. 843 (1955).

[25] American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs, supra note 1, at 856.

[26] 85 N.J. Super. 453, 205 A.2d 78 (1964).

more, on a question as close as this, policy considerations become decisive. By its decision, the Third Circuit adopted the policy of giving the employer his side of the *quid pro quo* equation. In light of the importance attached to the equation by the Supreme Court cases, this choice over the alternative of a more uniform federal labor law is a reasonable one. In addition, the policy of uniformity will be damaged only with respect to the nature of relief that the court can decree.[27]

Of course, under section 301 federal courts may still award money damages for breach of collective bargaining contracts. Federal courts may also stay an employer's federal court action for money damages for breach of a no-strike clause when there is an arbitration clause binding both parties to the contract.[28] It may be argued that, under similar circumstances, an employer's suit for an injunction in a state court might also be stayed, pending arbitration.[29] Still, even if the federal court may not stay the state court action, and, because of *American Dredging*, cannot accept removal of the state court suit, the Third Circuit chose the better of the two alternatives.

It now appears, in light of the Supreme Court's denial of certiorari,[30] that the decision in *American Dredging* will be given careful consideration. Technically, denial of certiorari is "a decision only that the case is not an appropriate one for consideration on the merits, and imports no adjudication."[31] "It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion.' "[32] Nevertheless, *American Dredging* should help the federal and state courts decide what the best policy should be.[33] Unfortu-

[27] Twenty-three states have some sort of anti-injunction statutes: Ariz. Rev. Stat. Ann. § 12-1808 (1956); Conn. Gen. Stat. Rev. §§ 31-112 to -121 (1962); Idaho Code Ann. §§ 44-701 to -713 (1947); Ill. Rev. Stat. ch. 48, § 2a (1959); Ind. Ann. Stat. §§ 40-501 to -514 (1952); Kan. Gen. Stat. Ann. § 60-1104 (1949); La. Rev. Stat. §§ 23-841 to -49 (1950); Me. Rev. Stat. Ann. ch. 107, § 36 (1954); Md. Code Ann. art. 100, §§ 63-75 (1957); Mass. Gen. Laws Ann. ch. 214, § 9A (1955); Minn. Stat. § 185.10 (1957); Mont. Rev. Codes Ann. § 93-4203(8) (1947); N.J. Rev. Stat. § 2A: 15-51 to -58 (1951); N.Y. Civ. Prac. Act § 876-76a, superseded by N.Y. Lab. Law § 807-08 (Supp. 1963); N.D. Cert. Code § 34-08-05 (1943); Okla. Stat. tit. 40, § 166 (1951); Ore. Rev. Stat. §§ 662.080-.090 (1961); Pa. Stat. Ann. tit. 43, § 206 (1952); R.I. Gen. Laws Ann. § 28-10-2 (1956); Utah Code Ann. §§ 34-1-28 to -34 (1953); Wash. Rev. Code §§ 49.32.010-.910 (1961); Wis. Stat. § 133.07 (1959); Wyo. Stat. Ann. §§ 27-239 to -245 (1957). Of these, only thirteen can properly be called "little Norris-LaGuardia acts." These are: Conn., Idaho, La., Md., Mass., Minn., N.J., N.Y., Ore., Pa., Wash., Wis., Wyo. Note that, even under a state's "little Norris-LaGuardia act," arbitrators may have the power to include injunctions in their awards, and the courts may have to enforce them. Ruppert v. Egelhofer, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958). New Orleans S.S. Ass'n v. General Longshore Workers, 49 L.R.R.M. 2941 (1962).

[28] Drake Bakeries, Inc. v. Local 50, American Bakery Workers, 370 U.S. 254 (1962).

[29] Aaron, Strikes in Breach of Collective Agreements: Some Unanswered Questions, 63 Colum. L. Rev. 1027, 1038-39 (1963).

[30] American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs, supra note 1.

[31] Hart and Wechsler, The Federal Courts and the Federal System 61 (1953).

[32] Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917 (1950).

[33] Subsequent to the *American Dredging* decision, the Pennsylvania Supreme Court decided that Norris-LaGuardia's prohibition of labor injunctions did not extend to state court suits for breaches of collective bargaining agreements. Shaw Elec. Co. v. IBEW,

nately, this choice must be made until there is either Supreme Court action, or a congressional amendment allowing federal and state courts to issue injunctive relief in section 301 cases.

REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITIES

A. Union's Right to Equal Time for Pre-Election Speech to Employees

Although coercive tactics, generally, have their place in labor-management relations, they are inappropriate under the rules governing the conduct of representation elections. These rules rest on the proposition that the electorate should have the fullest possible opportunity to make a rational choice on the merits. Consequently, equality of opportunity to communicate information to the employees is an important prerequisite for a valid election.

The latest development in election rules is the Sixth Circuit's decision in *Montgomery Ward & Co. v. NLRB*.[1] By enforcing the Board's order,[2] the court ruled that under certain circumstances the union has a right to equal time to respond to the employer's speech on the employer's premises during working hours.

The decision necessarily involved a balancing of the employees' right to organize[3] with the employer's right of free speech.[4] Earlier cases had held that the employer's right of free speech was not qualified by an obligation to give the union equal time. *Livingston Shirt Corp.* enunciated the Board rule that, absent either an unlawful broad no-solicitation rule or a privileged broad no-solicitation rule, "an employer does not commit an unfair labor

Local 98, 208 A.2d 769 (Pa. 1965). Accord, Radio Corp. of America v. Local 780, Int'l Theatrical Stage Employees, 160 So. 2d 150 (Fla. Dist. Ct. App. 1964), cert. denied, 33 U.S.L. Week 3347 (U.S. Apr. 26, 1965).

[1] 339 F.2d 889 (1965).

[2] Montgomery Ward & Co., 145 N.L.R.B. 846, 55 L.R.R.M. 1063 (1964).

[3] LMRA § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958), which reads in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

LMRA § 8(a), 61 Stat. 140 (1947), 29 U.S.C. § 158(a) (1958), which reads in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . .

[4] The constitutional protection of free speech in representation campaigns was recognized in NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941). But the limit of this first amendment right is reached when coercion is present. Thomas v. Collins, 323 U.S. 516, 537-38 (1945).

The statutory right of free speech was enunciated by Congress in LMRA § 8(c), 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1958), which states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

practice if he makes a pre-election speech on company time and premises to his employees and denies the union's request for an opportunity to reply. . . ."[5] The Board in *Livingston Shirt* asserted that the parties' right to equality of opportunity includes the lawful use of the customary media available to each. The employer's premises are his natural forum, just as the union hall is the usual place for the union to address its members.

It should be noted that the employer's speech in *Livingston Shirt* was noncoercive, and that his no-solicitation rule against activities for or against a union during working time would be valid today.[6] The current Board rules are summarized as follows:

An employer may forbid—

(1) the *distribution* of union literature by employees in working areas during both working and non-working time;
(2) union *solicitation* during working time in any part of the plant.

But an employer may not forbid—

(1) employee *distribution* of union literature in non-working areas during non-working time;
(2) union *solicitation* by employees on their own time, even in working areas.

These tests merely determine presumptive validity or invalidity. A presumptively valid rule may become invalid if it is applied in a discriminatory manner; a presumptively invalid rule may be proper if the employer can cite special, justifying circumstances (*e.g.*, a retail store where the employees are in almost constant contact with the public). See *Stoddard-Quirk Mfg. Co.*[7]

In determining whether the union should have equal time, what happens if an employer not only applies his valid no-solicitation rule in a discriminatory manner (which is legal in light of *Livingston Shirt*), but also makes coercive speeches against the union? Five years after *Livingston Shirt*, the Supreme Court, in the *Nutone* case,[8] held that an employer might enforce

[5] 107 N.L.R.B. 400, 409, 33 L.R.R.M. 1156, 1159 (1953). By its holding, the Board overruled the doctrine of Bonwit Teller, Inc., 96 N.L.R.B. 608, 28 L.R.R.M. 1547 (1951), enforcement denied, 197 F.2d 640 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953), that an employer who made a privileged speech was guilty of an unfair labor practice if he denied a request by the union to reply on the employer's time and property.

[6] However, enforcement of a no-solicitation rule against employee activity *outside of working hours*, although on company property, would be an unfair labor practice. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), which upheld the Board's decisions in Republic Aviation Corp., 51 N.L.R.B. 1186, 12 L.R.R.M. 320 (1943), and Le Tourneau Co., 54 N.L.R.B. 1253, 13 L.R.R.M. 227 (1944). NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), distinguished a similar *no-distribution rule* against *non-employees*. It held that an employer may protect his

> property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.

Id. at 112.

[7] 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962). NLRB v. United Aircraft Corp., 324 F.2d 128 (2d Cir. 1963), cert. denied, 376 U.S. 951 (1964), upheld the Board rule preventing an employer from prohibiting his employees from distributing union literature on company property during non-working hours.

[8] NLRB v. United Steelworkers, 357 U.S. 357 (1958).

his valid no-solicitation rule against his employees, and at the same time engage in coercive anti-union solicitation without giving the union equal time. The critical issue, as the majority saw it, was whether, under the circumstances, "the employer's conduct to any considerable degree created an imbalance in the opportunities for organizational communication."[9]

Mr. Justice Frankfurter, speaking for a majority of six Justices, refused to take the mechanical approach advanced by Mr. Chief Justice Warren's dissent, that a valid no-solicitation rule coupled with the employer's coercive anti-union solicitation should by itself entitle the union to equal time. Mr. Justice Frankfurter's rejection of a per se approach extended even to the case where other unfair labor practices accompanied the employer's coercive solicitation. In fact,

> No such mechanical answers will avail for the solution of this non-mechanical, complex problem in labor-management relations. If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these "otherwise valid" rules.[10]

But the decision in *Nutone* is not so conclusive as might first appear. Mr. Justice Frankfurter pointed out that the record did not indicate that the employees, or the union on their behalf, requested the employer to make an exception to the no-solicitation rule in order to allow pro-union solicitation. Furthermore, no attempt was made to show that the no-solicitation rules truly diminished the ability of the union to carry its message to the employees.[11]

In *Montgomery Ward*[12] the union did request the employer to allow an exception to his no-solicitation rule in order to reply to his coercive speeches. And both the Board[13] and the Sixth Circuit agreed that the employer should have honored the request. Most important was the employer's extension of its privileged broad no-solicitation rule to prohibit all union solicitation by employees on company property. This was illegal, and, coupled with the

[9] Id. at 362.

[10] Id. at 364. On the other hand Mr. Chief Justice Warren argued that:
the validity of both practices—the enforcement of the no-solicitation rule and the coercive antiunion solicitation—comes into question, for they are not separable. . . . Employees during working hours are the classic captive audience. . . . It is not necessary to suggest that in all circumstances a union must have the same facilities and opportunity to solicit employees as the employer has in opposing the union. However, the plant premises and working time are such decisive factors during a labor dispute that when an employer denies them to the union and at the same time pursues his own program of coercion on the premises and during working hours, this denial is by itself an interference with the rights guaranteed in Section 7 of the Act and hence contrary to Section 8(a)(1).
Id. at 368-69.

[11] Id. at 362.

[12] Montgomery Ward & Co. v. NLRB, supra note 1.

[13] Montgomery Ward & Co., supra note 2.

employer's coercive anti-union speeches, it *"created a glaring imbalance in organizational communication."*[14]

The Board had found this "glaring imbalance" in *May Department Stores*, an earlier case,[15] but the same Sixth Circuit (different judges presiding) had held that it did not exist.[16] The factors that distinguish *May Department Stores* from *Montgomery Ward* appear to be the absence of coercion in the employer's speeches and the validity of the broad no-solicitation rule.

Whether the employer must give the union equal time, when either of the above factors are missing, has not yet been decided.[17] Also not decided is whether the equal time rule applies outside of the retail store context where the special needs of the employers justify a broad no-solicitation rule.[18] Answers to these questions will be slow in coming in light of the case-by-case approach favored by the courts.[19] In the meantime, it is worth remembering that the objective of the Board's campaign rules is to afford the employer and union equality of opportunity for organizational communication to the employees, and that, generally, the legality of employer conduct with respect to enforcement of no-solicitation rules depends on whether or not this conduct tends to deprive the union of its opportunity to present its case.

B. No-Solicitation and No-Distribution Agreement between Employer and Union

Although the employer's unilateral no-solicitation, no-distribution limitation on employee activity during non-working time and in non-working areas is presumptively invalid,[1] the employer has been allowed to accomplish the same result by persuading the union to include the limitation in a collective bargaining contract.

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14 Id. at 849, 55 L.R.R.M. at 1064.

15 May Department Stores Co., 136 N.L.R.B. 797, 49 L.R.R.M. 1862 (1962).

16 May Department Stores Co. v. NLRB, 316 F.2d 797 (6th Cir. 1963).

17 For example: when the employer does not use coercion in his anti-union speeches, but does have an invalid broad no-solicitation rule; or when he uses coercive speeches, but his broad no-solicitation rule is valid.

18 It should be noted that the Regional Attorney of the 9th Region, located in Cincinnati, Ohio, has issued a complaint against an industrial employer for his failure to allow the union equal time, even though he had no privileged broad no-solicitation rule. This charge, against Wald Mfg. Co., was heard on May 25, 1965.

19 One writer has suggested that a happy medium between the automatic rules of the Board (often crude and arbitrary) and the case-by-case approach of the courts (that gives no clear guidance) would be to allow the union equal time whenever the employer speaks to employees during the last week before an election, and the unit involved is sizable, i.e., more than 50 to 75 employees. Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 102 (1964).

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1 Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), wherein Peyton Packing Co., 49 N.L.R.B. 828, 12 L.R.R.M. 183, modified, 50 N.L.R.B. 355 (1943), was cited with approval, and the Board's decision in Republic Aviation Corp., 51 N.L.R.B. 1186, 12 L.R.R.M. 320 (1943) was upheld. The rule was further refined by the Board in Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962), and upheld in NLRB v. United Aircraft Corp., 324 F.2d 128 (2d Cir. 1963), cert. denied, 376 U.S. 951 (1964).

The Seventh Circuit reached this result in *NLRB v. Gale Products*.[2] In reversing the Board, the court referred to dicta in *May Department Stores Co.*, where the Board said that contracts containing no-solicitation provisions "are the results of the mutual accommodation involved in Collective Bargaining . . . [and] the employees embraced by these contracts . . . have thereby effectively bargained away their right to engage in union solicitation on the respondent's premises."[3]

In adopting the *May* rationale, the court overlooked a possible change in the Board's position fifteen years later in *Wah Chang Corp.*[4] There, a panel of Members Rodgers, Jenkins, and Fanning, to whom the Board had delegated its powers, affirmed the Trial Examiner's report without discussion. The Trial Examiner had recommended that the Board find the employer guilty of violating sections 8(a)(1) and (2) for maintaining and giving effect to a contractual provision requiring the employees to receive permission from the incumbent union before engaging in solicitation on the employer's premises.

The Seventh Circuit also rejected the Board's position in the principal case. Here, for the first time, the Board had discussed in detail the rationale of its stand. It conceded that a contractual provision barring solicitation and distribution differed from a rule imposed unilaterally by the employer, and that the union might have won certain concessions as a result of its agreement to include the provision. But, in refusing to sanction enforcement of such a provision against rivals of the contracting union, the Board insisted that the "validity of a contractual waiver of employee rights must depend . . . upon whether the interference with the employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver."[5]

Under the circumstances in *Gale*, the Board held that the clause violated section 8(a)(1). It found that the contract clause went far in perpetuating the incumbent union by denying dissident employees an opportunity to express their opinions, and that it unduly infringed on "their basic rights under the Act."[6]

The two dissenting members of the Board, Chairman McCullough and Member Leedom, argued that the union's controverted exercise of its statutory right to bargain away employee rights was no more serious than "surrendering the right to strike, which the Board and the courts have recognized may lawfully be done."[7]

The Seventh Circuit adopted the Board dissent, and added a policy consideration. The court pointed out that the contractual provision waiving the employees' right to solicit union membership was "conducive to the stabilization of labor relations during the contract period and thus in harmony with a prime objective of the Act."[8] On the other hand, the dissenting judge

[2] 337 F.2d 390 (1964).
[3] 59 N.L.R.B. 976, 981 n.17, 15 L.R.R.M. 173, 174 (1944).
[4] 124 N.L.R.B. 1170, 44 L.R.R.M. 1615 (1959).
[5] Gale Prods., 142 N.L.R.B. 1246, 1249, 53 L.R.R.M. 1242, 1243 (1963).
[6] Ibid.
[7] Id. at 1251, 53 L.R.R.M. at 1244.
[8] N.L.R.B. v. Gale Prods., supra note 2, at 392.

argued that the purposes of the act would be frustrated by contractual provisions that tend to smother competitive union organizational activity. He also noted that the right of freedom to organize belongs to dissidents as well as to the bargaining agent.

This latter point was the genesis of controversy in *General Motors Corp.*,[9] which the Board handed down before the reversal of *Gale*. The Board, citing *Gale*, held that the employer and union violated section 8(a)(1) and 8(b)(1)(A), respectively, by maintaining a contract provision prohibiting employee distribution of union literature during non-working time and in non-work areas—insofar as it extended to employees who were members of labor organizations *other than the respondent union*. But the contracting union and its members were held bound by the agreement.

Member Jenkins, however, would not limit the allowance of employee distribution and solicitation to members of dissident unions. Rather, "such a contractual prohibition of organizational activity is also invalid to employees who are members or supporters of the contractory union."[10] He could see no logic in holding the contractual waiver effective with respect to organizational activity on behalf of the incumbent, while holding it ineffective as to activity on behalf of the rival. He concluded that "apart from the anomalous situation this holding in Gale creates, I think that holding, and the positions of the majority here, fail to give those 'basic rights' the recognition the Act commands."[11] Although Member Jenkins' stand appears more reasonable, the issue may be moot in light of the Seventh Circuit's reversal of *Gale*.[12]

While the Seventh Circuit in *Gale* is right in pointing out that one of the policies of the act is to stabilize industrial relations, the Board's rationale is preferable. A union should not be permitted to entrench itself by a contractual arrangement to which it is a party. It is irrelevant that such a clause may rarely in practice prevent a dissatisfied unit from casting aside a representative it no longer desires, or that the clause was entered into in good faith. It is enough that the effect of the clause *might* be to saddle a unit with a representative which no longer commands its confidence.

In addition, a union's waiver of the right to strike is not the same as a waiver of the employee's right to engage in on-the-premises organizational activity during non-working hours. If enough employees are dissatisfied with the union's waiver of their right to strike, they can immediately oust that union. But if the union bargains away the employees' rights to engage in on-the-premises organizational activity, and the employees subsequently do not like it, or

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[9] 147 N.L.R.B. No. 59, 56 L.R.R.M. 1241 (1964).

[10] Id., 56 L.R.R.M. at 1242.

[11] Ibid.

[12] There may be a conflict between circuit courts. Prior to the Seventh Circuit's decision in *Gale*, the Ninth Circuit collaterally handled the same issues in Wah Chang Corp. v. NLRB, 305 F.2d 15 (1962). The Board was denied enforcement of its order of reinstatement of the employees who had violated the employer-union contract rule. But the court found the rule valid, i.e., one that the Board allows an employer to make unilaterally. If the rule could not be made unilaterally by the employer, the court said that the contract provision to the same effect could not be held to limit either dissident employees or union employees.

do not like the union itself, the very clause which the employees dislike will hinder them in ridding themselves of it.

On the further question of whether the contractual waiver should be ineffective as to dissidents, but not to members of the incumbent union, Member Jenkin's position in *General Motors* seems more logical. If the employees' right to organize on the premises is so basic a right under the act as to allow a minority of employees who are members of dissident unions to ignore the contractual prohibition, then all the employees should be free to do so. The incumbent union, which was elected by a majority of the employees, might still best represent the workers. Its members should not be prevented from effectively fighting to retain it. If they are prevented, dissident groups are encouraged to breach the industrial peace which the Seventh Circuit in *Gale* recognized as so important.

C. Election of Remedies by Union

In *Bernel Foam Prods. Co.*,[1] the Board, declaring that the representation process is not a game and that the Board is not a detached observer, expressly overruled *Aiello Dairy Farms*,[2] which had stood for almost a decade.

The facts of *Bernel*, essentially the same as those in *Aiello*, are as follows: the union obtained authorization cards from a majority of the employees in the bargaining unit; the union requested the employer to recognize it as the exclusive bargaining representative; the employer refused; the union filed a representation petition with the Board; the employer committed unfair labor practices prior to the election; the union lost the election, filed objections, which resulted in the election being set aside, and filed an unfair labor practice charge, alleging that the employer had violated section 8(a)(5) of the act[3] by his refusal to bargain when the union declared that it represented a majority of the employees.

Under the above facts, the *Aiello* rule required the union to choose between invoking the slow and costly process of filing an 8(a)(5) unfair labor practice charge, which would postpone the election, or continuing to participate in the election to establish its representative status. If the union chose the latter, thereby risking the loss of its majority status by the later unlawful conduct of the employer, it could lose the election. If it did, it was deemed to have waived its right to file the refusal to bargain charge. At most, the union could request that the election be set aside and a new one ordered in light of the employer's misconduct.

The three member majority of *Bernel* recognized that a new "election is not a remedy either in statutory concept or in reality. On the contrary, experience has demonstrated that a vast majority of the re-run elections' results favor the party which interfered with the original election."[4] Therefore, since

[1] 146 N.L.R.B. No. 161, 56 L.R.R.M. 1039 (1964).

[2] 110 N.L.R.B. 1365, 35 L.R.R.M. 1235 (1954). *Aiello* had overturned the Board's original rule, stated in M. H. Davidson Co., 94 N.L.R.B. 142, 28 L.R.R.M. 1026 (1951) (Member Murdock dissenting).

[3] 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958).

[4] Bernel Foam Prods. Co., supra note 1, 56 L.R.R.M. at 1041. The majority did not cite any authority for this statement, and dissenting Member Leedom did "not share this far-reaching conclusion." Id., 56 L.R.R.M. at 1044 n.17.

the new election is not a remedy, the union has not had a meaningful choice of procedures, and it should not be deemed to have irrevocably committed itself to the representation proceeding.

By thus abolishing the *Aiello* waiver rule, the *Bernel* decision gives the union two choices of the procedure that it may follow. It may either file an (8)(a)(5) refusal to bargain charge before the election, thereby postponing it, or it may proceed with the election and file the charge thereafter, if it loses. These alternative procedures for establishing that the union represents a majority of the employees were denied in *Aiello* because they were deemed inherently inconsistent.[5] But the majority in *Bernel* argued that

> the unfair labor practice and the representation proceedings are not inconsistent. The latter may establish the union's majority as of the day of the election, but it does not resolve the union's majority status on the date demand for recognition and bargaining was made and refused—which is the determination made in the former proceeding.[6]

The majority pointed out that it is the refusal to bargain which causes the union to revert to the election procedure. When the union files the representation petition, it does not change its position that it represents a majority of the employees, even though it must as a formal matter allege that a question concerning representation exists. "Rather it is stating the employer's assertion of such a question and seeking an election as a means of proving that there is no validity in that assertion."[7]

The other ground on which the Board in *Aiello* had based its election of remedies rule was that allowing the union to file a refusal to bargain charge after losing the election involved the expenditure of public funds in "useless and repetitive proceedings."[8] The majority in *Bernel*, however, reasoned that there might now be a saving of time and money by encouraging the union to postpone its refusal to bargain charge and to proceed to the less costly election, which it might win, thereby obviating the need for refusal to bargain proceedings.[9]

The majority felt that, in any event, considerations of economy must not take precedence over the policies of the act. An employer should not be allowed to evade responsibility for violating the act. And, since Congress' overriding concern in this part of the act was the right of employees to be repre-

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See Pollitt, NLRB Re-Run Elections: A Study, 41 N.C.L. Rev. 209 (1963), where an almost three-year study, commencing in 1960, shows that, of 212 re-run elections caused by employer misconduct, the objecting union won 30%, picking up an average of a little over 20% of the total votes cast.

[5] Aiello Dairy Farms, supra note 2, at 1368, 35 L.R.R.M. at 1236.

[6] Bernel Foam Prods. Co., supra note 1, 56 L.R.R.M. at 1040.

[7] Id., 56 L.R.R.M. at 1040-41. The union must show that at least 30% of the employees in the unit want it to be their collective bargaining representative. 29 C.F.R. § 101.18(a)(4) (1964).

[8] Aiello Dairy Farms, supra note 2, at 1368, 35 L.R.R.M. at 1236.

[9] Bernel Foam Prods. Co., supra note 1, 56 L.R.R.M. at 1041.

sented by a labor organization of their own choosing, the Board's task is to provide an adequate remedy instead of acting like a spectator in a game of "election of remedies."[10]

In finding a refusal to bargain, the Board agreed with the Trial Examiner[11] that the employer's conduct constituted a violation of section 8(a)(5) under the Board's decision in *Snow & Sons*.[12] In that case, the employer wrongfully refused to bargain when he sought a Board-directed election without a valid ground and without a reasonable doubt about either the appropriateness of the proposed unit or the union's representative status, but he did not embark upon a program of interference to dissipate the union's majority.

Disagreeing with the Trial Examiner, however, the Board accepted the General Counsel's contention that there was a violation of section 8(a)(5) under the Board's decision in *Joy Silk Mills*.[13] In *Joy Silk*, the employer wrongfully refused to bargain by insisting on a Board election as proof of the union's majority, even though he had no good faith doubt about the union's status, but was motivated by a rejection of the collective bargaining principle or by a desire to gain time in order to undermine the union's majority status. The Board in *Joy Silk* declared that

> the question of whether an employer is acting in good or bad faith at the time of the refusal . . . must be determined in the light of all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct.[14]

Reversing the Trial Examiner, the Board found that the employer in *Bernel* had violated section 8(a)(1) by promising benefits to the employees, and by suggesting that they form a shop committee.[15] After considering all the facts, including the employer's illegal conduct, the Board held the employer's refusal to bargain wrongful because it was motivated by a desire to create an opportunity to dissipate the union's majority.[16]

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[10] Id., 56 L.R.R.M. at 1041-42.

[11] Id., 56 L.R.R.M. at 1042.

[12] 134 N.L.R.B. 709, 49 L.R.R.M. 1228 (1961), enforced, 308 F.2d 687 (9th Cir. 1962).

[13] Bernel Foam Prods. Co., supra note 1, 56 L.R.R.M. at 1042. The Trial Examiner did not use *Joy Silk* in finding a wrongful refusal to bargain, because he held that there was no intervening unlawful conduct by the employer.

[14] Joy Silk Mills, 85 N.L.R.B. 1263, 1264, 24 L.R.R.M. 1548, 1550 (1949).

[15] Bernel Foam Prods. Co., supra note 1, L.R.R.M. at 1043.

[16] Id., 56 L.R.R.M. at 1042. Member Jenkins concurred in this conclusion, see infra note 17.

It should be noted that "the sequence of events, and the time lapse between the refusal and the unlawful conduct" (*Joy Silk*, supra note 18) have been rendered less important as "relevant facts" by *Bernel*. In fact, it now appears that any unlawful conduct by the employer subsequent to his refusal to bargain is sufficient, by itself, to support a finding of bad faith in his refusal. This conclusion is reached by observing that the majority in *Bernel* argued that unlawful conduct occurring two weeks after the refusal to bargain, did not happen too late to indicate bad faith motivation in the refusal. The majority added that other unlawful conduct, occurring the day before the election, also

Dissenting Member Leedom argued that the *Aiello* rule should not be overturned. He reiterated the arguments made by the Board in *Aiello*, and concluded "that it would be balancing the scales unfairly toward the union side to allow it to have 'two bites at the apple.' "[17]

Member Leedom also pinpointed an apparent inconsistency in the majority's decision. As an illustration, he supposed that, as in *Aiello* and *Bernel*, the refusal to bargain occurs before the filing of the petition for election (the cutoff date for unlawful pre-election conduct), but that, unlike *Aiello* and *Bernel*, the employer engages in no other unlawful conduct before the election.[18] As he saw it, "since the majority's 'reversal' of Aiello was predicated on the fact that the election was set aside and was therefore a 'nullity,' presumably it would continue to apply the Aiello rule where the election is not set aside because no objections were filed or the Regional Director dismissed the objections."[19] Nevertheless, some of the reasons given by the majority for abolishing the *Aiello* waiver rule suggest that it should not be applied, even though the election is not set aside. "Thus, the majority says that Aiello is wrong because there is no inconsistency between representation and unfair labor practice proceedings and therefore the election of remedies doctrine is inapplicable; and, further, that as a matter of public policy, the Board should not permit an employer to evade responsibility for violating the Act."[20] Unable to find a reason why it would make any difference under these theories, insofar as *Aiello* is concerned, whether or not the election were set aside, Member Leedom confessed that he could not reconcile the inconsistencies in the majority's opinion.

The Board soon disclosed what it intended to do in the case Member

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indicated bad faith in the refusal, because it happened at a time when the employer would benefit most from his unlawful acts.

The timing of the unlawful conduct in *Bernel* should be compared with the timing in *Joy Silk*, where the wrongful conduct started exactly half-way through the election period and continued until the end.

The allowable time span, within which unlawful conduct can indicate bad faith in the employer's refusal to bargain, is made total by the fact that employer unfair labor practices in the period immediately after a refusal to bargain are even more consistent with bad faith. Therefore, it is hard to conceive of any point in the total pre-election time span when wrongful conduct by the employer will not indicate to the Board a bad faith refusal to bargain.

[17] Id., 56 L.R.R.M. at 1045. Member Jenkins, on the other hand, found it unnecessary to pass upon the merits ofthe *Aiello* waiver rule. He agreed with the majority that, since Joy Silk Mills, 85 N.L.R.B. 1263, 24 L.R.R.M. 1548 (1949), modified, 185 F.2d 732 (D.C. Cir. 1950), cert denied, 341 U.S. 914 (1951), allows the question of good or bad faith in the refusal to bargain to be determined in light of all the relevant facts, it was clear that the employer was motivated by bad faith in his refusal to bargain. But he did not believe that the *Aiello* waiver rule should apply to the union in *Bernel*, since a requirement for application is the union's pre-election knowledge of the employer's unlawful conduct. Member Jenkins did not think that, under the facts of the case, the union was sufficiently aware of the employer's unlawful conduct when it proceeded with the election. Id., 56 L.R.R.M. at 1043.

[18] Id., 56 L.R.R.M. at 1044 n.20.

[19] Id., 56 L.R.R.M. at 1044.

[20] Id., 56 L.R.R.M. at 1044 n.20.

Leedom supposes, but failed to explain any "apparent inconsistencies" in the *Bernel* opinion. In *Irving Air Chute Co.*,[21] involving facts similar to those of *Bernel*, the Board went out of its way to declare:

> This case falls within our decision in Bernel. . . . We held in that case that a labor organization which loses an election may nevertheless seek bargaining relief under Section 8(a)(5) of the Act or Section 8(a)(1) in appropriate circumstances, where it appears that the employer has engaged in conduct requiring the election to be set aside. *We will not grant such relief, however, unless the election be set aside upon meritorious objections filed in the representation case.* Were the election not set aside on the basis of objections in the present representation case, we would not now direct a bargaining order even though the unfair labor practice phase of this proceeding itself established the employer's interference with the election.[22] (Emphasis supplied.)

Irving Air Chute teaches that the union should file its petition for an election contemporaneously with its demand for recognition, or sooner. But cases will doubtless arise where this is not done. When they do, the Board will be forced to answer the charge that the rule in *Irving Air Chute* is inconsistent with much of the reasoning in *Bernel*.

For example, suppose that a union represents a majority of the employees in the appropriate unit, and demands recognition; the employer refuses; he commits section 8(a)(1) and (2) violations that destroy the union's majority, but cease before a petition is filed; although it knows of these violations, the union files a petition for an election; the employer engages in no unlawful conduct whatever between the filing and the election; the union loses. And suppose the same case, except that the union does not know of the employer's unlawful conduct when it files its petition. Finally, take the case, mentioned above, supposed by Member Leedom in his dissent in *Bernel*.

Since no unlawful conduct occurred between the filing of the petition and the election in these three examples, the election would not be set aside;[23] taken literally, then, the Board's statement in *Irving Air Chute* would preclude any bargaining relief in an unfair labor practice proceeding.

Many of the reasons for overruling *Aiello* put forth in *Bernel*, however, seem to apply in the first example.[24] Moreover, if the refusal to allow an 8(a)(5) charge unless the election is set aside rests on an application of the *Aiello* rule at the time of the petition, the second example requires a different result from the first. For under *Aiello* lack of knowledge of the employer's unlawful conduct precluded any waiver.

Perhaps, Member Leedom's hypothetical is the most illuminating of all. As pointed out, the same inconsistency between *Bernel's* reasoning in

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[21] 149 N.L.R.B. No. 59, 57 L.R.R.M. 1330 (1964).

[22] Id., 57 L.R.R.M. at 1332.

[23] Goodyear Tire & Rubber Co., 138 N.L.R.B. 453, 51 L.R.R.M. 1070 (1962).

[24] See text accompanying note 20, supra.

overruling *Aiello* and *Irving Air Chute's* requirement that the election be set aside appears here. But it just is not the same case as the other two because the employer did not interfere with the union's claimed majority. Since the employees rejected the union of their own free choice in a secret ballot election, why saddle them with it in an unfair labor practice proceeding. In theory, the employees' right to choose freely whether or not they want a union is the cornerstone of the act. Presumably, if the election is valid, they have made their choice.

Under the Board's rules governing representation proceedings, however, if the election in the first two examples is also valid. If the Board treats these cases differently, it will undermine its representation proceeding. Yet, in *Bernel*, the Board felt that the lingering effect of employer interference was illustrated by its experience wth *Aiello*, which demonstrated that a vast majority of re-run elections were lost by the union.[25] It is hard to believe that the conduct of the employer in these examples would not have the same result. Nevertheless, a line must be drawn beyond which conduct will not be considered to interfere with an election. Administrative necessity may well support drawing it at the filing of the petition. Besides, the union can protect itself by filing the petition at the same time that it demands recognition from the employer.

These are some of the questions *Bernel* raises[26]—the answers will have to wait for the cases.

D. Appropriate Bargaining Unit

In the recent case of *NLRB v. Metropolitan Life Insurance Co.*[1] the Supreme Court confirmed the proposition that "extent of organization" may be a factor in determining the appropriate bargaining unit.[2]

Insurance Workers International Union, AFL-CIO, had requested the Board to certify it as bargaining representative for all twenty-three debit agents at the Woonsocket, Rhode Island, district office of Metropolitan, a nation-wide insurance company with over 1,000 district offices. Woonsocket was one of eight district offices maintained in Rhode Island by Metropolitan, all of which are within greater Providence. The nearest district office to Woonsocket is in Pawtucket, twelve miles away. The Board certified the union. Metropolitan refused to bargain, contending that in determining the appropriate bargaining unit, the Board treated as controlling the extent of union

[25] Bernel Foam Prods. Co., supra note 1, 56 L.R.R.M. at 1041.

[26] As a byproduct of *Bernel*, the legality of authorization cards will doubtless be litigated more frequently.

[1] —— U.S. ——, 33 U.S.L. Week 4302 (U.S. April 5, 1965). Prior to the Supreme Court's decision, this case was discussed extensively in 6 B.C. Ind. & Com. L. Rev. 349 (1965).

[2] A leading case for this proposition, which gives a literal interpretation to section 9(c)(5) of the act (discussed below), is Texas Pipe Line Co. v. NLRB, 296 F.2d 208 (5th Cir. 1961). In agreement is National Labor Relations Board, Twenty-Eighth Annual Report 51 (1964), stating: "Although extent of organization may be a factor evaluated, under section 9(c)(5) it cannot be given controlling weight."

organization, in violation of Section 9(c)(5) of the LMRA. Metropolitan claimed that the only appropriate units would be (1) all its offices in the United States, (2) all its offices in its New England Territory, or (3) all its offices in Rhode Island. In an unfair labor practice proceeding, the Board adopted the prior determination of the appropriate bargaining unit, held that the petitioner violated section 8(a)(5), and ordered it to bargain with the union. The Court of Appeals for the First Circuit denied enforcement, holding that in determining the appropriate unit, the Board accorded controlling weight to extent of organization. No other basis appeared for the Board's decision.[3] The Supreme Court agreed that the Board had failed to articulate the grounds for its decision. At the same time, the Court gave the Board the benefit of the doubt by holding that, on its face, the Board's determination of the appropriate unit could not be found to have illegally made "extent of organization" the controlling factor. The Court remanded the case to the Board in order to allow it to explain the factors involved in its determination.

Section 9(b) of the act gives the Board broad authority to

> decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .[4]

But the 1947 enactment of section 9(c)(5) placed an express limitation on the Board's discretion by providing:

> In determining whether a unit is appropriate for the purposes specified in subsection (b) the *extent* to which the employees have *organized shall not be controlling*.[5] (Emphasis supplied.)

The issue of the weight that the Board may give to "extent of organization" arose in *NLRB v. Quaker City Life Ins. Co.*,[6] where the Fourth Circuit upheld the Board's decision to depart from its 1944 rule that denied certification to any unit for insurance agents that was less than state-wide.[7] The court found that extent of organization may be considered by the Board as a factor.[8] Unanswered was the question whether the pre-1944 Board rule of sometimes allowing extent of organization to govern[9] was resurrected.

If the Board in *Metropolitan* and later cases was attempting to bring back the pre-1944 rule, and trying to hide the fact by not specifying the factors that it considered relevant, it was clearly violating its statutory duty. This was the belief of the Court of Appeals for the First Circuit in the instant

[3] Metropolitan Life Ins. Co. v. NLRB, 327 F.2d 906, 911 (1st Cir. 1964).

[4] 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1958).

[5] 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(5) (1958).

[6] 319 F.2d 690 (1963).

[7] Metropolitan Life Ins. Co., 56 N.L.R.B. 1635, 14 L.R.R.M. 187 (1944).

[8] The Board decision in *Quaker City* is reported in 134 N.L.R.B. 96, 49 L.R.R.M. 1281 (1961). The Board found these other factors: (1) autonomous operation of the district office; (2) overall supervision by the district manager; (3) lack of contact among employees of the various district offices; and (4) absence of any administrative subdivision between the home office and the district office.

[9] Prudential Ins. Co., 49 N.L.R.B. 450, 12 L.R.R.M. 239 (1943).

case. It refused to enforce the Board's order to bargain with the disputed unit because of its conclusion "that the . . . Board . . . has indeed . . . [regarded] the extent of the union organization as controlling in violation of 9(c)(5) of the Act."[10]

The court based its conclusion on the Board's failure to articulate reasons for its determination of the bargaining unit; the Board's apparently inconsistent determinations of appropriate units of Metropolitan's employees in other regions; its failure to discuss in these cases what weight it gave to the factor of the extent of union organization; and the fact that in these cases the Board consistently certified the unit requested by the union.

The Supreme Court, in overruling the First Circuit, agreed that "other recent decisions of the Board are relevant [but] we cannot . . . agree that the only possible conclusion here is that the Board has violated § 9(c)(5)."[11] In remanding the case to the Board, the Court declared that the Board "must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' "[12]

UNFAIR LABOR PRACTICES

A. Duty to Bargain

1. *Employer's Decision to Subcontract*

In December, the Supreme Court announced its long awaited decision in *Fibreboard v. NLRB.*[1] It held that the "contracting out of . . . work previously performed by employees of the bargaining unit, which the employees were capable of continuing to perform . . . is covered by the phrase 'terms and conditions of employment' within the meaning of section 8(d)."[2] Hence, the employer violated section 8(a)(5)[3] by unilaterally subcontracting work and failing to bargain with the union. The Court was careful to point out that its decision rested on the particular facts and that not all subcontracting is a mandatory subject of bargaining. Nevertheless, three Justices felt constrained to write a concurring opinion stating that, although the peculiar facts of this case created a mandatory duty to bargain, they were opposed to any holding

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[10] Supra note 3, at 911.

[11] NLRB v. Metropolitan Life Ins. Co., supra note 1, 33 U.S.L. Week at 4303.

[12] Ibid. Mr. Justice Douglas, the sole dissenter, declared that all the parties wanted a decision on the merits, and that the Board order should be set aside. Ibid.

In light of its decision in the instant *Metropolitan* case, the Supreme Court has recently granted writs of certiorari in the other Metropolitan cases, involving the same issue. It vacated the judgments of the courts of appeals and remanded the cases with instructions to remand to the NLRB for further proceedings consistent with its opinion in *Metropolitan.* 33 U.S.L. Week 3349 (U.S. April 26, 1965).

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[1] 379 U.S. 203 (1964).

[2] Id. at 210.

[3] Section 8(a)(5) states:

It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees. . . .

61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1958).

which would make subcontracting in general a "term or condition of employment" within the scope of mandatory bargaining.[4]

In reaching its decision, the Supreme Court affirmed the NLRB's holding that a decision to subcontract made solely for economic reasons may subject the employer to a requirement to bargain.[5] The Board on its first consideration of *Fibreboard* had dismissed the complaint for failure to show that the employer's decision was motivated by a desire to avoid a legal obligation under the NLRA.[6] Thus, the view of the Board and the courts was that a decision to subcontract was within management's prerogative, so long as it was not made for the purpose of avoiding collective bargaining, union organization, or some other right protected by the NLRA.[7]

The Board reversed its position in *Town & Country Mfg. Co.*,[8] and announced its policy of ordering bargaining, whether or not the subcontracting was motivated by anti-union sentiments.[9] Subsequently, the Board reheard *Fibreboard* and reversed on the authority of *Town & Country*.[10] The Board also found an 8(a)(5) violation in *Adams Dairy, Inc.*,[11] but the Eighth Circuit reversed because it could find no anti-union motivation.[12] Following its *Fibreboard* decision, the Supreme Court remanded *Adams Dairy* "for reconsideration in light of" *Fibreboard*.[13]

The *Fibreboard* decision raises a great many questions and creates some confusion because it is not clear whether the Court means its decision to be an exception to a general rule that subcontracting falls within management's prerogative, or whether it regards subcontracting as a subject of mandatory bargaining except in particular, undefined circumstances. The concurring opinion feels that the Court adopted the latter approach, and although the majority said its decision was limited to the facts, its opinion speaks of broad policy reasons for including subcontracting as a subject of mandatory bargaining.

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[4] Fibreboard v. NLRB, supra note 1, at 217. Mr. Justice Stewart wrote the concurring opinion and based his holding on the following facts: The work contracted out had been performed by employees in the bargaining unit; the work continued to be performed in the employer's plant after it was subcontracted and remained under the ultimate supervision of the employer; the independent contractor was paid on a "cost plus" basis, so that the employer remained liable for the actual costs incurred. He concluded: "all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer." Id. at 224.

[5] Fibreboard Paper Prods. Corp., 138 N.L.R.B. 550, 51 L.R.R.M. 1101 (1962).

[6] 130 N.L.R.B. 1558, 47 L.R.R.M. 1547 (1961).

[7] See NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962); NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955); NLRB v. Houston Chronicle Pub. Co., 211 F.2d 848 (5th Cir. 1954). Compare NLRB v. Gluek Brewing Co., 144 F.2d 847 (8th Cir. 1944).

[8] 136 N.L.R.B. 1022, 49 L.R.R.M. 1918 (1962).

[9] The decision was momentarily robbed of some of its vitality when the Fifth Circuit specifically based its enforcement of the Board order on a finding of anti-union motivation. Town & Country Mfg. Co. v. NLRB, 316 F.2d 846 (1963).

[10] See note 5 supra. The Board's order was affirmed in 322 F.2d 411 (D.C. Cir. 1963).

[11] 137 N.L.R.B. 815, 50 L.R.R.M. 1281 (1962).

[12] 322 F.2d 553 (1963).

[13] 379 U.S. 644 (1965).

Assuming no absolute duty to bargain, when does the duty arise? Or perhaps, more properly, when is the employer excused from the duty? Does the employer have a different duty at the bargaining table than he has when the actual occasion for unilateral subcontracting arises? And what is the effect of a subcontracting clause in the collective bargaining contract? What if the parties negotiate on the subject but do not incorporate a subcontracting clause into the contract? It is also proper to inquire how previous conduct and subcontracting practices will affect the employer's duty, and whether the union may waive its right to protest to unilateral subcontracting by its failure to request that the employer bargain. Lastly, when the employer has a duty to bargain, may a unilateral subcontracting decision be made prior to informing the union, and if so, what if it is irrevocable?

Fibreboard has not provided answers to these questions, but the Board, in a series of cases following *Town & Country*, has provided some indications that unilateral subcontracting will raise a duty to bargain except in the presence of certain justifying circumstances. The remainder of this section will deal with these cases and whatever answers they provide.

In *Motorsearch Co.*[14] the union knew of the employer's subcontracting when it sat down to negotiate a collective bargaining contract. In the course of eighteen bargaining sessions the union did not protest the subcontracting. When the union subsequently brought an unfair labor practice charge, the Board dismissed it because the union, by its failure to bargain when it had the opportunity, was estopped from later complaining to the Board. This evidences the Board's desire to have parties negotiate their differences, when practicable, without Board intervention. Furthermore, for this approach to work, the Board must hold that when the union raises the problem of subcontracting in negotiations, the employer must bargain. The recent *Westinghouse Electric* case[15] went even further by implying that if the union in general negotiations protested existing and long established subcontracting practices, the employer would be obligated to bargain. *Westinghouse* also indicated that "an employer is under a continuing duty to bargain on request with respect to subcontracting affecting unit work and, therefore, must bargain with the union in good faith upon demand as to such subcontracting even during the term of an existing agreement."[16]

The *Shell Oil* cases[17] afford an opportunity to examine the employer's duty to bargain about unilateral subcontracting at several different stages in the general negotiatory process. The only reference in the collective bargaining contract to subcontracting was a clause requiring the employer to pay union wages when it contracted out work which could be done by the unit. The employer had adhered to this clause for many years, and had, during that time, established a practice of subcontracting unit work without notice to the union. When the time came to negotiate a new contract, the union expressed its desire to bargain about subcontracting practices and to limit the employer's

[14] 138 N.L.R.B. 1490, 51 L.R.R.M. 1240 (1962).

[15] 150 N.L.R.B. No. 136, 58 L.R.R.M. 1257 (1965).

[16] The quote is from a very recent case, American Oil Co., 151 N.L.R.B. No. 45, 58 L.R.R.M. 1412, 1413 (1965).

[17] 149 N.L.R.B. Nos. 22, 23, 57 L.R.R.M. 1271, 1275 (1964).

power to unilaterally subcontract. The employer was willing to bargain and agreed to pay union wages when he did subcontract, but through forty-seven bargaining sessions, he adamantly refused to limit his right to subcontract in any other way. The collective bargaining contract expired, but the parties continued to operate substantially under its terms. After several months the union declared a strike; subsequently it signed a new contract in which the employer agreed only to pay union wages as he had in the past when subcontracting. At this point, the union brought 8(a)(5) charges, alleging that the employer had refused to bargain about the following subcontracts:

1. Subcontracts awarded after the bargaining contract had expired, but before the strike.
2. Subcontracts temporarily awarded to replace striking workers.
3. Subcontracts awarded during the strike which were not completed until after the new contract became effective.
4. Subcontracts awarded after the new bargaining contract went into effect.

The Board, in denying relief on all counts, emphasized that for years the employer had been subcontracting work and that this was his customary business practice. The contractual provision requiring payment of union wages was not a limitation on this right and even tended to imply the existence of the right. Because it was a customary business practice and would not result in a change in the employees' conditions of employment, the employer could continue to subcontract after expiration of the bargaining contract, so long as this subcontracting did not vary in kind or degree from what had been his previous practice. Thus, subcontracting after expiration of the contract was valid despite the strike and even though some of the subcontracts did not expire until after the new collective bargaining contract became effective. As to subcontracts made after the new collective bargaining contract was signed, they were merely a continuation of the customary subcontracting practice. The new contract did not limit the practice, and the mere discussion of subcontracting at the bargaining table was not enough to change a customary business practice.[18]

The Board also upheld the employer's temporary subcontracts for the duration of the strike, even though these were apparently substantial enough in number to warrant a finding that they differed in degree and kind. The Board said that "temporary subcontracting necessitated by the strike did not transcend the reasonable measures an employer may take in order to maintain operations in such circumstances."[19] The Board cited *NLRB v. Mackay Radio & Telegraph Co.*[20] for this proposition, thus making temporary subcontracts a legitimate means for replacing economic strikers without imposing a duty to bargain. In stating this proposition, the word "temporary" must be emphasized because several years ago, in *Hawaii Meat Co.*,[21] the Board

[18] This result is consistent with Jacobs Mfg. Co., 94 N.L.R.B. 1214, 28 L.R.R.M. 1162 (1951).

[19] Shell Oil Co., supra note 17, 57 L.R.R.M. at 1272.

[20] 304 U.S. 333 (1938).

[21] 139 N.L.R.B. 966, 51 L.R.R.M. 1430 (1962).

struck down the replacement of economic strikers by a permanent subcontracting arrangement.[22] The distinction seems to be that, in *Hawaii Meat*, the subcontracting eliminated union jobs and, therefore, was a change in "terms and conditions of employment," whereas the *Shell* subcontracting did not affect the bargaining unit, except in its power to exert economic pressure and to preserve the business operation during the strike.

A third *Shell Oil* case,[23] based on different facts, also imposes limitations on an absolute duty to bargain. In this case, the employer gave the union two days notice before transferring certain delivery operations to another plant. Nevertheless, at the union's request, the employer met both before and after the transfer and presented fully the economic reasons for the transfer. The transfer did not change the size or work schedule of the bargaining unit. At the outset of its opinion, the Board made this statement:

> Our decision is based on the various facts in the instant case, including the conduct of Respondent [employer], the nature of the management determination, and the minimal effect of this determination.[24]

Considering these factors, the Board found no 8(a)(5) violation. It conceded that the two-days notice was short, but it said that this factor was offset by the employer's willingness to bargain both before and after the change and the lack of any substantial impact on the union. The Board also mentioned the union's failure to offer any specific counterproposals and, perhaps more important, the absence of a commitment to any third party, so that the employer could have changed its mind. These facts were important evidence substantiating the conclusion that the employer had bargained in good faith.

General Motors Corp.[25] involved the reassignment of certain drivers to other jobs within the bargaining unit when their driving positions were given to an independent contractor. The reassignments were effected through use of contractual grievance procedures. The Board would not find an 8(a)(5) violation because there was no substantial impairment of the bargaining unit, and it felt that the employer had the right to make job reassignments. It was also undoubtedly influenced by the fact that the issue was resolved by grievance procedures.[26] It is interesting to note that in both *Shell Oil* and *General Motors*, the Board permitted subcontracting which did not substantially impair the unit.

The most thoroughgoing subcontracting case is *Westinghouse Elec.*

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[22] The circuit court refused to enforce the Board's order. 321 F.2d 397 (9th Cir. 1963). However, in light of *Fibreboard*, the Board's holding appears proper and should be good law today.

[23] 149 N.L.R.B. No. 26, 57 L.R.R.M. 1279 (1964).

[24] Id., 57 L.R.R.M. at 1280.

[25] 149 N.L.R.B. No. 40, 57 L.R.R.M. 1277 (1964).

[26] The Board dismissed a failure-to-bargain complaint in Flintkote Co., 149 N.L.R.B. No. 136, 57 L.R.R.M. 1477 (1964). The dispute was over certain job changes which the employer claimed were a matter of management prerogative. The controversy was submitted to the grievance procedure, but just before arbitration the union brought the refusal to bargain charge. Dismissal was based on the Board's policy of encouraging settlement of contractual disputes by arbitration.

Corp.,[27] already noted in connection with the employer's continuing duty to negotiate subcontracting at collective bargaining sessions and during the life of the contract. The Board reversed the Trial Examiner, who found a duty to bargain, basing his result on the Supreme Court's *Fibreboard* decision. The Board said that *Fibreboard* did not require bargaining in all subcontracting cases and that an employer was not obligated to bargain if it met all the following tests:

1. The contracting out is motivated solely by economics.
2. Contracting out is a customary method by which the employer does business.
3. The particular subcontracting in question does not vary significantly in kind or degree from the customary subcontracting practices of the employer.
4. The union had an opportunity to bargain about changes in existing subcontracting practices at general negotiatory meetings.
5. There is no showing that the subcontracting will have a significant impact on employees' job interests.[28]

Westinghouse met all these requirements, and no bargaining duty was found.

The Board also indicated that the presence of any of the following factors would in itself create a duty to bargain:

1. Where the subcontracting involves a departure from previously established operating methods.
2. Where it effects a change in conditions of employment.
3. Where it results in significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the unit.[29]

The reference to "reasonably anticipated work opportunities" may indicate that the employer has a duty to bargain about contracting out work not done by the unit, but which the unit contends it should do.

These cases have gone far toward the development of a mature body of substantive law under the doctrine of *Fibreboard*. The employer must always bargain in good faith when the union raises the issue of subcontracting for general negotiations. This duty does not require the employer to give in, and, as the *Shell* cases show, it may adamantly refuse to relent. This type of hard bargaining is not in itself bad faith.[30] But the employer may engage in unilateral subcontracting only where it is his customary business practice to do so or where it does not involve a substantial impairment of the bargaining unit.

2. *Employer's Decision To Go Out of Business*

In 1956, shortly after the Textile Workers had successfully organized the employees of Darlington Mfg. Co. in South Carolina, the board of direc-

[27] Supra note 15.
[28] Id., 58 L.R.R.M. at 1259.
[29] Id., 58 L.R.R.M. at 1258.
[30] See the section on conduct of bargaining, infra p. 862.

tors voted to liquidate the business. There was evidence that the liquidation was motivated by the anti-union bias of Roger Milliken, controlling shareholder of Deering Milliken, which in turn controlled Darlington. Roger Milliken also served on the board of directors of Darlington. The newly certified union brought unfair labor practice charges, and the Board found violations of several sections, including 8(a)(3) and (5).[1] The Board ruled that the closing down was discrimination aimed at discouraging union membership at the Darlington plant, and that the circumstances disclosed a refusal to bargain with the certified representative of the employees. The Board further found that Darlington was a member of an affiliated group of plants controlled by Deering Milliken and that the group constituted a "single employer." Hence, its remedial order could extend to Deering Milliken. From this finding, the Board concluded that Darlington had not completely terminated business, and it ordered reinstatement of Darlington employees in plants in South Carolina or adjacent states, with back pay to run until the employees obtained substantially equivalent employment or were placed on preferential hiring lists at the other plants.

The court of appeals reversed, holding that Darlington could go out of business for any reason at all, including anti-union animus, and that this absolute right extended to partial closings as well.[2] Thus, whether or not Darlington was an independent employer, the closing down did not constitute an unfair labor practice.

The Supreme Court, in its recent disposition of the case, reached a conclusion different from both the Board's and the court of appeals' and probably a surprise to both. The Court said:

> We hold that so far as the Labor Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases, but disagree with the Court of Appeals that such right includes the ability to close part of a business no matter what the reason.[3]

The Court then remanded the case, already disputed for nine years, to the Board for additional findings.

In rejecting the union's contention that an employer may not close down completely for any reason whatever, the Court examined the argument in the framework of section 8(a)(3), which makes it an unfair labor practice for an employer—

> by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .[4]

As the Court saw it, "one of the purposes of the Labor Act is to prohibit the discriminatory use of economic weapons in an effort to obtain *future bene-*

[1] Darlington Mfg. Co., 139 N.L.R.B. 241, 51 L.R.R.M. 1278 (1962).

[2] Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (4th Cir. 1963).

[3] Textile Workers v. Darlington Mfg. Co., — U.S. —, 33 U.S.L. Week 4292, 4293 (1965).

[4] 61 Stat. 140 (1947), as amended by 73 Stat. 525 (1959), 29 U.S.C. § 158(a)(3) (Supp. V, 1964).

fits."[5] (Emphasis added.) Thus, a discriminatory lockout or a "runaway shop" may yield benefits by discouraging future union activity, but a complete, bona fide termination yields no prospects of future discouragement of union membership. Even though the closing is vindictive and makes the employees of the closed plant suffer, it is not section 8(a)(3) discrimination, absent the motive to achieve future benefit.[6]

Since the Board ruled that Darlington, Deering Milliken, *et al.*, were a "single employer," the Court could not rest its decision on the foregoing discussion of complete termination, but had to establish a rule governing the closing of one of several plants. Keeping in mind the necessity of finding a "future benefit," the Court said that the Board erred in considering only the impact on Darlington employees. Instead, the Court said that

> a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such a closing will likely have that effect.[7]

In explaining its test, the Court did not feel it necessary to find an "organizational integration" of the plants or corporations, as the Board had. It established the following test:

> If the persons exercising control over a plant that is being closed for anti-union reasons (1) have an *interest* in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the *purpose* of producing such a result; and (3) occupy a *relationship* to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.[8] (Emphasis added.)

In short, the Court requires that the employer have an interest which would benefit by discouraging union membership, that the closing be motivated to achieve that benefit, and that the employer occupy a relationship to employees in the other plants such that its action will reasonably produce the effect of "chilling" union activity.[9] Applying the test to the present case, the Court

[5] Textile Workers v. Darlington Mfg. Co., supra note 3, 33 U.S.L. Week, at 4294.

[6] Ibid. In a footnote, the Court discussed NLRB v. Savoy Laundry, 327 F.2d 370 (2d Cir. 1964), and NLRB v. Missouri Transit Co., 250 F.2d 261 (8th Cir. 1957), which the Board urged were indistinguishable from *Darlington*. In both, however, the Court found a discriminatory motive to discourage future union organization.

[7] Textile Workers v. Darlington Mfg. Co., supra note 3, 33 U.S.L. Week, at 4295.

[8] Ibid.

[9] The Court's use of the word "persist" in its test raises some questions. If employees, in a plant controlled by an employer who has just closed another plant, have never attempted to organize, is the shutdown discriminatory? Or, to put the question another way, must the employer's effort to discourage unionism be aimed at a specific target? The question is probably answered in the negative because the Court continually emphasized "future benefits." However, it should be recognized that the problems of

said that the Board had found proper interest and relationship, but that it had not properly considered the purpose and effect of the shutdown. Thus, it remanded the case to the Board for further findings. And since the circuit court had not considered any of these issues, it will be open to it to review all findings.

In light of the facts discussed in its decision in *Darlington*, it is unlikely that the Board will have much difficulty finding the required elements of purpose and effect. The Textile Workers were attempting to get a foothold in the South, and the employer certainly realized that there would be future attempts to organize other plants and that the plant closing would severely discourage these attempts.[10]

3. *Remedies*

When the Supreme Court ruled on *Fibreboard v. NLRB*[1] and found a violation of section 8(a)(5), it approved the Board's remedy, which ordered the employer to resume performance of the subcontracted operation and reinstate the discharged employees with back pay. This type of remedy is known as restoring the *status quo ante*, because it is the Board's attempt to return conditions of employment to what they were before the employer committed his unfair labor practice. The Board has used this remedy in numerous subcontracting cases since *Town & Country*.[2]

The power to order so sweeping a remedy is found in Section 10(c) of the NLRA, which gives the Board the right "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."[3] Thus, the Board has consistently been allowed to fashion its remedy so as to minimize the effect of an unfair labor practice, and its order will stand where it effectuates the policies of the NLRA, even though the order may have some punitive effect. In *NLRB v. Seven-Up Bottling Co.*, Mr. Justice Frankfurter stated that the approach for the Court to take in reviewing a Board order is not to consider whether it is remedial or punitive but, rather, whether it bears appropriate relation to the policies of the act. Mr. Justice Frankfurter also said in this case that the Board is not confined solely to the record of the proceeding in fashioning its remedy, but may draw upon its experience and expertise. Nevertheless, the Board must consider circumstances that would make its usual remedy oppressive in the particular case and, therefore, not calculated to further the policies of the act.[4]

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proving anti-union motivation are more difficult where there have been no attempts to organize other plants.

[10] The Supreme Court's decision, particularly its discussion of section 8(a)(3) and the requirement of proving motive, is treated further in the section on lockouts, infra p. 871.

[1] 379 U.S. 203 (1964).

[2] 136 N.L.R.B. 1022, 49 L.R.R.M. 1918 (1962). See also, Hawaii Meat Co., 139 N.L.R.B. 966, 51 L.R.R.M. 1430 (1962); Fibreboard Paper Prods. Co., 138 N.L.R.B. 550, 51 L.R.R.M. 1101 (1962); Adams Dairy, Inc., 137 N.L.R.B. 815, 50 L.R.R.M. 1281 (1962).

[3] 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1958).

[4] 344 U.S. 344, 348-49 (1953).

This warning is a clear indication that restoration of the *status quo ante* may not always be the appropriate remedy, and that in some cases the employer's unilateral action violating the duty to bargain should be allowed to stand. Thus, a line of cases has developed in which employers have avoided reestablishment of a business operation and reinstatement of employees by showing that such a remedy would be unduly oppressive.

In *The Renton News Record*,[5] a newspaper subcontracted certain printing processes because it was unable to compete and was faced with a need to automate. The Board found a failure to bagain, but would not order resumption of the processes or reinstatement. It noted that the change was motivated by extreme economic necessity, and that without it the newspaper would be unable to compete and would have to go out of business. The Board also deemed it important that the change involved a totally different process and that it required participation of other newspapers not parties to the proceeding, in order for all the parties to succeed. Therefore, restoration of the *status quo ante* would be detrimental to third parties and an unjust punishment of Renton. The Board's only order was that the employer bargain about the effects of the termination of operations upon the employees.

Another approach was taken in *Winn-Dixie Stores*,[6] where the employer's discontinuance of an operation without notifying the union violated section 8(a)(5). The Board noted that there was no necessity for the change, and that no outside interests would be injured if it ordered resumption of operations. Nevertheless, it refused to do so, because, in taking into account what it called "practical considerations," the Board found such an order unnecessary. It noted the broad scope of the employer's general business operations (supermarkets) and the possibility of employing the displaced employees elsewhere in these operations. It also said that the discontinued operation might now be outmoded. Consequently, the Board ordered only that the employer bargain about whether the operation should be continued and, if not, about its effect on the employees, and that the displaced employees be awarded back pay until the employer fulfilled its bargaining duty.[7]

Plant-closing cases have presented a difficult problem in selecting the appropriate remedy. The Supreme Court's decision in *Darlington*[8] limits the occasions when a plant closing may violate section 8, but since findings of violations are still likely, discussion of remedies is appropriate.

In *Savoy Laundry*[9] the Board ordered resumption of operations where a partial closing down was intended to frustrate union organization. It also ordered reinstatement of employees with back pay, until an offer of reinstatement was made. The Second Circuit refused to order the resumption of operations because Savoy had not performed the service for three years and had lost its patronage. On the issue of back pay, the court remanded for the

[5] 136 N.L.R.B. 1294, 49 L.R.R.M. 1972 (1962).

[6] 147 N.L.R.B. No. 89, 56 L.R.R.M. 1256 (1964).

[7] Back pay was ordered because the unfair labor practice had caused the loss of employment which bargaining might have prevented.

[8] Textile Workers v. Darlington Mfg. Co., —U.S. —, 33 U.S.L. Week 4292 (1965).

[9] 137 N.L.R.B. 306, 50 L.R.R.M. 1127 (1962).

Board to set a time limitation.[10] The Board, on remand, issued the same back pay order and expressed its belief that the order did not subject the employer to indefinite payments. The Board said:

> discriminatees will be required to make a reasonable search for work during periods of unemployment; [and] back pay will not accrue during periods when a discriminatee is unable to work or otherwise out of the labor market. . . .[11]

The Board feels that an employer may not initially protest its back pay order, even though unlimited in time, but must wait until circumstances arise which would make continuance of back pay infeasible and unduly burdensome.[12]

In *Star Baby Co.*,[13] two partners dissolved the partnership, terminated operations, and disposed of the business assets. The Board would not order resumption of operations, but commanded that the employees be placed on a preferential hiring list, and be offered the first jobs if either or both partners resumed operations. Back pay was awarded from the time of dissolution, even though the employees were out on strike. While the Board usually requires a request for reinstatement before it will compute back pay, it recognized that such a requirement would be futile in this case. It also noted that although its back pay order was to run until employees obtained substantially equivalent employment, individual employees must, nevertheless, make good faith efforts to minimize the back pay obligation.

In *Pepsi Cola Bottling Co.*, the employer decided to shutdown *"before* its obligation to bargain with the union matured."[14] (Emphasis in original.) The decision was motivated by the lack of heating, lighting or sanitary facilities, which the employer was unable to fix because workers would not cross the union picket line, and the union would not remove the line to permit the work. Under these circumstances, the employer was ordered to bargain with the union only in the event it reopened the plant, and then to offer employment to those workers who lost their jobs when the plant closed.

One of the broadest Board orders, short of an order to reopen, was that in *Darlington Mfg. Co.*[15] Darlington, Deering Milliken, and several affiliate corporations were held to constitute a "single employer." Consequently, the Board order extended to the entire group, not just Darlington. Important elements of the order were:

1. Darlington must bargain with the union and offer to reinstate its old employees if the plant reopens.
2. Copies of the order must be mailed directly to each employee to constitute adequate notice of the decision.
3. Back pay must be given to the employees until they are able to find substantially equivalent employment, or placed on preferential hiring lists at other employer plants.

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[10] NLRB v. Savoy Laundry, Inc., 327 F.2d 370 (1964).
[11] 148 N.L.R.B. No. 5, 56 L.R.R.M. 1450, 1451 (1964).
[12] Ibid.
[13] 140 N.L.R.B. 678, 52 L.R.R.M. 1094 (1963).
[14] 145 N.L.R.B. 785, 786, 55 L.R.R.M. 1051, 1052 (1964).
[15] 139 N.L.R.B. 241, 51 L.R.R.M. 1278 (1962).

4. Deering Milliken and its affiliates must offer employment to the discharged employees in their other mills in South Carolina or adjacent states. However, this order would not require dismissal of employees with less seniority in these other plants.
5. Employees who do not thus acquire jobs are to be placed on preferential hiring lists.
6. The employer must pay travel and moving expenses for relocated employees.

The same sweeping order was made in *New England Web*,[16] with the addition that the Board ordered reinstatement of the displaced employees as a group and that, whether or not the plant reopened or the employees obtained jobs elsewhere in affiliated plants, the old union was to retain its integrity and continue to bargain for them. This seems excessive, but the First Circuit, in reversing, declined to discuss remedy, inasmuch as it could find no unfair labor practice.[17]

In *Royal Plating & Polishing Co.*,[18] the employer shut down solely for economic reasons. With this in mind, the Trial Examiner, although finding a failure to bargain, would not order back pay and recommended only that a preferential hiring list be drawn up in the event the plant should reopen. In his opinion, a back pay order would be punitive. The Board disagreed, stating that such an order would be appropriate, even though the shutdown was not discriminatory. It noted that the cessation of business and sale of assets would make an order to resume operations unfair, but that these factors did not excuse the failure to bargain. Thus, back pay was the proper remedy to make the employees whole for their loss resulting from the unfair labor practice.[19]

In summary, an order to restore the *status quo ante* will continue as the appropriate remedy where the employer commits an unfair labor practice in its subcontracting or partial shutdown. Where extenuating circumstances make this remedy unduly harsh or impractical, the order will be mitigated. In plant-closing cases where there is an unfair labor practice, an order to reopen would be extremely harsh. So far, the Board has been content to award back pay and to order the employer to offer the discharged workers jobs at affiliated plants.

4. *Conduct During Negotiations*

One of the most perplexing problems in labor law is the determination whether the parties are bargaining in good faith. Sections 8(a)(5) and 8(b)(3) of the NLRA require good faith bargaining from both the employer and union.[1] Section 8(d) defines good faith collective bargaining as "the

[16] 135 N.L.R.B. 1019, 49 L.R.R.M. 1620 (1962).

[17] NLRB v. New England Web, Inc., 309 F.2d 696 (1962).

[18] 148 N.L.R.B. No. 59, 57 L.R.R.M. 1006 (1964).

[19] The order was limited so as not to extend beyond the time when the employer had a legal duty to vacate the premises because of a contract with the local municipal housing authority.

[1] Section 8(a)(5) makes it an unfair labor practice for an employer—

performance of the 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 . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession."[2] In short, the parties must meet and bargain, but they need not agree. Under these circumstances, the problem of determining what is good faith bargaining has consistently plagued both the Board and the courts. Several recent cases have shed some light on what facts and circumstances must be weighed in considering whether the totality of an employer's conduct violates section 8(a)(5).

In *Philip Carey Mfg. Co.*,[3] the union and employer had eleven meetings after certification and agreed on many major questions, such as grievance and arbitration procedures. In the eleventh meeting the employer presented what it termed its final offer. Because of an objectionable seniority clause the union would not agree. Seven meetings followed in which neither party would budge from its position; then the union struck. After more negotiations, the employer permanently replaced struck workers. The Trial Examiner found that the employer's submission of its "final offer" constituted a refusal to bargain and that this led to the strike. Consequently, it was an unfair labor practice strike, and all striking workers had to be reinstated. The Board differed sharply because it felt that the Trial Examiner had over-stressed the finality of the offer. The Board pointed out that the offer had been preceded by eleven fruitful sessions in which agreement had been reached on most problems. Viewed in this context, there was no failure to bargain in stating the position beyond which the employer would not go, nor could the Board find any conduct evidencing bad faith in the negotiations following the offer but before the strike.[4]

In *NLRB v. American Aggregate Co.*,[5] the Board had initiated a civil contempt proceeding on the ground that the employer did not comply in good faith with its order to bargain. There were thirty-two bargaining sessions at which both employer and union stood fast by their positions. The court said:

> [The record shows that] . . . management was merely endeavoring

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to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 8(b)(3) makes it an unfair labor practice for a union—

to refuse to bargain collectively with an employer, provided it is the representative of his employees, subject to the provisions of section 9(a).

61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5), (b)(3) (1958).

[2] 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

[3] 140 N.L.R.B. 1103, 52 L.R.R.M. 1184 (1963).

[4] A violation of section 8(a)(5) was found because the employer insisted to the point of impasse upon an illegal super-seniority clause. However, this impasse was not reached until several months after the strike by which time the bulk of strikers had been permanently replaced. Consequently, only a small number of employees were unfair labor practice strikers. The decision was enforced, with a few unimportant exceptions, in Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir. 1964).

[5] 335 F.2d 253 (5th Cir. 1964).

> . . . to have the bargaining go as it wished it to do rather than being required to yield to the views of . . . the union.[6]

The Board apparently disapproved of the terms sought by management and felt it was refusing to agree to reasonable union demands. But the court would have no part in allowing Board supervision of substantive terms of the agreement. It stated:

> [N]either board nor court has any power or function to order or compel management to agree to particular clauses or demands merely because the Labor Board or a court might think that the refusal was unreasonable.[7]

It concluded that the Board's function is to supervise the negotiating process. And since there was no evidence of anti-union animus or attempt not to reach agreement, the court would not find a failure to bargain merely from adherence to the same offer.

A third "hard bargaining" case, *Dierks Forests*,[8] affords perhaps the most comprehensive look at what factors are considered in conduct of bargaining cases. The Board accorded significance to the following factors in refusing to find a failure to bargain:

1. The employer met with the union whenever requested.
2. There was no overt evidence of anti-union hostility.
3. In rejecting union proposals, the employer offered numerous counter-proposals.
4. The employer discussed all proposals at length.
5. When the employer remained adamant on a proposal, it fully explained its position.
6. During negotiations the parties reached agreement on 54 of the 62 proposals submitted, and three proposals were withdrawn.
7. The employer made significant concessions concerning seniority and grievance procedure.
8. There was a per se violation of section 8(a)(5) in the employer's failure to supply information concerning wages, but in consideration of all other factors, this alone was not enough to sustain the finding of a refusal to bargain in the totality of the employer's conduct.[9]

At this point, it is perfectly clear that totality of bargaining conduct cases involve a careful weighing of all the facts related to the bargaining process. The proper approach is to examine the employer's conduct and determine whether its subjective intent was to reach agreement with the union or to put off agreement and derogate from the union's position as representative of the employees by making agreement impossible. The list of elements in *Dierks Forests* is by no means exclusive or exhaustive, and, conceivably, any or all of the items mentioned may be absent in a given case.

[6] Id. at 254.
[7] Id. at 255.
[8] 148 N.L.R.B. No. 92, 57 L.R.R.M. 1086 (1964).
[9] Id., 57 L.R.R.M. at 1089-90.

It is also evident from *Philip Carey* and *Dierks Forests* that a per se violation of section 8(a)(5) may not by itself be enough to find a section 8(a)(5) violation based on totality of conduct.

Probably the most publicized bargaining conduct case of the year is *General Electric Co.*[10] There, the Board found an overall refusal to bargain based on a number of significant factors. There were several per se violations of section 8(a)(5), including (1) failure to supply data requested by the union, (2) attempts by the employer to deal with individual locals while engaging in national negotiations, and (3) presentation of the personal accident insurance proposal on a take-it-or-leave-it basis. In viewing GE's overall bargaining approach, the Board was impressed not only with these facts but also with a number of others, including GE's system of communications to its employees and its bargaining technique.

The Communications System. GE had developed a highly perfected communications system which it used extensively to gain support for its positions. Before negotiations, GE initiated a hard drive to arouse employee support. During negotiations, it used its communications system to criticize the union's demands and the motives of its leaders. It also unleashed a deluge of propaganda with the obvious intent of inducing employees to pressure the union into acceptance of company proposals. The Board had little trouble finding this a thinly disguised attempt to deal with the union through its employees rather than vice-versa. The Board said:

> On the part of the employer, . . . [good faith bargaining] requires at a minimum recognition that the statutory representative is the one with whom it must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees.[11]

The Bargaining Technique. GE had a policy of doing year-round research to determine what was "right" for its employees. It would then listen to union demands and arguments, and, after studying its own and union statistics, it would submit in full its final offer. It would not change even the smallest item unless new information subsequently came to light. It is not perfectly clear whether the Board disapproved of this technique. It seems more likely that what the Board most strongly objected to was GE's attitude, and that to the extent GE's bargaining technique reflected this attitude, the Board disapproved of it. GE's attitude was that it knew best what was right for the employees, and that it was not overly concerned with what the union thought or about conducting employee relations through the union. To this extent, it was not bargaining. The union's job is to represent the employees and protect their interests. The employer is in a sense an adversary, and this technique of bargaining, when coupled with the other elements of the case, evinced an attitude of unwillingness to work with the union in solving employment problems.

It is not to be understood that a technique of presenting an offer at the outset and refusing to budge is a refusal to bargain. But, like all conduct of

[10] 150 N.L.R.B. No. 136, 57 L.R.R.M. 1491 (1964). The case is given further treatment in Note, infra p. 949.

[11] Id., 57 L.R.R.M. at 1499.

the parties, this technique is evidence on that issue, and, when the facts show, as they did in *General Electric*, an unwillingness to work together and recognize the union's true purpose, the technique is an element of the violation.

In contrast, the technique of bargaining found in *Bethlehem Steel Co.* (Shipbuilding Division),[12] although similar to GE's in many respects, was upheld. There, the employer opened negotiations by stating its belief that business would fall off and expressing an immediate need to cut costs, in particular, the high labor costs, in order to meet the strong challenges of competitors. The employer explained that it had spent three and one-half months researching and preparing its statements, which were "designed at convincing union representatives."[13] Throughout hotly contested negotiations, the employer held fast to its position. Ultimately, the union took the matter before the Board. The Trial Examiner in an exhaustive, thoughtful opinion found no violation. In his opinion he said:

> I see the main theory to be that Respondent [employer] could not lawfully demand as much as it did and adamantly insist upon all of it, without yielding at all.[14]

But the Trial Examiner would not subscribe to such a theory. He said there must be "something more" than a refusal to budge. The "something more" may be conduct indicative of anti-union hostility or intent not to reach agreement or rejection of the collective bargaining principle. Or the "something more" may be found in the nature or character of the demands themselves.[15] In any event, the Trial Examiner thought it lacking in *Bethlehem Steel.*

It is most significant that the employer's research and negotiations were aimed at "convincing union representatives," not at determining what is "right" for employees in spite of union demands. True, the employer was diametrically opposed to union demands and refused to yield, but, nevertheless, in trying to persuade the union to adopt its position, it was bargaining. At the heart of the matter is the attitude of the employer as demonstrated by its conduct. On the one hand, Bethlehem Steel, convinced of future economic difficulties, made an intensive effort to persuade the union, while refusing to budge from what it considered the best it could offer. On the other hand, General Electric disparaged the union and sought to provide for its employees without dealing with the union. In short, Bethlehem was bargaining hard; GE was hardly bargaining.

5. *Per Se Violations*

In addition to the requirement that an employer's general conduct be in good faith, there is also a line of cases in which the employer has been found to violate section 8(a)(5) by a single act. The theory in such cases is that the act or refusal has such a vital effect on the bargaining process and so

[12] 133 N.L.R.B. 1347, 49 L.R.R.M. 1016 (1961).

[13] Id., 133 N.L.R.B. at 1368.

[14] Id., 133 N.L.R.B. at 1369. The Board adopted the Trial Examiner's report, incorporating it into its opinion.

[15] Ibid.

impairs the union's bargaining rights that it must be remedied before good faith bargaining can result. Thus, the conduct is considered a per se violation of the duty to bargain.

One of the most controversial issues in the per se refusal to bargain area is under what circumstances the employer must supply the union with information exclusively within his control. Section 8(d) requires employer and union to bargain "with respect to wages, hours and other terms and conditions of employment,"[1] and the *Borg-Warner* rule[2] has made bargaining on those subjects mandatory. However, bargaining presupposes an ability on the part of the union to represent the employees intelligently and capably, and it is readily admitted that the union cannot satisfactorily perform this function unless supplied by management with data pertaining to wages, hours, terms and conditions of employment which are not otherwise available to it. Thus, the Board and courts have imposed a duty upon the employer to provide the required information.[3] Nevertheless, problems have arisen about what information must be supplied, whether a claim of privilege will excuse the employer's failure to perform,[4] whether the union may waive its right to acquire information, and about whether the union must have an express purpose in mind when it requests the data.

In *Fafnir Bearing Co.*,[5] the union requested permission to make independent time studies in order to determine whether to arbitrate several employee grievances relating to the employer's standard production rates. The grievances claimed that rates were too high and cut down on incentive benefits. The employer based its refusal on three grounds: (1) the union had access to the employer's time study data; (2) the union had no contractual right to make the time study; and (3) the arbitrator would conduct his own time study to determine the merit of the grievances. The Board found that the time study was relevant and necessary to enable the union intelligently to determine whether the grievances warranted arbitration. The employer's data was judged incomplete and not satisfactory for the union's purposes. The Board also took care to point out that the right to make the time study is not contractual, but is statutory, arising from the reciprocal duties to bargain. The Board noted that this statutory right may be waived, but it said that such waiver must be "clear and unmistakable." That the arbitrator would perform a time study was judged irrelevant because the union needed the information

[1] 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

[2] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

[3] NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Whitin Mach. Works, 108 N.L.R.B. 1537, 34 L.R.R.M. 1251 (1954), aff'd, 217 F.2d 593 (4th Cir. 1954), cert. denied, 349 U.S. 905 (1955).

[4] In Metropolitan Life Ins. Co., 150 N.L.R.B. No. 135, 58 L.R.R.M. 1298 (1965), the employer was required to submit information, including names of the policy holders upon whose complaints the company had discharged certain employees, to enable the union to process grievances. The employer's claim that the names were privileged and confidential was unavailing.

[5] 146 N.L.R.B. No. 179, 56 L.R.R.M. 1108 (1964). The case is presently before the Second Circuit. The union sought to intervene in the appellate proceeding, but the court denied the motion, granting leave for the union to file a brief as amicus curiae. Fafnir Bearing Co. v. NLRB, 339 F.2d 801 (1964). The Supreme Court recently granted certiorari on the intervention question. 33 U.S.L. Week 3322 (March 30, 1965).

for the very purpose of determining whether or not to arbitrate. Since there were no alternative means of obtaining the information,[6] and since the time studies would not impair the employer's business operations,[7] the employer was ordered to permit such studies.

In contrast to the Board's approach in *Fafnir*, a majority of the Board refused to enforce union requests for information relating to wages in *Anaconda American Brass Co.*[8] The employer used a point system to evaluate and classify each job. Different elements involved in performance of the job were assigned different point values, and the job was classified and assigned minimum and maximum wage rates. The contract gave the union the right to examine job classification information, but made no mention of the right to know how many points were assigned to each element of the job in arriving at that classification. In the contract negotiation sessions, the union specifically refused to negotiate the mutual determination of a point system. During the contract period, the crane operation was changed and the operator's classification lowered. The operator filed a grievance, and his old classification was restored. Some time later the union filed a second grievance seeking disclosure of the point system relating to the crane operator's job.

The Board's denial of relief was principally based on a finding that the union's demands were not relevant either to a pending grievance or to the general administration of the contract. Thus, the Board believed that the union's request was not reasonably related to its duty to bargain. In addition, the Board seemed to indicate that the union had waived its right to the information by its contractual agreement limiting what kind of job classification data would be made available by the employer.

The dissent, by Member Fanning, pointed out that the waiver of a statutory right must be "clear and unmistakable," and should not be implied from equivocal conduct. Member Fanning also disagreed on the relevancy test. In his view, relevancy should not depend on the union's contract rights, nor should it be required that the request be relevant to an immediate purpose. Since the right is statutory, the only requirements should be that the request be made in good faith and pertain to information regarding wages, hours, terms and conditions of employment.

The position taken by the dissent in *Anaconda American Brass* was first stated in *Whitin Machine Works*[9] in a concurring opinion by Chairman Farmer. It was his belief that because of the vast multitude of this type of case coming before the Board, a clear-cut rule should be laid down. He suggested that the test should be whether the information is material to the entire collective bargaining process and whether the request is made in good faith.

[6] In NLRB v. Otis Elevator Operator Co., 208 F.2d 176 (2d Cir. 1953), the court refused to enforce a Board-ordered time study because the union had other reasonable methods by which to obtain the information.

[7] The employer had argued that the working areas of its plant should be free from disturbance, citing the no-solicitation rule of Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962).. However, the Board ruled that in the absence of evidence of particular harmful circumstances the time studies were not an unreasonable burden. Fafnir Bearing Co., supra note 5, 56 L.R.R.M. at 1111.

[8] 148 N.L.R.B. No. 55, 57 L.R.R.M. 1001 (1964).

[9] Supra note 3.

Thus, if the data bear a substantial relationship to wages, hours, terms and conditions of employment, it should be made available without regard to its immediate relationship to the negotiation or administration of the collective bargaining contract.

Following the *Whitin* case, several circuit courts adopted the broad approach to relevancy, either citing Chairman Farmer's concurrence or giving the majority opinion an equally broad construction.[10] In *Boston Herald-Traveler Corp. v. NLRB*, the First Circuit said:

> the Board stated a general rule that, in effect, linked wage data is always presumptively relevant to collective bargaining. The requesting union need not show the precise relevance of the information to particular issues under discussion.[11]

In *Hercules Motor Corp.*,[12] the Board imposed a limitation on the union's right to demand relevant information. The union sought time study and job evaluation data in order to prepare a grievance. The employer, however, denied that the dispute was covered by the contractual grievance procedure, and, therefore, denied the relevancy of the data to the union's duty to administer the contract. The Board agreed with the employer that before the union could pursue its request for related data, it must invoke the contractual machinery to determine whether a grievance exists. This approach appears to retreat from a rule which would permit the union to request data without stating the relevant purpose for which it is desired. Thus, with *Hercules*, the test apparently became not merely whether the requested data are relevant to subjects of mandatory bargaining, but whether they are relevant to the union's purpose, which, in turn, must be a part of the bargaining process.

Anaconda American Brass indicates that the relevancy test of *Hercules* retains its vitality. Although *Hercules* may be rationalized on the procedural ground that the union's request was not timely, the result reached presumes a duty on the union to explain the purpose for its request. And only by conceding such a duty could *Anaconda* have resulted in a finding inimical to the union. Whether or not explanation of purpose is a valid condition precedent to the union's statutory right may be doubted. Presumably, the final word will have to come from the Supreme Court.

Even if the information requested is relevant, the union may waive its right to make the request. In *Timken Roller Bearing Co. v. NLRB*,[13] the employer claimed that a waiver had resulted when the union submitted a collective bargaining proposal that the employer be required to supply certain information, and later dropped the proposal. The Sixth Circuit refused to extend the *Jacobs Mfg.* doctrine[14] to this case, because that doctrine applies only to contractual rights, not to those arising from statute. But a waiver will occur if the company's refusal to supply information constitutes a grievance under

[10] Boston Herald-Traveler Corp. v. NLRB, 223 F.2d 58 (1st Cir. 1955); NLRB v. Item Co., 220 F.2d 956 (5th Cir. 1955).

[11] Boston Herald-Traveler Corp. v. NLRB, supra note 10, at 60.

[12] 136 N.L.R.B. 1648, 50 L.R.R.M. 1021 (1962).

[13] 325 F.2d 746 (6th Cir. 1963).

[14] 94 N.L.R.B. 1214, 28 L.R.R.M. 1162 (1951), aff'd, 196 F.2d 680 (2d Cir. 1952).

the contract. Then the union must adhere to the bargaining procedures, and may not complain of a per se refusal to bargain. In short, *Timken* reiterates the proposition that a waiver of the statutory right to relevant information must be "clear and unmistakable."[15]

Another problem in the area of per se violations of the bargaining duty is whether either party may insist or refuse to the point of impasse on having a stenographer present at bargaining sessions. In *Reed & Prince*,[16] the Board said:

> The presence of a stenographer at such negotiations is not conducive to the friendly atmosphere so necessary for the successful termination of the negotiations. . . . The insistence by the [employer] in this case upon the presence of a steno-typist at the bargaining meetings is, in our opinion, further evidence of its bad faith.[17]

The First Circuit disagreed, saying that insistence on a steno-typist was not evidence of bad faith.[18] In subsequent cases, "the legality of insisting upon a stenographic typist at bargaining sessions has been determined in the light of the entire bargaining context rather than on a per se basis."[19] In an interesting reversal of roles, the company in *St. Louis Typographical Union* (Graphic Arts Assoc.),[20] filed a section 8(b)(3) charge that the union's refusal to permit a stenographer was bad faith bargaining. The Board used a factual approach and found no bad faith because (1) there was a long history of harmonious relations between the union and employer; (2) there had been no recording of bargaining sessions during the last ten years; (3) the union could reasonably fear that the employer would breach its confidence because there was evidence that such a breach had occurred when a stenographer was last used; (4) the presence of a stenographer imposed a certain amount of restraint on the negotiators; and (5) the union was willing to discuss the issue with management in private. *Graphic Arts* intimates that the employer's insistence would violate section 8(a)(5) where made in order to impede effective negotiation.

In another recent case, *NLRB v. Southern Coach & Body Co.*, [21] the Fifth Circuit held that where the employer had a longstanding policy of granting automatic wage increases to new employees after three and six months of service, it was not a violation of section 8(a)(5) for the employer to continue such wage increases after unionization. Although an employer may not unilaterally change a condition of employment, these facts did not show such a change, but merely a continuation of an existing and established policy.

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[15] See also, NLRB v. Perkins Mach. Co., 326 F.2d 488, 489 (1st Cir. 1964), where the court said that a waiver should be express, and that a mere inference, no matter how strong, should be insufficient.

[16] 96 N.L.R.B. 850, 28 L.R.R.M. 1608 (1951).

[17] Id. at 854, 28 L.R.R.M. at 1610.

[18] NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1953).

[19] E.g., Allis-Chalmers, 106 N.L.R.B. 939, 32 L.R.R.M. 1585 (1953). The quote is from St. Louis Typographical Union, 149 N.L.R.B. No. 71, 57 L.R.R.M. 1370, 1371 (1964).

[20] Supra note 19.

[21] 336 F.2d 214 (1964).

B. Employer Discrimination—The Economic Lockout

In a year of crucial commentary on the development of labor-management relations, three Supreme Court cases, dealing with the important issues of what economic weapons may be used by an employer and what is the NLRB's function in making such a determination, appear to be the most significant policy decisions by that Court in a number of years. Two of the cases involved lockouts aimed at preserving the employer's bargaining position; the third dealt with the closely akin problem of plant closings.[1]

In *American Ship Bldg. Co. v. NLRB*,[2] the union and employer were unable to reach agreement in negotiations for a new collective bargaining contract. The old contract expired, and after the parties had reached a bargaining impasse, the employer locked out his employees, attempting by economic pressure to compel union agreement with his demands. The union charged that this conduct violated sections 8(a)(1) and (3),[3] but the Trial Examiner found that the employer had reasonable grounds to fear a strike and that the lockout was justifiable to prevent the unusual economic loss which would result from such a strike. The Board expressly found that the employer's fear of a strike was unreasonable, and that the lockout was an interference with section 7 rights violating section 8(a)(1).[4] The Board also found that the lockout discriminated against union membership and violated section 8(a)(3), even though there was no anti-union motive. The court of appeals sustained these findings.[5]

The Supreme Court felt not only that the Board had misread the statute and prior case law, but also that it had misconceived its function in the supervision of labor-management disputes.[6] The Court defined the issue as whether the employer commits an unfair labor practice when it invokes "the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after impasse has been reached."[7] The Board had held that the lockout interfered with the employees' section 7 rights to bargain collectively and to strike. The Court noted a lack of evidence that the employer had sought to escape bargaining or to punish his employees for bargaining, or that the lockout had even impaired the right to bargain. True, the lockout applied powerful economic pressure

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[1] The plant closing case, Textile Workers v. Darlington Mfg. Co., — U.S. —, 33 U.S.L. Week 4292 (1965), has already been discussed in connection with the employer's duty to bargain, supra p. 856.

[2] — U.S. —, 33 U.S.L. Week 4273 (1965).

[3] Sections 8(a)(1) and (3) make it an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section 7 of this title;

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

61 Stat. 140 (1947), as amended by 73 Stat. 525 (1959), 29 U.S.C. § 158(a)(1), (3) (Supp. V, 1964).

[4] American Ship Bldg. Co., 142 N.L.R.B. 1362, 53 L.R.R.M. 1245 (1963).

[5] NLRB v. American Ship Bldg. Co., 331 F.2d 839 (D.C. Cir. 1964).

[6] American Ship Bldg. Co. v. NLRB, supra note 2.

[7] Id., 33 U.S.L. Week at 4275.

against the employees, but it did not affect their right or ability to bargain in any way forbidden by statute. "Nor is the lockout one of those acts which is demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation. . . ."[8] In essence, the Court seemed to take the position that economic suffering undergone by a union in pursuit of economic benefit will not in itself be the predicate of an employer unfair labor practice.

On the charge of interference with the right to strike, the Court stated that the right is only "to cease work—nothing more" and does not include the right to determine when and how long the work stoppage will occur.[9] Thus, the lockout in support of a legitimate bargaining position did not violate section 8(a)(1).

This brought the Court to the section 8(a)(3) charge. It noted that illegal discrimination generally requires proof of the employer's motivation. But, the Court said:

> This is not to deny that there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required. In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose.[10]

The Court did not think that this was such a case because a lockout does not necessarily tend to discourage union membership, and if it did in this case, it did so only indirectly.[11] The real purpose of the lockout was to pressure the union into modifying its demands, and discriminatory effects were not so foreseeable as to dispense with proof of motivation.

The Court might have concluded at this point, but it went on, severely castigating the Board's handling of the case. In past rulings, the Board had as a matter of policy justified lockouts only where certain "operative" or "economic" conditions prevailed. The Court said that this approach ignored the requirement of intent to discourage union membership or otherwise to discriminate against the union. There must be proof of such intent to sustain

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[8] Ibid.

[9] Id., 33 U.S.L. Week at 4276.

[10] Ibid. The Court cited Radio Officer's Union v. NLRB, 347 U.S. 17 (1954), and NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

[11] Mr. Justice Harlan apparently took the approach in the *Darlington* case, supra note 1, that section 8(a)(1) could not be violated by an act not inherently discriminatory without first proving the motivation necessary for proof of a section 8(a)(3) violation. Conversely, it is likely that no act violates section 8(a)(3) without proof of motive unless it also violates section 8(a)(1). Compare this statement from NLRB v. Brown, — U.S. —, 33 U.S.L. Week 4285, 4288 (1965): "We recognize that, analogous to the determination of unfair labor practices under § 8(a)(1), when an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation of § 8(a)(3)." See NLRB v. Erie Resistor Corp., supra note 10; Gaynor News Co. v. NLRB, 347 U.S. 17 (1954) (a companion case to *Radio Officers*, supra note 10), and Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

the unfair labor practice. "[W]here the intention proven is merely to bring about a settlement of a labor dispute on favorable terms, no violation of § 8(a)(3) is shown."[12] In reality, the basic issue was one of approach to the legality of lockouts and the power of the Board to weigh the effects of a lockout and conclude that it was so strong a weapon that it upset the balance of bargaining power between the employer and union. The Court felt that the Board had exceeded its authority by assuming "general authority to define national labor policy by balancing the competing interests of labor and management."[13] True, a primary purpose of the NLRA was to eliminate much of the imbalance between labor and management, but Congress "sought to accomplish that result by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers."[14] The primary purpose of these restrictions was to protect union organization and collective bargaining. These restrictions are not to be extended further, and the Court seemed to say that, having allowed the union to organize and having granted it freedom against discrimination in bargaining, Congress freed the employer and union to use all weapons of economic warfare to shape the substantive terms of employment. While willing to guarantee the union the means to organize and to require the employer to bargain with it, the Supreme Court renounced any liability to insure the strength of this "ward" of the state, so long as its initial rights are not transgressed. The only balancing open to the Board is that which may be done within the proper construction of the act.

Mr. Justice Goldberg concurred in the result because of the special facts of the case. He noted that the employer's business was highly seasonal, with most ship repair work coming in the winter when the Great Lakes were frozen. Occasional summer repairs required quick work, so that the customer could get his ship back in circulation without great loss of time. There was a long history of striking by the union before each contract. Mr. Justice Goldberg agreed with the Trial Examiner that the employer held a reasonable belief that the union would time a strike so as to catch a ship in for repairs or would wait until the winter to strike. In either case, the work stoppage would be disastrous to employer and customer alike. Therefore, the lockout was permissible to protect against "unusual operational problems or hazards or economic loss where there is reasonable ground for believing that a strike [is] . . . threatened or imminent."[15] Applying the test of *Universal Camera Corp. v. NLRB*,[16] Justice Goldberg could not find sufficient evidence on the record as a whole to support the Board's finding that the employer had no reasonable belief that there would be a strike. The Board was, therefore, not justified in overturning the Trial Examiner's recommendations. Mr. Justice Goldberg

[12] American Ship Bldg. Co. v. NLRB, supra note 2, 33 U.S.L. Week at 4277. The term "labor dispute" makes this an unduly broad statement of the problem in this case, and it may lead to claims that the case supports a lockout to settle a grievance or that a lockout before impasse in negotiations is justifiable.

[13] Id., 33 U.S.L. Week at 4277-78.

[14] Id., 33 U.S.L. Week at 4278.

[15] Quaker State Oil Ref. Corp., 121 N.L.R.B. 334, 337, 42 L.R.R.M. 1343, 1345 (1958).

[16] 340 U.S. 474 (1951).

cautioned against the broad interpretations invited by the Court's opinion, and urged that lockout cases be decided on a case-by-case basis without laying down general rules.

Mr. Justice White also concurred, but, to his mind, the facts did not present a lockout situation. Rather, the employer notified its customers of its labor problems, so that they would not give it business until the dispute ended. Then, since there was no work available, it laid off the workers. There is, Mr. Justice White reasoned, certainly no prohibition against laying off employees for lack of work. As to the majority's lockout discussion, he wholeheartedly disagreed. He views the NLRA as a broad prohibition against employer conduct interfering with the rights it guarantees. Since Congress could not conceivably envision every tactic by which employers would seek to circumvent the statute, it left it to the Board to apply the general prohibitory language of the act to secure those rights. The Board, therefore, is entitled to weigh the effects of economic weapons. If it concludes that a particular weapon is too potent and gives the employer an unfair advantage, then, to the extent the employer uses that weapon, it interferes with the employees' protected rights. Only where unusual facts create sufficient justification to outweigh the impairment of employee rights, will the conduct in question be tolerated.[17]

The difference between the majority and Mr. Justice White is basic. The questions involved are what employee rights are guaranteed and how far are employees protected in exercising them. It is difficult to understand why the Court chose so narrow a construction of the act, but it cannot be said that either the majority or Mr. Justice White is wrong. Nevertheless, in such a complex, mystifying area of the law, it might have been more prudent to adopt the case-by-case approach suggested by Mr. Justice Goldberg, rather than have to erode a broad rule with unanticipated exceptions.

The same day it decided *American Ship Bldg.*, the Court decided another lockout case involving many of the same underlying policy considerations. In *NLRB v. Brown*,[18] the issue was whether members of a multi-employer bargaining group might lock out their employees when one member of the group was struck and continued to operate with temporary replacements until a new collective bargaining agreement was reached. The union had called a whipsaw strike against only one member of the group (grocery stores), in order to exert pressure during negotiations. In *NLRB v. Local 449, Teamsters* (the *Buffalo Linen* case),[19] the Supreme Court had permitted other employers to lock out the union where the struck employer had ceased operations. It was reasoned there that the lockout was necessary to protect the integrity of the multi-employer group against the union's "divide and conquer" tactics. However, the situation in the *Brown* case was somewhat different. The struck employer obtained temporary replacements, as was his right,[20] and continued to operate. Then, with the avowed purpose of preserv-

[17] American Ship Bldg. Co. v. NLRB, supra note 2, 33 U.S.L. Week at 4278-81.

[18] — U.S. —, 33 U.S.L. Week 4285 (1965).

[19] 353 U.S. 87 (1957).

[20] NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

ing solidarity, the remaining employers locked out their employees and continued operations with temporary replacements.

The Board, while recognizing the use of the lockout in whipsaw strikes and sanctioning the use of temporary replacements in strikes, felt that the combination was just too much in this case, because it created a bargaining imbalance and interfered with the employees' right to strike.[21] Accordingly, the employers' actions violated sections 8(a)(1) and (3). The Tenth Circuit, disagreeing that this conduct was in itself unlawful without proof of intent, refused to enforce the Board's order.[22]

The Supreme Court viewed the lockout and temporary replacement as a defense to the strike, aimed at maintaining the integrity of the multi-employer group, not at discriminating against the union. Because the grocery store business is "very competitive and repetitive patronage is highly important,"[23] the employers were justified in continuing operations after the lockout.[24] In discussing the alleged 8(a)(1) violation, the Court concluded:

> Continued operations with the use of temporary replacements may result in the failure of the whipsaw strike, but this does not mean that the employers' conduct is demonstrably so destructive of employee rights or so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act.[25]

It seems that the Court is saying, as it did in *American Ship Bldg.*, that it will not guarantee the success of the union's bargaining tactics, so long as the *right to use* the tactic is not impaired. In examining the section 8(a)(3) violation, the Court found that "the tendency to discourage union membership is comparatively slight," and that "the employer's conduct is reasonably adapted to achieve legitimate business ends."[26] Thus, the conduct by itself did not violate section 8(a)(3), and since there was no proof of motivation, the charge failed.

The Board raised the issue of the competency of the reviewing court to overturn decisions shaped by the Board's expert judgment. The Court agreed that when the Board's determination is one of fact, judicial review extends only to a determination whether the finding is supported by substantial evidence on the record as a whole.[27] But in *Brown* the question was one of

[21] Brown Food Store, 137 N.L.R.B. 73, 50 L.R.R.M. 1046 (1962).

[22] NLRB v. Brown, 319 F.2d 7 (1963).

[23] NLRB v. Brown, supra note 18, 33 U.S.L. Week at 4287.

[24] Although the Court did not say so, it was probably important that the employers' action was necessitated by the union's whipsaw strike tactic. Use of a tactic which gives strong advantage to the union raises a presumption that it may be offset by legitimate employer tactics without a guarantee that the union will be as well off as before the strike.

[25] NLRB v. Brown, supra note 18, 33 U.S.L. Week at 4287. The description of conduct violating section 8(a)(1) as "destructive" is different from the "inherently discriminatory" language used in *American Ship Bldg.* and *Darlington*. However, it does not appear that the test is different, and it may be that Mr. Justice Brennan merely wished to emphasize what is meant by "inherently discriminatory." Compare Mr. Justice White's dissent, saying that the Court by this language created a different test from that adopted in Radio Officer's Union v. NLRB, supra note 10.

[26] Id., 33 U.S.L. Week at 4288.

[27] See Universal Camera Corp. v. NLRB, supra note 16.

congressional policy and statutory application, and the reviewing court must test the soundness of the legal foundations of the Board's decision. Since the Board's concept of balancing economic weapons exceeded the statutory mandate, the decision was reversed because it rested on "an erroneous legal foundation."[28]

Mr. Justice Goldberg concurred, limiting his opinion to the specific facts. He raised the question whether the same result would occur if the non-struck employers had *permanently* replaced their employees after the lockout. He indicated that the decision might be different, despite the majority's broad language, because the test of *Buffalo Linen* is "whether the nonstruck employer's actions are necessary to counteract the whipsaw effects of the strike and to preserve the employer bargaining unit."[29]

Mr. Justice White dissented because he felt that the Board had not exceeded its power to balance the conflicting interests of the parties to achieve bargaining equality. Mr. Justice White saw no necessity for the lockout or replacement of non-strikers. He interpreted *Buffalo Linen* as applying only where the struck employer is forced to close down, and found the substantial disadvantage, which justified the lockout in *Buffalo Linen*, absent where the struck employer continues operations with replacements.[30]

Besides propounding broad policy rules, *American Ship Bldg.*, *Brown*, and *Darlington* also clarify the test for proving a section 8(a)(3) violation. The basic problem has been to what extent acts tending to show discrimination against union membership will obviate the necessity to prove subjective intent to discriminate. The leading case on the question is *Radio Officer's Union v. NLRB*, where the Supreme Court said that encouragement or discouragement of union membership must result from discrimination, thus making the employer's motive relevant to the violation. Furthermore, the Court said proof of motivation was not necessary where it could be reasonably inferred from the nature of the conduct.

> This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. [Citations omitted.] Thus an employer's protestations that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement.[31]

"Moreover the Act does not require that the employees discriminated against be the ones encouraged [or discouraged] for the purpose of violations of

[28] NLRB v. Brown, supra note 18, 33 U.S.L. Week at 4289.

[29] Id., 33 U.S.L. Week at 4290.

[30] Mr. Justice White's views are already discussed in relation to the *American Ship Bldg.* case, where it was noted that he believes that the Board's function is to strike a balance which achieves bargaining equality. The majority requires only the protection of the rights to organize and bargain, and do not view equality as necessary to the purpose of the act.

[31] Supra note 10, at 45.

§ 8(a)(3). Nor does the act require that this change in employees' 'quantum of desire' to join a union have immediate manifestations."[32] Accordingly, the Court has found that a no-solicitation clause applying to nonworking hours violates section 8(a)(3),[33] that an offer of super-seniority to non-strikers during a strike was discriminatory,[34] and that payment of higher wages to union members in the bargaining unit illegally encouraged union membership.[35] In all these cases the conduct also violated section 8(a)(1). On the other hand, without proof of motive, no section 8(a)(3) violation was found where an employer permanently replaced economic strikers,[36] where the employers in a group bargaining unit locked out their employees after a whipsaw strike,[37] or where the employer abided by a union hiring hall clause.[38] Examination of these cases reveals that more was involved than a determination whether the employer's actions were "inherently discriminatory." The test seems to include consideration of the amount of discrimination vis-à-vis the business justifications for the acts. Thus, in *Republic Aviation Corp. v. NLRB*,[39] there was no business purpose to be served by preventing union solicitation during nonworking time, and in *NLRB v. Mackay Radio & Telegraph Co.*,[40] the employer's right to continue operations during a strike was adequate justification for permanent replacement of strikers, so long as the motive was not to discourage union membership.

In *Local 357, Teamsters v. NLRB*,[41] the Court held that without proof of motive, it would be unreasonable to infer that a hiring hall clause discriminated by encouraging union membership. Mr. Justice Harlan, in concurring, noted the Board's contention that *Radio Officers* required only a showing that the tendency to encourage or discourage union membership was foreseeable to the employer. To this he replied:

> It has long been recognized that an employer can make reasonable businss decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects.[42]

Thus, motivation must ordinarily be proved. Mr. Justice Harlan thought *Republic Aviation* an exception, because the employer did not show any "significant business justification" for the particular no-solicitation rule.[43] And *Gaynor News* was an exception because the action substantially encour-

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[32] Id. at 51.
[33] Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
[34] NLRB v. Erie Resistor Corp., supra note 10.
[35] Gaynor News Co. v. NLRB, supra note 11.
[36] NLRB v. Mackay Radio & Tel. Co., supra note 20.
[37] NLRB v. Local 449, Teamsters, supra note 19.
[38] Local 357, Teamsters v. NLRB, 365 U.S. 667 (1961).
[39] Supra note 33.
[40] Supra note 20. This case seems to have been the first case based on the underlying policies expounded in *American Ship Bldg.* and *Brown*.
[41] Supra note 38.
[42] Id. at 679.
[43] Id. at 680.

aged union membership by conferring benefits clearly based only on union membership.[44] Thus, Mr. Justice Harlan concluded:

> [T]he Act was not intended to interfere significantly with those activities of employer and union which are justified by nondiscriminatory business purposes, or by nondiscriminatory attempts to benefit *all* the represented employees."[45] (Emphasis in original.)

Mr. Justice Harlan wrote the *Darlington* opinion, and an examination of it indicates that the Court has adopted the approach of his concurring opinion in *Local 357, Teamsters*.[46] The *Darlington* opinion and the *Brown* and *American Ship Bldg.* decisions discuss the employer's business justification and whether union membership was substantially discouraged. Having found business justification, but no clear-cut benefit or detriment based on union membership, the Court has found it necessary to prove anti-union motivation.[47]

C. Secondary Boycotts

In 1959, Congress amended Section 8(b)(4)(A) of the Taft-Hartley Act in order to close several loopholes through which unions had been able to avoid committing unfair labor practices.[1] Several recent cases have added considerably to an understanding of how broadly the new law will be applied.

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[44] Id. at 681.

[45] Id. at 682.

[46] For additional discussion of *Darlington*, see the section on the employer's decision to go out of business, supra p. 856.

[47] In NLRB v. Burnup & Sims, 379 U.S. 21 (1964), the employer fired two employees who he believed had threatened to dynamite his plant if they could not successfully organize it. The Court said that when an employee is fired for misconduct arising out of a protected activity, then, despite the employer's good faith, section 8(a)(1) is violated if it is shown that the misconduct never occurred. Since the threats had not in fact been made, the violation was established. The Court declined to rule on the charge of a section 8(a)(3) violation.

[1] Sections 8(b)(4)(i) and (ii)(B) state:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other [person] . . . or to cease doing business with any person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver,

In *NLRB v. Servette*,[2] the union was engaged in a labor dispute with Servette, a wholesaler. Union representatives went to the local managers of a retail supermarket chain which carried Servette's products and asked these managers to discontinue handling the merchandise.[3] In addition, the union warned that it would distribute handbills in front of the supermarkets asking customers not to buy Servette's products; some handbills actually were distributed. The NLRB found no inducement of an "individual" under section 8(b)(4)(i) on the ground that this subsection was not meant to apply to the market managers, and, no violation of section 8(b)(4)(ii) on the ground that even if the handbilling was threatening or coercive, it was protected by the publicity proviso.[4] The Ninth Circuit reversed, holding that managers were individuals under subsection (i) and that the publicity proviso was inapplicable because the products were not "produced" by Servette.[5]

The Supreme Court, in reversing, seemingly took the best from the preceding decisions. It stated that a manager is an "individual" under subsection (i), but that the subsection was not violated because the managers were not induced "to engage in a refusal in the course of their employment." Subsection (i) applies to employment functions, not managerial functions, and, since it was within their managerial authority to cease dealing with Servette, the managers were not being induced to withhold their employment services. The Court then agreed with the Board that no violation of subsection (ii) had occurred. The publicity proviso applied, because the word "produced," properly interpreted, includes distribution as well as manufacture.[6] Finally, the warning that the union would distribute handbills was not a "threat" under subsection (ii); "threaten," apparently, means to threaten an act of coercion or restraint which, if actually committed, would violate the section.

The key point in *Servette* is the recognition that whether a person falls under subsection (i) or (ii) depends, not on his title, but on the functions he is asked to perform in the particular case. Subsection (i) is meant to apply to the withholding of an employment service aimed at requiring the secondary employer to cease doing business with a struck employer. It appears likely that if the local managers had not had authority to cease carrying Servette's goods, and if the union had induced them to take Servette's goods off the shelves, this would have constituted an inducement to withhold employment services. Subsection (ii) is designed to apply to the employer or some person

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or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution. . . .

61 Stat. 141 (1947), as amended by 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(B) (Supp. V, 1964). Subsection (i) is substantially the same as the original Section 8(b)(4)(A) of the Taft-Hartley Act with the exception of technical changes. It now applies to "any individual employed by any person" and a "concerted" refusal is no longer required. See Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 1086 (1960). Subsection (ii) was added in order to protect secondary employers from direct union pressures.

[2] 377 U.S. 46 (1964).

[3] The managers had authority to discontinue handling the merchandise.

[4] Wholesale Delivery Drivers, Local 848, 133 N.L.R.B. 1501, 49 L.R.R.M. 1028 (1961).

[5] Servette, Inc. v. NLRB, 310 F.2d 659 (1962).

[6] Supra note 2.

exercising managerial functions; it is not violated without a showing of threats, coercion, or restraint.

NLRB v. Local 760, Fruit Packers[7] dealt with section 8(b)(4)(ii)(B) and the problem of consumer picketing. The union picketed the retail stores selling the employer's apples, but took care to emphasize that there was no dispute with the retailer, and that customers should continue to patronize its stores. The only appeal was that customers refrain from buying the primary employer's apples. The NLRB found this picketing violated section 8(b)(4)(ii)(B) because consumer picketing was made illegal per se by the 1959 amendments.[8] The Supreme Court, however, held that Congress had not intended to outlaw all consumer picketing. It drew the rather fine distinction that, if the purpose of the picketing was to persuade persons not to trade with the secondary employer, the picketing was illegal; whereas picketing aimed solely at persuading persons not to buy the struck product was permissible. Accordingly, the Court found no unfair union practice.

The *Fruit Packers* decision is by no means a panacea for all consumer boycott difficulties; indeed, it raises almost as many problems as it resolves. The test seems solely to involve the objectives and methods of the union in pressuring the employer with whom it is in dispute. No attention is given to the effect on the neutral employer, and this may, in some circumstances, cause injustice. As Mr. Justice Harlan's dissent asks, is there really any difference between a boycott of a product which accounts for substantially all the sales of the neutral employer and a boycott of the neutral employer himself?[9]

A recent decision highlights with great clarity how the NLRB will apply the *Fruit Packers* and *Servette* decisions. In 1961, before the Supreme Court's pronouncements in *Servette* and *Fruit Packers*, the Board held that handbilling appeals not to buy made to customers of companies which advertised products on a television station with which the union had a dispute were coercive under section 8(b)(4), but that there was no violation because the publicity proviso exempted the appeals.[10] The Ninth Circuit reversed and remanded in 1962, holding that the proviso did not extend to advertising services.[11] The Board in a supplemental decision first applied *Fruit Packers* and found coercion because the union's appeals did not attempt to limit the boycott only to those products which the companies advertised on television. However, the Board felt that *Servette* vindicated its original position that the publicity proviso applied to any person who enhanced the value of the product. Consequently, it again found no unfair union practice because of the proviso.[12] This is a valuable decision because it shows graphically how narrow the prohibitions on consumer picketing are. Two conditions must be met: (1) the boycotting activity must fail to distinguish between struck products and those not involved in the dispute, and (2) the activity must

[7] 377 U.S. 58 (1964), noted in 6 B.C. Ind. & Com. L. Rev. 125 (1964).

[8] Local 760, Fruit Packers, 132 N.L.R.B. 1172, 48 L.R.R.M. 1496 (1961).

[9] Supra note 7, at 83.

[10] Television and Radio Artists, 134 N.L.R.B. 1617, 49 L.R.R.M. 1391 (1961).

[11] Great Western Broadcasting Co. v. NLRB, 310 F.2d 591.

[12] Television and Radio Artists, 150 N.L.R.B. No. 46, 58 L.R.R.M. 1019 (1964).

not be exempted by the publicity proviso, which is acquiring an increasingly broad interpretation.

In *Steelworkers v. NLRB*,[13] the issue was whether the union's picketing was protected by the primary picketing proviso. The union pickets went on railroad land adjacent to the struck employer (Carrier Corporation) and patrolled in an effort to force the railroad not to make its usual deliveries and pickups at Carrier's plant. The Second Circuit, apparently placing heavy emphasis on the fact that the picketing occurred on railroad property, concluded that it was secondary.[14] The Supreme Court, in reversing, cited *Local 761, Electrical, Radio & Machine Workers v. NLRB*[15] as holding that location is not the sole factor in determining whether picketing is primary or secondary. The test used by the Court hinges on the type of work being done by the secondary employees. If the activities picketed relate to the day-to-day operations of the struck employer, the picketing is primary. If the picketing is aimed at activities which have no bearing on the ordinary business operations of the struck employer, it is secondary.

D. Hot Cargo Clauses

1. *Validity of the Clause*

When Congress enacted section 8(e) in 1959, outlawing hot cargo clauses in all but the construction and garment industries,[1] the move was generally considered aimed at the Teamsters and other powerful unions which were using such clauses to force small businessmen to cease dealing with non-union persons.[2] The clause was generally invoked when the union had a primary dispute with the non-union employer; when neutral employers ceased business with him, the powerful economic effect would invariably cause the pri-

[13] 376 U.S. 492 (1964).

[14] 311 F.2d 135 (1962). The decision is criticized in 5 B.C. Ind. & Com. L. Rev. 200 (1963).

[15] 366 U.S. 667 (1961).

[1] Section 8(e) provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such an extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer" . . . shall not include persons in the relation of a jobber, manufacturer . . . in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. V, 1964).

[2] Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 272-73 (1959).

mary employer to accede to union demands. Case law prior to section 8(e) had made the clause, once obtained, substantially unenforceable.[3] Nevertheless, in view of the powerful economic potential of the hot cargo clause, it was decided to make it illegal merely to enter into such an agreement[4] or to use coercion to seek to execute the illegal agreement.[5]

As expected, unions were reluctant to relinquish this power and have sought loopholes in section 8(e). However, the District of Columbia Circuit, in *Local 413, Teamsters v. NLRB (Brown Transport)*,[6] has established the policy that agreements used to achieve the results viewed as undesirable by Congress when it passed section 8(e) will violate the hot cargo ban despite arguments that they are not within the specific prohibition of section 8(e). This broad approach reflects the extreme distaste with which Congress viewed the secondary effects of hot cargo clauses and its determination that the ban should not be evaded by subterfuge.

The opinion of Judge J. Skelly Wright merits extended discussion because of its thorough handling of a number of types of hot cargo clauses. Before individual discussion of the clauses, Judge Wright treated the problem whether a section 8(e) violation was to be determined by the *object*, *effect*, or *terms* of the clause. He held that "the contract must be tested by its terms, express or implied."[7] This result is undoubtedly correct. An objects test would place emphasis on subjective intent and require proof of acts from which the intent could be implied. An effects test also places emphasis on action taken to enforce the clause. But section 8(e) makes it illegal merely to "enter into" the clause, and it has been held that a violation is established by proving existence of the clause without any proof of the party's intent or attempts to enforce it.[8] Thus, it is proper to test the agreement by its terms to determine whether they have the effect of requiring the employer to cease doing business with another person.

The Picket Line Clause. The collective bargaining contract contained a clause that the employer might not take disciplinary action against an indi-

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[3] Local 1976, Carpenters v. NLRB, 357 U.S. 93 (1958) (enforcement of clause not a defense to secondary boycott charge); Application of Apex Lumber, 15 Misc. 2d 15, 179 N.Y.S.2d 503 (Sup. Ct. 1958), aff'd, 7 App. Div. 920, 183 N.Y.S.2d 697 (1959) (injunction to compel arbitration of clause denied).

[4] Section 8(e), 73 Stat. 542 (1959), 29 U.S.C. § 158(e) (Supp. V, 1964), quoted supra note 1.

[5] Section 8(b)(4)(A) makes it an unfair labor practice for a union—

> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> > (A) Forcing or requiring any employer . . . to enter into any agreement which is prohibited by section 8(e).

73 Stat. 543 (1959), 29 U.S.C. § 158(b)(4)(A) (Supp. V, 1964).

[6] 334 F.2d 539, cert. denied, 379 U.S. 913, 916 (1964).

[7] Id. at 542.

[8] American Feed Co., 133 N.L.R.B. 214, 48 L.R.R.M. 1622 (1961).

vidual employee who refused to cross any picket line.[9] The Board[10] conceded that this clause is valid protection of the employee's right to refuse to cross a primary picket line at the employer's own premises. Also the clause is valid with respect to a refusal to cross a picket line on another employer's premises which meets the conditions of the proviso to section 8(b)(4).[11] But, the Board said, the clause went too far in sanctioning a refusal to cross a secondary picket line at the employer's own premises and also by permitting refusals to cross a picket line on another employer's premises which does not meet the conditions of the section 8(b)(4) proviso. The circuit court agreed with the Board except on one point. An employee has the right to refuse to cross any primary picket line, whether or not it meets the requirements of the proviso. In essence, the court was saying that the test for determining whether the agreement is legal is whether it may have unlawful secondary effects on a labor dispute. The proviso does not by implication proscribe those forms of primary picketing that it does not specifically permit, and to the extent that primary picketing goes beyond the proviso, the clause may validly apply. Beyond that point, when the picket line becomes secondary, whether at the premises of the contracting employer or elsewhere, the clause is an invalid authorization of secondary activity.

The Struck Goods Clause. Clause (a) under this section of the contract read:

> It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to perform any service which, but for the existence of a controversy between a labor union and any other person (whether party to this Agreement or not), would be performed by the employees of such person.[12]

The court said a refusal to work under this clause would be valid only where the relationship between the contracting employer and the employer involved in the labor dispute is so close that they may be considered allies. Quoting

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[9] Local 413, Teamsters, supra note 6, at 542. The clause states:

It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line, including the picket line of Unions party to this Agreement and including picket lines at the Employer's place or places of business.

[10] The Board's holdings appear in two separate decisions: Local 413, Teamsters, 140 N.L.R.B. 1474, 52 L.R.R.M. 1252 (1963); and Local 728, Teamsters, 140 N.L.R.B. 1436, 52 L.R.R.M. 1258 (1963).

[11] The proviso states:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of an employer (other than his own employer), if the employees of such employer are engaged in a strike ratified . . . by a representative . . . whom such employer is required to recognize under this Act.

73 Stat. 543 (1959), 29 U.S.C. § 158(b)(4) (Supp. V, 1964).

[12] Local 413, Teamsters, supra note 6, at 546.

from *NLRB v. Business Mach. & Office App. Mechanics*,[13] the court noted two requirements for treating employers as economic allies:

1. When the contracting employer knowingly does work which would otherwise be done by the striking employees of the primary employer, and
2. When the work is paid for by the primary employer pursuant to an arrangement enabling it to meet its contractual obligations.

Clause (a) goes beyond the ally doctrine insofar as it permits a refusal to work even where the second element is lacking. Therefore, to the extent it authorized a work refusal when the employers were not allies, the clause was invalid.

Clause (b) of the struck goods section of the contract was clearly a hot cargo clause permitting individual employees to refuse to handle goods involved in a labor controversy without fear of disciplinary action. However, the union argued that, read in conjunction with clause (c), it lost its illegal nature. In clause (c), the employer agreed not to cease doing business with any other person as a result of individual employees exercising their rights (in particular the right granted by clause (b)). The court refused to allow such a promise to affect the status of an agreement plainly illegal under section 8(e).

The Subcontracting Clause. This clause required the employer to "refrain from using the services of any person who does not observe the wages, hours and conditions of employment established by labor unions having jurisdiction over the type of services performed."[14] The Board had found this clause illegal because it conditioned subcontracting on the person with whom the employer might subcontract. The court noted that if the clause conditioned subcontracting on union recognition (a union signatory clause), it was secondary in nature and illegal. But if it conditioned subcontracting only on the maintenance of union standards, it was really a job protection clause having primary importance between the union and the contracting employer. Examining the clause, Judge Wright upheld it as a union standards clause limiting the right to subcontract only to the extent that the subcontractor must adhere to union wages and conditions of employment.[15]

The Hazardous Work Clause. This clause proposed that in the event the picket line clause should be declared invalid, an employee would recover additional wages and fringe benefits for incurring the dangers and difficulties of crossing picket lines.[16] The Board felt that this was essentially a penalty

[13] 228 F.2d 553, 559 (2d Cir. 1955), cert. denied, 351 U.S. 962 (1956), quoted in Local 413, Teamsters, supra note 6, at 546.

[14] Local 413, Teamsters, supra note 6, at 548. In a footnote the court noted that its disposition of the clause was based on the assumption that it applied only to work which would otherwise be done by the bargaining unit.

[15] In a later case, Judge Wright held that a work allocation clause requiring all deliveries into Chicago, whether originating within or outside the state, to be made by local employees was primary in nature. Local 710, Teamsters v. NLRB, 335 F.2d 709 (D.C. Cir. 1964).

[16] Local 728, Teamsters, supra note 10, 140 N.L.R.B. at 1438, 52 L.R.R.M. at 1260. The hazardous work clause read:

for the employer's continuance of his regular business, and found another section 8(e) violation. The circuit court refused to pass judgment because the clause had been repudiated before drawing up the final contract and because the issue had not been fully litigated.

Having found section 8(e) violations in the picket line and struck goods clauses, the court declared those sections void to the extent they exceeded the legal limits set out in the opinion. Essentially, this might be considered either rewriting the bargaining contract or defining the limits within which the various clauses are applicable. In refusing to declare whole clauses or even the entire contract void, the court kept in mind that part of section 8(e) which makes agreements invalid only to the extent of the illegality. In addition, the court noted from the general language of the clauses that the parties apparently intended them to be valid and binding to the maximum extent legally possible. Thus, the opinion makes the picket line clause valid where the dispute is primary, the struck goods clause valid where the ally doctrine applies, and the subcontractor clause valid unless the union attempts to treat it as a union signatory clause.

In addition to *Brown Transport*, numerous other cases have dealt with different aspects of section 8(e), so that there is now a comprehensive body of law by which to determine whether a clause violates the section. Many of the cases deal with subcontracting clauses and pertain specifically to the issue—what is a union signatory clause? When the employer agrees to "refrain" from dealing with any person "who has not executed this agreement," it is clearly violating section 8(e) by conditioning subcontracting on unionization.[17] Nor may subcontracting be conditioned on union consent.[18] Use of the word "refrain" instead of "cease" will not make the contract valid.[19] The courts interpret an "agreement to cease" under the statute as including the agreement to refrain from doing business with non-union subcontractors. An agreement prohibiting all contracting out of work done by the unit is clearly permissible on the ground that it seeks to preserve job opportunities and conditions of employment, and thus comes within the area of primary dispute between the contracting parties.[20]

Another practice which the Board has condemned under section 8(e) is a clause that employees are not required to work on goods not bearing the "union label."[21] In the construction industry a subcontractor clause is valid, whether it requires union recognition or merely adherence to union standards. But the distinction becomes important because the signatory clause may not be enforced by picketing, threats, or any form of coercion which violates

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> In the event it shall be finally determined . . . that employees covered by this Agreement may be required to make deliveries to, pickups from or enter upon the premises of any person who is involved in a labor dispute, the Employer shall provide the following additional benefits in view of the additional hazards . . . of performing such duties. . . .

[17] NLRB v. Joint Council of Teamsters, 338 F.2d 23 (9th Cir. 1964).

[18] Ibid.

[19] Ibid.

[20] Ohio Valley Carpenters Dist., 136 N.L.R.B. 977, 49 L.R.R.M. 1908 (1962).

[21] Carpenters Union, 149 N.L.R.B. No. 65, 57 L.R.R.M. 1341 (1964).

section 8(b)(4)(B).[22] Hence, this clause may be enforced only by legal means.[23] On the other hand, the union standards clause involves a primary dispute not subject to the secondary boycott provisions of 8(b)(4).[24]

Section 8(e) makes it illegal to "enter into" a hot cargo clause. Recent cases have given "enter into" an extremely broad definition. Thus, if the agreement was made before section 8(e) was enacted, it will be a violation for the union to seek enforcement of the void agreement. Reinstituting the void clause constitutes "entering into" an agreement.[25] However, section 8(e) is not violated if the unfair labor practice charge is brought more than six months after the making of the agreement and there has been no attempt to enforce it or comply with it in the previous six months.[26]

Clauses which seek to circumvent section 8(e) by giving individual employees the right not to handle goods or cross picket lines will be void to the extent that the same promise by their employer would be void.[27] This was one of the defenses in *Brown Transport*; the reasoning was deemed so transparent as to merit only summary treatment. Since an employer must work through its employees, such an agreement has the same effect as the employer itself making the promise. It is no excuse that the employer has available other persons who may perform the work refused by the employees in the bargaining unit.[28]

A final point should be emphasized. While a clause on its face may relate to an area of primary concern between the parties, if the union interprets it in an illegal manner and attempts to enforce that illegal interpretation, the conduct will violate section 8(b)(4)(B).[29]

2. *The Construction Proviso*

When Congress enacted the ban on hot cargo clauses, it excluded two areas of commerce—the garment industry and the construction industry.[30] The garment industry was specifically excluded not only from the prohibitions of section 8(e) but also from the secondary boycott provisions of section 8(b)(4). Consequently, in that industry the hot cargo agreement is

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22 San Bernardino Bldg. & Constr. Trades Council v. NLRB, 328 F.2d 540 (D.C. Cir. 1964).

23 Local 48, Sheet Metal Workers v. Hardy Corp., 332 F.2d 682 (5th Cir. 1964).

24 This was apparently the union's position in Samoff v. Local 542, Operating Eng'rs, — F. Supp. —, 58 L.R.R.M. 2127 (M.D. Pa. 1964). The district court, needing only to find *probable cause* of an unfair labor practice, granted a temporary injunction pending Board disposition of the case. The agreement required the contractor to make subcontractors observe the "terms" of the labor agreement. Whether this will be a union signatory or union standards clause will depend on the Board's interpretation of what is included in the word "terms."

25 District 9, Machinists v. NLRB, 315 F.2d 33 (D.C. Cir. 1962); Los Angeles Mailers Union No. 9 v. NLRB, 311 F.2d 121 (D.C. Cir. 1962).

26 Teamsters Union, 149 N.L.R.B. No. 3, 57 L.R.R.M. 1223 (1964).

27 Los Angeles Mailers Union No. 9 v. NLRB, supra note 25.

28 Ibid.

29 NLRB v. Local 753, Milk Wagon Drivers, 335 F.2d 326 (7th Cir. 1964).

30 Section 8(e), 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. V, 1964), quoted supra note 1.

valid, and the union may exert coercive economic pressure to obtain or enforce the agreement.

The picture in the construction industry is not so clear. First of all, the proviso exempts only hot cargo agreements relating to the subcontracting of work to be done on the job site. Thus, an agreement covering materials to be transported to the job site is not exempted.[31] Also, only "an employer in the construction industry" may enter the clause.[32] Furthermore, the clause must relate to subcontracting and not, for instance, to crossing picket lines.[33]

While the construction unions were permitted to enter into hot cargo agreements, it was understood that the law pertaining to such clauses prior to 1959 would remain unchanged. The report of the conference committee states:

> The committee of conference does not intend that this *proviso* should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case. . . . It is not intended that the *proviso* change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract.[34]

Reading these statements, one might readily infer that most of the problems concerning hot cargo clauses were clearly resolved prior to the 1959 amendments. This was far from true. The leading hot cargo case, *Local 1976, Carpenters v. NLRB*[35] (the *Sand Door* case), established that a hot cargo clause may not be enforced by conduct such as picketing, striking, or any other form of economic coercion which would violate the secondary boycott section. But *Sand Door* did not specifically comment on whether it was legal to use coercion to obtain the hot cargo agreement, nor did it refer to the union's right to seek legal enforcement of the clause on a contractual theory. However, the Court indicated that, although the union might not use economic coercion to enforce the clause, it might secure its goal by other means.[36]

[31] Conf. Rep. No. 1147, 2 U.S. Code Cong. & Admin. News, 86th Cong., 1st Sess. 2511 (1959). Because the scope of an agreement is not always clearly defined, each year several cases concerned with whether the clause is limited to the work site are brought before the Board. E.g., NLRB v. Local 294, Teamsters — F.2d —, 58 L.R.R.M. 2518 (2d Cir. 1965); Los Angeles Bldg. & Constr. Trades Council, 150 N.L.R.B. No. 152, 58 L.R.R.M. 1315 (1965); Cement Masons Union, 149 N.L.R.B. No. 111, 57 L.R.R.M. 1471 (1964).

[32] Columbus Bldg. & Constr. Trades Council, 149 N.L.R.B. No. 117, 57 L.R.R.M. 1465 (1964) (picketing prospective lessee of building under construction for hot cargo clause held to violate section 8(b)(4)(A)).

[33] Los Angeles Bldg. & Constr. Trades Council, 151 N.L.R.B. No. 46, 58 L.R.R.M. 1440 (1965); Los Angeles Bldg. & Constr. Trade Council, supra note 31.

[34] Conf. Rep. No. 1147, 2 U.S. Code Cong. & Admin. News, supra note 31, at 2511-12.

[35] Supra note 3.

[36] The Court said:

Thus, despite statements that hot cargo law would continue unchanged in the construction industry, this area of law suffered from incomplete development, and it was left to the courts to continue to develop that law as if section 8(e) had not been enacted.

One of the major problems was whether picketing or other coercion used to obtain a valid hot cargo clause would violate section 8(b)(4)(A). That section prohibits coercion used to obtain "any agreement which is prohibited by section 8(e)."[37] The Board originally took the position in *Colson & Stevens*[38] that picketing to obtain a union signatory clause violated section 8(b)(4)(A). It felt that this result was consistent with the reasoning of *Sand Door*, and that if coercion to enforce the agreement was illegal, the same pressures to obtain it should also be illegal. The Board reached this decision mainly because of the way it read *Sand Door*, even though the majority recognized that it was straining the meaning of sections 8(b)(4)(A) and 8(e) in doing so. Nevertheless, in order to continue what it believed was federal policy, it held the construction proviso applicable only to section 8(e) and not to have any limiting effect on section 8(b)(4)(A).

The Ninth Circuit refused to enforce *Colson & Stevens*[39] because it felt that it must read the two sections together. Since the agreement was not illegal under section 8(e), picketing to obtain it could not be illegal. Following *Colson & Stevens*, a number of other circuits reversed Board findings of section 8(b)(4)(A) violations based on similar facts.[40]

In *Centlivre Village Apts.*,[41] the Board, in view of the total lack of support, reversed its position in *Colson & Stevens*. In numerous recent cases it has adopted the principle that a section 8(b)(4)(A) violation must rest on the illegality of the clause under section 8(e).[42] These decisions in no way affect the prohibitions against enforcement of a hot cargo agreement,[43] nor will they prevent the Board from finding a violation of section 8(b)(4)(B) where an object of the conduct is to force the employer to cease doing business with any person, even though it was also the union's objective to obtain a legal hot cargo clause.[44] As the Board observed in *Centlivre*:

> It does not necessarily follow from the fact that unions cannot invoke the contractual provision in the manner which they sought to do so in the present cases that it may not, in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties.

Id. at 108.

[37] Section 8(b)(4)(A), 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(A) (Supp. V, 1964), quoted supra note 5.

[38] Local 383, Laborers, 137 N.L.R.B. 1650, 50 L.R.R.M. 1444 (1962).

[39] Local 383, Laborers v. NLRB, 323 F.2d 422 (1963).

[40] Essex County & Vicinity Dist. Council of Carpenters v. NLRB, 332 F.2d 636 (3d Cir. 1964); Orange Belt Dist. Council of Painters No. 48 v. NLRB, 328 F.2d 534 (D.C. Cir. 1964); San Bernardino Bldg. & Constr. Trades Council, supra note 22.

[41] 148 N.L.R.B. No. 93, 57 L.R.R.M. 1081 (1964).

[42] Local 36, Roofers, 150 N.L.R.B. No. 132, 58 L.R.R.M. 1259 (1965); Hod Carriers, 150 N.L.R.B. No. 19, 58 L.R.R.M. 1033 (1964); Plasterers Union, 149 N.L.R.B. No. 106, 57 L.R.R.M. 1448 (1964); Los Angeles Bldg. & Constr. Trades Council, 149 N.L.R.B. No. 78, 57 L.R.R.M. 1410 (1964); Columbus Bldg. & Trades Council, 149 N.L.R.B. No. 13, 57 L.R.R.M. 1249 (1964).

[43] E.g., Carpenters Dist. Council v. NLRB, 339 F.2d 142 (6th Cir. 1964).

[44] See cases cited in note 42 supra.

> No different result [under section 8(b)(4)(B)] is called for because Respondents by their picketing seek simultaneously to obtain a lawful "hot cargo" clause and termination of business relations with a primary employer . . . rather than first the contract and then the termination.[45]

In the area of section 8(b)(4)(B) the Board has recently added a requirement that the object of the coercion be to cause the employer to cease doing business with an existing and identified subcontractor.[46] This will be the case every time a union uses coercion to obtain a hot cargo clause, and the employer at that time has business relations with a non-union subcontractor.[47]

Assuming that the union successfully obtains a valid hot cargo clause and conceding that it cannot be enforced by conduct violating section 8(b)(4)(B), is there some way the union can compel the employer to live up to his agreement? In *Local 48, Sheet Metal Workers v. Hardy Corp.*,[48] the union brought a breach of contract action under section 301, seeking damages and injunctive relief. The district court denied relief because it felt that judicial enforcement would amount to coercion of the employer's exercise of its right freely to decide whether to engage in a secondary boycott.[49] The Fifth Circuit reversed, and in so doing exhibited an understanding of *Sand Door* not found in any other opinion. The court read *Sand Door* "as proscribing those pressures which were statutorily illegal at the time . . . and as having left the question of judicial enforcement open."[50] It felt that cases such as *Application of Apex Lumber*[51] were incorrectly decided because they read into *Sand Door* a broad policy discouraging any restraint on the employer's freedom to decide whether to engage in the secondary boycott. In fact, *Sand Door* did not prohibit all enforcement of the clause, only enforcement which would violate the secondary boycott laws. In other words, *Sand Door* proscribed illegal coercion in the name of contract enforcement. But judicial enforcement is not "coercion" in the sense that the word is used in section 8(b)(4)(ii)(B),[52] and it is improbable that Congress would have intended a legal contract

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[45] Centlivre Village Apts., supra note 41, 57 L.R.R.M. at 1083.

[46] Plasterers Union, supra note 42.

[47] The union may avoid section 8(b)(4)(B) by seeking a union standards clause rather than a signatory clause. See discussion of clauses earlier in this section.

[48] 332 F.2d 682 (5th Cir. 1964).

[49] 218 F. Supp. 556 (N.D. Ala. 1963). The court apparently relied strongly on this language from *Sand Door*:

> it seems most probable that the freedom of choice for the employer contemplated by [§ 8(b)(4)(B)] is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation. . . . Such a choice, free from the prohibited pressures . . . must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into by the parties.

Local 1976, Carpenters v. NLRB, supra note 3, at 105.

[50] Local 48, Sheet Metal Workers v. Hardy Corp., supra note 48, at 687.

[51] Supra note 3. The New York court enjoined arbitration proceedings on the hot cargo clause as being a violation of federal policy.

[52] See discussion of secondary boycotts, supra p. 878.

clause to be totally unenforceable. Hence, the circuit court remanded for further findings.

Little can be said against the interpretation of the law in *Hardy Corp.* or in the Ninth Circuit's opinion in *Colson & Stevens*. Under the present statute it is difficult to conceive how either court might have reached a different result. However, when combined, the two cases entitle the union to exert all forms of economic pressure it may validly use in a primary dispute to obtain a clause that is secondary in nature. The clause may then be legally enforced if the employer balks. This total result can only be justified if there is some valid consideration affecting the employees' status in the construction industry which warrants infringement on the rights of non-union subcontractors to be free from unfair secondary pressures to recognize the union. The problem appears to be one of job preservation. Employees in construction unions are employed on a job-to-job basis. They may have several different employers in a year. By obtaining union signatory clauses, the union is able to guarantee that the contractor will use its men for the job. In this respect the clause is primary and protects union jobs. But it also tends to force the non-union subcontractor to recognize the union. Thus, the ultimate issue is whether the right of unionized construction workers to this form of job security outweighs the right of other workers not to be compelled to join the union in order to get construction work. Perhaps the safest solution is that if Congress thinks the wrong rights are prevailing, it will change the law.

E. Union's Duty of Fair Representation

On July 1, 1964, the day before the President signed the Civil Rights Act,[1] the NLRB handed down a significant decision giving itself broad power to prevent and eliminate racial discrimination by the statutory bargaining representative. In *Hughes Tool*,[2] the Board found violations of sections 8(b)(1)(A), (2), and (3)[3] when a white local failed to process the grievance of

[1] 78 Stat. 241 (1964).

[2] Metal Workers Union, 147 N.L.R.B. No. 166, 56 L.R.R.M. 1289 (1964).

[3] Section 8(b)(1)(A) states:

> It shall be an unfair labor practice for a labor organization or its agents—
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title . . . .

61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958).

Among the rights guaranteed to employees by section 7 is the right "to bargain collectively through representatives of their own choosing. . . ." 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

Section 8(b)(2) makes it an unfair labor practice for a union

> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of [section 8] or to discriminate against an employee with respect to whom membership in such organization has been denied . . . on some ground other than his failure to tender the periodic dues. . . .

61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1958).

Section 8(b)(3) makes it an unfair labor practice for a union

> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) of this title.

61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958).

a member of the Negro local jointly representing the bargaining unit. A Negro employee who had applied for an apprenticeship was rejected for white employees with less seniority. Since under the collective bargaining agreement, the apprenticeships were available only to white workers, only the white local could process grievances relating to those positions.[4] Consequently, the Negro employee requested the white local to process his grievance; when it refused, the Negro local brought unfair labor practice charges and a petition for decertification.

The Board majority expressly adopted the Trial Examiner's findings:

> 1. *8(b)(1)(A)*. The union's refusal to process the employee's grievance was a refusal, for reasons not related to his qualifications, to represent him. Consequently, the union was restraining the employee in his section 7 right "to bargain collectively through representatives of [his] own choosing." The Trial Examiner pointed out that the apprenticeship contract was no defense because it excluded members of the unit not eligible for membership in the white local, and that when a union is responsible for supplying workers for certain jobs, it owes a duty to represent all unit employees in relation to these jobs. Discrimination against Negro members violated this duty.
> 2. *8(b)(2)*. The Trial Examiner found a violation of this section in the "withholding from Davis of treatment which would have been given to him had he been eligible for membership in local 1. . . ."
> 3. *8(b)(3)*. This violation was predicated upon a holding that the union's duty to bargain runs not only to the employer, but also to the employees being represented. Since the refusal to process the grievance was based upon considerations irrelevant to the employee's qualifications, the section was violated.[5]

The Board adopted the above findings in their entirety and in addition found that the "Board cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative."[6] In denying the ability of a union to obtain or retain certification when it practices racial discrimination, the Board expressly overruled the line of cases following *Atlanta Oak Flooring Co.*[7] Then, in accordance with its findings, the Board ordered the union to cease and desist from further discriminatory practices, and it decertified the union.

Chairman McCulloch and Member Fanning dissented on sections 8(b)(2) and (3), but concurred on the section 8(b)(1)(A) violation for reasons different from the majority. They felt that no violations of sections 8(b)(2)

[4] The bargaining contract on its face discriminated against Negro members of the unit and violated sections 8(b)(1)(A), (2) and (3). However, the allegations of the charging Negro local were not sufficient for such a finding. Hence, the case revolved around the white local's failure to process the grievance.

[5] Metal Workers Union, supra note 2, 56 L.R.R.M. at 1292.

[6] Id. at 1294. The Board cited Shelley v. Kraemer, 334 U.S. 1 (1948), and Bolling v. Sharpe, 347 U.S. 497 (1954).

[7] 62 N.L.R.B. 973, 16 L.R.R.M. 235 (1945). This case adopted a sort of "separate but equal" locals approach.

and (3) could be found unless the charge alleged such violations.[8] Furthermore, they said that there was no violation of section 8(b)(2) on the merits because that section applies only to discrimination related to "union membership, loyalty, the acknowledgment of union authority or the performance of union obligations."[9] Racial discrimination, they urged, does not fit these categories. As to section 8(b)(3), they maintained that it was intended to create a duty owing only to employers.

The minority completely disapproved of the holding that a violation of the duty of fair representation was an unfair labor practice violating section 8(b)(1)(A). In their view, such a duty was to be enforced only in the courts. Nevertheless, they found a section 8(b)(1)(A) violation, apparently on the ground that the discrimination was based on nonmembership considerations, violating the section 7 right to abstain from union activity.

The rulings in *Hughes Tool* seem likely to affect two types of cases: those involving racial discrimination and those involving breach of the duty of fair representation. To a large extent, the former is encompassed by the latter; racial discrimination, however, raises strong national policy considerations not found in most labor disputes, and so merits separate discussion.

Racial Discrimination. The duty of a statutory bargaining agent not to engage in racial discrimination was first recognized in *Steele v. Louisville & Nashville Ry.*[10] That case, involving the Railway Labor Act, arose in the Alabama state courts, because there was no administrative remedy available for employees injured by union discrimination.[11] In *Syres v. Oil Workers,*[12] the Supreme Court ordered the lower court to consider charges of racial discrimination under the NLRA. The Court cited *Steele* and subsequent cases as creating a federal policy condemning discrimination in labor unions.

In addition to the court remedy, the NLRB had power to decertify a union whose racial discrimination violated its duty of fair representation.[13] But racial discrimination was not per se violative of that duty.[14]

Hughes Tool seems to have completely changed these remedies. Now, no union practicing racial discrimination may obtain or retain certification as statutory bargaining agent. This raises problems, because Board certification procedures are not generally subject to judicial review. Therefore, the Board will have exclusive say on questions of racial discrimination in the certifica-

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[8] The charge had alleged a violation only of section 8(b)(1)(A). The Trial Examiner felt that all pertinent issues had been discussed and that the evidence as a whole warranted his findings of section 8(b)(2) and (3) violations.

[9] Metal Workers Union, supra note 2, 56 L.R.R.M. at 1300. The dissenting members formulated this position in their dissent to Miranda Fuel Co., 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962).

[10] 323 U.S. 192 (1944).

[11] Subsequent cases involving the Railway Labor Act are Conley v. Gibson, 355 U.S. 41 (1957); Brotherthood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944).

[12] 350 U.S. 892 (1956) (memorandum).

[13] Larus & Brother Co., 62 N.L.R.B. 1075, 16 L.R.R.M. 242 (1945).

[14] Atlanta Oak Flooring Co., supra note 7. Certification of segregated locals was upheld.

tion context.[15] Such a policy may be approved only if the Board is deemed to have sufficient expertise to determine what is racial discrimination. In clear cases, such as denial of union membership or job opportunities, the Board will have little difficulty finding discrimination. In close cases, however, it seems unfair to refuse certification when other remedies are available.[16]

The *Hughes Tool* holding also raises jurisdictional problems. By finding that racial discrimination violates the duty of fair representation and is, therefore, an unfair labor practice, *Hughes Tool* apparently will bring the *Garmon* preemption rule into play.[17] Thus the Board's finding of an unfair labor practice preempts the field from both federal and state courts, and the remedy in *Syres* is no longer available.

Whether or not the Board's remedy will itself be preempted by the Civil Rights Act cannot yet be determined. The Board takes the position that its power is in no way limited by Title VII. It bases its reliance on the Senate's refusal to amend the act by making Title VII the exclusive remedy for racial complaints.[18]

Briefly, the workings of Title VII will be as follows: It creates the Equal Employment Opportunity Commission consisting of five members under the Department of Labor.[19] Unlawful employment practices by employers, employment agencies, and labor organizations based on discrimination on grounds of race, color, religion, sex or national origin are enumerated.[20] The Commission may act when it receives a complaint, or on its own initiative when it has reasonable cause to believe a person has violated the act.[21] Subject to certain restrictions, an aggrieved party under the act may commence a civil action in a United States district court when efforts to settle

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[15] The Leedom v. Kyne, 358 U.S. 184 (1958), exception granting judicial review of legal questions would be unavailable because racial discrimination is a question of fact.

[16] On July 2, 1965, Title VII of the Civil Rights Act will take effect and provide judicial remedies against discrimination in labor.

[17] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). It is worth noting, however, that even with the Board's expansion of its powers to regulate racial discrimination, its powers in the field of job discrimination are, and will remain, quite limited. Accordingly, the queston of preemption under the NLRA will arise only in narrow contexts, such as the certification area. Nevertheless, given the need for elimination of job discrimination, the urgency for effective action, on both the local and federal levels, and the multiplicity of federal and state regulation in the area, a difficult and confusing problem of accommodation of conflicting exercises of authority lies ahead. See Colorado Anti-Discrimination Comm'n v. Continental Airlines, 372 U.S. 714 (1963), and Note, 5 B.C. Ind. & Com. L. Rev. 458 (1964).

It should also be noted that the Board's power may not be exclusive even in the unfair labor practice area. Under Humphrey v. Moore and Republic Steel v. Maddox, an aggrieved employee, after exhausting the contract grievance arbitration procedures, may sue the union and employer under section 301. See the section on employee rights under the collective bargaining agreement, supra p. 826.

[18] Rubber Workers Union, 150 N.L.R.B. No. 18, 57 L.R.R.M. 1535 (1964).

[19] Civil Rights Act of 1964 § 705(a), 78 Stat. 257.

[20] Civil Rights Act of 1964 § 703, 78 Stat. 255. The apprenticeship program encountered in *Hughes Tool* is specifically condemned in section 703(d), 78 Stat. 256.

[21] Civil Rights Act of 1964 § 706(a), 78 Stat. 259.

a dispute have failed.[22] The Attorney General, also, may bring a civil action when there is reasonable cause to believe that a person or persons "is engaged in a *pattern or practice* of resistance to the full enjoyment of any of the rights secured by this title. . . ." (Emphasis supplied.)[23] If the court finds an intentional violation of the act, it may order a wide variety of remedies, including injunctions, reinstatement of employees, back pay orders and other appropriate actions.[24]

A final problem involved in *Hughes Tool* is what type of racial discrimination will breach the union's duty of fair representation. Clearly, the grievances in *Hughes Tool* dealt with "terms and conditions of employment," but what about grievances relating to discriminatory use of plant facilities and privileges? In *Rubber Workers Union*, the Board recently held that the privilege of playing on the plant golf course is a condition of employment, and that the union was obligated to process the grievance of Negroes denied that privilege.[25] The same case found violations of sections 8(b)(1)(A), (2) and (3) in the union's refusal to process grievances objecting to the maintenance of segregated toilets and showers.

Fair Representation. The union's duty to represent fairly all employees in the bargaining unit was first recognized in the *Steele* case,[26] and was extended to unions certified under the NLRA in *Wallace Corp. v. NLRB*.[27] Suits for breach of this duty were begun by petitioning a district court[28] without reference to the unfair union practices section of the NLRA enacted in 1947.[29] Then, in 1962, the Board, in *Miranda Fuel Co.*,[30] found that a union's arbitrary reduction of an employee's seniority violated its duty to represent him fairly and was an unfair labor practice. The Board chose section 8(b)(1)(A) as the basis for its discrimination charges. It regarded the union's discriminatory practice as coercing or restraining employee exercise of section 7 rights, among which are the rights to bargain collectively and to refrain from union activities. The duty to represent all employees fairly arises because section 9(a) makes the union the sole bargaining agent. Since employees have lost their right to bargain individually, the union representing them must do so fairly.

Section 8(b)(1)(A) was a somewhat dubious source of a duty of fair representation. No such duty is mentioned either in the statute or the legislative history. Moreover, *NLRB v. Local 639, Teamsters*[31] (the *Curtis* case) makes the holding in *Miranda* all the more doubtful. *Curtis* involved recog-

[22] Civil Rights Act of 1964 § 706(e), 78 Stat. 260. The Attorney General may intervene if the case is of general public importance.

[23] Civil Rights Act of 1964 § 707, 78 Stat. 261.

[24] Civil Rights Act of 1964 § 706(g), 78 Stat. 261.

[25] Rubber Workers Union, supra note 18.

[26] Supra note 10.

[27] 323 U.S. 248 (1944).

[28] Syres v. Oil Workers, supra note 12; Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

[29] 61 Stat. 141 (1947), as amended by 73 Stat. 542 (1959), 29 U.S.C. § 158(b) (Supp. V, 1964).

[30] 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962).

[31] 362 U.S. 274 (1960).

nitional picketing by a minority union after it lost a representation election.[32] Finding that the purpose of the picketing was to make the employer deal with the union, the Board concluded that the picketing coerced employees in their exercise of the right to be representd by a bargaining agent of their own choosing and thus violated section 8(b)(1)(A).[33] The Supreme Court disagreed, finding that section 8(b)(1)(A) "is a grant of power to the Board limited to authority to proceed against union tactics involving *violence, intimidation, and reprisal or threats thereof*. . . ." (Emphasis supplied.)[34]

The Second Circuit refused to enforce the Board's order in *Miranda*, relying on the *Curtis* decision and its belief that the only type of discrimination prevented by sections 8(b)(1)(A), (2) and (3) was discrimination relating to "union membership, loyalty, the acknowledgment of union authority, or the performance of union obligations."[35] Only one judge spoke directly on the issue of fair representation, arguing that such a duty, while implicit in section 9, was not intended by Congress to be read into sections 7 and 8.[36] He viewed the wrong done as a private tort better remedied by a court than the Board.

Despite the widely accepted authoritativeness of the Second Circuit, the Board has shown in *Hughes Tool* that only an adverse Supreme Court holding will make it relinquish its theory that breach of the duty of fair representation is an unfair labor practice.[37] In *Maremount Corp.*,[38] three members, each for a different reason, found violations of section 8(b)(1)(A). Analyzing the complex factual situation,[39] Member Leedom found unfair representation resulting from racial discrimination. Chairman McCulloch felt that the violation stemmed from reduction of seniority as punishment for internal political opposition to the controlling union leaders. Member Jenkins believed that racial discrimination practiced by members in the Tool and Die unit resulted

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[32] The particular problem raised in *Curtis* is now treated by NLRA § 8(b)(7), 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7) (Supp. V, 1964).

[33] 119 N.L.R.B. 232, 41 L.R.R.M. 1025 (1957).

[34] NLRB v. Local 639, Teamsters, supra note 31, at 290. This statement on its face appears to indicate that the Board erred in *Miranda*, since there were no threats, intimidation, or violence. But the *Curtis* case may be distinguished by several factors. Picketing involves the right of free speech, a right jealously protected by the Supreme Court. Section 13 of the act states that no section of the act not specifically curtailing the right to strike may be used to infringe that right. The Court equated the right to picket to the right to strike. There are no specific statutory limitations on the Board's power to impose the duty of fair representation.

[35] NLRB v. Miranda Fuel Co., 326 F.2d 172, 175 (1963).

[36] The court largely adopted the dissent of Board Members McCulloch and Fanning.

[37] See Local 1367, Longshoremen, 148 N.L.R.B. No. 44, 57 L.R.R.M. 1083, 1085 (1964), where the Board states this conviction in footnote 7. The major Board decisions in this area have all been 3-2 with Members McCulloch and Fanning consistently dissenting. Thus, a change in Board membership could result in reversal of *Miranda* and *Hughes Tool*.

[38] 149 N.L.R.B. No. 48, 57 L.R.R.M. 1298 (1964).

[39] The Tool and Die section had for years employed only white workers. It had a long history of political opposition to the group which controlled union bargaining. The controlling group was half white, half Negro. When the Tool and Die unit was transferred into the main plant, the members' seniority was reduced on the ground that they were no longer performing the same work.

in their own seniority being reduced by controlling union members. Apparently, his reasoning was that one discrimination does not justify another. Perhaps the most authoritative conclusion that may be drawn from this case is that conduct of the nature discussed by any of the three opinions will violate the Board's concept of fair representation.

The broadest approach to fair representation was taken in the *Rubber Workers* case,[40] already discussed. Here, the Board ordered the union to process Negroes' grievances covering everything from back pay and separate seniority rosters to use of the company golf course and integrated toilets.

Another recent case, *Tanner Motor Livery*,[41] held that an employer's firing of employees who were protesting his racial discrimination violated section 8(a)(3). This holding was necessarily bottomed on a finding that the right to protest racial discrimination is a concerted activity protected by section 7. Thus, the case further develops the Board's proposition that members of the bargaining unit have the right to be free from discriminatory treatment and to protest when such treatment exists.

Whether or not the Board's position is to be vindicated awaits the final word of the Supreme Court. More is at stake than the legal interpretation of the statute. The heart of the problem is to what extent the Board is empowered to control the conduct of the bargaining agent it certifies. The very issue emphasizes a change which has come about in the Board's position in labor-management problems. Where once the problem was to strengthen the power of unions by helping them to organize, it now appears that the emphasis must shift somewhat if the Board is to retain its vitality. More and more, as union power increases, it becomes necessary to afford some protection to minority or dissident groups which may not share a common goal with their statutory representatives. Certainly, the fiduciary duty implicit in the function of exclusive statutory bargaining agent presupposes a remedy for its breach. The problem then centers on where the remedy shall be obtained. The answer should not come solely from an examination of legislative history to see whether the drafters of an act envisioned all the problems which could arise. Rather, like our Constitution, general laws should be interpreted in a sufficiently broad manner to obtain results consistent with the needs of society when the needs arise. The answer is not to require passage of new law every time a new problem arises. Instead, the most efficient and thorough legislation designed to cope with social problems should make the administrative board a repository of power from which administrators may draw as a new problem arises.

Such an approach to the difficulties of fair representation would make available the processes and remedies of unfair labor practice proceedings, while leaving review with the courts to insure that substantial justice is done. It is not satisfactory to dismiss the tort done as being a private wrong. To do so ignores the fact that the union is an entity certified or licensed by the government to perform certain functions. When such an entity by its con-

[40] Rubber Workers Union, supra note 18.

[41] 148 N.L.R.B. No. 137, 57 L.R.R.M. 1170 (1964).

duct thwarts the purpose of other legislation, it uses power given it by the government to the detriment of government policies. Hence, the wrong done has a significant impact on governmental responsibility and is public in nature.

WILLIAM J. MCDONALD
ROBERT M. STEINBACH