FORTY-FIRST

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR ENDED JUNE 30

1976

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Acting Director
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[1] Took office November 26, 1975, to succeed Ralph E Kennedy, who retired on July 30, 1975
[2] Took office December 1, 1975, to succeed Peter G Nash, whose term expired August 15, 1975.

LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., January 3, 1977.

SIR: As provided in section 3(c) of the Labor Management Relations Act, 1947, I submit herewith the Forty-first Annual Report of the National Labor Relations Board for the fiscal year ended June 30, 1976, and, under separate cover, lists containing the cases heard and decided by the Board during this fiscal year.

Respectfully submitted.

BETTY SOUTHARD MURPHY, *Chairman.*

THE PRESIDENT OF THE UNITED STATES
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES
Washington, D.C.

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I

Operations in Fiscal Year 1976

A. Summary

Forty years after the National Labor Relations Board was created to administer the basic United States labor relations law, a steadily expanding economy brought the NLRB its largest caseload, by far, in fiscal 1976.

In a record-setting year, 49,335 cases of all types were filed with the NLRB by individual workers, by unions, and by business firms. The NLRB initiates no cases, it processes only those brought before it. In the last dozen years, NLRB's caseload has almost doubled.

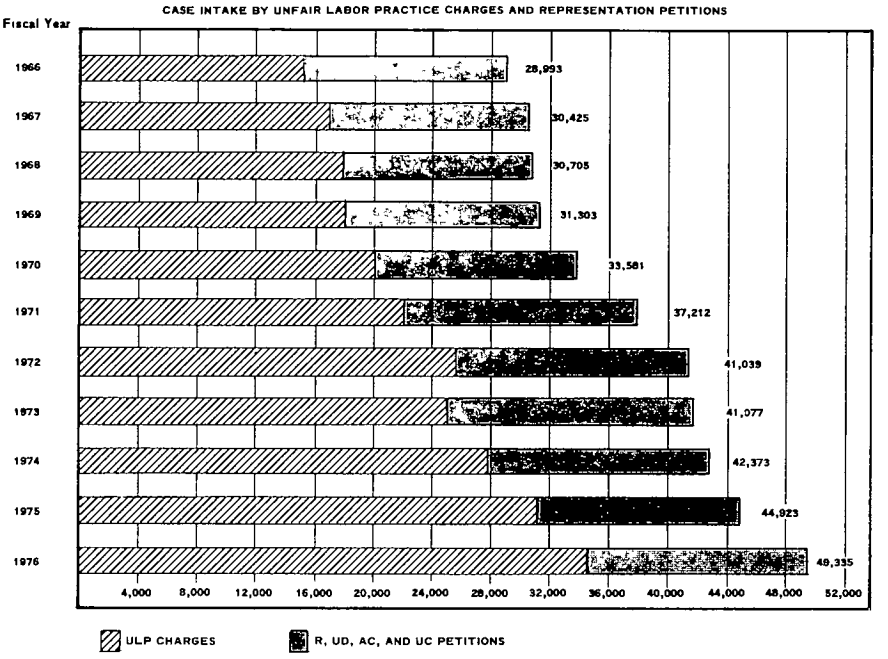
While the great bulk of its cases were processed to disposition in NLRB field offices without the necessity of litigation, the number of cases remaining for final decision was larger than ever. The five-member Board set an all-time 1-year record in issuing decisions. The fiscal 1976 total was 1,678 contested decisions of all types, more than 19 percent greater than the previous record.

Chairman Betty Southard Murphy noted a 30-percent increase in case-processing productivity by attorneys assisting Board Members.

The continuing growth of the service which the labor relations public calls upon the NLRB to perform—processing a caseload which continues to increase apparently without end—brought an important new development during the year. The Chairman's Task Force on the National Labor Relations Board—a 27-member blue-ribbon corps of labor law attorneys—was established to conduct a 2-year study with a goal of modernizing and streamlining NLRB's rules and procedures

The Task Force is composed of legal experts representing labor, management, academia, and the public Created by the Board in accord with the Federal Advisory Committee Act, the Task Force has members nominated by the American Bar Association, Federal Bar Association, U.S Chamber of Commerce, AFL–CIO, National Association of Manufacturers, United Automobile Workers, Business Roundtable, International Brotherhood of Teamsters, Institute of Collective Bargaining and Group Relations, and the NLRB and its General Counsel, John S Irving.

Chart No. 1



The Task Force will make its initial recommendations at the close of calendar 1976.

The 40th anniversary of the Act and the NLRB was marked with a series of observances. Chairman Murphy noted that the statute had stood the test of time, asserting "during these four decades the U.S. in large measure has achieved industrial democracy under law." She said the statute "has been a key factor in our country's immense economic growth, it has brought an evolution of labor relations from sitdown strikes and violence to thoughtful bargaining and productive compromise."

Three leaders in labor, management, and government—AFL–CIO President George Meany, NAM President-elect R. Heath Larry, and Secretary of Labor John T. Dunlop—addressed an NLRB 40th anniversary banquet.

During the fiscal year the NLRB, which had three women regional directors in the 1930's, named women to head two important offices, Natalie P. Allen as regional director in San Francisco and Winifred D. Morio as regional director in New York. Alex V. Barbour was appointed regional director in Chicago and Robert J. Cannella in Hato Rey, Puerto Rico.

A new resident office was opened in San Antonio, Texas, and at year's end the NLRB announced plans to establish its 32d regional office in Oakland, California, dividing its busiest region into two areas

to improve service in central and northern California and in Nevada and Hawaii.

1. NLRB Administration

The National Labor Relations Board is an independent Federal agency created in 1935 by Congress to administer the basic law governing relations between labor unions and business enterprises engaged in interstate commerce. This statute, the National Labor Relations Act, came into being at a time when labor disputes could and did threaten the Nation's economy.

Declared constitutional by the Supreme Court in 1947, the Act has been substantially amended in 1947, 1959, and 1974, each amendment increasing the scope of the NLRB's regulatory powers.

NLRB Members are Chairman Betty Southard Murphy of New Jersey, John H. Fanning of Rhode Island, Howard Jenkins, Jr., of Colorado, John A. Penello of Maryland, and Peter D. Walther of Pennsylvania. John S. Irving of New Jersey is General Counsel. During fiscal 1976, Member Walther succeeded Ralph E. Kennedy of California and General Counsel Irving succeeded Peter G. Nash of New York. John C. Miller, NLRB Solicitor, served as Acting General Counsel for 3½ months.

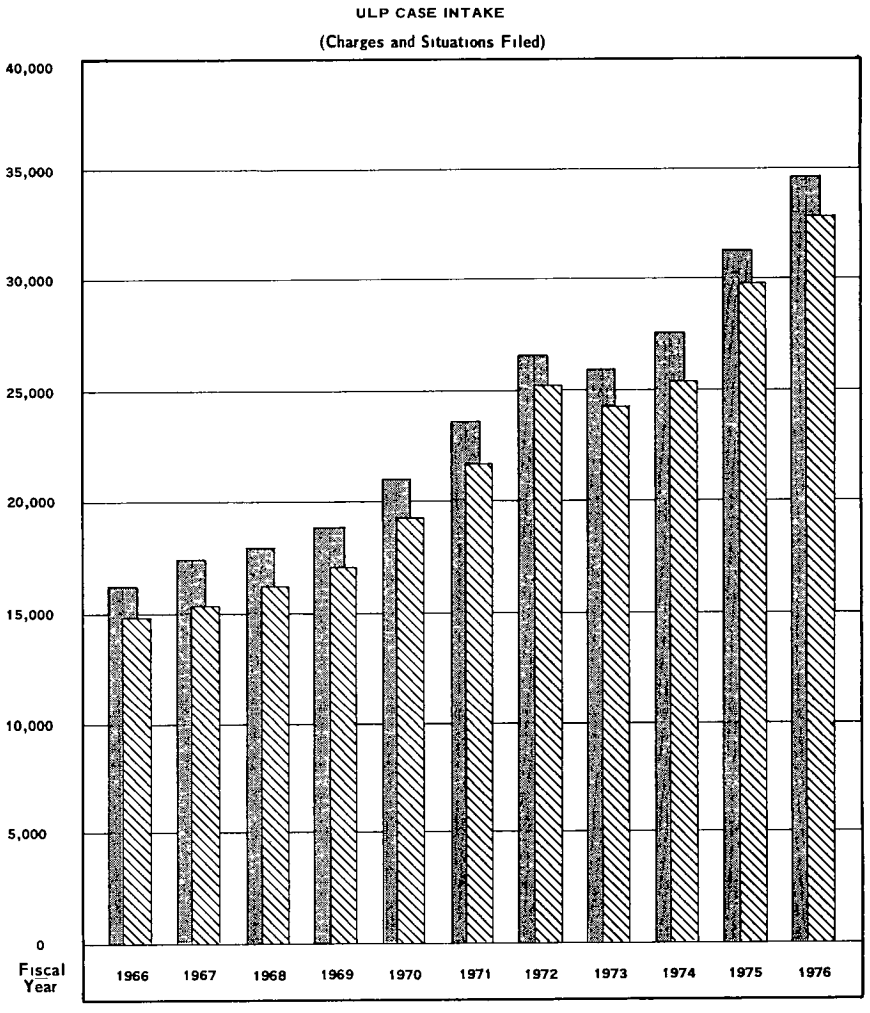
The purpose of the Nation's primary labor relations law is to serve the public interest by reducing interruptions in commerce caused by industrial strife. It seeks to do this by providing orderly processes for protecting and implementing the respective rights of employees, employers, and unions in their relations with one another. The overall job of the NLRB is to achieve this goal through administration, interpretation, and enforcement of the Act.

In its statutory assignment, the NLRB has two principal functions: (1) to determine and implement, through secret ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union, and (2) to prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions or both.

The NLRB does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections which are filed in the NLRB's 47 regional, subregional, and resident offices.

The Act's unfair labor practice provisions place certain restrictions on actions of employers and labor organizations in their relations with employees, as well as with each other Its election provisions provide mechanics for conducting and certifying results of representation elections to determine collective-bargaining wishes of employees, in-

Chart No. 2



	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
CHARGES	15,933	17,040	17,816	18,651	21,038	23,770	26,852	26,487	27,726	31,253	34,509
SITUATIONS	14,539	15,499	16,343	17,045	19,402	22,098	25,143	24,854	26,226	29,665	32,630

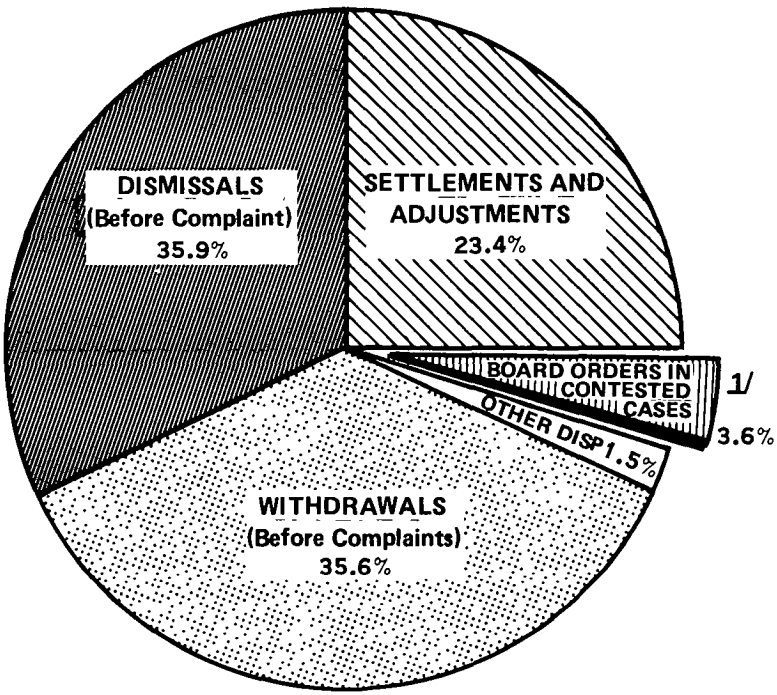
cluding balloting to determine whether a union shall continue to have the right to make a union-shop contract with an employer.

In handling unfair labor practice cases and election petitions, the NLRB is concerned with the adjustment of labor disputes either by way of settlements or through its quasi-judicial proceedings, or by way of secret ballot employee elections.

Chart No. 3

DISPOSITION PATTERN FOR UNFAIR LABOR PRACTICE CASES
(Based on Cases Closed)

FISCAL YEAR 1976



1/ Contested cases reaching Board Members for Decisions.

The NLRB has no independent statutory power of enforcement of its decisions and orders. It may, however, seek enforcement in the U.S. courts of appeals, and parties to its cases also may seek judicial review.

NLRB authority is divided by law and by delegation. The five-member Board primarily acts as a quasi-judicial body in deciding cases on formal records. The General Counsel, who, like each Member of the Board, is appointed by the President, is responsible for the issuance and prosecution of formal complaints in cases leading to Board decision. He has general supervision of the NLRB's nationwide network of field offices.

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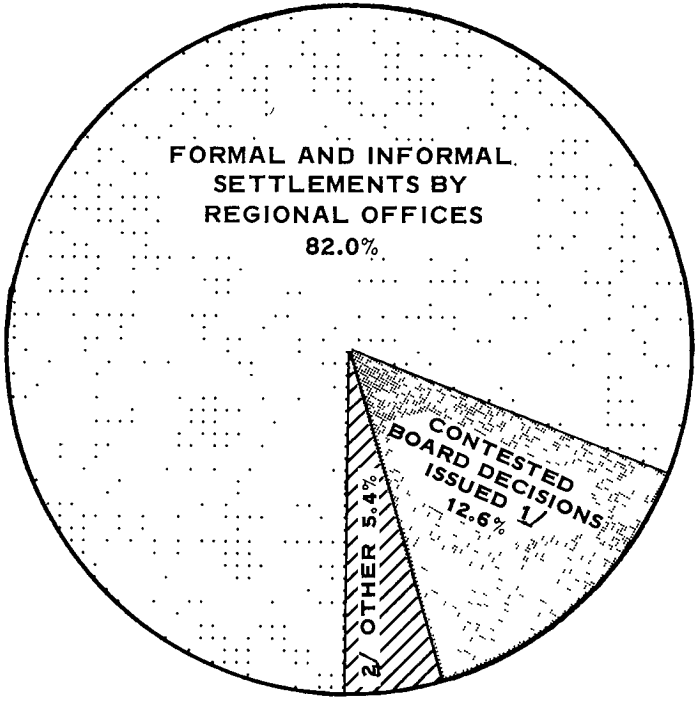
For the conduct of its formal hearings in unfair labor practice cases, the NLRB employs administrative law judges who hear and decide cases. Administrative law judges' decisions may be appealed to the Board by the filing of exceptions, but if no exceptions are taken, under the statute the administrative law judges' orders become orders of the Board.

Chart No. 3A

DISPOSITION PATTERN FOR MERITORIOUS UNFAIR LABOR PRACTICE CASES

(Based on Cases Closed)

FISCAL YEAR 1976



1/ Following Administrative Law Judge Decision, stipulated record or summary judgment ruling.

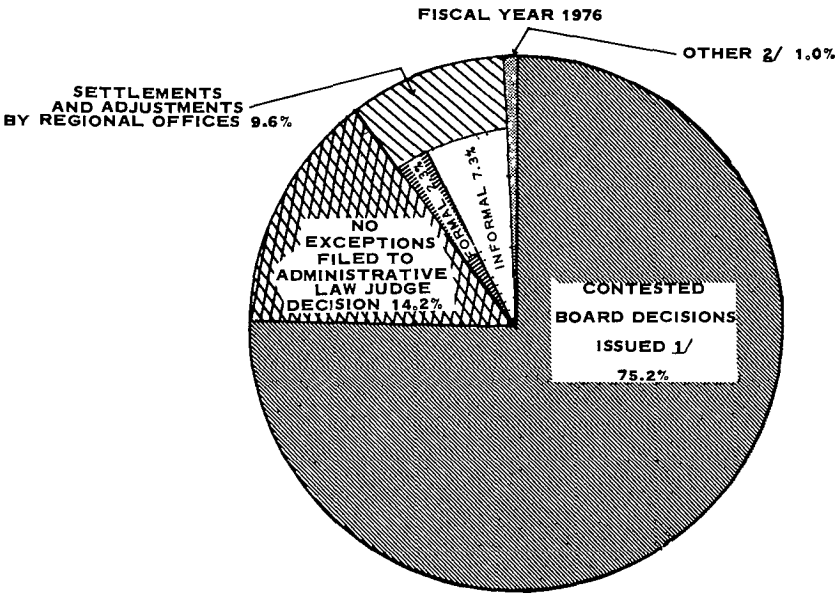
2/ Compliance with Administrative Law Judge Decision, stipulated record or summary judgment ruling.

As noted above, all cases coming to the NLRB begin their processing in the regional offices. In addition to processing unfair labor practice cases in the initial stages, regional directors also have authority to investigate representation petitions, determine units of employees appropriate for collective-bargaining purposes, conduct elections, and pass on objections to conduct of elections. There are provisions for appeal of representation and election questions to the Board.

Chart No. 3B

DISPOSITION PATTERN FOR UNFAIR LABOR PRACTICE CASES AFTER TRIAL

(Based on Cases Closed)



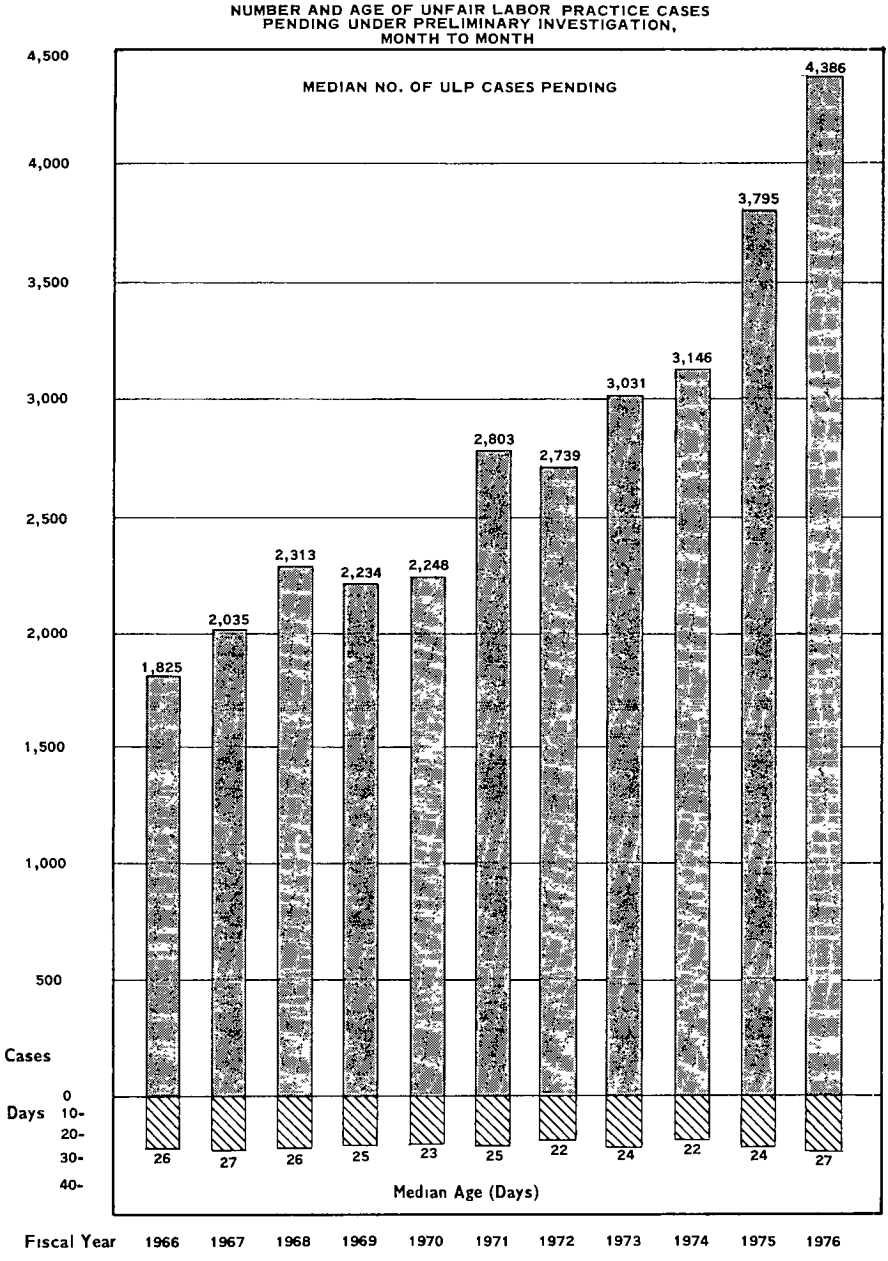
1/ Following Administrative Law Judge Decision, stipulated record or summary judgment ruling.

2/ Dismissals, withdrawals, and other dispositions.

2. Case Activity Highlights

All segments of the American public dealing with the NLRB utilized its processes with unprecedented frequency during the fiscal year. This triggered record activity in many areas of performance throughout the NLRB. For example:

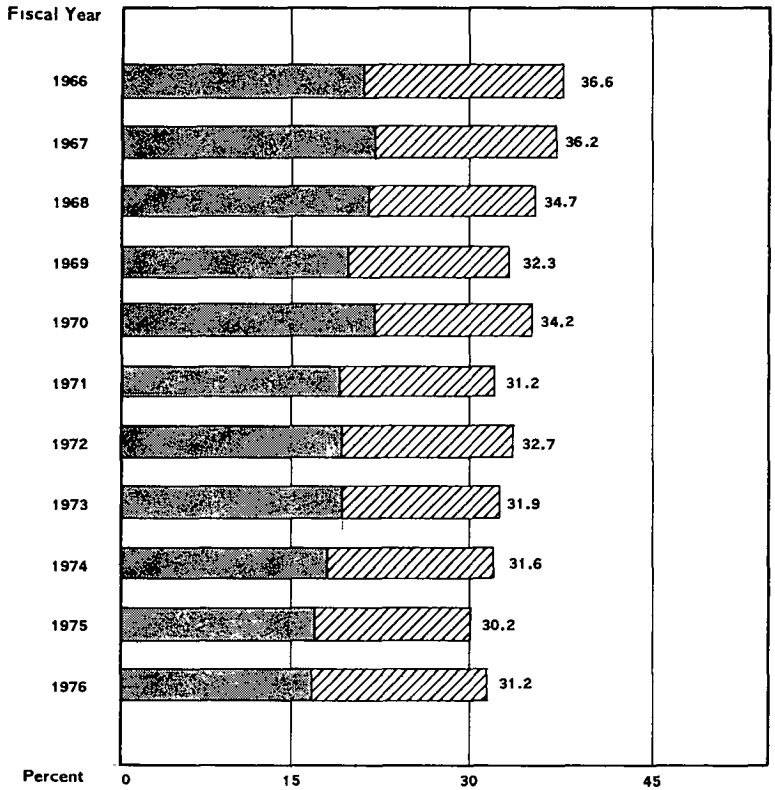
Chart No. 4



- More new cases were filed—49,335—than ever before. Unfair labor practice charges totaled a record 34,509; petitions for employee representation elections were a record 14,189.

Chart No. 5

UNFAIR LABOR PRACTICE MERIT FACTOR

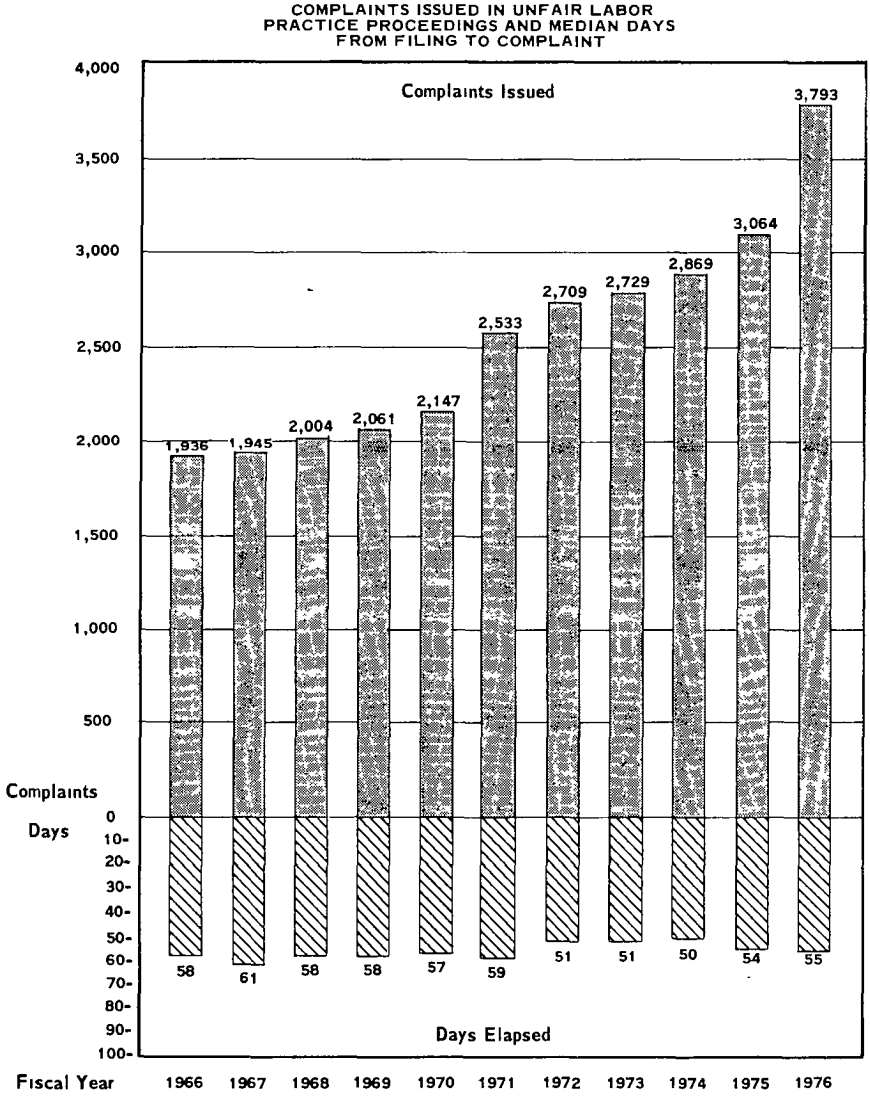


	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
Precomplaint settlements and adjustments (%)	19.4	20.5	20.2	18.4	20.4	17.7	18.3	18.2	17.8	17.1	16.6
Cases in which complaints issued (%)	17.2	15.7	14.5	13.9	13.8	13.5	14.4	13.7	13.8	13.1	14 6
Total merit factor (%)	36.6	36.2	34.7	32.3	34.2	31.2	32.7	31.9	31.6	30.2	31 2

- More cases were handled to conclusion—46,136—than ever before by decision, settlement, withdrawal, or dismissal. Of the total, 32,406 were unfair labor practice cases; 13,393 were representation cases and union-shop deauthorization polls; and 337 were amendment of certification and unit clarification cases.
- More contested decisions were issued by the five-member Board—1,678. There were 1,033 decisions in contested unfair labor practice cases, and 645 decisions in contested representation and related proceedings.

- More decisions were issued by administrative law judges—1,115. These were findings and recommendations following hearings by the administrative law judges in unfair labor practice cases.
- More formal complaints in unfair labor practice cases were issued by the General Counsel—3,793. For a complaint to be issued, investigation by professional regional office staff must show the allegation to have merit.

Chart No. 6



- More settlements of unfair labor practice charges were achieved in regional offices (before issuance of administrative law judge's decision)—7,588. The General Counsel emphasizes settlement efforts before proceeding to trial with meritorious complaint cases. Backpay collected—$11,635,885—for employees discharged unlawfully was the largest amount in NLRB history. Job reinstatement was offered to 4,440 individuals discriminated against under provisions of the labor relations law.

In this year of greatest operational activity—with a record number of cases received and a record number closed—the NLRB ended fiscal 1976 with a pending inventory of 17,996 cases on hand in all stages of processing. This compared with 14,797 cases on the same date a year earlier. The number of cases in Washington awaiting decision of the Board totaled 674, compared with 730 at the end of fiscal 1975.

B. Operational Highlights

1. Unfair Labor Practices

In fiscal 1976, 34,509 unfair labor practice cases were filed with the NLRB, an increase of 3,256 above the 31,253 filed in fiscal 1975. In situations in which related charges are counted as a single unit, there was a 10-percent increase from fiscal 1975. (Chart 2.)

Alleged violations of the Act by employers increased to 23,496 cases, a 16-percent increase from the 20,311 of 1975. Charges against unions increased 0.7 percent to 10,898 from 10,822 in 1975.

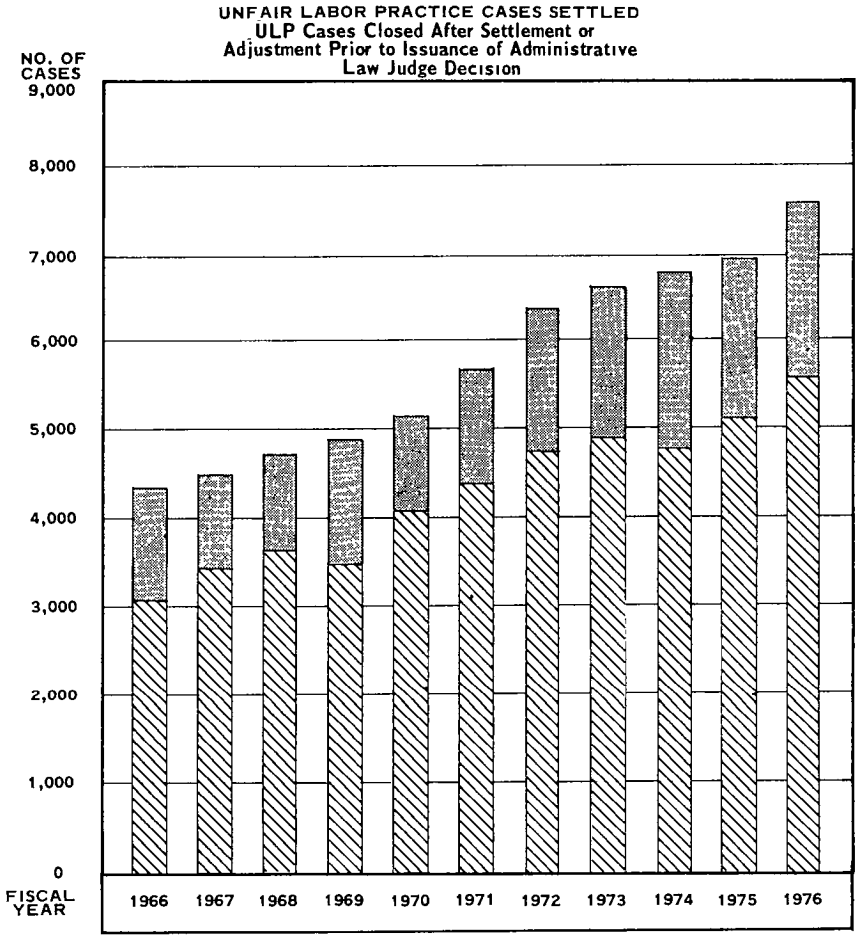
There were 115 charges of violations of section 8(e) of the Act, which bans hot cargo agreements; 106 against unions, 3 against employers alone, and 6 against both unions and employers. (Tables 1 and 1A.)

Regarding charges against employers, 15,090, or 64 percent of the 23,496 total, alleged discrimination or illegal discharge of employees. There were 6,729 refusal-to-bargain allegations, about 29 percent of the charges. (Table 2.)

Of charges against unions, there were 7,266 alleging illegal restraint and coercion of employees, about 67 percent as compared with the 64 percent of similar filings in 1975. There were 2,265 charges against unions for illegal secondary boycotts and jurisdictional disputes, 16 percent less than the 2,684 of 1975.

There were 1,921 charges of illegal union discrimination against employees. There were 444 charges that unions picketed illegally for recognition or for organizational purposes, a decrease from the 503 charges in 1975. (Table 2.)

Chart No. 7



FISCAL YEAR	PRECOMPLAINT	POSTCOMPLAINT	TOTAL
1966	3,085	1,176	4,261
1967	3,390	1,072	4,462
1968	3,608	1,089	4,697
1969	3,451	1,266	4,717
1970	4,054	1,174	5,228
1971	4,277	1,322	5,599
1972	4,755	1,626	6,381
1973	4,936	1,765	6,701
1974	4,778	2,120	6,898
1975	5,186	1,780	6,966
1976	5,586	2,002	7,588

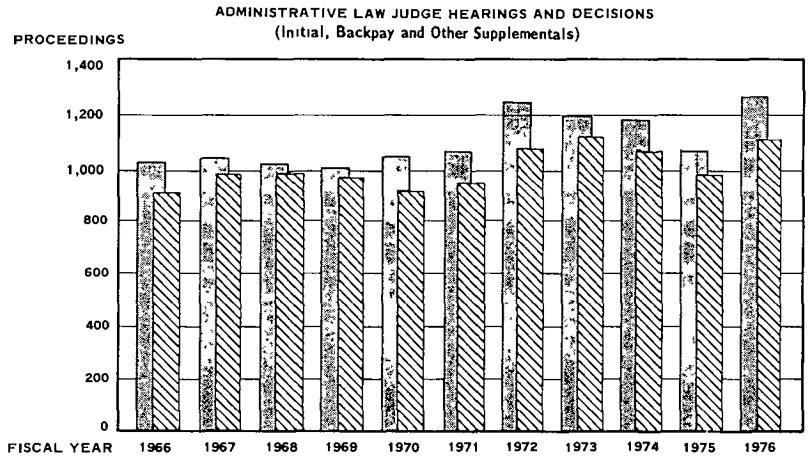
In charges against employers, unions led by filing 56 percent. Unions filed 13,208 charges, individuals filed 10,225, and employers filed 63 charges against other employers.

As to charges against unions, 6,740 were filed by individuals, or 62 percent of the total of 10,898. Employers filed 3,898, and other unions filed the 260 remaining charges. There were 115 hot cargo charges against unions and/or employers: 93 were filed by employers, 3 by individuals, and 19 by unions.

A record high 32,406 unfair labor practice charges were closed. Some 95 percent were closed by NLRB regional offices as compared with 95 percent in 1975. In 1976, 23 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 36 percent by withdrawal before complaint, and 36 percent by administrative dismissal. In 1975 the percentages were 23 percent, 36 percent, and 36 percent, respectively.

In evaluation of the regional workload, the number of unfair labor practice charges found to have merit is important. The highest level of cases found to have merit was 36.6 percent in fiscal 1966. In fiscal 1976 it was 31.2 percent.

Chart No. 8



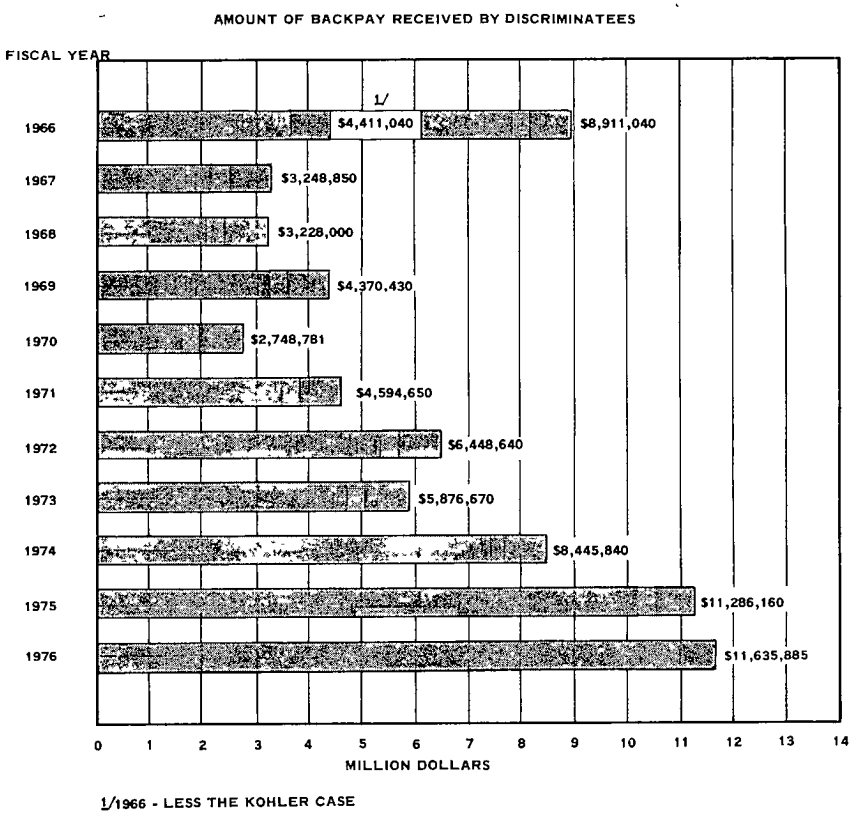
FISCAL YEAR	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
HEARINGS HELD	1,028	1,037	1,008	1,000	1,044	1,058	1,234	1,199	1,189	1,051	1,261
DECISIONS ISSUED	901	981	988	967	934	965	1,079	1,127	1,070	980	1,115

The merit factor in charges against employers was 33.2 percent as compared to 32.3 percent in 1975. In charges against unions, the merit factor was 27.0 percent, compared with 26.4 percent in 1975.

Since 1962, more than 50 percent of merit charges have resulted in precomplaint settlements and adjustments; these amounted to 53 percent in fiscal 1976.

There were 4,918 merit charges which caused issuance of complaints, and 5,586 precomplaint settlements or adjustments of meritorious charges. The two totaled 10,504 or 31.2 percent of the unfair labor practice cases. (Chart 5.)

Chart No. 9



NLRB regional offices issued 3,793 complaints, a 24-percent gain from the 3,064 issued in 1975. (Chart 6)

Of compaints issued, 82 percent were against employers, 15 percent against unions, and 3 percent against both employers and unions.

NLRB regional offices processed cases from filing of charges to issuance of complaints in a median of 55 days, compared with 54 days

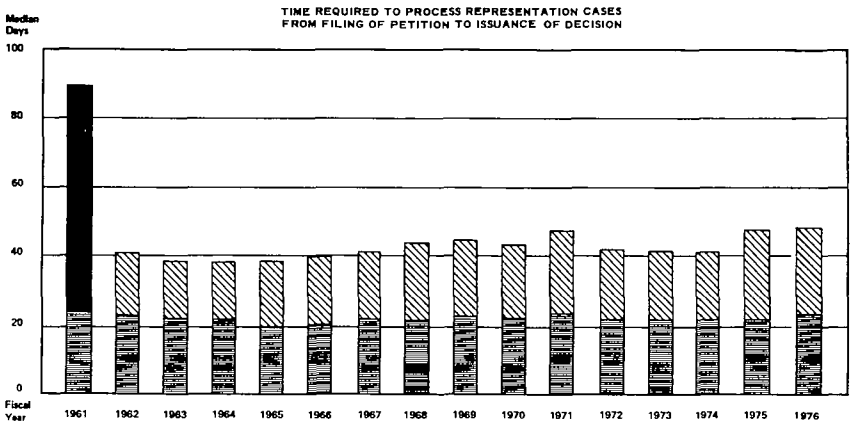
in 1975. The 55 days included 15 days in which parties had the opportunity to adjust charges and remedy violations without resort to formal NLRB processes. (Chart 6.)

Administrative law judges issued 1,115 decisions in 1,606 cases. The administrative law judges conducted 1,207 initial hearings, compared with 1,006 hearings in 1975. Administrative law judges conducted 54 additional hearings in supplemental matters. (Chart 8 and Table 3A.)

At the end of fiscal 1976, there were 13,259 unfair labor practice cases being processed in all stages by the NLRB. This compared with 11,156 cases pending a year earlier.

The NLRB awarded backpay to 7,238 workers, in total amounting to $11.6 million. (Chart 9.)

Chart No. 10

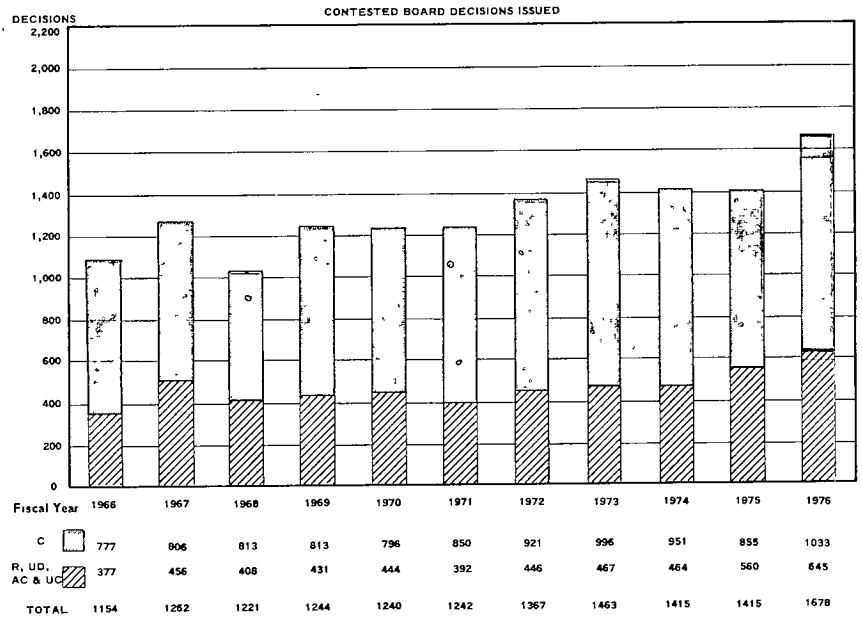


FISCAL YEAR	FILING TO CLOSE OF HEARING	CLOSE OF HEARING TO BOARD DECISION	CLOSE OF HEARING TO REGIONAL DIRECTOR DECISION
1961	24	65	–
1962	23	–	18
1963	22	–	17
1964	22	–	17
1965	21	–	18
1966	21	–	19
1967	22	–	20
1968	22	–	22
1969	23	–	22
1970	23	–	20
1971	24	–	23
1972	22	–	20
1973	22	–	20
1974	22	–	20
1975	23	–	22
1976	24	–	23

Some employees were offered reinstatement and 2,976 or 67 percent accepted. In fiscal 1975, about 68 percent accepted offered reinstatement.

Work stoppages ended in 153 of the cases closed in fiscal 1976. Collective bargaining was begun in 1,668 cases. (Table 4.)

Chart No. 11



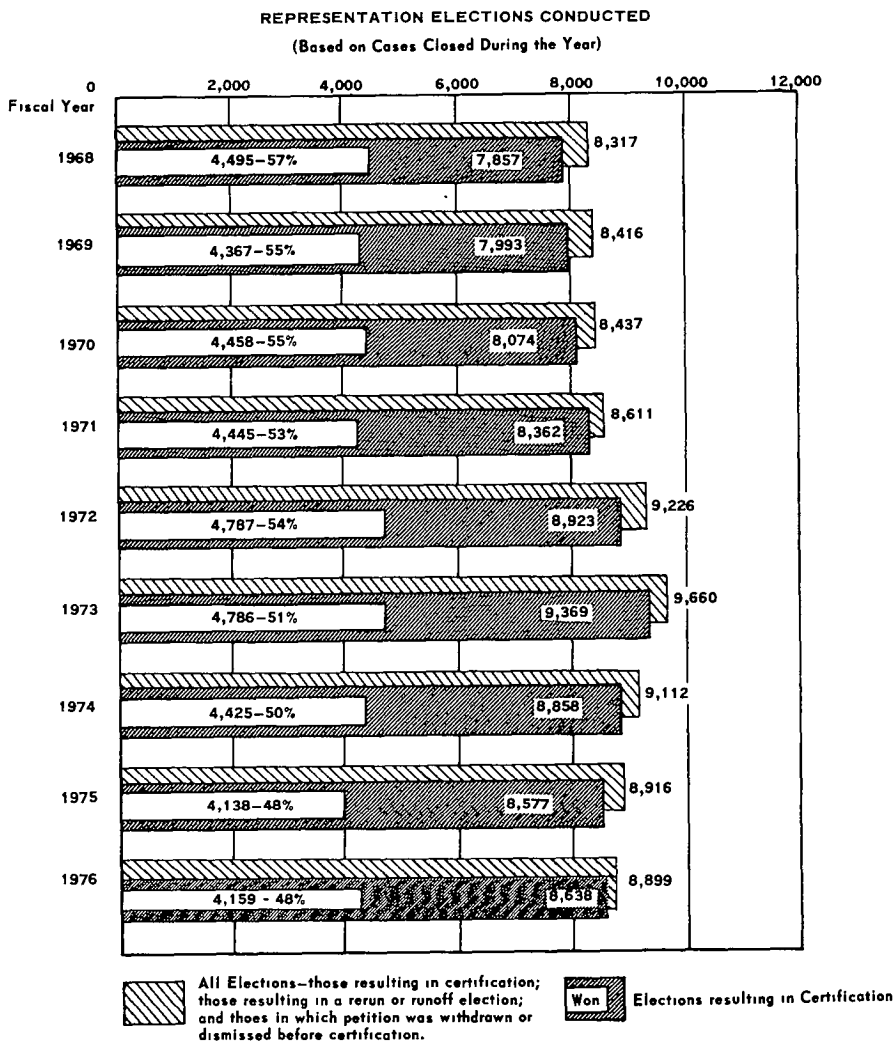
2. Representation Cases

The NLRB received 14,826 representation and related case petitions. These included 12,732 collective-bargaining cases; 1,457 decertification petitions; 235 union-shop deauthorization petitions; 64 petitions for amendment of certification; and 338 petitions for unit clarification. The NLRB's total representation intake was 9 percent or 1,156 cases more than the 13,670 of fiscal 1975.

There were 13,730 representation and related cases closed, about 1 percent fewer than the 13,899 closed in fiscal 1975. Cases closed included 11,858 collective-bargaining petitions; 1,326 petitions for elections to determine whether unions should be decertified; 209 petitions for employees to decide whether unions should retain authority to make union-shop agreements with employers; and 337 unit clarification and amendment of certification petitions. (Chart 14 and Tables 1 and 1B.)

NLRB regional directors ordered elections following hearings in 1,629 cases, or 12 percent of those closed by elections. There were 32 cases which resulted in expedited elections pursuant to the Act's 8(b)(7)(C) provisions pertaining to picketing. Board-directed elections in 100 cases in 1976, about 1 percent of election closures, followed appeals or transfers from regional offices. (Table 10.)

Chart No. 12



3. Elections

There were 8,638 conclusive representation elections conducted in cases closed in fiscal 1976. An additional 261 inconclusive representation elections were held that resulted in withdrawal or were dismissed before certification, or required a rerun or runoff election. Of the conclusive elections 8,027, 93 percent, were collective-bargaining elections—unions won 3,993 or 50 percent of them. Six hundred eleven decertification elections were conducted to determine whether incumbent unions would continue to represent employees. There also were 111 deauthorization polls to decide whether unions would con-

tinue to have authority to make union-shop agreements with employers.

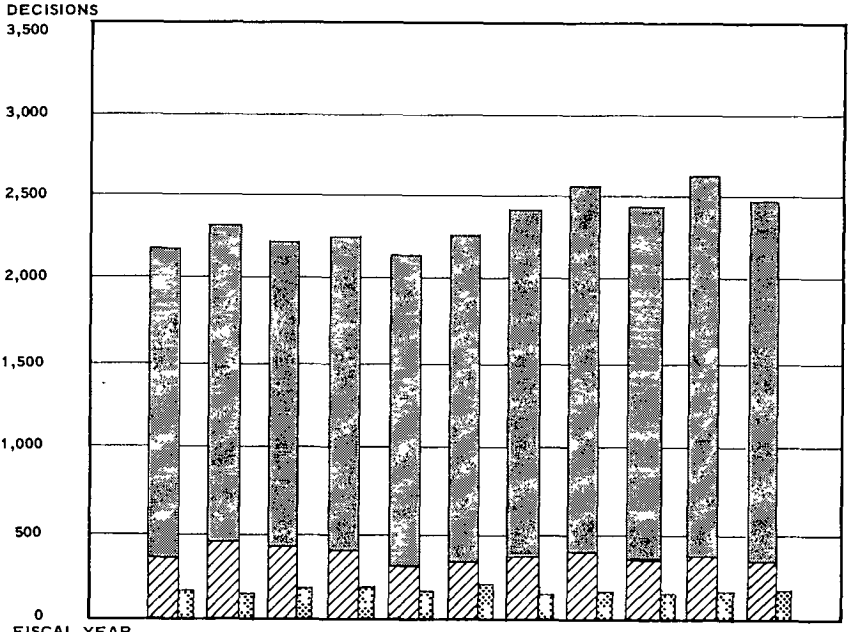
Unions lost the right to make union-shop agreements in 62 of the 111 deauthorization elections, while they maintained the right in 49 other elections which covered 3,638 employees. (Table 12.)

By voluntary agreement of the parties, 6,988 stipulated and consent elections of all types were conducted. These were 80 percent of the 8,749 total conclusive elections, compared with 79 percent in fiscal 1975. (Table 11.)

In 1976, a total of 422,635 employees exercised their right to vote in conclusive elections, compared with 508,031 in 1975 For all types of elections, the average number of employees voting, per establishment, was 48 in 1976—down from 58 in 1975. About three-fourths of the collective-bargaining elections involved 49 or fewer employees. About 75 percent of decertification elections involved 49 or fewer employees. (Tables 11 and 17.)

Chart No. 13

REGIONAL DIRECTOR DECISIONS ISSUED IN REPRESENTATION AND RELATED CASES



FISCAL YEAR	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
R & UD INITIAL	1829	1892	1809	1876	1802	1949	2057	2165	2106	2250	2 119
ON OBJ./ CHALLS.	368	445	422	405	308	323	354	366	332	355	347
AC & UC	161	158	178	184	205	139	159	181	161	174	158

Unions won in 166 and lost in 445 decertification elections Unions retained the right of representation of 13,123 employees in the elections won. Unions lost the right of representation of 15,303 employees in elections they did not win. As to size of the bargaining units involved, unions won in units averaging 79 employees, and lost in units averaging 34 employees. (Table 13.)

4. Decisions Issued

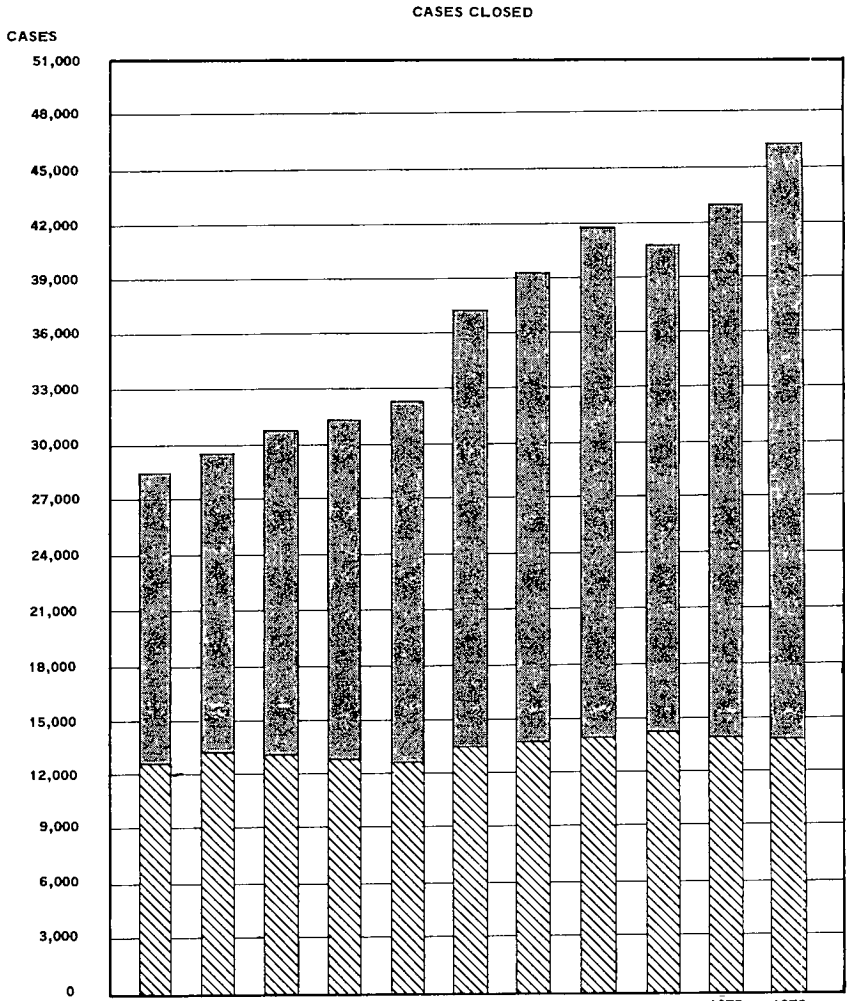
a. Five-Member Board

Dealing effectively with the flow of cases reaching it from nationwide filings, the Board handed down 2,685 decisions concerning allegations of unfair labor practices and questions relating to employee representation: a 1-year record and a substantial precent increase over the 2,359 decisions rendered during fiscal 1975

A breakdown of Board decisions follows:

Total Board decisions			2,685
Contested decisions			1,678
Unfair labor practice decisions		1,033	
Initial (includes those based on stipulated record)	927		
Supplemental decisions	8		
Backpay	39		
Determinations in jurisdictional disputes	59		
Representation decisions		637	
After transfer by regional directors for initial decision	122		
After review of regional director decisions	112		
Decisions on objections and/or challenges	403		
Other decisions		8	
Clarification of bargaining unit	4		
Amendment to certification decisions	3		
Union-deauthorization decisions	1		
Noncontested decisions			1,007
Unfair labor practice decisions		441	
Representation decisions		563	
Other decisions		3	

Chart No. 14



FISCAL YEAR	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
C CASES	15,587	16,360	17,777	18,939	19,851	23,840	25,555	26,989	27,016	29,808	32,406
R, UD, AC & UC CASES	12,917	13,134	12,973	12,658	12,502	13,360	13,919	14,577	14,084	13,899	13,730
TOTALS	28,504	29,494	30,750	31,597	32,353	37,200	39,474	41,566	41,100	43,707	46,136

Thus, it is apparent that the great majority, 62 percent, of Board decisions resulted from cases contested by the parties as to the facts and/or application of the law (Tables 3A, 3B, and 3C.).

Emphasizing the steadily mounting unfair labor practice caseload facing the Board was the fact that in fiscal 1976 approximately 13 percent of all meritorious charges and 75 percent of all cases in which a hearing was conducted reached the five-member Board for decision. (Charts 3A and 3B.) These high proportions are even more significant

considering that unfair labor practice cases in general require about two and one-half times more processing effort than do representation cases. (Charts 3B and 3C and Tables 7 and 7A.)

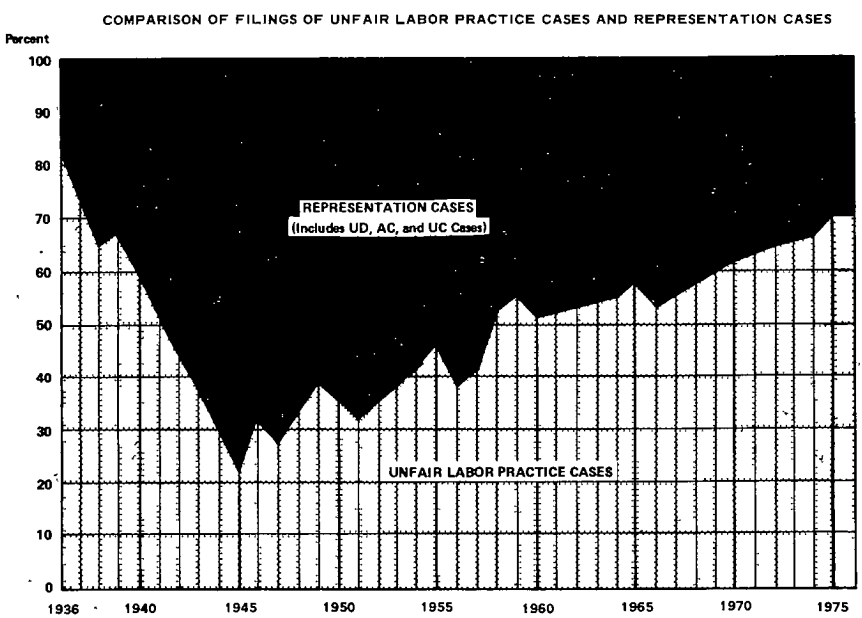
b. Regional Directors

Meeting the challenge of a climbing workload, NLRB regional directors issued 2,624 decisions in fiscal 1976, about 6 percent fewer than the record 2,779 of the previous year. (Chart 13 and Tables 3B and 3C.)

c. Administrative Law Judges

Again, reflecting increased case filings, the administrative law judges issued a record 1,115 decisions. They also conducted an all-time 1-year total of 1,261 hearings. (Chart 8 and Table 3A.)

Chart No. 15



This graph shows the percentage division of the NLRB caseload between unfair labor practice cases and representation cases during fiscal years 1936 – 1976

5. Court Litigation

The National Labor Relations Board conducts the most extensive litigation in the United States courts of appeals of any Federal agency. In fiscal 1976, appeals court decisions in NLRB-related cases numbered 250. In these rulings, the NLRB was affirmed in whole or in part in 84 percent. The prior year it was 85 percent.

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A breakdown of appeals courts rulings in fiscal 1976 follows:

Total NLRB cases ruled on	250
Affirmed in full	185
Affirmed with modification	17
Remanded to NLRB	20
Partially affirmed and partially remanded	8
Set aside	20

In the 30 contempt cases before the appeals courts, the respondents complied with NLRB orders after the contempt petition had been filed but before decisions by courts. (Tables 19 and 19A.)

The U.S. Supreme Court set aside one NLRB order and remanded one case to the Board.

The NLRB sought injunctions in 163 petitions filed with the U.S. district courts, compared with 337 a year earlier. (Table 20.) Injunctions were granted in 55, or 79 percent, of the 70 cases litigated to final order.

The following shows NLRB injunction activity in district courts in fiscal 1976·

Granted	55
Denied	15
Withdrawn	9
Dismissed	5
Settled or placed on courts' inactive lists	71
Awaiting action at end of fiscal year	25

There were 101 additional cases involving miscellaneous litigation decided by appellate and district courts. The NLRB's position was upheld in 78 cases. (Table 21.)

C. Decisional Highlights

In the course of the Board's administration of the Act during the report year, it was required to consider and resolve complex problems arising from the great variety of factual patterns in the many cases reaching it. In some cases, new developments in industrial relations, as presented by the factual situation, required the Board's accommodation of established principles to those developments. Chapter II on "Jurisdiction of the Board," Chapter III on "Effect of Concurrent Arbitration Proceedings," Chapter IV on "Board Procedure," Chapter V on "Representation Proceedings," and Chapter VI on "Unfair Labor Practices" discuss some of the more significant decisions of the Board during the fiscal year. The following summarizes briefly some of the decisions establishing basic principles in significant areas.

1. Jurisdiction Over Charitable Institutions

The longstanding Board policy of declining jurisdiction over charitable nonprofit institutions whose activities are primarily noncommercial in nature, and intimately connected with the charitable purpose of the institution, was held by the Board in *Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home* [1] to be no longer tenable. The Board noted that Congress, in amending section 2(2) of the Act to provide Board jurisdiction over nonprofit hospitals, had deleted the only statutory reference to the exclusion from Board jurisdiction of charitable institutions, and left the broad coverage of that section applicable without reference to the charitable nature of the employer. With the statutory basis for the charitable purpose exemption thus removed, the Board concluded that there was no longer a basis for giving special consideration to the charitable nature of institutions outside the health care field, when institutions within coverage of the amendments serve an equally worthy purpose but are specifically made subject to the Board's jurisdiction.

2. Interest Arbitration Clauses

An "interest arbitration" contract clause proposal, pursuant to which contract negotiation issues which the parties were unable to resolve were to be referred to binding arbitration before an impartial arbitrator, was held by the Board to be a permissive rather than a mandatory subject of bargaining, wherefore the union was not entitled to insist upon it to the point of impasse.[2] The Board noted that, whereas a grievance arbitration provision was an integral part of the terms and conditions of employment established by the contract, interest arbitration provisions did not regulate terms and conditions of employment of the employees covered by the contract, and were therefore not mandatory subjects of bargaining.

3. Union Steward Superseniority

In *Dairylea Cooperative*,[3] the Board held that an employer and a union engaged in prohibited discrimination in employment by maintaining and enforcing a contract provision under which the union-appointed steward was accorded top seniority with respect not only to layoff and recall—long recognized as essential to the effective administration of the contract by encouraging the continued presence of the

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[1] 224 NLRB No 70, *infra*, see p 27

[2] *Columbus Printing Pressmen & Assistants' Union 252, Subordinate to IP & GCU (R W Page Corp)*, 219 NLRB 268, *infra*, see p 89.

[3] 219 NLRB 656, *infra*, see p. 86

steward—but to all contractual benefits where seniority was a consideration, irrespective of the steward's actual length of service. Noting that there is nothing a unit employee can do to obtain such seniority except through designation by the union, which designation would reasonably be made only of those who effectively believe in and support union policy and goals, the Board concluded that the all-inclusive superseniority clause "ties job rights and benefits to union activities, a dependent relationship essentially at odds with the policy of the Act, which is to insulate the one from the other."

4. Successor Employer Clauses

A collective-bargaining agreement provision obligating the employer to make any sale or lease of the business during the term of the agreement conditional upon the purchaser or lessee assuming the obligations of the agreement until its expiration date was found by the Board not to be violative of the provisions of section 8(e) of the Act.[4] Finding that the transfer of the entire business entity from one person to another was not a "doing business" within the purview of that section, the Board concluded that the purpose of the clause in question was not the protection of union interests generally, but rather the interests of the work unit and its members.

5. Picketing of Health Care Institutions

In an initial interpretation of section 8(g) of the Act, which was added by the 1974 health care institution amendments, the Board held[5] that the prepicketing notice obligation was applicable to any picketing conducted at a health care institution situs, even though the picketing was primary picketing at a reserved gate at the site of new construction for the hospital and no health care employees were affected or involved. From an examination of the legislative history, the Board concluded that section 8(g) was to be read literally so as to apply to any picketing at a health care institution, rather than only picketing directed against the health care institution or which has an immediate adverse impact on the institution's ability to provide health care services.

6. Bargaining Orders

Upon reexamination of the policies and principles concerning the issuance of and legal basis for bargaining orders set forth in the Board's

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[4] *District 71, IAM (Harris Truck & Trailer Sales)*, 224 NLRB No. 10, *infra*, see p. 128

[5] *United Assn of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Loc. 630 (Lein-Steenberg)*, 219 NLRB 837, *infra*, see p 133.

decision in *Steel-Fab*[6] and the decision of the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co.*,[7] the Board in *Trading Port*[8] resumed its pre-*Steel-Fab* position in concluding that the employer violated section 8(a)(5) of the Act by refusing to recognize and bargain with a majority union while coterminously engaging in conduct which undermined the union's majority status and prevented the holding of a fair election. The Board further concluded that, since in some instances the prospective bargaining orders entered under the *Steel-Fab* policy had fallen short of reinstating the situation as it would have been, it was appropriate that "an employer's obligation under a bargaining order remedy should commence as of the time the employer has embarked on a clear course of unlawful conduct or has engaged in sufficient unfair practices to undermine the union's majority status."

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended June 30, 1976, are as follows:

Personnel compensation	$47, 691, 664
Personnel benefits	4, 889, 269
Travel and transportation of persons	3, 005, 546
Transportation of things	128, 944
Rent, communications, and utilities	6, 385, 565
Printing and reproduction	759, 902
Other services	4, 312, 231
Supplies and materials	739, 618
Equipment	579, 486
Insurance claims and indemnities	21, 581
Total obligations and expenditures [9]	68, 513, 806

[6] 212 NLRB 363 (1974), 39 NLRB Ann. Rep. 86 (1974)
[7] 395 U.S 575 (1969)
[8] 219 NLRB No 76.
[9] Includes reimbursable obligations distributed as follows

Personnel compensation	$17, 867
Personnel benefits	4, 846
Total obligations and expenditures	22, 713

II

Jurisdiction of the Board

The Board's jurisdiction under the Act, as to both representation proceedings and unfair labor practices, extends to all enterprises whose operations "affect" interstate or foreign commerce.[1] However, Congress and the courts [2] have recognized the Board's discretion to limit the exercise of its broad statutory jurisdiction to enterprises whose effect on commerce is, in the Board's opinion, substantial—such discretion being subject only to the statutory limitation [3] that jurisdiction may not be declined where it would have been asserted under the Board's self-imposed jurisdictional standards prevailing on August 1, 1959.[4] Accordingly, before the Board takes cognizance of a case, it must first be established that it has legal or statutory jurisdiction; i.e., that the business operations involved "affect" commerce within the meaning of the Act. It must also appear that the business operations meet the Board's applicable jurisdictional standards.[5]

A. Charitable Institutions

Three cases decided during this report year presented questions involving the Board's assertion of jurisdiction over charitable institutions.

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[1] See secs 9(c) and 10(a) of the Act and also definitions of "commerce" and "affecting commerce" set forth in sec 2 (6) and (7), respectively Under sec. 2(2) the term "employer" does not include the United States or any wholly owned Government corporation, any Federal Reserve Bank, any state or political subdivision, any person subject to the Railway Labor Act, or any labor organization other than when acting as an employer The exclusion of nonprofit hospitals from the definition of employer was deleted by the health care amendments to the Act (Public Law 93-360, 88 Stat 395, effective August 25, 1974). Nonprofit hospitals, as well as convalescent hospitals, health maintenance organizations, health clinics, nursing homes, extended care facilities, and other institutions "devoted to the care of sick, infirm, or aged person" are now included in the definition of "health care institution" under the new sec. 2(14) of the Act "Agricultural laborers" and others excluded from the term "employee" as defined by sec 2(3) of the Act are discussed, *inter alia*, at 29 NLRB Ann Rep 52-55 (1964), and 31 NLRB Ann Rep 36 (1966)

[2] See 25 NLRB Ann Rep. 18 (1960).

[3] See sec. 14(c)(1) of the Act

[4] These self-imposed standards are primarily expressed in terms of the gross dollar volume of business in question, 23 NLRB Ann Rep 18 (1958) See also *Florida Hotel of Tampa*, 124 NLRB 261 (1959), for hotel and motel standards.

[5] While a mere showing that the Board's gross dollar volume standards are met is ordinarily insufficient to establish legal or statutory jurisdiction, no further proof of legal or statutory jurisdiction is necessary where it is shown that the Board's "outflow-inflow" standards are met 25 NLRB Ann Rep 19-20 (1960) But see *Sioux Valley Empire Electric Assn.*, 122 NLRB 92 (1958), as to the treatment of local public utilities

In the leading case, *Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home*,[6] the Board majority overruled *Ming Quong Children's Center* [7] and asserted jurisdiction over the employer, a charitable nonprofit institution providing a year-round facility for the education and treatment of emotionally disturbed children. In the opinion of Members Jenkins and Walther, in the recent health care amendments to the Act, "the deletion of the nonprofit hospital exemption [8] from Section 2(2) . . . removed any statutory basis the Board may have had for declining jurisdiction over nonprofit organizations on the basis of their charitable function or worthy purpose." They concluded that, as the health care amendments treated all charitable and noncharitable health care institutions alike, there was no "present basis" for distinguishing charitable institutions outside the health care field from charitable institutions which were specifically made subject to the Board's jurisdiction by the amendments.[9] Thus, in their view, the same considerations for asserting or declining jurisdiction should be applied equally to charitable and noncharitable institutions and the "substantive purpose" of the institution should govern what discretionary jurisdictional standard should be applied. The majority determined that, as the employer's operations involved the specialized care and custody of children, and as the employer met the jurisdictional standard of $250,000 gross revenues established for such institutions,[10] it would effectuate the policies of the Act to assert jurisdiction in this case.

Member Fanning concurred in the result on the basis of his dissenting opinion in *Ming Quong*, emphasizing that, while he agreed with the majority's observation that the passage of the health care amendments served to demonstrate the fundamental error in the *Ming Quong* decision, he rejected any implication that *Ming Quong* was reasonably decided on the basis of the law as it existed at that time. He would have asserted jurisdiction for the reasons expressed in his dissent in *Salt & Pepper Nursery School & Kindergarten 2, infra* (i.e., the jurisdictional standard should be the same as that applied to nursing homes).

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[6] 224 NLRB No 70 (Members Jenkins and Walther, Member Fanning concurring, Chairman Murphy and Member Penello dissenting)

[7] 210 NLRB 899 (1974) In that case, a Board majority concluded that "it would not effectuate the policies of the Act for the Board to assert its jurisdiction over this type of nonprofit institution whose activities are noncommercial in nature and are intimately connected with the charitable purposes of the institution "

[8] Public Law 93-360 (effective August 25, 1974)

[9] In addition, Member Walther believed that in light of recent economic developments, including the increasing incidence of related disputes in this area, the time had arrived when the Board must exercise its authority under the Act

[10] The employer's total income for 1974 was approximately $459,000, and the employer purchased goods which were received directly or indirectly from out-of-state sources in the amount of $128,000. See *Salt & Pepper Nursery School & Kindergarten 2*, 222 NLRB No 202 (Chairman Murphy and Members Jenkins, Penello, and Walther, Member Fanning dissenting), discussed *infra*, wherein the Board established the jurisdictional standard for institutions involving specialized care and custody of children

In their dissenting opinion, Chairman Murphy and Member Penello contended that the 1974 health care amendments had the narrow purpose of repealing the statutory exemption of nonprofit hospitals from the Act's coverage and were not addressed to the Board's jurisdictional policies concerning other charitable institutions. Instead, Chairman Murphy and Member Penello viewed the legislative history of the Act as demonstrating the intent of Congress to exclude, in all but "exceptional circumstances," charitable institutions other than nonprofit hospitals. Thus, they concluded that *Ming Quong* should not be overruled as it "represented a careful policy of exercising [the Board's] discretionary jurisdiction under Section 14(c)(1) of the Act in harmony with the clear indication of Congress' attitude toward charitable, nonprofit, noncommercial organizations. . . ." Relying on *Cornell University*,[11] the dissenters contended that the only basis for asserting jurisdiction over a certain class of nonprofit employers such as charitable institutions was if the operations of such institutions as a class had a "massive" impact on interstate commerce and if the individual employer within such class had a "substantial" impact on commerce. Following such guidelines, Chairman Murphy and Member Penello concluded that jurisdiction should not have been asserted over the employer.

In *Chicago Lighthouse for the Blind*,[12] a Board panel asserted jurisdiction over a nonprofit employer providing services for the blind population of Northern Illinois through rehabilitation and social services. Relying on *Rhode Island Catholic Orphan Asylum*, the panel rejected the regional director's finding that jurisdiction should be declined because in his view the employer served a worthy or charitable purpose and therefore engaged in noncommercial activities.[13] Stating that charitable employers are now classified according "to what they do—as with any other employer. . . ." for the purposes of determining the applicable jurisdictional standard, Members Jenkins and Walther noted that the employer was engaged in the nonretail performance of services, particularly in view of its subcontracts to perform assembly and packaging work for other companies. As the employer earned over $50,000 in income from such contracts, jurisdiction was asserted on the basis of *Siemons Mailing Service*[14] in order to effectuate the purpose of the Act.[15] Member Fanning concurred in the

[11] 183 NLRB 329 (1970).

[12] 225 NLRB No. 46 (Members Fanning, Jenkins, and Walther).

[13] The regional director relied on the Board's decision in *Sheltered Workshops of San Diego*, 126 NLRB 961 (1960).

[14] 122 NLRB 81 (1958).

[15] The employer's total income for the period July 1, 1974, to June 30, 1975, was $1,601,733 of which $541,657 was derived directly from subcontracts Of the revenues from subcontracts, $350,000 in income derived from subcontracts with Skil-Craft, Inc , a nationaly known manufacturer of toys and a subsidiary of Western Publishing Co., Inc., a Wisconsin corporation.

result for the reasons expressed in his dissenting opinion in *Ming Quong* and in his concurring opinion in *Rhode Island Catholic Orphan Asylum.*

In *Beverly Farm Foundation,*[16] a Board majority dismissed certain unfair labor practice allegations against the employer because the employer's conduct occurred prior to the passage of the health care amendments.[17] Although the Board had found the employer to be a health care institution under section 2(14) of the Act in a prior decision,[18] the majority specifically rejected any implication that it lacked statutory jurisdiction over the employer before the health care amendments. Instead, the majority refused to consider the employer's conduct occurring before the health care amendments because under its discretionary jurisdiction announced in *Ming Quong,* which prevailed before the amendments, the Board would have declined to assert jurisdiction over the employer, a nonprofit corporation operating a home for mentally retarded persons, in view of its charitable or worthy purpose. At the same time, the majority adopted the administrative law judge's findings that the employer's misconduct after the passage of the health care amendments violated the Act. Member Fanning did not join in the dismissal of the alleged unfair labor practices occurring before the health care amendments in view of his dissent in *Ming Quong* and his belief that the Board under the rationale of *Siemons Mailing, supra,* may apply a "revised jurisdictional standard to all future and pending cases that had not been dismissed, settled, or decided" prior to the standard's issuance. Member Penello joined the majority solely because he believed that the employer was a health care institution. He also cited the dissenting opinion in the *Rhode Island Catholic Orphan Asylum* case.

In a separate opinion, Chairman Murphy noted that she would not have asserted jurisdiction over the employer in accordance with her views in the prior decision in *Beverly Farm Foundation,* and therefore concurred with the dismissal of the complaint which concerned the alleged violations occurring prior to the effective date of the health care amendments and dissented from the majority's failure to dismiss those allegations based on the employer's conduct subsequent to the health care amendments. The Chairman also referred to the reasons set forth in the dissent in *Rhode Island Catholic Orphan Asylum.*

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[16] 225 NLRB No. 70 (Members Fanning, Jenkins, and Penello, Chairman Murphy concurring in part and dissenting in part)

[17] Public Law 93-360 (effective August 25, 1974)

[18] *Beverly Farm Foundation,* 218 NLRB 1275 (1975)

B. Activities Intimately Connected to Operations of Exempt Employer

Among the noteworthy cases decided during this report year, five presented questions concerning the Board's jurisdiction over Government-related employers.

A majority of the panel in *Teledyne Economic Development Co.*[19] concluded that the employer, which operated two job corps centers in Pittsburgh under a contract with the U.S. Department of Labor (DOL), shared the DOL exemption from the Act and dismissed the petition for lack of jurisdiction. The majority cited, *inter alia*, the fact that the DOL exercised prior approval over the selection of the center's director and senior staff, as well as the position descriptions, salary range, wage increases, fringe benefits, and qualifications for all personnel. In addition, the employer was obligated to follow certain hiring policies established by the Federal agency. Thus, the majority was "satisfied that the DOL [controlled] and [circumscribed] the labor relations policy applicable to the employees . . . which [precluded] the Employer from exercising the necessary independent judgment to effectively bargain in good faith . . . as to wages and other working and employment conditions."

Member Fanning, dissenting, would have asserted jurisdiction, for in his view "the Employer [controlled] the essential elements of its employees' working conditions." Thus, the dissent contended that the "uncontroverted evidence" indicated that the employer had authority to hire, fire, promote, transfer, or demote its employees and to establish their working hours. Although the DOL retained the right to exert cost controls under the contract, the dissent maintained that the day-to-day control over the centers' labor relations was vested in the employer.

A unanimous panel in *Colonial Williamsburg Foundation*[20] asserted jurisdiction over the employer, which is organized exclusively for charitable and educational purposes in connection with the restoration and preservation of historical Colonial Williamsburg. The panel found that the employer was "a private institution having total financial and administrative independence from any governmental authority" and, as it completely controlled its labor relations, it could satisfy its bargaining obligations under the Act. Rejecting the employer's contention that the Federal enabling legislation establishing the preservation of Colonial Williamsburg was inconsistent with the Board's assertion of jurisdiction, the panel found that the

[19] 223 NLRB No 156 (Chairman Murphy and Member Penello, Member Fanning dissenting).
[20] 224 NLRB No 115 (Chairman Murphy and Members Jenkins and Walther)

employer had substantial commercial activities affecting interstate commerce which justified the assertion of jurisdiction, regardless of the employer's charitable or educational purposes. The panel further agreed that the employer was similar to an art museum and found that the employer's operating income exceeding $35 million more than met the discretionary jurisdictional standard of $1 million gross revenues established for such institutions.[21]

In *Howard University*,[22] the Board majority asserted jurisdiction over the employer, despite a prior Board decision in which jurisdiction was declined on the ground that the employer had a "unique relationship" with the Federal Government.[23] The majority opinion noted that Members Fanning and Penello had carefully examined the record in this case and were still of the view that jurisdiction should be asserted for the reasons expressed in their earlier dissent. It stated further that Chairman Murphy and Member Walther, who had been appointed since issuance of the earlier decision, had now considered the issue and were in full agreement with the view of Members Fanning and Penello. The new majority, citing Board precedent as authority, observed that the action of reconsideration after a change in Board composition was not novel.

The new majority reconsidered the question of the employer's relationship to the Federal Government and determined that Howard University, which operates under a charter granted by the Federal Government in 1867, is a private university rather than a "public university or an instrumentality of the Federal Government." The majority found that the Federal Government did not own the employer's physical plant and did not exercise control over the appointment of the board of trustees or the allocation and spending of private funds, nor did it tell the employer whom to hire or fire or what wages to establish. The majority also noted that the Federal Government did not impose any restriction on collective bargaining; in fact, the employer had voluntarily recognized a number of unions and negotiated a number of collective-bargaining agreements.

In his dissenting opinion, Member Jenkins remarked that the Board, less than 2 years after the previous ruling, was reaching an opposite conclusion on facts which were essentially the same as the ones previously considered by the Board. The dissent contended that "[w]hat has changed is not the relationship between Howard University and the Federal Government, but the composition of the membership of

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[21] See *Helen Clay Frick Foundation*, 217 NLRB No 182 (1975), *Trustees of the Corcoran Gallery of Art*, 186 NLRB 565 (1970), *Pacifica Foundation—KPFA*, 186 NLRB 825 (1970)

[22] 224 NLRB No 44 (Chairman Murphy and Members Fanning, Penello, and Walther, Member Jenkins dissenting)

[23] *Howard University*, 211 NLRB 247 (1974) In this decision, former Chairman Miller and former Member Kennedy joined Member Jenkins in the majority opinion, while Members Fanning and Penello dissented

this Board." Concluding that the "result will be to stimulate the testing of numerous issues" as the Board's membership changes, the dissenter stated that he would have adhered to the earlier decision and dismissed the petition.

Roesch Lines,[24] raised the question whether the services performed by the employer, an independent contractor which contracted with two school districts in the State of California for the provision of school bus transportation, were so intimately connected with the exempted functions of a governmental entity as to preclude the assertion of jurisdiction. Chairman Murphy and Members Penello and Walther determined that the employer was so enmeshed in the school district's functions by providing school bus service that it performed, in effect, a municipal function.[25] Additionally, they noted that the employer's school bus operations were essentially local in character and therefore could not qualify for jurisdictional purposes under the Board's jurisdictional standard governing transit systems. Therefore, jurisdiction was declined over that portion of the employer's operations which involved the provision of transportation services to the school district. For the reasons expressed in *We Transport, Inc. and Town Bus Corp.*,[26] Members Fanning and Jenkins stated that they would have asserted jurisdiction over the employer's entire operations, including the school bus operations. Member Fanning noted in particular that the decisive factor should be the extent to which the employer has retained control over the employment conditions of its employees. His consideration of the record persuaded him that the employer had sufficient control over the employment conditions of all its employees so that bargaining could take place without approval or participation of the school districts.

The Board did assert jurisdiction over the employer's nonschool-related charter bus service which directly and indirectly affected commerce and which produced annual revenues in excess of $250,000.

In *Lexington Taxi Corp.—Transportation Management Corp.*,[27] an employer engaged principally in the provision of school bus services at its Boston and Lexington, Massachusetts, locations petitioned the Board for an advisory opinion to determine whether or not the Board would assert jurisdiction over its operations. The employer admitted that the bulk of its business involved the provision of school bus transportation services to public school children pursuant to contracts

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[24] 224 NLRB No 16 (Chairman Murphy and Members Fanning, Jenkins, Penello, and Walther).

[25] The majority cited evidence that the contracts precluded the school districts from obtaining school bus service from any other employer and that there were no comparable commercial or public transportation services as alternatives

[26] 215 NLRB No 91 (1974)

[27] 224 NLRB No. 136 (Chairman Murphy and Members Jenkins, Penello, and Walther).

with appropriate public school authorities. Its services were neither available to the general public nor performed pursuant to a franchise. Adhering to longstanding precedent, the Board refused to assert jurisdiction, finding the employer to be an "essentially local [enterprise] engaged primarily in aid of the State in the field of education." The Board specifically rejected the employer's argument that it was not "local in character" because it provided school bus service pursuant to an order of a United States district court. The Board found that the court order against the Boston School District, standing alone, did not alter the essentially "local in character" operations of the employer and thus afforded no basis for the Board's assertion of jurisdiction.

C. Other Issues

In *Salt & Pepper Nursery School & Kindergarten 2*,[28] the Board majority established a discretionary jurisdictional standard for employers involved in day care center operations in the amount of $250,000 gross annual revenues. Jurisdiction had previously been established over the day care center industry in *Young World*, but no discretionary standard had been announced.[29] The majority stated that this discretionary standard would be applied "for the present," but added that future knowledge of day care and similar industries could require a different standard to be adopted. Regarding the petition before it, the Board agreed that the employer was a day care center and not an adjunct to any local public school system within the meaning of *Young World, supra*. However, as the employer had received only $140,000 in gross revenues, the majority dismissed the petition.

In his dissenting opinion, Member Fanning urged that the Board adopt a discretionary jurisdictional standard of $100,000 gross revenues for day care centers. He noted that this standard has been adopted for the nursing home industry which provides comparable services—"custodial care necessitated by age and the unavailability of family attention for the recipient of the care"—as the day care industry. Another important consideration in Member Fanning's view was the fact that informal statistics assembled by the Department of Health, Education and Welfare indicated that only 25 to 30 percent of the day care centers would meet the $100,000 standard, thus, based on the majority's standard of $250,000, jurisdiction would be asserted over a very much smaller number of employers in this industry.

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[28] 222 NLRB No 202 (Chairman Murphy and Members Jenkins, Penello, and Walther, Member Fanning dissenting)

[29] 216 NLRB 520 (1975), 40 Ann. Rep 34 (1975)

Grand Lodge of Free & Accepted Masons, Masonic Home [30] presented questions involving the retroactive application of the Board's assertion of jurisdiction over nonprofit nursing homes.

Following the initial issuance of the decision and order in this case which found, in agreement with the administrative law judge, that the employer had engaged in certain unfair labor practices,[31] the Board panel decided on its own motion to consider the question whether the union was obligated to comply with the notice provisions of section 8(d) of the Act at the time of the strike which commenced prior to the Board's assertion of jurisdiction over nonprofit nursing homes on the ground that it knew, or had reason to believe, that jurisdiction would be asserted over nonprofit nursing homes such as the employer. The panel concluded that, even though the union knew that the jurisdictional question was pending before the Board,[32] the union could not have predicted the Board's disposition of the matter. The panel also decided that as the union was under no legal obligation to act in accordance with the requirements of the notice provisions the Board's subsequent assertion of jurisdiction could not "be treated as relating back to the start of the strike so as to create a legal duty or obligation where none existed before." Thus, the assertion of jurisdiction over nonprofit nursing homes was not to be applied retroactively to find a violation, but rather was to be applied so as to enable the Board to consider conduct, arising in cases unresolved prior to the assertion of jurisdiction, which would have been previously barred from the Board's scrutiny for lack of jurisdiction. The panel also cited the fact that the union had requested conciliation efforts by the appropriate state agency and therefore the policies and purposes of the Act directed to the peaceful resolution of labor disputes had been effectuated.

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[30] 220 NLRB No 206 (Members Fanning, Jenkins, and Penello)
[31] 215 NLRB No. 24 (1974).
[32] *Drexel Home*, 182 NLRB 1045 (1970)

III

Effect of Concurrent Arbitration Proceedings

It is clear that the jurisdiction of the Board over unfair labor practices is exclusive under section 10(a) of the Act and is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." However, consistent with the congressional policy to encourage utilization of agreements to arbitrate grievance disputes,[1] the Board, in the exercise of its discretion, will under appropriate circumstances withhold its processes in deference to an arbitration procedure.

The Board has long held that, where an issue presented in an unfair labor practice proceeding has previously been decided in an arbitration proceeding, the Board will defer to the arbitration award if the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.[2] Before the *Collyer* decision,[3] the Board had deferred in a number of cases [4] where arbitration procedures were available but had not been utilized, but had declined to do so in other such cases.[5] In the *Collyer* decision,[6] the Board established standards for deferring to contract grievance arbitration procedures before arbitration has been held.

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[1] E g , *Textile Workers Union* v *Lincoln Mills*, 353 U S 448 (1957), *United Steelworkers* v *Warrior & Gulf Navigation Co* , 363 U S 574, 578-581 (1960)

[2] *Spielberg Mfg Co* , 112 NLRB 1080, 1082 (1955)

[3] *Collyer Insulated Wire*, 192 NLRB 837 (1971) See 36 NLRB Ann. Rep 33-37 (1972)

[4] E g , *Jos. Schlitz Brewing Co* , 175 NLRB 141 (1969) The case was dismissed, without retaining jurisdiction pending the outcome of arbitration, by a panel of three members, Members Brown and Zagoria did so because they would defer to arbitration, Member Jenkins would not defer but dismissed on the merits. 34 NLRB Ann Rep 35-36 (1969), *Flintkote Co* , 149 NLRB 1561 (1964) 30 NLRB Ann Rep 43 (1965), *Montgomery Ward & Co* , 137 NLRB 418, 423 (1962), *Consolidated Aircraft Corp.*, 47 NLRB 694, 705-707 (1943).

[5] E g , cases discussed in 34 NLRB Ann Rep 34, 36 (1969), 32 NLRB Ann Rep 41 (1967), 30 NLRB Ann. Rep 43 (1965)

[6] Members Fanning and Jenkins dissented in separate opinions to the policy announced therein Both have continued to adhere to the views expressed in their respective dissents and have dissented in many of the cases issued during the report year in which the *Collyer* doctrine has been applied A recurrent theme of these dissents, as noted more particularly in the discussion of the various cases hereafter, is that the *Collyer* doctrine has been expanded in subsequent cases to the point where the Board has abdicated its statutory responsibilities and denied its processes to employees, labor organizations, and employers

Reassertion of Jurisdiction After Deferral to Arbitration

In cases in which the Board has deferred to contractual grievance-arbitration procedures issues which have not been submitted to arbitration, the Board has customarily retained jurisdiction to permit further consideration upon a showing that the dispute either has not been promptly resolved through the grievance process or has not been promptly submitted to arbitration. Where an issue presented in an unfair labor practice case has previously been decided in an arbitration proceeding, whether following prior Board deferral or as a matter before the Board for initial consideration, the Board will give conclusive effect to the arbitration award if the proceeding appears to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitration panel was not clearly repugnant to the purposes and policies of the Act—the standards for deferral set forth in *Spielberg.*[7] The following cases decided during the report year involve application of these standards.

In *Washington Post Co.*,[8] the Board reasserted jurisdiction where it had previously deferred to the parties' contractual grievance-arbitration procedure an alleged violation of section 8(b)(1)(B) of the Act due to the refusal of the union to arbitrate. The union's refusal to arbitrate was based on its view that the employer's failure to file and process the grievances for 10 months following the Board's decision and order constituted both an abandonment of the grievances and a failure to act with the "reasonable promptness" required by that order. In rejecting the union's laches argument, Members Fanning, Jenkins, and Penello concluded that the employer's request to arbitrate was not unreasonably late since at the time of the Board's decision and order the employer and the union were engaged in contractual negotiations in which the employer unsuccessfully attempted to resolve the disputed issues underlying the grievances. When these negotiations, which culminated in a new bargaining agreement 9 months after the decision and order issued, were completed without resolution of the issues involved in this case, the employer requested arbitration. In a "moreover argument," Members Fanning, Jenkins, and Penello noted that the union had presented no evidence to show that it had "suffered any meaningful or real detriment" as a result of the employer's failure to request arbitration at an earlier time. Accordingly, they reinstated the complaint for consideration on the merits. Chairman Murphy, who was appointed to the Board after

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[7] *Spielberg Mfg. Co , supra.*

[8] *Columbia Typographical Union 101, ITU (Washington Post Co)*, 220 NLRB No 144 (Members Fanning, Jenkins, and Penello, Chairman Murphy concurring, Member Penello further concurring, Members Fanning and Jenkins further concurring).

the decision and order in this case issued, concurred by stating that she, like her colleagues, "would reach the merits at this time. . . ."

In *Hawaiian Hauling Service, Ltd.*,[9] a Board majority refused to defer to an arbitrator's award upholding an employee discharge, finding it to be repugnant to the policies of the Act. The employee involved was discharged for calling the employer's vice president and general manager a liar during the course of a grievance meeting. Without explanation, the arbitrator's award stated "that the discharge in question was proper." In finding the award repugnant to the policies of the Act, the majority concluded that "[t]he effect of such an award is to substantially dilute an employee's right to fully present his case during grievance and arbitration proceedings as the employer's equal." In so concluding, the majority noted further that the arbitrator's award "[struck] at the very foundation of the grievance and arbitration mechanism" in that its enforcement precluded "a union from calling into question the credibility of management witnesses" and required "it to accept management's factual assertions. . . ." Acknowledging, however, that the employee involved in this case could have used more moderate language in expressing his disagreement with his supervisor, the majority nevertheless concluded that his lack of diplomacy did not render his conduct any less protected. Accordingly, on the merits, the majority found the discharge to have been in violation of section 8(a)(1) of the Act.

Unlike their colleagues, Members Kennedy and Penello would have deferred to the arbitrator's award since, in their view, the proceedings satisfied all of the standards for deferral as set forth in *Spielberg*.[10] According to the dissenters, the issue to be decided was a factual one—whether the employee's conduct at the grievance meeting was "so unwarranted as to cross the line of protected grievance activity." The resolution of that issue by the arbitrator against the employee, in the view of the dissenters, should have been final, and the majority should not have "substitut[ed] its factual judgment for that of the arbitrator" in reaching a contrary result.

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[9] 219 NLRB 765 (Chairman Murphy and Members Fanning and Jenkins, Members Kennedy and Penello dissenting)

[10] *Spielberg Mfg Co*, *supra*

IV

Board Procedure

A. Petition To Cede Jurisdiction

Section 10(a) of the Act gives the Board authority to cede jurisdiction to any agency of a State or territory where the relevant statute is neither on its face, nor construed to be, inconsistent with the National Labor Relations Act. A case decided during this report year which involved the effect of the Board's expanded jurisdiction over nonprofit health care institutions [1] on States which had vested jurisdiction over labor relations in nonprofit hospitals in a state agency illustrated the issues involved in the Board's cessation of jurisdiction.

The State of Minnesota, in *In re: State of Minnesota, by Warren Spannaus, Its Attorney General, and Charles A. Swanson, Director of Its Bureau of Mediation Services,*[2] petitioned the Board to cede to the Minnesota Bureau of Mediation Services jurisdiction over labor relations in nongovernmental nonprofit hospitals on the basis of the Minnesota Charitable Hospitals Act. The Board denied the petition on the basis of three crucial inconsistencies between the National Labor Relations Act and the pertinent state statute. Thus, the Board concluded that the Minnesota statute's prohibition of the right to strike "[which] is so fundamental and basic to the collective-bargaining process under Federal law" conflicted with the National Labor Relations Act. In addition, the Board found that the prohibition against employer lockouts was inconsistent with the National Labor Relations Act in that the Federal law permits a lockout in certain circumstances. As well, it was determined that the provisions for compulsory arbitration conflicted with the Act's policy of "encouraging free and unfettered collective-bargaining." The Board decision also cited, as an additional ground for declining to cede jurisdiction, congressional intent that a uniform Federal policy concerning health care institutions would prevail.

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[1] Public Law 93-360 (effective August 25, 1974)

[2] 219 NLRB 1035 (Chairman Murphy and Members Fanning, Jenkins, and Penello).

B. Petition for Declaratory Order

In *American Federation of Television & Radio Artists*,[3] two national news commentators petitioned the Board to issue a declaratory order finding that the union-shop provisions of the broadcasting companies' collective-bargaining agreements with the union were unlawful. The petitioners, who each tendered the initiation fees and periodic dues required under the union-shop provisions of the relevant collective-bargaining agreements, urged that, in effect, the collective-bargaining agreement required "full-fledged membership" for employment and that the mere payment of fees and dues did not satisfy this condition. Chairman Murphy and Members Jenkins and Penello noted that the parties agreed that the law was clear that the petitioners had only to satisfy the "financial core of membership" by paying the uniform dues and fees, and that the petitioners had never tested the union's enforcement policy of its union-shop clause to prove that it did not conform to the prevailing law. Thus, as the law was clear that a termination of employment for reasons other than nonpayment of dues and fees or a refusal to employ an individual who refused to become a "member" of the union would be a violation of the Act, Chairman Murphy and Members Jenkins and Penello dismissed the petition for declaratory order on the grounds that there was "no justiciable issue to be decided or uncertainty to be dispelled . . . ."

In a separate opinion, Member Fanning concurred in the dismissal of the petition for declaratory order for the reasons that the petition sought a determination as to events which were time-barred by section 10(b) of the Act and which were neither investigated nor made subject of a complaint by the General Counsel under section 3(d) of the Act.

C. Unfair Labor Practice Procedure Issues

In *Gould, Inc.*,[4] the Board concurred with the administrative law judge that the employer committed unfair labor practices by engaging in certain conduct with the intent of undermining the union's organizational campaign and that such conduct interfered with the employees' freedom of choice in a representation election, thereby necessitating setting aside the election and directing a new one. The employer had argued that, as it was subject to a prior unfair labor practice proceeding involving the same set of circumstances, the General Counsel was precluded from further litigation on the ground

[3] 222 NLRB No 34 (Chairman Murphy and Members Jenkins and Penello, Member Fanning concurring)
[4] 221 NLRB No 127 (Chairman Murphy and Members Fanning, Jenkins, and Penello).

that he knew or should have known of the currently alleged violations prior to the issuance of the administrative law judge's decision in that former proceeding.[5] The employer cited *Jefferson Chemical Co.*[6] as authority for its position Contrary to the employer and in agreement with the administrative law judge, a unanimous Board determined that its decision in *Jefferson Chemical* was inapposite to the proceedings before it.

In *Jefferson Chemical*, the Board found that the General Counsel was precluded from litigating a surface bargaining allegation in view of an earlier proceeding against the same employer, based on a broad refusal-to-bargain charge during which the General Counsel expressly declared that surface bargaining was not at issue. Thus, the Board held that the General Counsel's "failure to litigate bad faith bargaining in the earlier case for whatever reason cannot now justify his litigation of surface bargaining in the instant case."

In distinguishing *Jefferson Chemical* from the proceeding before it in *Gould*, the Board noted that "the General Counsel is not required to be aware of each and every fact giving rise to a possible unfair labor practice prior to the issuance of a complaint since its investigation is normally limited to the events set forth in the charge." The Board found that the violations in the case before it were predicated on charges concerning conduct by different supervisors and against employees different from those involved in the prior proceeding and thus were "wholly unrelated in time and substance" to the prior proceeding. Member Jenkins indicated that he would not apply *Jefferson Chemical* in view of his dissenting opinion in that case. Member Fanning, relying on his dissent in *Jefferson Chemical*, found that whether or not the General Counsel should have known about matters in issue here at the time of the earlier hearing was irrelevant to the proper disposition of this proceeding.

In disposing of the employer's additional allegation that it was entitled to General Counsel witness affidavits, the Board found it unnecessary to decide whether the amended Freedom of Information Act [7] had any bearing on the case as the General Counsel furnished the employer with copies of witness pretrial affidavits following direct examination, and the employer had made no showing of prejudice.

In *Eidal Intl. Corp* ,[8] a unanimous Board determined that representation issues which had been decided in a representation proceeding could be relitigated in an unfair labor practice proceeding which did

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[5] See *Gould, Inc* , 216 NLRB 1031 (1975)

[6] 200 NLRB 992 (1972).

[7] 5 U S C Sec 552, *et seq* , as amended by Public Law 93-502 (effective February 19, 1975)

[8] 224 NLRB No. 128 (Chairman Murphy and Members Fanning, Jenkins, Penello, and Walther)

not involve section 8(a)(5) of the Act. The Board adopted an administrative law judge's decision that the employer did not violate the Act when it discharged two "over-the-road" truckdrivers pursuant to the union-security clause contained in its unexpired collective-bargaining agreement with the union. The General Counsel had argued that the employees' discharge violated the Act in view of a regional director's decision and direction of election, issued after the discharges occurred, in which the existing contract was found not to bar a rival union's petition for election in a unit of "over-the-road" truckdrivers Since the regional director determined that the "over-the-road" drivers were not covered by the contract, the General Counsel argued that the representation determinations were binding on the Board and therefore the employer could not claim that the discharges were pursuant to an applicable contract. The administrative law judge ruled that the contract issue could be relitigated in the unfair labor practice proceeding as it did not involve an unlawful refusal-to-bargain allegation. On the basis of the collective-bargaining history and the administration of the contract, the administrative law judge concluded that the employees were covered by the contract and therefore bound by the union-security provision. The administrative law judge also determined that, even if the employer's enforcement of the union-security provisions was taken, in part, to discourage the rival union's organizational drive, the employer's action was protected by the proviso in section 8(a)(3) of the Act permitting discrimination pursuant to a valid union-security clause.

Chairman Murphy found it unnecessary to adopt that part of the administrative law judge's decision which implied that in all unfair labor practice proceedings which are not concerned with an unlawful refusal-to-bargain allegation all issues involved in a prior representation case may be litigated.

D. Representation Procedure Issues

Two cases decided this year presented the Board with questions involving the extent to which unfair labor practices could affect election results where either such conduct was not the subject of election objections or the objections had been withdrawn.

In *Albuquerque Publishing Co.*,[9] the petitioner-union filed objections to an election upon which a hearing was directed and, without withdrawing such objections, filed charges that the employer engaged in conduct following the election which violated section 8(a)(1) and (3)

[9] 219 NLRB 631 (Chairman Murphy and Members Kennedy and Penello)

of the Act. Based on the regional director's investigation of the objections, a hearing was held before a hearing officer which dealt solely with the conduct specified in the petitioner-union's objections. In investigating the charges alleging postelection employer conduct violative of section 8(a)(1) and (3) and in deciding their merit, the regional director discovered evidence which he deemed sufficient to indicate that certain conduct violative of section 8(a)(1) occurred on dates falling within the critical preelection period Accordingly, the regional director issued a complaint alleging employer violations of the latter conduct as well as the conduct contained in the petitioner-union's charges.

The regional director issued a supplemental report on objections and an order consolidating the unfair labor practice and representation proceedings, in which he provided that the administrative law judge should determine whether any conduct described in the complaint warranted setting aside the election and, at the same time, recommended to the Board that it defer its decision on objections until the administrative law judge's decision issued. The employer filed exceptions. Subsequently, the hearing officer issued his report on election objections, recommending that all such objections be overruled, and that the results of the election be certified; the petitioner filed exceptions.

The Board panel concluded that the regional director erred in consolidating the two proceedings when, during his investigation of the charges of unfair labor practices filed subsequent to his completion of the investigation of objections to the election, he uncovered other conduct which arguably interfered with the results of the election. That additional conduct was described in the regional director's supplemental report on objections and, as there noted, evidence of its occurrence was disputed The Board panel observed that the regional director accordingly proposed that, although the only issues raised by the election objections as described by the regional director's initial report on objections were ripe for resolution, the Board should not, if it found those objections to be without merit, certify the election results until a further hearing was held to resolve the disputed issues concerning the newly discovered alleged objectionable conduct, even though the latter was never made the subject of any formal objections The Board panel found no warrant for this proposal.

Citing *Hecla Mining Co.*[10] and the Board's policy of avoiding inordinate delays in determining representation matters, the panel

[10] 218 NLRB 860 (1975) There, the Board refused to consider the effect on an election of allegedly objectionable conduct which had been brought to the regional director's attention by supplemental objections filed after the regional director had completed his investigation of the timely objections, but before the Board had ruled on their merits

determined that the scope of the inquiry concerning alleged election interference should be limited to "matters specified and/or uncovered during a duly conducted investigation of timely filed objections." Therefore, the panel ordered the severance of the two cases, remanded the unfair labor practice case to the regional director, and, adopting the hearing officer's report, certified the results of the election.

In *Bandag, Inc.*,[11] the petitioner-union, having lost the election, filed timely objections to the election and filed unfair labor practice charges based on both preelection and postelection employer misconduct. In the course of his postelection investigation, the regional director discovered additional evidence of preelection misconduct not included in the petitioner-union's objections. Before the regional director issued his report on objections, the petitioner-union requested that its objections be withdrawn. In his report, the regional director approved the withdrawal request and directed a hearing on the newly discovered evidence of preelection misconduct. Such evidence, together with the unfair labor practice charges, formed the basis of a subsequently issued order consolidating cases, consolidated complaint, hearing on objections, and notice of hearing. The hearing followed and the administrative law judge found most of the allegations in the consolidated complaint, including those derived from the regional director's postelection investigation of objections, to be proven and recommended the issuance of a remedial bargaining order.

The Board majority adopted the administrative law judge's findings that the employer had engaged in most of the unlawful conduct alleged in the complaint, but declined to issue a remedial bargaining order on the basis of *Irving Air Chute Co., Marathon Div.*[12] In that case, the Board decided that even though a union may have lost the election, thereby failing to prove its majority status, a bargaining order would be granted if, and only if, the "election be set aside upon meritorious objections filed in the representation case." In view of the fact that the union, by withdrawing its election objections, "effectively removed any question as to the election's finality," the majority certified the results of the election. Thus, as the union failed to prove its majority status, a bargaining order was inappropriate.

Chairman Murphy, in a separate concurring opinion, stressed the fact that the withdrawal of election objections precluded the union from overcoming its lack of majority status demonstrated by its election loss.

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[11] 225 NLRB No 11 (Members Penello and Walther, Chairman Murphy concurring, Members Fanning and Jenkins dissenting).

[12] 149 NLRB 627 (1964)

Members Fanning and Jenkins, dissenting in part, agreed with the majority's unfair labor practice findings, but would have granted a bargaining order to remedy the employer's "egregious misconduct." They contended that cases issued subsequently to *Irving Air Chute* indicated "that the issuance of a bargaining order does not turn on the narrow question of existence of 'meritorious objections,' but rather on the broader question of whether the Board is faced with the results of a valid election." [13] The dissenters voiced their opinion that, once timely objections have been filed activating the postelection investigative machinery, the Board has a statutory obligation to remedy whatever employer misconduct it finds "even if it means going beyond the four corners of the original objections."

In *Sambo's North Div. Store 144*,[14] a Board panel majority found that the regional director did not abuse his discretion by denying the employer additional time for submitting evidence supporting its election objections and by refusing to consider the untimely evidence once it was submitted. As the employer's objections were not accompanied by any evidence or supporting materials, the regional director granted the employer additional time to submit such documentation as to allow the regional director to proceed with its investigation. In view of the employer's failure to meet the deadline, the regional director overruled the objections, noting that 17 days had passed since the election and the employer had neither submitted any of the requested information nor requested additional time in which to do so.[15]

The majority agreed with the regional director that the employer incurred no additional or onerous burdens by the time limit in which to submit the requested information, especially since it was reasonable to assume that the employer possessed such information in order to file the objections in the first place. The majority also considered that the requested information was far less extensive to prepare than evidence of a *prima facie* case which an objecting party is obligated to submit with its objections and which, noted the majority, the employer had failed to submit.

Member Walther dissented on the ground that the regional director abused his discretion by overruling the employer's objections without considering the supporting evidence submitted by the employer. In the view of the dissent, the employer had requested an extension of

[13] This concept, according to the dissenters, was illustrated most clearly in the decision in *Pure Chem Corp*, 192 NLRB 681 (1971)

[14] 223 NLRB No 81 (Chairman Murphy and Member Jenkins, Member Walther dissenting).

[15] On the last day of the deadline, the employer requested additional time in which to send witness affidavits, but the regional director noted that the requested extension was for the submission of information other than that requested by him After the issuance of the regional director's report, the employer submitted witness affidavits in support of its objections

time by mail,[16] which was appropriate in view of the regional director's use of the mails, and that witnesses' affidavits, such as those offered by the employer were customarily accepted as "one form of a 'summary of a witness' testimony.' " The dissenter would have remanded the case to the regional director to complete the investigation of the objections.

[16] The information was due on December 8, the regional director's report issued on December 12, and the witnesses' affidavits were submitted on December 16 Member Walther noted that on December 5 the employer mailed a request for an extension of time to December 16, in which the extenuating circumstances necessitating the extension were fully set forth As promised, the requested information was submitted on December 16

V

Representation Proceedings

The Act requires that an employer bargain with the representative designated by a majority of his employees in a unit appropriate for collective bargaining.[1] But it does not require that the representative be designated by any particular procedure as long as the representative is clearly the choice of a majority of the employees. As one method for employees to select a majority representative, the Act authorizes the Board to conduct representation elections.[2] The Board may conduct such an election after a petition has been filed by or on behalf of the employees or by an employer confronted with a claim for recognition from an individual or a labor organization. Incident to its authority to conduct elections, the Board has the power to determine the unit of employees appropriate for collective bargaining[3] and formally to certify a collective-bargaining representative on the basis of the results of the election. Once certified by the Board, the bargaining agent is the exclusive representative of all employees in the appropriate unit for collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment. The Act also empowers the Board to conduct elections to decertify incumbent bargaining agents who have been previously certified, or who are being currently recognized by the employer. Decertification petitions may be filed by employees, by individuals other than management representatives, or by labor organizations acting on behalf of employees.

This chapter concerns some of the Board's decisions during the past fiscal year in which the general rules governing the determination of bargaining representatives were adapted to novel situations or reexamined in the light of changed circumstances.

A. Existence of Questions Concerning Representation

Section 9(c)(1) empowers the Board to direct an election and certify the result thereof, provided the record of an appropriate hearing be-

[1] Secs 8(a)(5) and 9(a).
[2] Sec. 9(c)(1)
[3] Sec 9(b)

fore the Board [4] shows that a question of representation exists. However, petitions filed in the circumstances described in the first proviso to section 8(b)(7)(C) are specifically exempted from these requirements,[5] and the parties may waive a hearing for the purpose of a consent election.[6]

The investigation of a petition for a representation election must establish a proper basis for a finding of the existence of a question concerning representation. During the report year, the Board considered this issue in a case involving "the blurred line that often exists between work assignment disputes and controversies over which of two or more unions is the appropriate bargaining unit" [7] representative. In *A. S. Abell Co.*,[8] a Board panel dismissed the employer's representation petition after finding that in the particular circumstances—the development of an in-house staff to maintain new equipment which had completely eliminated the "hot metal" process in the employer's composing room; and similar, but separate, grievances filed by each of the two incumbent unions claiming that the work being done by the new in-house staff belonged to employees represented by it—since the ultimate effect of the claims by both unions was to dispute the employer's assignment of work, there was no merit to the employer's assertion that either of the unions was seeking to represent the employees on the in-house staff. Thus, the Board concluded, since "its sole function in representation proceedings is to ascertain and certify the name of the bargaining representative, if any, that has been designated by the employees in the appropriate unit," [9] the petition failed to raise a representation question. The Board did not reach the merits of contentions made by the parties as to whom the work should be properly assigned.

B. Standing To Participate in Election

The Board will refuse to direct an election when the proposed bargaining agent fails to qualify as a bona fide representative of the employees sought. One case involving guard employees which pre-

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[4] Sec 9(c)(1) provides that a hearing shall be conducted if the Board "has reasonable cause to believe that a question of representation . . . exists . . . ."

[5] That section prohibits a labor organization, which is not currently certified as the collective-bargaining representative, from engaging in recognitional picketing without filing a representation petition within a reasonable period of time not exceeding 30 days. However, when such a petition has been filed, the proviso directs the Board to hold an expedited election without regard to sec 9(c)(1). See also NLRB Rules and Regulations and Statements of Procedure, Series 8, as amended, sec 101.23(b).

[6] Sec. 9(c)(4), see also NLRB Rules and Regulations and Statements of Procedure, Series 8, as amended sec. 101.19

[7] *Carey* v *Westinghouse Corp* , 375 U S. 261, 268–269 (1964)

[8] 224 NLRB No. 63 (Members Jenkins, Penello, and Walther)

[9] *Gas Service Co.*, 140 NLRB 445, 447 (1963)

sented the question of qualification [10] in unusual circumstances came to the Board during the year. In *Wackenhut*,[11] a qualified *nonincumbent* guard union petitioned for a representation election. The acting regional director issued a decision and direction of election after allowing a nonincumbent nonguard labor organization to intervene, provided that, in the event it were successful, merely the arithmetic results of the election would be certified The acting regional director relied upon the Board's *Burns* decision [12] which provided that an *incumbent* nonguard union might be placed on the ballot where a petition had been filed by a legitimate guard union.

The Board majority held that the nonguard union in *Burns* was allowed to intervene only because it was the incumbent union, and that the purpose of section 9(b)(3) would not be served by allowing a nonguard union to intervene and appear on a ballot in an election among guards, at least where, as here, such nonguard union was not the incumbent. The majority pointed out that to allow the *Burns* case to be extended, as was done by the acting regional director, would have opened the door to every nonguard union to "jump" on the ballot in a guard election by merely submitting a minimal showing of interest, i.e., a single authorization card.

According to the majority, whatever might have been the rationale with regard to placing incumbents on the ballot, i.e., that the Board might not have wished to disturb unduly what might historically have been a voluntary bargaining relationship, such rationale had no applicability to an unqualified nonincumbent labor organization. To leave such unqualified union off the ballot in no way required employees to vote "no" in order to continue what they may have believed was a desirable existing bargaining relationship because, by hypothesis, the nonincumbent nonguard union had not been the bargaining representative. Further, the majority pointed out that its decision did not prohibit nonincumbent nonguard unions from representing guard employees where they attained voluntary recognition from employers. Accordingly, the majority amended the acting regional director's decision and direction of election by deleting the intervening labor organization's name from the ballot.

In their dissenting opinion, Members Fanning and Jenkins asserted that section 9(b)(3) only prohibits the Board from *certifying* any labor organization "as representative of employees in a bargaining unit of guards if such organization admits to membership, or is af-

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[10] Sec 9(b)(3) provides that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards "

[11] *Wackenhut Corp* , 223 NLRB No 17 (Chairman Murphy and Members Penello and Walther, Members Fanning and Jenkins dissenting)

[12] *Wm. J. Burns Intl. Detective Agency*, 138 NLRB 449 (1962).

filiated directly or indirectly with an organization, which admits to membership, employees other than guards." They observed that the Act thus deprives a nonguard union only of the benefits of certification. Members Fanning and Jenkins pointed out that guards have the right to designate as their bargaining agent a union which the Board is proscribed from certifying. They disagreed with the majority's policy, which, in effect, moved toward prohibiting a nonincumbent nonguard union from representing guard employees who might wish that union to represent them. In their view, such result was not consistent with the intent and purpose of section 9(b)(3).

Members Fanning and Jenkins would have allowed the nonincumbent nonguard union to intervene and appear with the qualified nonincumbent guard union on the ballot. If the intervenor were successful, they would have certified the arithmetical results. In the opinion of Members Fanning and Jenkins, this procedure would have conformed with section 9(b)(3) and would have contributed to stable labor relations by allowing employees to express fully their wishes as as to a collective-bargaining representative.

C. Unit Issues

1. Health Care Institution Units

Public Law 93–360 amended the National Labor Relations Act to eliminate the exemption from coverage of the Act previously accorded to private nonprofit hospitals. Several cases issued during the report year established guidelines for units of employees appropriate for collective bargaining in the private health care field.

a. Effect of Prior Bargaining History

The Board twice during the fiscal year dealt with the effects of prior bargaining history on unit determinations.

In *St. Joseph Hospital & Medical Center, et al.*,[13] the Board refused to disturb separate units of maintenance employees at various hospitals, notwithstanding the hospitals' claim that such units were repugnant to Congress' recognized policy of avoiding undue proliferation of bargaining units in the health care industry. The Board found no merit in the contention that the Act precluded such units in this industry. Rather, the Board observed that, in the health care industry, parties are permitted "the broadest possible latitude to mutually define the context in which collective bargaining should take place." [14]

[13] 219 NLRB 832 (Chairman Murphy and Members Fanning, Jenkins, and Penello).
[14] *Otis Hospital*, 219 NLRB No. 55 (1975), discussed *infra*

While such mutually defined units might not have been the same as the units which the Board might have found had the matter not been agreed upon by the parties, the Board was reluctant to disturb bargaining units in the health care industry which had been mutually agreed upon by the parties so long as such units did not contravene the Act or established Board policy.

Citing the fact that the unions and hospitals involved had maintained collective-bargaining relationships for periods ranging from 6 to 30 years, the Board declined to invalidate bargaining units which had been established by mutual agreement and had been characterized by long histories of continuous and harmonious bargaining.

In *North Memorial Medical Center*,[15] the Board panel majority, however, did not give controlling weight to the parties' prior bargaining history. Noting that bargaining history is relevant, but not the sole factor, in determining the appropriateness of a unit, the majority found that an historically established separate unit of emergency medical technicians was inappropriate in view of the technicians' close community of interest with other hospital employees and in view of the congressional admonition against unit proliferation.

St. Joseph Hospital, supra, was distinguished on the grounds that, contrary to the situation prevailing in *St. Joseph,* bargaining in the emergency medical technicians' unit, which had proceeded under the artificial stabilizing influence of a Minnesota statute, had in fact been something less than harmonious and lacked continuity, inasmuch as the identity of the labor organization representing the emergency medical technicians had recently changed. The majority noted that the state statute under which the bargaining history occurred permitted fragmented units contrary to the principal thrust of the legislative history of the health care amendments of the Act and deprived the parties of resort to economic power in the form of strike or lockout.

In his dissent, Member Fanning asserted that, by disregarding the parties' prior bargaining history, the majority had repudiated the principles announced in *St. Joseph Hospital.* In this regard, Member Fanning argued that the importance of this continuous bargaining history should not be discounted by the mere lack of continuity of the bargaining representative. Noting—in addition to bargaining history—separate supervision, different work schedules, separate wage classifications, lack of contact with other hospital employees, and specialized training, Member Fanning found that the emergency medical technicians enjoyed a singular homogeneous community of interest apart from other employees and would have directed an election.

[15] 224 NLRB No. 28 (Chairman Murphy and Member Penello, Member Fanning dissenting).

b. Effect of Stipulation as to Unit

In *Otis Hospital*,[16] the Board majority announced that in the health care industry it would give effect to the parties' stipulations as to bargaining units even if the units designated by the parties did not comport with the standards set by the Board in contested cases. Stipulations designating unit compositions which contravened the provisions or purposes of the Act or well-settled Board policies would not, however, be honored.

In support of its decision, the Board majority observed that allowing parties broad latitude to agree upon a mutually acceptable unit encourages collective bargaining, introduces a desirable element of flexibility in unit determinations, and is supported by the legislative history. The Board majority accordingly deemed appropriate a stipulated unit of licensed practical nurses (LPN's), even though Board policy was generally to regard such a unit as "inappropriate," as it did not run counter to either the express provisions or the broader purposes of the Act. Similarly, a stipulated unit of service and maintenance workers which included office clericals was approved despite contrary Board precedent, since it was not considered to be contrary to the provisions of the Act or to Board policy and the inclusion was in keeping with the legislative directive to avoid the consequences of bargaining unit fragmentation.[17]

Member Kennedy dissented from the majority's approval of a separate unit of licensed practical nurses. He argued that the Board's finding that a unit was inappropriate in a contested case compelled the conclusion that similar units were inappropriate even if both parties agreed on the composition. He also observed that the majority's decision was directly contrary to its decision not to honor the parties' stipulation regarding licensed practical nurses in *Nathan & Miriam Barnert Memorial Hospital Assn. d/b/a Barnert Memorial Hospital Center*, 217 NLRB No. 132 (1975).

The majority replied that it perceived a clear distinction between the result reached in *Otis Hospital* and its refusal to honor the stipulated exclusion of licensed practical nurses from the units involved in *Barnert Memorial Hospital*. Thus, "the parties in *Barnert* agreed to exclude LPN's *but from different units*." Unlike the situation in *Otis Hospital*, the parties in *Barnert* had no "shared perspective" as to what unit in their work place would function well, and be an appro-

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[16] 219 NLRB 164 (Chairman Murphy and Members Fanning, Jenkins, and Penello, Member Kennedy dissenting).

[17] Member Penello, in a concurring footnote, stated that he agreed with the majority's approval of a separate unit of licensed practical nurses, but noted that in the absence of a clear stipulation by the parties he would not have found such a unit to be appropriate

priate one. With no Board pronouncement in the lead hospital cases having issued at the time of the *Barnert* hearing, the majority was unwilling to treat the employer's "agreement" to exclude LPN's from an otherwise all-inclusive unit as applicable in the event the Board found, as it did, a unit limited to technical employees appropriate.

In another case[18] raising the stipulation issue, a Board panel honored the parties' stipulation as to a unit consisting of licensed practical nurses, nurses aides, orderlies, ward clerk, and housekeeping, dietary, and maintenance employees even though the stipulated unit was not in conformity with the determinations made by the Board in the lead contested hospital cases.[19]

c. Single-Location Unit of Multiple-Location Operation

The issue of whether a single-location bargaining unit is appropriate in a multiple-location health care operation was treated by the Board in a variety of contexts.

In *Kaiser Foundation Hospitals*,[20] a Board panel majority dealt peripherally with the multiple-location issue when it found a separate unit of pharmacists employed at five different branches of the employer's medical operation in Hawaii to be inappropriate. The petitioning union had originally requested a unit of just these pharmacists located at the employer's medical facilities on the island of Oahu. The acting regional director rejected this request and determined that a unit consisting of all pharmacists employed by the employer on both Oahu and Maui was appropriate. The Board panel majority thereafter reversed, but for reasons which did not bring the multiple-location question directly into issue. In the majority's view, the pharmacists did not have a community of interest distinct from other professional employees such as would justify departing from the policy of avoiding proliferation of units in the health care industry. Indeed, the majority noted that all of the employees under consideration in this case possessed a "commonality of professionalism" which set them apart from other employees in the employer's operations. A multiple-location

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[18] *Southwest Community Hospital*, 219 NLRB 351 (Members Fanning, Jenkins, and Penello).

[19] Member Penello would not have found the parties' stipulation to be contrary to Board policy However, in the absence of such a clear stipulation by the parties, he would not have found such a unit to be appropriate since it failed to include all the nonprofessionals excepting office clericals in one unit and thus would have resulted in the kind of proliferation Congress had admonished the *Board* to prevent In view of the circumstances herein, where such a clear stipulation existed to which the employer had agreed on two occasions, Member Penello deemed the unit to be appropriate

[20] 219 NLRB 325 (Members Fanning and Jenkins, Member Kennedy concurring in part and dissenting in part)

unit of pharmacists and unrepresented professional employees, excluding nurse anesthetists,[21] was therefore found appropriate.

Member Kennedy dissented from the majority's exclusion of unrepresented nurse anesthetists from the designated unit as he would have found a unit of *all* unrepresented professional employees appropriate.

In *Saddleback Community Hospital*,[22] the Board majority refused to approve separate units for pharmacists located at the employer's hospital and medical clinic pharmacies. The majority also affirmed the regional director's conclusion that employees in the employer's medical clinic pharmacy and those in its hospital pharmacy shared a substantial community of interest and that, therefore, separate units comprised of employees at each of the pharmacies, respectively, were inappropriate. Thus, in the opinion of the majority, the record disclosed that the employees of both pharmacies were hourly paid and subject to the same wage scale, and were subject to a common labor relations policy with identical fringe benefits, health, and insurance plans. The record further revealed that the hospital pharmacy technicians and the clinic pharmacy clerks had similar skills, job duties, and apparently performed the same sort of work, which principally consisted of aiding the pharmacists.

In these circumstances, given the centralized control of labor relations, the common ultimate supervision, and the close community of interest of both pharmacies' employees, as evidenced by the similarity in job duties and skills and employee benefits, the majority found insufficient warrant for a unit limited to the clinic pharmacy employees.

Members Fanning and Jenkins, dissenting, took the position that the employees of the medical clinic pharmacy were entitled to separate representation and that a unit limited to those employees was appropriate. While the dissenters conceded that there were things which were common to the employees at both pharmacies, in their judgment the differences far outweighed the similarities that existed. Thus, Members Fanning and Jenkins pointed out that the experience requirements for all classifications employed at the hospital pharmacy far exceeded those required of the employees at the clinic pharmacy, and, correspondingly, the wage rates for the two groups of employees

[21] Although the record indicated that the nurse anesthetists were professional employees, the majority did not include them in the unit because they had to possess a license as a registered nurse (RN), as well as certification as a registered nurse anesthetist (RNA), the RNA's were basically RN's who took additional training, and they had sufficient community of interest with the other RN's who were then represented by the Hawaiian Nurses Association—not a party to this proceeding

[22] 223 NLRB No 45 (Chairman Murphy and Members Penello and Walther, Members Fanning and Jenkins dissenting)

were not the same; there was no interchange between the employees of the two pharmacies; and, in their view, the evidence established the absence of any interrelationship between the employees of the two pharmacies.

The dissenters observed that the medical clinic pharmacy was, in effect, a retail drugstore and as such served a completely different purpose from the hospital pharmacy, which did not deal at all with the the general public, but functioned as a supportive arm of the medical staff of the hospital. They advocated application of the same principles employed by the Board in resolving multiple-location issues in other industries. Members Fanning and Jenkins, accordingly, cited two cases—*Sav-On Drugs*, 138 NLRB 1032 (1962), and *Haag Drug Co.*, 169 NLRB 877 (1968)—wihch held that separate retail drugstores were presumptively appropriate for collective-bargaining purposes.[23] As, in the opinion of the dissenters, the evidence failed to overcome this presumption that the single facility here was appropriate, they would have found that the employees of the clinic pharmacy constituted an appropriate unit.

In *Baptist Memorial Hospital*,[24] a Board panel again refused to find appropriate a unit confined to a single location within the employer's multiple-location operation. The petitioner sought to represent a unit of service employees assigned to the employer's Lamar unit, located approximately 1 mile from the employer's main hospital unit The Board panel concluded that a separate unit for the Lamar unit employees was inappropriate, inasmuch as several factors—such as the absence of any difference between the Lamar unit and a separate floor or wing at the main unit; Lamar and the main units' utilization of common purchasing, engineering and power control, and laundry and garage facilities; common labor relations policy and administration; common overall supervision of employees performing similar work at the two facilities; common holidays and other fringe benefits; same hours and wage scale; and massive employee transfers between Lamar and the main unit, both permanent and temporary—established that the Lamar unit was functionally and operationally integrated with the main hospital unit.

In *Kaiser Foundation Health Plan of Oregon*,[25] the Board majority rejected a single-location unit of psychotherapists at the employer's

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[23] According to the majority, *Sav-On Drugs*, *supra*, and *Haag Drug Co*, *supra*, relied on by the dissenters, were inapposite here, inasmuch as those cases involved the issue of the appropriateness of single-location units within retail chains The majority stated that the instant case, however, involved the issue of the appropriateness of a single unit limited to one of two pharmacies within a unified health care institution and, therefore, the congressional mandate to avoid undue proliferation of units within this industry was fully applicable herein.

[24] 224 NLRB No. 52 (Members Jenkins, Penello, and Walther).

[25] 225 NLRB No. 50 (Chairman Murphy and Members Penello and Walther, Members Fanning and Jenkins dissenting).

mental health clinic. The employer operated a hospital and seven outpatient clinics, of which the mental health clinic was one. Although no psychotherapists were employed outside the mental health clinic, at several other clinic locations the employer employed medical social workers whose duties were roughly analogous to the duties of the psychotherapists.

In finding inappropriate a single-location unit of psychotherapists exclusive of professionals at the employer's other facilities, the majority cited the facts that the employee records were centrally maintained; the operation of the mental health clinic was highly integrated with the operation of the employer's overall health facilities; and other employees (medical social workers) performed similar work at several other clinic locations. The majority saw no reason why the fact that the psychotherapists comprised the entire complement of professionals at the mental health clinic dictated a single-location unit finding, in view of the centralized control of labor relations, the psychotherapists' relationships with other professionals at the hospital, and particularly the fact that the requested "psychotherapists" included "social workers" and "mental health assistants" whose duties were close to those of the "medical social workers" employed at other clinics. The majority thus concluded that the psychotherapists did not possess a community of interest separate from that shared by other professionals.

Members Fanning and Jenkins dissented from the majority's refusal to find appropriate a single-location unit. Emphasizing the fact that the psychotherapists comprised the entire complement of professionals at the mental health clinic, they concluded that the psychotherapists possessed a sufficient community of interest in and amongst themselves, apart from the other professionals employed by the employer, to warrant establishment of a separate unit. In support thereof they observed that the mental health clinic was geographically isolated and functionally distinct from the employer's other facilities and that there was absolutely no interchange of duties or personnel between the psychotherapists at the mental health clinic and any other professionals at any facility of the employer.

d. Appropriateness of Craft or Maintenance Unit

In *Jewish Hospital Assn. of Cincinnati d/b/a Jewish Hospital of Cincinnati,*[26] the Board majority directed an election in a service and maintenance unit, excluding technical employees, despite the employer's contention that the only appropriate unit included all serv-

[26] 223 NLRB No 91 (Members Jenkins and Walther, Chairman Murphy and Member Penello separately concurring in part and dissenting in part, Member Fanning dissenting).

ice and maintenance employees and all technical employees. One petitioning union sought to represent the approximately 50 powerhouse and maintenance employees in the employer's engineering department. The majority concluded that "a maintenance unit [would have been] appropriate if an application of the Board's traditional standards, viewed against the congressional admonition against the undue proliferation of units, [established] that the employees [had] a sufficiently separate community of interest to warrant such a finding." In analyzing the community of interest of the engineering department employees, however, the majority found that these employees did not comprise a homogeneous grouping possessed of interests sufficiently distinct from the other employees to constitute a separate unit. Because the first petitioning union did not wish to participate in an election in a unit broader than the engineering department, the majority dismissed that petition and included the maintenance employees in a unit along with the service employees petitioned for by a second union.[27] Relying upon precedent [28] in cases involving health care institutions, the majority, contrary to the employer's wishes, declined to include technical employees in the service and maintenance unit.

In Chairman Murphy's view, the maintenance employees in the engineering department, in view of their separate supervision, functions, and conditions, had separate interests justifying the establishment of a departmental unit.

Member Penello concurred in the majority's direction of election in the service and maintenance unit; however, based upon his dissenting opinions in *Nathan & Miriam Barnert Memorial Hospital Assn. d/b/a Barnert Memorial Hospital Center* and in *Newington Children's Hospital*, he would have included the technical employees in the unit.

Relying primarily upon higher wage levels, craft skills, lack of interchange, and separate supervision, Member Fanning found that the engineering department employees possessed a sufficient community of interest in and amongst themselves to warrant their establishment as a separate unit. In his dissent, Member Fanning argued that the majority failed to apply the traditional standards set forth in *American Cyanamid Co.*[29] and *Miami Inspiration Hospital* [30] governing the appropriateness of separate maintenance units to this industry.

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[27] Subsequently an order amending the decision, order, and direction of election was issued to provide for supplemental showing of interest

[28] *Newington Children's Hospital*, 217 NLRB No 134 (1975), *Nathan & Miriam Barnert Memorial Hospital Assn. d/b/a Barnert Memorial Hospital Center*, 217 NLRB No. 132 (1975), *Mercy Hospitals of Sacramento*, 217 NLRB No 131 (1975), *Trumbull Memorial Hospital*, 218 NLRB 796 (1975), 40 NLRB Ann Rep 61, 63 (1975).

[29] 131 NLRB 909 (1961)

[30] 175 NLRB 636 (1969)

In *St. Vincent's Hospital*,[31] the Board directed an election in a unit of boiler operators. Noting that the boiler operators performed functions different from other employees, were licensed, worked in a separate area with minimal contact with other employees, and did not interchange with other employees, Members Fanning and Jenkins applied the traditional unit standards and found the boiler operators constituted a separate appropriate unit.

Chairman Murphy, agreeing with this result, indicated that she would "continue to find appropriate a traditional powerhouse unit or a maintenance department unit in a hospital or other health care facility where such a unit is sought and shown to be appropriate on the facts."

Member Penello, with whom Member Walther agreed in a separate concurring opinion, concurred that the boiler operators were an appropriate separate unit. Member Penello distinguished *Shriners Hospitals for Crippled Children* [32] and clarified his position in that case. He stated his view that a craft maintenance unit might be appropriate when considered "in light of all the criteria traditionally [examined] in determining the appropriateness of maintenance units generally, its establishment [did] not conflict with the congressional mandate against proliferation of bargaining units in the health care industry." This standard, which is a more rigid one than is applied in other industries, according to Member Penello, could be met when the unit sought, as in this case and unlike the situation in *Shriners*, was composed of licensed craftsmen engaged in traditional craftwork, which was performed in a separate and distinct location apart from other employees in the health care facility. Member Penello observed that the boiler operators in this case, unlike the stationary engineers in *Shriners*, did not perform other services throughout the health care facility, and, in addition, there was no transfer or interchange to and from the craft unit.

In *Riverside Methodist Hospital* [33] the Board majority found that the requested unit of plant operations department employees did not comprise a distinct and homogeneous group of employees with sufficiently separate interests from other employees to warrant separate representation. Noting that these employees performed varying job duties and functions, possessed a wide disparity of background and skills, performed work of a routine and uncomplicated nature similar to that performed by service employees in other

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[31] 223 NLRB No 98 (Members Fanning and Jenkins, Chairman Murphy and Members Penello and Walther each concurring separately

[32] 217 NLRB No. 138 (1975), 40 NLRB Ann Rep. 64 (1975).

[33] 223 NLRB No 158 (Members Jenkins, Penello, and Walther, Chairman Murphy and Member Fanning dissenting)

departments, had regular contact with other employees, and shared similar hours, benefits, and working conditions with other employees, the majority concluded that the employees in the plant operations department did not possess any commonality of skills or functions which were sufficiently specialized to warrant their comprising a separate bargaining unit and, accordingly, dismissed the petition.

The dissenters viewed the record before the Board differently and, noting separate supervision and training, lack of significant interchange, different wages, and superior skills and qualifications, concluded that the operations department employees possessed a sufficiently distinct community of interest to warrant their representation in a separate unit.

In *St. Joseph Hospital* [34] the Board majority found that a unit of maintenance and engineering department employees was inappropriate and dismissed the petition. The majority found that the petitioned-for employees worked in areas throughout the hospital, spent the majority of their time outside the maintenance department, were subject to the same personnel policies and received a similar hourly wage scale and the same fringe benefits as other employees, and performed both skilled and routine unskilled jobs. In view of the entire record and in light of the decision in *Riverside, supra,* the majority found that the employees of the maintenance and engineering department did not possess a community of interest sufficiently separate and distinct from the broader community of interest which they shared with all other service and maintenance employees to warrant finding that they constituted a separate appropriate unit.

The dissent found that, since the maintenance and engineering department employees were the hospital's highest paid nonprofessional employees, were subject to departmentally determined salary scale, starting time, work rules, dress code, and hiring procedure, had little or no transfer or interchange with other hospital departments, an only minimal outside supervision, and it was clear that Congress contemplated the appropriateness of departmental units, the maintenance and engineering department employees comprised an appropriate separate unit. For the reasons stated in their dissents in *Jewish Hospital Assn. of Cincinnati, supra,* and *Riverside, supra,* Chairman Murphy and Member Fanning would have directed an election in the maintenance and engineering department unit sought by the petitioner.

In *Baptist Memorial Hospital,*[35] a panel of the Board found a unit consisting of the engineering department employees to be inappro-

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[34] 224 NLRB No 47 (Members Jenkins, Penello, and Walther, Chairman Murphy and Member Fanning dissenting).

[35] 224 NLRB No. 51 (Members Jenkins, Penello, and Walther).

priate and dismissed the petition. These employees were found not to constitute a separate appropriate unit on a craft basis because they performed many tasks of a relatively unskilled nature, as well as jobs frequently performed by employees of craftsman status and about 30 percent of the employees were unskilled helpers, while little more than 20 percent could be considered true craftsmen; moreover, the record testimony showed that it was not uncommon for the employer to hire independent contractors to perform such major work as that involving electrical wiring. The panel found that the engineering department employees did not possess a community of interest sufficiently separate and distinct from the broader community of interest which they shared with all the other service and maintenance employees to warrant finding that they constituted a separate appropriate unit.

In *West Suburban Hospital*,[36] the Board majority directed an election in a unit of maintenance department employees. The majority found that the maintenance employees worked primarily in a separate maintenance area of the hopsital isolated from areas where nonmaintenance department employees worked, that they had primary and constant contact with other maintenance employees, that they were under the overall supervision of the superintendent of buildings and grounds, that integration of function was prevalent within the maintenance department, that the employees were hourly paid and received the same fringe benefits, and that promotional opportunities within the department were encouraged Relying on these factors, the Board majority concluded that the maintenance department constituted a distinct and homogeneous unit whose employees shared a community of interest

The dissenters noted that the maintenance employees had extensive contact with other employees throughout the hospital, received the same fringe benefits and worked under a wage scale similar to other hospital employees, and were subject to a common grievance procedure. The dissenters observed that transfers between the other departments within the hospital and the maintenance department were available and had occurred in the past. Notification of job openings at the hospital were posted in the cafeteria; hence, the lower rated service employees had the opportunity and were encouraged to apply for maintenance positions. Job tasks performed involved not only some relatively highly skilled operations, but also included routine and general maintenance matters throughout the hospital, at times even requiring direct patient contact. For the reasons set forth in *Jewish*

[36] 224 NLRB No 100 (Chairman Murphy and Members Fanning and Jenkins, Members Penello and Walther dissenting)

Hospital, supra, and *St. Vincent's Hospital, supra,* the dissent found that the maintenance employees were fully integrated into the entire operation of the hospital and thus did not appropriatelyc onstitute a separate and distinct unit.

2. Skilled Tradesmen Unit

In *Firestone Tire & Rubber Co.,*[37] the Board declined to sever the "skilled trades" employees who performed maintenance functions from a multiplant production and maintenance unit. The employees sought to be severed performed a wide range of skilled, semiskilled, and unskilled maintenance work which was highly integrated with their production work and essential for the employer's continued operation.

The skilled trades employees had the same working conditions, received essentially the same fringe benefits, and had their interests actively pursued via the contractual grievance and arbitration procedure. The separate community of interests which the skilled trades people had enjoyed by reason of their skills was found to have been largely integrated in the broader community of interest shared with the production employees in view of (1) the long and stable 28-year history of collective bargaining within the existing pattern of representation, (2) the high degree of integration of the employer's operations; (3) the active participation of the employees sought in the administration and negotiation functions of the incumbent union; (4) the likelihood that severance would have had a disruptive effect on the industry; (5) the certainty of production cessation if the skilled trades did not perform their job functions; and (6) the heterogeneous nature of the unit sought Therefore, the requested severance was found to be inappropriate.

3. Status as "Employee"

A bargaining unit may include only individuals who are "employees" within the meaning of section 2(3) of the Act. The major categories expressly excluded from the term "employee" are agricultural laborers, independent contractors, and supervisors. In addition, the statutory definition excludes domestic servants, or anyone employed by his parent or spouse, or persons employed by a person who is not an employer within the definition of section 2(2). These statutory exclusions have continued to require the Board to determine whether the employment functions or relations of particular employees preclude their inclusion in a proposed bargaining unit.

[37] 223 NLRB No. 152

a. Independent Contractors

During this fiscal year, a majority of the Board again applied the common law right-of-control test in resolving the recurring issue of employee versus independent contractor status of owner-drivers and nonowner-drivers. Under this test, an employer-employee relationship exists when the employer reserves not only the right to control the results to be achieved, but also the means to be used in attaining the result. On the other hand, where the employer has reserved only the right to control the ends to be achieved, an independent contractor relationship exists.[38]

In *Twin City Freight, S & B Nelson*,[39] a Board majority found that an owner-operator acting as a dray agent for the employer was an independent contractor and that there was no indication in the record that the employer gave any directions to the owner-operator or had reserved to itself control over the means by which the owner-operator performed his drayage operation. The majority also concluded that a nonowner-driver was an employee of the dray agent rather than the employer. The Board majority relied particularly on the following factors for its finding of independent contractor status: (1) the owner-operator used his own discretion to determine the order and timing of deliveries and was responsible for the hire, discipline, scheduling, compensation, and discharge of his drivers, (2) unlike city drivers whose hours and activities were carefully regulated by the employer and who were conceded to be employees of the employer, the owner-operator was paid a fee based on weight and mileage and received no guarantee as to the number of hours he would work or as to his total pay; (3) the owner-operator, unlike the employer's employees, could deliver the employer's freight by any vehicle he deemed most efficient and was not required to report to work at any set time; and (4) the owner-operator was free to sell his tractor or work for a competitor, paid for his own gas, tires, and maintenance on the tractor, obtained his own liability and collision insurance, and had no payroll taxes withheld by the employer from his paychecks.

Members Fanning and Jenkins filed separate dissents. Member Jenkins found that the dray agent was an employee of the employer. He relied, *inter alia*, on the following. (1) the employer's supervisory personnel made visits every 2 weeks to the terminal from which the dray agent operated, during which time directions were given as to how the routes were to be run; (2) the employer unilaterally removed part of the dray agent's territory and installed another dray agent in his place, (3) the dray agent required permission from the employer to

[38] See 36 NLRB Ann Rep 41 (1971)

[39] 221 NLRB No 205 (Chairman Murphy and Members Penello and Walther, Members Fanning and Jenkins dissenting separately)

delay delivery of a shipment; and (4) the dray agent and the employer had a verbal agreement whereby the tractor purchased by the dray agent from the employer would not be sold for a profit.

Based on the foregoing, plus the dray agent's testimony that he spent only 1 hour a week directing the activities of a driver working out of one of the employer's terminals, Member Jenkins would have found the dray agent an employee of the employer, properly within the unit petitioned for, and would have affirmed the regional director's decision and direction of election, except as to his finding that the dray agent was a supervisor

Member Fanning agreed with Member Jenkins that the dray agent was not an independent contractor, but found that he was a statutory supervisor with the authority to hire, fire, and direct the work of employees.

The Board again faced the issue of employee versus independent contractor status of owner-drivers when its decision in *Loc. 814, Teamsters (Santini Bros.)* [40] was remanded from the United States Court of Appeals for the District of Columbia for clarification. In the original decision, a panel of the Board found that owner-operators were independent contractors. In its supplemental decision and order,[41] a Board majority distinguished the decision in *Loc. 814, Teamsters (Molloy Bros. Moving & Storage)*,[42] in which owner-operators were found to be employees. In adhering to the original finding of independent contractor status, the majority concluded that the facts found by the administrative law judge in *Santini* did not show, as they did in *Molloy*, that "there was a layer of carrier regulation put upon the [owner-operators] beyond what was required by government regulation, impairing the [owner-operators'] independence." Among the factors noted by the majority in support of the independent contractor finding was the lack of supervision by the employer over the owner-operators and evidence that in *Molloy* owners were required to attend training classes where they used as a text a 102-page driver's manual, whereas in *Santini* drivers could attend a training program, but were not disciplined for failing to do so; Santini's owner-operators themselves paid for any health insurance they may have carried, whereas Molloy assumed the costs of health insurance for the owners; in *Santini*, the owners bore the costs and incidents of operation and the employer did not advance trip expenses, whereas Molloy alone bore the risk of any default by a customer in payments for services rendered by owner-drivers, and it advanced

[40] 208 NLRB 184 (1974)

[41] 223 NLRB No 121 (Chairman Murphy and Members Penello and Walther, Members Fanning and Jenkins dissenting).

[42] 208 NLRB 276 (1974)

trip expenses from a reserve account accumulated from the owner-operators' commissions Further, in *Molloy*, the employer established a profit-sharing plan for the owners, while in *Santini* there was no similar arrangement.

The majority concluded that it was obvious that the controls imposed upon Molloy's owner-operators were much greater than those exercised over the Santini drivers, and that *Santini* was in sharp contrast to *Molloy* in which the facts showed "pervasive control" over owner-operators which "exceed[ed] governmental requirements to a significant degree."

In the view of Members Fanning and Jenkins, the factual situations in *Santini* and *Molloy* were identical and the degree of control exercised by the employer in *Santini* over the owner-operators was, as in *Molloy*, indicative of an employer-employee relationship. Among the factors relied on by the dissent as indicative of an employment relationship was that the long-haul drivers worked exclusively for the employer; freight was carried in trailers owned by the employer and which bore the employer's name; drivers were paid on a commission basis, receiving a percentage of the total moving charges as their compensation; and employees of the employer inspected shipments, estimated their costs, wrote up orders, arranged for the pickup dates, prescribed delivery times, assembled the proposed moves that would make an appropriate van load, and advised the driver in advance of his arrival in the area of the availability of the load which had been put together by the employer.

The dissenters noted in this regard that aforementioned incidents of the driver-employer relationship parallel many of those found by the Supreme Court to be significant indicators of an employment relationship in the landmark case of *N.L.R.B.* v *United Insurance Co. of America*, 390 U.S. 254 (1968)

According to the dissenters, the drivers' earnings were controlled almost entirely by the amount of business which Santini generated; the drivers' only function was to pick up the loads generated and put together by Santini and deliver them as Santini directed; Santini's activities alone determined the amount of business that would be available; and the entrepreneurial character of the drivers' earnings stemmed almost entirely from Santini's efforts.

b. Hospital Housestaff as Students

In *Cedars-Sinai Medical Center*,[43] four Board Members found that interns, residents, and clinical fellows comprising a hospital house-

[43] 223 NLRB No 57 (Chairman Murphy and Members Jenkins, Penello, and Walther, Member Fanning dissenting)

staff were primarily students engaged in graduate educational training programs and were not employees within the meaning of the Act.[44] The majority found "[t]hey participate in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine."

In support of this finding, the majority noted, *inter alia*, that the programs were prerequisites for licensing examinations and certification in specialities and subspecialities of medicine, that the programs were not intended to meet hospital staffing requirements, but rather to permit housestaff personnel to develop their skills in a clinical environment, and that the housestaff received a fixed stipend which was characterized as a scholarship for graduate study and was "more in the nature of a living allowance than compensation for services rendered." [45]

In Member Fanning's dissent, he expressed the view that the housestaff personnel were employees since they, *inter alia*, performed critical medical care services without immediate supervision, received payment for their services from which Federal and state taxes were withheld, received fringe benefits, and received no degree, grades, or examination for their services. Member Fanning stated, "Certainly, there is a didactic component to the work of *any* initiate, but simply because an individual is 'learning' while performing this service cannot possibly be said to mark that individual as 'primarily a student and, therefore, not an employee' for purposes of our statute." In his opinion, the definition of professional employee in section 2(12) fitted, precisely, housestaff officers.

c. Professional Status of Newsmen

In *Express-News Corp.*[46] a Board majority found that journalists are not professional employees under section 2(12) of the Act. Based on its interpretation of the statute, the majority concluded that professional status is predicated upon "a *prolonged* course—or equivalent experience—of specialized instruction." Finding that the employer employed journalists with either no college training or college training in fields other than journalism, the majority interpreted the statute as not permitting "any advanced background (rather than one in journalism or communications) to support a finding that all journalists

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[44] The majority also found that the petitioner, Cedar-Sinai Housestaff Association, was not a labor organization since it was composed solely of interns, residents, and clinical fellows

[45] In *St Christopher's Hospital for Children*, 223 NLRB No 58 (Chairman Murphy and Members Jenkins and Penello, Member Fanning dissenting), a Board majority, citing *Cedars-Sinai Medical Center*, found that residents were not employees and that the petitioner, St Christopher's Hospital House Staff Association, was not a labor organization Member Fanning dissented for the reasons stated in his dissenting opinion in *Cedars-Sinai Medical Center*.

[46] 223 NLRB No. 97 (Members Fanning, Jenkins, and Penello, Chairman Murphy dissenting)

are 'professionals.' " Moreover, the majority concluded that journalists could competently perform their work without having completed an extensive period of apprenticeship or without "advanced knowledge acquired through a prolonged course of specialized study in journalism or communications in an institution of higher learning," since journalists apply knowledge acquired by virtue of their broad diverse backgrounds and through the performance of various journalistic functions. Thus, the majority found that "journalism is primarily a field of generalists with general academic backgrounds." With regard to "professional" status, the majority concluded that it did not have the latitude to confer such status on individuals other than those satisfying the strict criteria set forth in section 2(12) of the Act. Therefore, on the bases of the facts in this case, its interpretation of section 2(12), and Board precedent for determining professional status, the majority found those employees employed by the employer as journalists were not professionals within the meaning of the Act.

Chairman Murphy, dissenting, would have found that most, if not all, of the newsroom employees were professional employees based on "the nature of their work, the advanced skills and specialized training required for effective performance of such work, and the employees' and the Employer's unique responsibilities under the First Amendment to the United States Constitution." Finding that section 2(12) requires only that the type of knowledge possessed by an employee be that which is "*customarily* received in institutions of higher learning," but does not mandate that such knowledge *must* have been received at an institution of higher learning, Chairman Murphy concluded that the employer's requirement that journalists have experience and training equivalent to advanced degrees in journalism was sufficient to establish their status as professional employees. Moreover, she stated that the "broad spectrum of knowledge, the ability to probe into the meaning of an event, and the ability to write clearly and concisely in newspaper style are the essence of professionalism exercised by employees who, as reporters, editors, columnists, and political cartoonists, carry the constitutional burden of keeping the citizens informed on all manner of subjects around the world affecting their lives." There was no question in the Chairman's mind, and she would have found, that they met the statutory definition of "professional employee "

4. Conduct of Elections

Section 9(c)(1) of the Act provides that where a question concerning representation is found to exist pursuant to the filing of a

petition, the Board shall resolve it through a secret ballot election. The election details are left to the Board. Such matters as voting eligibility, timing of elections, and standards of election conduct are subject to rules laid down by the Board in its Rules and Regulations and in its decisions. Elections are conducted in accordance with strict standards designed to insure that the participating employees have an opportunity to register a free and untrammeled choice in the selection of a bargaining representative. Any party to an election who believes that the standards have not been met may file timely objections to the election with the regional director under whose supervision it was held. The regional director may either make an administrative investigation of the objections or hold a formal hearing to develop a record as the basis for a decision, as the situation warrants. If the election was held pursuant to a consent election agreement authorizing a determination by the regional director, he will then issue a final decision.[47] If the election was held pursuant to a consent agreement authorizing a determination by the Board, the regional director will issue a report on objections which is subject to exceptions by the parties and decision by the Board.[48] However, if the election was originally directed by the Board,[49] the regional director may either (1) make a report on the objections, subject to exceptions, with the decision to be made by the Board, or (2) issue a decision, which is then subject to limited review by the Board.[50]

An election will be set aside and a new election directed if the election campaign was accompanied by conduct which, in the Board's view, created an atmosphere of confusion or fear of reprisals or which interfered with the employees' exercise of their freedom of choice of a representative as guaranteed by the Act. In evaluating the interference resulting from specific conduct, the Board does not attempt to assess its actual effect on employees, but rather concerns itself with whether it is reasonable to conclude that the conduct tended to prevent the free formation and expression of the employees' choice. In making this evaluation, the Board treats each case on its facts, taking an *ad hoc* rather than a *per se* approach in resolution of the issues.

In *Savair Mfg. Co.*,[51] the Supreme Court held that a union's offer to waive its initiation fee for employees who sign authorization cards prior to a representation election is an impermissible campaign tactic and constitutes ground for setting aside the election. In a case decided during the report year, *L. D. McFarland Co.*,[52] a Board

[47] Rules and Regulations, sec. 102 62(a)

[48] Rules and Regulations, sec 102.62 (b) and (c).

[49] Rules and Regulations, secs 102 62 and 102.67.

[50] Rules and Regulations, sec 102.69 (c) and (a).

[51] *N L R B* v *Savair Mfg Co.*, 414 U.S. 270 (1973), affg 470 F. 2d 305 (C A. 6, 1972).

[52] 219 NLRB No 575 (Chairman Murphy and Members Fanning and Jenkins, Members Kennedy and Penello dissenting)

majority found that the petitioner's preelection offer to waive initiation fees "for any member presently working in the plant" and its preelection offer that "there will be no monthly dues until a contract is negotiated" were not the kind of preelection offers condemned by the Supreme Court in *Savair, supra.* The Board majority found that the offers did not interfere with the election because they would "apply to employees who sign up for the union *after* the election as well as before." With respect to the offer to waive fees for "members," the majority found that the "requirement that an employee be a 'member' [was] not objectionable since such language [placed] no requirement upon employees to join the Union before the election." The majority held that the union's conduct was wholly consistent with the Supreme Court's teaching in *Savair* in that here, unlike *Savair,* there was not a waiver limited to those who signed a card for, or otherwise supported, the union before the election. In this case, the union's offers in no way implied that eligible voters would have to pay dues or initiation fees unless they joined the union prior to the election. Rather, according to the majority, the employees would have received a waiver of dues and initiation fees even though they had become members of the union after the election. Thus, in the opinion of the majority, the waiver of dues and initiation fees here was unconnected with support for the union before or after the election.

In the view of dissenting Members Kennedy and Penello, the waiver of initiation fees for "any member presently working in the plant" violated the principles established by the Supreme Court in *Savair.* They pointed out that the union had established two prerequisites for qualifying for the waiver: (1) the individual had to have been "presently working" at that point in time in the plant, and (2) the individual had to have been a "member." The dissenters observed that, accordingly, the conditional waiver did not apply to all employees in the unit—it applied to those who had become *union members* before the election. In their opinion, the waiver here represented "precisely the type of improper 'endorsement buying' which the Supreme Court sought to eradicate in *Savair.*" The dissent contrasted the union's waiver of monthly dues "until a contract is negotiated," finding such language to be "a clear indication that only the waiver of monthly dues [was] applicable during the postelection period."

In *Honeywell, Photographic Products Div.*[53] a Board majority set aside an election after determining that an employer's preelection statement constituted a threat. The employer stated:

> In order to meet customer demands from these new marketing approaches, we expect to recall 10 or so employees in the next

[53] 225 NLRB No. 79 (Members Fanning, Jenkins, and Penello, Chairman Murphy and Member Walther dissenting)

> several weeks. But all of this effort could be wasted if we can't continue to work effectively as a team. I therefore feel the interference of a labor union would only hinder our chances of further recovery.

The majority construed the employer's statement as conveying the impression to employees that, although favorable conditions had made it possible to consider the recall of laid-off employees, the selection of the union as bargaining representative would jeopardize the recall of these employees as well as the company's economic recovery. The majority observed that the employer's statement was not a prediction supported "on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control," but was an implicit threat of economic consequences that would follow unionization of the plant.[54]

In the view of Chairman Murphy and Member Walther, dissenting, the employer merely expressed concern that the union might interfere with the team work necessary to achieve company growth, and did not threaten to take any adverse action against its employees. They would have certified the results of the election.

In *Felsenthal Plastics*,[55] a Board majority found an employer's conduct objectionable and accordingly set aside a decertification election. Prior to the election, the employer, by a letter, had informed the employees at its organized plant that employees at its six nonunion foundries received larger and more frequent wage increases, a better fringe benefit package, and greater job security than they had received under their current collective-bargaining agreement. The employer's letter went on to state that "these facts are the result of a team effort on the part of all of these employees in satisfying our customers." It concluded that we "believe you should be part of this successful team—and free from union dues" and "Vote *NO*."

The majority agreed with the regional director's conclusion that the letter was a clear invitation to the employees to reject the union and receive benefits for doing so. Thus, the majority pointed out, the letter stressed the fact that all the nonunion employees received better wages and benefits and had better job security than the union had been able to obtain; and the letter described the nonunion plants as constituting a team and invited these union employees to join that team by rejecting the union. According to the majority, since the employees knew that if the decertification effort were unsuccessful the union would be bargaining with the employer over wages, fringe benefits, and job security, the employees also knew that it was within

[54] See *N.L.R B. v. Gissel Packing Co.*, 395 U S 575, 618 (1969).

[55] 219 NLRB 592 (Members Fanning, Jenkins, and Penello, Chairman Murphy and Member Kennedy dissenting).

the employer's power to agree or not to agree to employment terms desired by them. Thus, in the majority's view, it was clear that the contents of the letter told employees that if they joined the employer's "team" they would enjoy "team" benefits, but warned them that if they declined to join the "team" and did not vote for decertification the employer would not agree to terms and conditions of employment comparable to those enjoyed by its nonunion employees.

The dissenters pointed out that the employer's statements of the wages and benefits at its nonunion plants were truthful and accurate and that employers are entitled to inform employees of such facts which employees may legitimately consider in deciding whether or not they desire continued union representation. The dissenters noted that the employer did not anywhere even hint that it would grant those same benefits to the unit employees. If, in fact, their collective-bargaining agent was unsuccessful in securing for these employees higher wages than the employer paid in its other plants, the dissenters failed to see why that could not properly be called to their attention.

In *Mike Yurosek & Sons*,[56] a Board panel overruled an employer objection concerning alleged threats made to employees by a petitioning union that if it were to lose the election it would notify the Immigration and Naturalization Service of the existence of employees who were illegal aliens, thereby causing their deportation. The alleged threatening statements were made by two of the six members of a voluntary in-plant organizing committee and an unidentified person. The panel held that: (1) the record disclosed no evidence that officials of the petitioner made any threats to employees of the type found to have been made by the two members of the in-plant organizing committee; (2) the fact that employees served as members of the in-plant organizing committee or as election observers did not, in the circumstances of this case, constitute them as petitioner's agents in the making of threatening statements to fellow employees; and (3) the mere fact that some members of the organizing committee may have engaged in such conduct, without more, was insufficient to establish agency.

The panel noted that conduct engaged in by third persons tends to have less effect upon voters than similar conduct of one of the parties. Evaluating the impact of the threats made in the light of the entire record, including the evidence that in the recent past Immigration authorities had been at the employer's plant checking on employees who were aliens and that rumors were afloat that the Immigration authorities would be called if the petitioner lost—or, according to some testimony, if it won—the panel concluded that the conduct was not so aggravated in character as to destroy the atmosphere of employee free choice in the

[56] 225 NLRB No. 20 (Chairman Murphy and Members Fanning and Penello).

election. Moreover, the panel found evidence that some persons assisting in the organizational campaign made substantial efforts to disabuse employees of the idea that the union would call the Immigration authorities. The panel also found that *Westside Hospital*[57] was factually distinguishable, since that case did not deal with third-person conduct.

5. Postelection Issues

Petitions or motions for amendment of certification normally tend to raise less complex issues than petitions for unit clarification. Petitions for amendment are intended, among other things, to permit changes in the name of the bargaining representative, not a change in the representative itself. In one case decided this year, a panel of the Board granted the amendment of certification to reflect an independent local union's change in affiliation from one international with which it was certified as the bargaining representative of appropriate units to another international.[58] The panel majority was of the view that the procedure used by the local for the change in affiliation was appropriate, that the resolutions put to the membership presented adequate alternatives, and that, while not all members voted in the mail balloting, the majority of each bargaining unit voted to ratify the transfer of bargaining rights Thus, the panel majority found sufficient indication that the membership had an adequate opportunity to consider and vote on the question. In addition, the majority of the panel determined that there was no break in the continuity of representation, since the local union's right to negotiate its own collective-bargaining agreements, process its grievances as it felt appropriate, and determine its dues structure remained as it was prior to the change in affiliation. The panel majority concluded that the local was functionally the same organization as the certified representative and that the nature of the relationship between the local and each international affiliate was substantially the same.

Under the circumstances of the case,[59] the dissent felt that to certify the local and its new affiliate as the bargaining representative without affording the employees of these units an opportunity to

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[57] *Professional Research d/b/a Westside Hospital*, 218 NLRB 96 (1975).

[58] *Ocean Systems*, 223 NLRB No 105 (Members Jenkins and Penello, Member Walther dissenting).

[59] Member Walther expressed the view that the local union's membership was widely scattered and only one-third of the membership attended the meeting where the vote to approve disaffiliation occurred, the membership received only 4 days' notice that a meeting was to be conducted, the general membership was not informed that an affiliation vote was to be taken until the day of the meeting, the balloting by mail was neither completely secret not completely in the hands of a neutral third party, the local with its new affiliate was, arguably, not functionally the same organization as the certified representative, since the "pre-affiliation change" local continued to maintain its corporate structure after the affiliation election and sought to represent and bargain for employees of employers located within the surrounding area on the basis of single-employer bargaining units.

express a choice in a Board-conducted election ignored the purpose of Section 9 of the Act.

In *Bear Archery*,[60] a majority of a Board panel approved the affiliation vote of an employee association that it become known as a local of an international union. The panel majority found that the affiliation election was valid and accurately reflected the wishes of the employees; that it was conducted with sufficient procedural and substantive safeguards to insure a democratic vote; and that not a single employee in a unit of over 500 had been heard to complain that the election was other than fair and regular. The majority noted that it was clear from the record that the employees had adequate opportunity to discuss and consider the question of affiliation before the voting began. The employees had ample notice of the meeting and its purpose and the polls were open throughout the day so that all employees had ample opportunity to attend the meeting and to vote. Both the international representative and the president of the association were present at the meeting and all members were accorded an opportunity to raise questions or make comments for or against the proposed affiliation Thereafter, the election was held and, most significantly the panel majority pointed out, no employee objected to the procedures followed, challenged the validity of the election, or claimed that he or she was denied due process.

The panel majority referred to the statement in *Hamilton Tool Co.*, 190 NLRB 571, fn. 8 (1971), that "the Board . . . does not normally concern itself with determining whether a membership meeting was held in strict conformity with a union's constitution and bylaws absent a clear showing . . of substantial irregularity" In conclusion, the majority observed that, while the procedures followed in the instant affiliation election might not have measured up to the standards the Board demands for conducting its own elections, it was unwilling to find that the procedures were so lax or so "substantially irregular" as to negate the validity of the election, especially in the absence of any complaint from an employee or member of the association.

In his dissent, Member Walther contended that the Board's test for the minimum standards of due process in an affiliation election are not sufficiently stringent. In the dissenter's view, while internal union elections are, of course, not required to follow Board electoral procedures, due process requires that the basic safeguards of a free and fair election cannot be ignored if those elections are to serve as the basis for Board sanctions. If the Board is to accept privately conducted

[60] *Bear Archery, Div of Victor Comptometer Corp*, 223 NLRB No 191 (Chairman Murphy and Member Fanning, Member Walther dissenting)

elections as a predicate for amending its certifications, the dissent would require "that minimal standards of due process be observed lest the very validity of Board certifications and elections be undermined." [61] In view of the small number of voters involved in "discussion" of the affiliation issue and the questionable secrecy of the balloting, the dissent found that such standards had not been met

Petitions for clarification of a bargaining unit are provided for in section 102.60(b) of the Board's Rules and Regulations While the Board will entertain requests for clarification of units established by voluntary recognition and contract as well as for units established by Board certification,[62] if the Board finds that the petition raises a question concerning representation, it will deny clarification of the existing unit, thereby requiring an election to resolve the issue.[63] In *Peninsula Hospital Center*,[64] the Board ordered that a mixed bargaining unit of guards and nonguards established as a result of a privately supervised election be clarified so as to exclude the job classifications of guards as defined in the Act.[65] In reaching its decision, the Board found that there was no substantial evidence to support the contention that the current bargaining relationship was conducted on the basis of unit lines which separated the guards from the other employees; that the employer had standing to file the petition even though it was a member of a multiemployer association authorized to bargain in its behalf on some, if not all, mandatory subjects of bargaining; and that the petition was timely since it was filed shortly before the expiration of the last applicable collective-bargaining agreement, even though the union and employer had signed a new master contract purporting to cover the employees in issue 2 months prior to the filing. While finding that the employer's membership in a multiemployer unit was not sufficient to deny the employer standing to file its petition, the Board was mindful of the union's claim that all of the employer's employees for whom the union is the recognized agent are now part of a multiemployer unit extending in its scope to all employer-members of that unit. The Board found it unnecessary to decide the factual merits of this claim, noting that neither the multiemployer unit nor any of its members objected to the petition or sought to intervene and that the clarification granted did not affect the right of any other employer who was a member of the association to maintain the status quo in conducting its relationship with the union.

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[61] *North Electric Co* , 165 NLRB 942, 944 (1967) (dissent of Members Zagoria and Jenkins)

[62] *Brotherhood of Locomotive Firemen & Enginemen*, 145 NLRB 1521 (1964), 29 NLRB Ann Rep 57 (1964) Compare *Springfield Discount d/b/a J C Penney Food Dept* , 195 NLRB 921 (1972)

[63] *Gas Service Co* , 140 NLRB 445 (1963)

[64] 219 NLRB 139

[65] Sec 9(b)(3) provides that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards "

VI

Unfair Labor Practices

The Board is empowered under section 10(c) of the Act to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. In general, section 8 prohibits an employer or a union or their agents from engaging in certain specified types of activity which Congress has designated as unfair labor practices. The Board, however, may not act to prevent or remedy such activities until an unfair labor practice charge has been filed with it. Such charges may be filed by an employer, an employee, a labor organization, or any other person irrespective of any interest he might have in the matter. They are filed with the regional office of the Board in the area where the alleged unfair labor practice occurred.

This chapter deals with decisions of the Board during fiscal year 1976 which involved novel questions or set precedents that may be of substantial importance in the future administration of the Act.

A. Employer Interference With Employee Rights

Section 8(a)(1) of the Act forbids an employer "to interfere with, restrain, or coerce" employees in the exercise of their rights as guaranteed by section 7 to engage in or refrain from engaging in collective-bargaining and self-organizational activities. Violations of this general prohibition may be a derivative or byproduct of any of the types of conduct specifically identified in paragraphs (2) through (5) of section 8(a),[1] or may consist of any other employer conduct which independently tends to interfere with, restrain, or coerce employees in exercising their statutory rights. This section treats only decisions involving activities which constitute such independent violations of section 8(a)(1).

1. No-Solicitation Rules in Health Care Institutions

A rule prohibiting employees from soliciting or distributing literature during nonworking time in a nonwork area of the employer's premises

[1] Violations of these types are discussed in subsequent sections of this chapter

is presumptively invalid. But a no-solicitation rule limited to the time an employee is actually working is presumed to be for the purpose of maintaining production and discipline and therefore valid in the absence of a discriminatory purpose, even though it restricts section 7 rights

On two occasions during the past year, the Board has applied its policy concerning no-solicitation and no-distribution rules to health care institutions. In *St. John's Hospital & School of Nursing*,[2] the full Board found violative of section 8(a)(1) an employer-promulgated rule which prohibited solicitation "during working time or in working areas of the hospital, or in any areas to which patients and visitors have access," and which prohibited distribution "in any area of the hospital except in nonworking areas where patients and visitors do not have access." As the no-solicitation aspect of the rule encompassed areas to which patients and visitors had access, it in effect limited solicitation during nonworking time and was thus presumptively invalid. Likewise, as the no-distribution aspect of the rule encompassed these same nonwork areas where patients and visitors had access, it too was also presumptively invalid. The employer had argued that the presumption of invalidity was overcome by the unique nature of hospitals which required that disruption in the care of patients which might result from solicitation and distribution of literature in any public area be kept to a minimum. While conceding that a hospital may properly limit solicitation and distribution in "strictly patient care areas" such as patients' rooms, operating rooms, and X-ray and therapy areas, the Board nevertheless held that a rule, as in the instant case, embracing all areas of patient access such as a cafeteria and lounges, was unlawfully broad since the possibility of disruption in patient care stemming from the solicitations or distributions was remote.[3]

The full Board found another hospital no-solicitation rule unlawful in *St. Peter's Medical Center*.[4] Here, the rule promulgated by the employer prohibited solicitation "for any reason," the express purpose thereof being to "protect the employee from any solicitor of products, literature, services, bill collectors, insurance salesmen, etc." As in the *St. John's Hospital* case, *supra*, the Board found this rule unlawfully broad in that its scope exceeded immediate patient care areas. The Board noted that, while the rule made no express reference to "union" solicitations, the broad language was susceptible

[2] 222 NLRB No 182

[3] The Board also rejected the employer's argument that hospitals are analogous to retail establishments in which no-solicitation and no-distribution rules on the selling floor have been held by the Board to be lawful

[4] 223 NLRB No 140

of the interpretation that all employees were prohibited from soliciting coworkers for union membership, especially in the absence of any attempt by the employer to clarify the rule to permit nonworking time employee solicitation. Furthermore, while the *prima facie* invalidity of the instant rule might have been overcome by extrinsic evidence that such rule was applied in a lawful manner, i.e., permission for solicitations during nonworking time such as coffeebreaks or lunch breaks, such extrinsic evidence was lacking in this case. Finally, the Board regarded as irrelevant the fact that the employer's rule was promulgated prior to the time when hospitals, such as the one here, were under the jurisdiction of the Board.

2. Discharge of Employees Engaging in Protected Activity

Section 8(a)(1) of the Act precludes an employer from discharging an employee for engaging in protected concerted activity. The forms the protected concerted activity may take are numerous. The following cases decided by the Board during the past year provide a representative sample of the types of activity found by the Board to be protected.

In *General Nutrition Center*,[5] the Board found an employer in violation of section 8(a)(1) when it discharged four employees and one supervisor after they announced that they were leaving work to file a charge with the Board against the employer, and then proceeded to do so. The Board found their conduct to be protected concerted activity, notwithstanding the fact that the basis for filing the charge, the employer-imposed requirement that they solicit customers outside the employer's store in cold weather, might in and of itself lack merit. Citing the landmark Supreme Court decision in *N.L.R.B.* v. *Washington Aluminum Co.*,[6] the Board regarded the reasonableness of the employees' decision to engage in the walkout as irrelevant. As long as they were acting in concert in an effort to better their working conditions, their conduct was protected; and, thus, their discharge for engaging in such conduct violated section 8(a)(1). Moreover, since the employer's discharges of the employees were also motivated by their recourse to the Board as well as by their initial walkout, their discharges also violated section 8(a)(4).

In *Alleluia Cushion Co.*,[7] a Board panel interpreted the definition of protected concerted activity as including conduct undertaken solely by one employee. Here the employee, concerned with what he considered to be numerous safety hazards at the employer's plant,

[5] 221 NLRB No. 130 (Chairman Murphy and Members Fanning, Jenkins, and Penello)
[6] 370 U S 9 (1962).
[7] 221 NLRB No. 162 (Chairman Murphy and Members Jenkins and Penello)

and dissatisfied with the employer's failure to correct these problems after he brought them to its attention, filed a complaint with the local occupational safety and health office (herein OSHA) without consulting any other employees. After an OSHA inspection of the employer's plant, the employee, who had earlier been reprimanded for contacting OSHA, was discharged.

The Board panel found the employee's complaint to management regarding unsafe working conditions and his ultimate recourse to OSHA to be protected concerted activity, even though such activity was accomplished on his own. The panel pointed out that: section 7 provides that employees have the right to engage in concerted activities for the purpose of mutual aid and protection; the employee's filing of the complaint with the California OSHA office was an action taken in furtherance of guaranteeing the employer's employees their rights under the California Occupational Safety and Health Act; and it would be incongruous with the public policy enunciated in such occupational safety legislation (i.e., to provide safe and healthful working conditions and to preserve the nation's human resources) to presume that, absent an outward manisfestation of support, the employee's fellow employees did not agree with his efforts to secure compliance with the statutory obligations imposed on the employer for their benefit. Rather, in the view of the panel, since minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees have disavowed such representation, the panel stated that it would find an implied consent thereto and deem such activity to be concerted.

In *Meade Construction Co.*,[8] a Board panel found the employer in violation of section 8(a)(1) when it discharged an employee/union steward for engaging in protected concerted activity. Here, such protected activity consisted of attempting to obtain a copy of a contract between the employer and the county for which his employer was doing construction renovation work so that he might ascertain whether he and fellow employees had earlier been paid according to an erroneously low wage rate. After contacting various county officials, he obtained a copy of the contract from a county commissioner and was subsequently discharged. Thereafter, the State Department of Labor arranged a settlement in which the steward and other

[8] 220 NLRB No. 104 (Members Fanning and Jenkins, Chairman Murphy concurring)

employees received their additional pay to compensate them for their early underpayment of wages. Under these circumstances, Members Fanning and Jenkins found that the steward's conduct in investigating into whether he and other employees were being paid their proper contractual wage rate was clearly protected concerted activity, as the steward was not acting alone, but in concert with and on behalf of other employees.

Chairman Murphy agreed with her colleagues, for the reasons given, that the steward was unlawfully discharged for engaging in protected concerted activity. She also would have found that, although the employer might have been apprehensive that the steward's approaching county officials might have had some future detrimental effects, that was not reason enough to remove the steward's conduct from the protection of the Act.

Another form of employee concerted activity, a "work-in," was found by a Board majority to be protected in *Advance Industries Div.—Overhead Door Corp.*[9] Here, five employees, after being told that their shift would end 2 hours prior to the normal elapsed time of 8 working hours, refused to leave the plant at the designated time, insisting instead on remaining at their work stations and requesting an explanation by the employer as to why he was unilaterally departing from official personnel policy of working employees 8 hours per day and notifying employees in advance of any change in hours. After 45 minutes, the employer called in the police to remove them from the plant. The five employees were subsequently discharged. Finding the 8(a)(1) violation, the Board majority held that the 45-minute occupation of the employer's premises was protected concerted activity and that it was peaceful and legitimately motivated. The majority distinguished the Supreme Court's early decision in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*[10] which found such seizure of an employer's property was unprotected in that there the seizure was for 9 days and was accompanied by a wide range of violent conduct by the employees, including attempts to block access to management, whereas here the seizure was brief and peaceful, and without any attempt to exclude management officials from the plant.

Member Penello, dissenting, expressed the view that the employees engaged in the "work-in" without first attempting to articulate their underlying concerns to management. Moreover, the employees knew well in advance that the employer might be shutting down the plant 2 hours early and that its action was not part of an attempt to avoid bargaining with a previously certified union, but rather was motivated

[9] 220 NLRB No 68 (Chairman Murphy and Members Fanning and Jenkins, Member Penello dissenting in part).

[10] 306 U.S. 240 (1939).

by legitimate business considerations. While Member Penello conceded that, unlike the situation in *Fansteel*, the conduct of the employees here was unattended by violence and the ousting of management officials, nevertheless, he pointed out that the conduct of the five employees in this case constituted in effect, if not in actual fact, a plant seizure which, therefore, fell within the general type of conduct found unprotected in *Fansteel*. Member Penello observed that, furthermore, the Board has held that the "gravamen of a plant seizure involves a refusal by employees to yield possession of a plant when ordered to do so." [11] In Member Penello's view, this is precisely what occurred in this case. Thus, when the 10 p.m. bell rang, all employees, save the five, left the plant.

Member Penello took the position that neither Congress, nor the courts, nor the Board had ever suggested that section 7 was designed to protect the type of activity evidenced here. The effect of such a holding, in Member Penello's opinion, was to encourage employees to resort to a type of compulsion, i.e., a "work-in," which would in future cases necessarily lead to confrontation and violence between employees and employers—a result wholly at odds with the basic purposes of the Act.

In *Pilot Freight Carriers*,[12] a Board panel addressed yet another form of concerted employee activity, refusal to cross a picket line. Here, a sister local, having engaged in an unfair labor practice strike at an out-of-state terminal of the employer, put up a picket line around the employer's Ohio terminal. When an employee at the latter terminal refused to cross the picket line, she was discharged. The Board found her refusal to be protected and her discharge thus violative of section 8(a)(1), even though the contract in effect between the employer and the union representing the employee in question contained a no-strike clause. The basis for the sister local's picketing was an unfair labor practice strike undertaken by that local at the out-of-state terminal. Therefore, the employee who honored the picket line at the Ohio terminal assumed the status of an unfair labor practice striker. In view of her status, and considering the seriousness of the unfair labor practices which prompted the original strike by the sister local, her act in refusing to cross the picket line was protected.

In a separate concurring opinion, Member Walther found the employee's conduct protected not because she assumed the status of an unfair labor practice striker, but because the no-strike clause, limited as it was to situations where a grievance was pending, could not encompass this employee's activities. Member Walther took the posi-

[11] *KDI Precision Products*, 176 NLRB 135, 137 (1969), and cases cited therein at fn 4

[12] 224 NLRB No. 46 (Members Fanning and Jenkins, Member Walther concurring)

tion that, in the absence of an applicable no-strike provision, the employee enjoyed a section 7 right to engage in sympathy picketing.

Not all concerted activity is protected, however. In the following cases, the Board has attempted to define the limits of activity in which an employee can freely engage without subjecting himself to discharge or other employer discipline

In *Bovee & Crail Construction Co.*,[13] a panel majority found unprotected the conduct of three employees who, in their capacities as members of their local union executive board, mailed a letter to the employer's general foreman, also a member of the union, summoning him to appear at a local union meeting "to discuss ways and means of having a more harmonious job" and warning him that his failure to appear at the meeting might result in his being disciplined by the executive board. In the majority's view, the employer's immediate discharge of the three employees for writing and sending this letter did not violate section 8(a)(1), as these activities were not protected by section 7 of the Act. The panel majority pointed out that while the Act protects employees engaged in intraunion activity, such protection is removed when the employees' activity "transcends purely internal union affairs and interferes with a supervisor-member's conduct in the course of representing the interests of his employer." Such conduct, in the wake of the Supreme Court decision in *Florida Power & Light Co.* v. *IBEW, Loc. 641, et al.*[14] and subsequent Board cases interpreting that decision,[15] was arguably a violation of section 8(b)(1)(B), which prohibits a union from coercing an employer in the selection of its representative for the purposes of collective bargaining or adjusting grievances. Here, the Board found that the ultimate purpose of the employees' letter, especially the explicit threat of discipline, was to coerce the employer's general foreman to change his policy regarding the processing and settlement of job-related grievances, thereby interfering with the employer's control over its own representative. As this is the type of conduct Congress sought to prevent by enacting section 8(b)(1)(B), such conduct could not be protected activity.

In his dissent, Member Fanning accused the panel majority of taking away from employees the right to assist their union free of employer retribution merely because the union may have violated another section of the Act, here, section 8(b)(1)(B). If an employee/union member, in aiding his union, caused the union to violate the Act, such violation was attributable to the union, not to the indi-

[13] 224 NLRB No 71 (Chairman Murphy and Member Jenkins, Member Fanning dissenting).

[14] 417 U.S 790 (1974)

[15] *Chicago Typographical Union No 16 (Hammond Publishers)*, 216 NLRB 903 (1975), *New York Typographical Union No. 6, ITU (Daily Racing Form, subsidiary of Triangle Publications)*, 216 NLRB 896 (1975).

vidual as an employee. Member Fanning argued that, assuming *arguendo*, as a result of the employees' letter, the employer was victimized by an unlawful union action, the burden was on it, as respondent, to show that its response "must be no more than sufficient to its legitimate objective." Here, the employer failed to meet that burden in that it did not and could not justify the drastic course of firing the employees. If the union violated the Act, the employer could easily have filed a charge with the Board to protect itself. Instead, it took direct action against its employees. By taking recourse against the employees rather than the union, "no action by a union member could safely be assumed to be free from his employer's judgment." Finally, Member Fanning argued that the employee letter could not in any event constitute a violation of section 8(b)(1)(B) in that the employer's foreman to whom the letter was directed did not have the authority to deal with either the union or grievances—the subjects of section 8(b)(1)(B).

In *J. P. Stevens & Co.*,[16] one panel majority (consisting of Members Kennedy and Penello) found unprotected the attempt by 22 employees at the employer's Wallace, South Carolina, plants to interrupt the employer's election eve captive audience speeches by asking questions at the outset of the speeches. The majority expressed the view that the Wallace employees were engaged in a planned course of conduct to disrupt the speeches in an attempt to turn the meetings into a union forum. The panel majority pointed out that the union organizers had circulated a list of suggested argumentative questions and a news item indicating that employees had the right to ask questions at management speeches. In the opinion of the majority, the conduct of the employees showed a motive to disrupt the speeches. Thus, although there were variations from one meeting to another, generally at the beginning of the management speech an employee would ask loud and distracting questions, then others would join in. At another speech, employees loudly asserted that they had the right to ask questions and one employee insisted on being given time to speak in favor of the union The speakers repeatedly told the employees to sit down and that they were not there to answer questions; only when the employees persisted were they discharged.

While recognizing the principles set forth in its earlier decision in *Prescott Industrial Products Co.*[17] that certain concerted activity by employees remained protected even though it exceeded the bounds of lawful conduct "in a moment of animal exuberance," the panel majority held that here the employee activity transcended the bounds of

[16] 219 NLRB 850 (Members Fanning and Penello, Member Fanning concurring and dissenting in part, Member Kennedy dissenting in part)

[17] 205 NLRB 51 (1973)

protected activity delineated in *Prescott*, as the employees were engaged in a premeditated plan to interrupt the speeches with loaded and argumentative questions designed to disrupt the employer's meetings by preventing the speakers from making speeches and substantially negating the employer's rights to present its arguments.

Another panel majority (consisting of Members Fanning and Penello) found that an employee at the employer's Turnersburg, North Carolina, plant engaged in a protected concerted activity by interrupting a speech for the employer with the insistence that another employee's question be answered and that the employees had a right to an answer. The majority pointed out that, in the instant situation, no violent conduct, improper motive, or bad faith was shown and held that, for the reasons set forth in *Prescott*, *supra*, the discharge was unlawful.

Member Fanning, dissenting with respect to the finding that the 22 Wallace plant employees engaged in unprotected activity, expressed the view that, given the context of a hotly contested union campaign at a plant long hostile to legitimate attempts of employees to organize, the speaker's initial refusal to entertain questions triggered a spontaneous reaction by employees who arose either to assert their right to ask questions, or just remained standing silently in support of their coworkers. Member Fanning took the position that such conduct was clearly within the scope of protected activity as set forth in *Prescott*.

Member Kennedy, dissenting with respect to the finding that the Turnersburg plant employee's conduct was protected and concerted, expressed the view that, essentially for the reasons given in his dissent in *Prescott*, the employee's conduct was unprotected and constituted insubordination for which the employee could have been, and was, lawfully discharged by the employer.

3. Other Forms of Interference

Unlawful employer interference with employee rights can take other and more subtle forms than discharging an employee for engaging in protected concerted activity. Whether certain employer conduct constitutes interference can be a difficult question as indicated by the following cases. In *Cato Show Printing Co.*,[18] the employer conduct alleged as interference consisted of holding a meeting with supervisors, including a group of floorladies and working foremen, and instructing all of those present as to their proper roles in the current union organizational campaign. The employer told the persons at the meetings that the union was conducting an organizational campaign and explained,

[18] 219 NLRB 739 (Chairman Murphy and Members Kennedy and Penello, Members Fanning and Jenkins concurring and dissenting in part).

upon advice of the employer's attorneys, what was permissible and impermissible supervisory conduct. Thus, the employer explained that supervisors should refrain from interrogating employees concerning union activities or disciplining employees because of such activities. Further, the employer instructed those assembled that they were not to talk to Board agents outside the presence of the company attorneys, nor were they to discuss the union, pro or con, with any employee. They were also told to watch employees to make sure that they did not engage in union activity during working time, that this prohibition did not extend to nonworking time such as breaktime and lunch periods. A few months subsequent thereto, the employer agreed, in a consent election agreement, to include the aforementioned floorladies and working foremen in the unit as employees.

A Board majority refused to find interference. The majority agreed with the administrative law judge that at the time of the meeting the employer honestly regarded the floorladies and working foremen as part of supervision. The majority pointed out that although the employer at a later date included floorladies and working foremen in the unit for a consent election—apparently conceding that they were not statutory supervisors—this occurrence which took place months after the meeting did not prove that the administrative law judge was wrong in concluding that at the earlier date the employer in good faith believed that the floorladies and working foremen were statutory supervisors. In view of the employer's honest belief that the floorladies and working foremen were supervisors, the majority found that the speech to supervisory personnel was not unlawful. The majority stated that such Supreme Court decisions as *N.L.R.B.* v. *Brown Food Stores*, 380 U.S. 278 (1965), and *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965), illustrate that motive could be considered a factor in determining whether certain conduct was violative of section 8(a)(1), and that the correct test to be applied was the balancing of conflicting legitimate interests.

The majority concluded that the instructions at the meeting were given to supervisors; that also sharing in the instructions were the floorladies and working foremen because the employer honestly believed that they were supervisors; that admittedly as to supervisors the instructions were lawful; that the instructions against discussing the union with employees was intended to prevent interference with the employees' union activity; that it would have been ironic if the Board were to convert this neutrality instruction into a violation of the Act; and that, under all the circumstances, the majority believed that the administrative law judge reached the right result in finding no violation.

Members Fanning and Jenkins dissented on the basis that the instructions to the floorladies and working foremen, clearly employees, not to talk to fellow employees or Board agents about the union and the employer's further instructions that they spy on their fellow employees as to their worktime union activities were obvious interference with employee section 7 rights. In the view of Members Fanning and Jenkins, the employer's statements to those assembled at the meeting to "watch the people," to keep them from "congregating during working hours," and to make sure they did not discuss the union "with anyone" were violations of section 8(a)(1).

Members Fanning and Jenkins pointed out that with respect to the meeting it was the employer's privilege to instruct supervisors not to talk to Board agents unless in the presence of the company attorney, but the privilege had no application here because it was undisputed that the floorladies and working foremen, to whom the orders were also given, were employees. Thus, it was abundantly clear to the dissenting Board Members that the employer at the meeting openly discouraged a number of employees from cooperating with the Board and thereby impeded an investigation, the sole purpose of which was to vindicate their own and their fellow employees' statutory rights. Furthermore, that the employer gave his instructions under the good-faith belief that the floorladies and working foremen were supervisors is immaterial in view of repeated Supreme Court pronouncements (citing *Intl Ladies' Garment Workers' Union* v. *N.L.R.B*, 366 U.S. 731 (1961), and *N.L.R.B.* v. *Burnup & Sims*, 379 U.S. 21 (1964)) that 8(a)(1) conduct cannot be excused by a showing of good faith.

A Board majority again found no unlawful interference in *Jerome J. Jacomet, d/b/a Red's Novelty Co. & R–N Amusement Corp.*[19] In this case, a meeting was held during a union campaign between the employer and employees at the latter's request. A spokesman for the employees told the employer that all the employees decided that they did not want to join the union, whereupon the employer said, "Nobody wants to join the union," and the employees nodded yes. The employer then said, "Well fine. That's excellent. Is this everybody here? Nobody wants to join the Union?" The Board majority declared inapplicable the *Struksnes Construction* formula[20] for determining whether or not the employer's polling of employees was coercive since here the employer's poll, such as it was, took place only after the employees openly stated their position as to their

[19] 222 NLRB No 145 (Chairman Murphy and Members Penello and Walther, Members Fanning and Jenkins dissenting)

[20] *Struksnes Construction Co*, 165 NLRB 1062 (1967).

desire for union representation. The employer then merely verified what the employees had already told him. Thus, the majority found no interference which would justify setting aside the ultimate election which was lost by the union.

Members Fanning and Jenkins, dissenting, took a position in favor of the applicability of *Struksnes Construction Co.* which forbids the employer's recourse to employee polls barring certain unusual circumstances which, in their opinion, were not present here. Furthermore, they observed that, even if circumstances permitted such a poll, the employer must adhere to specific and stringent safeguards which clearly were not met here

B. Employer Assistance to Labor Organizations

Section 8(a)(2) makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

Under the Board's *Midwest Piping* doctrine,[21] an employer faced with conflicting claims of two or more rival unions which gave rise to a real question concerning representation violates section 8(a)(2) and (1) if it recognizes or enters into a contract with one of these unions before its right to be recognized has been finally determined under the special procedures provided in the Act

The *Midwest Piping* doctrine was reaffirmed by the Board in *Associated General Contractors of California* [22] Here, a Board panel found a multiemployer bargaining group in violation of section 8(a)(2) when it entered into a new collective-bargaining agreement with a multilocal union group after the Board had directed a decertification election based on a petition earlier filed by unit employees. The direction of the election was clear evidence of a question concerning representation. Therefore, the execution of a new contract with the incumbent union group in the face of such a question concerning representation was a clear violation of the *Midwest Piping* doctrine. In so holding, the Board panel did not regard section 8(f), which allows the recognition of unions in the construction industry without the requirement of a showing of majority status, as providing the basis for not applying the *Midwest Piping* doctrine.

Support by an employer of a labor organization can take less subtle forms. In *Vernitron Electrical Components*,[23] the Board found an employer in violation of section 8(a)(2) when it assembled the employees

[21] *Midwest Piping & Supply Co*, 63 NLRB 1060 (1945)
[22] 220 NLRB No 93 (Chairman Murphy and Members Fanning and Jenkins)
[23] 221 NLRB No 74

during worktime for meetings with union organizers at which a union representative explained the benefits of union representation and then openly solicited cards. Supervisors were present for all or part of these meetings and were in a position to observe employees as they signed the cards. After the meetings, in which the union secured a card majority, the employer, after inspecting the cards, immediately granted recognition to the union. While the Board referred to similar past decisions where a union solicitation of a card majority during employer-called meetings of employees was found not to have been violative of the Act, the Board concluded that the employer's entire course of conduct in this case constituted unlawful assistance. It cited specifically certain circumstances not present in the earlier cases, e.g., the presence of supervisors during the union solicitation of cards, the same-day speed in which the employer recognized the union after being presented with the cards, and the employer's recognition of the union without third-party verification of the authenticity of the cards.

In *Henry Book, Wm. Russ & Robt. Klein d/b/a Sprain Brook Manor*[24] a Board majority held that an employer violated section 8(a)(2) by recognizing a union when it did not in fact represent a majority of the employees. Here, the union submitted 59 cards (out of a 101-man unit) to the employer and demanded recognition. The employer and union then agreed to submit the cards to an arbitrator for a binding decision as to the majority status of the union. The arbitrator, after examining the cards, and from his own observation by comparing the cards with the employees' W–4 forms which contained employee signatures, declared that the signatures were verified "to the best of his ability" and concluded that a majority of the employees wanted the union. The employer and union executed a contract, after which the union destroyed the authorization cards.

The Board majority found the 8(a)(2) violation based on the *prima facie* case made out by the GeneralCounsel at the hearing at which the majority of the unit employees tes tified as to never having authorized the union to represent them. Citing the Supreme Court's *Bernhard-Altmann* decision[25] as authority, the Board majority pointed out that the fact that the employer relied on the cards in "good faith" as proof of the union's majority did not preclude a finding that the employer violated section 8(a)(1) and (2) of the Act by recognizing a union which, in fact, represented only a minority of the employer's employees at the time of the union's demand for recognition. The Board majority minimized the effect of the arbitrator's decision noting that a rival union, which was also soliciting cards, was not a party to the card

[24] 219 NLRB 809 (Chairman Murphy and Members Jenkins and Kennedy, Members Fanning and Penello dissenting)

[25] *Intl. Ladies' Garment Workers' Union* [*Bernhard-Altmann Texas Corp*] v *N L R B.*, 366 U S. 731 (1961)

check. Moreover, as indicated in previous cases, the Board is not bound by third-party verification of cards where it is shown that certain cards counted towards the majority were in fact invalid. The majority observed that, while proof of validity or invalidity here was precluded by the union's destruction of the authorization cards, the "best objective evidence available" was that presented by the General Counsel, i.e., testimony of a majority of employees that they never designated the union to represent them.

In their dissent, Members Fanning and Penello acknowledged that the General Counsel made out a *prima facie* case, but, accepting the testimony and evidence at face value, particularly that an experienced and reputable arbitrator was presented with authorization cards from a majority of employees, which cards he found to bear their signatures, Members Fanning and Penello believed the employer had met its burden of coming forth with evidence in refutation of the General Counsel's case. As the burden of proving his case by a preponderance of the evidence always remained with the General Counsel and they did not believe his evidence preponderated in favor of finding that the union was a minority union at the time it was recognized by the employer, unless one indulged in impermissible speculation for example, speculation that the union perpetrated a fraud upon the arbitrator, Members Fanning and Penello would have dismissed the complaint.

C. Employer Discrimination and Conditions of Employment

Section 8(a)(3) prohibits an employer from discriminating againt employees "in regard to hire or tenure of employment or any term or condition of employment" for the purpose of encouraging or discouraging membership in any labor organization. Many cases arising under this section present difficult factual, but legally uncomplicated, issues as to employer motivation. Other cases, however, present substantial questions of policy and statutory construction.

In *Dairylea Cooperative*,[26] a Board majority found that an employer violated section 8(a)(3) when it negotiated, maintained, and enforced along with the union, a steward superseniority clause in its current collective-bargaining agreement. According to the terms of the clause, stewards were given top seniority not only with respect to layoffs and recall, but also with respect to all contractual benefits in which seniority was a consideration, such as assignments of overtime, awarding

[26] 219 NLRB 656 (Chairman Murphy and Members Jenkins, Kennedy, and Penello, Member Fanning dissenting)

of routes, preference in shifts and hours, etc. Pursuant to this clause, a union steward bid on a lucrative delivery route and was awarded it over a more senior employee. The basis for the Board's 8(a)(3) finding was that by reserving top seniority for the union-appointed stewards, the company, along with the union, encouraged "union activism" and discriminated against employees who preferred to refrain from union activity. The Board majority observed that, while a union might theoretically appoint as steward any employee who possesses the requisite skill, the union would, "viewed realistically," give a marked preference to those employees who were "committed unionists," and conversely tend to exclude those who refrained from union activities. Also, the impact of this clause was not only to deny certain employees the chance to become a union steward, but also to preclude access to certain contractual benefits which they would ordinarily be entitled to by virtue of the supersenior position of the steward. Consequently, there could be no question, in the opinion of the majority, but that the superseniority clause tied job rights and benefits to union activities, a dependent relationship at odds with the policy of the Act, which is to insulate the one from the other.

In finding this clause in violation of section 8(a)(3), the Board majority did concede that certain superseniority clauses which are limited solely to layoff and recall are valid in that they furthered the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job. But the majority found that superseniority clauses which are not on their face limited to layoff and recall are presumptively unlawful and the burden of rebutting that presumption (i.e., establishing justification) rests on the shoulders of the party asserting their legality. The majority concluded that, absent justification for the across-the-board superseniority clause obtaining here, the disputed clause was illegal.

Member Fanning, dissenting, pointed out that steward superseniority clauses had been commonplace throughout 30 years of collective bargaining; that they had never been questioned; that no member of the unit suggested such clauses be changed or eliminated; and that contracts containing such clauses were ratified regularly by the bargaining unit. Member Fanning observed that evidence of steward selection on any basis other than ability was lacking and there was nothing to suggest that selection as a steward was a reward for supporting the union. In his view, there was no evidence that any member of the unit had less than an equal opportunity to be selected as steward, or that there was, or ever had been, any invidious discrimination in the selection of stewards. Member Fanning took the position that, as there was

no evidence of any discrimination in the selection of stewards, and no basis for concluding that measuring seniority, in the first instance, by service to the unit as a steward violates the Act as a matter of law—precedent and logic both pointing in quite the opposite direction—there was a clear failure of proof of any violation of the Act.

Georgia-Pacific Corp.[27] presented a somewhat more complicated factual setting for an 8(a)(3) finding. Here, various employees struck a jobsite of the employer and attempted to get jobs with an independent contractor working for the same employer, but at a different jobsite owned by the employer. While the independent contractor was understaffed and therefore predisposed to hire the strikers, it refused to do so, complying instead with the instructions of the employer that none of the strikers was to be hired at this second jobsite. Unless these orders were complied with, the employer would have terminated the independent contractor's contract. A Board panel found both the employer and the independent contractor in violation of section 8(a)(3); the independent contractor because it specifically refused to hire the four strikers, and the employer because it ordered the independent contractor not to hire them. In finding the employer in violation of section 8(a)(3), the panel rejected the employer's argument that it had a right to keep its own striking employees off its premises. The panel observed that, while this may have been true, the employer did not have the right to prevent its strikers from obtaining work at a completely different and unrelated jobsite working for a completely independent employer.

D. Employer Bargaining Obligation

An employer and the representative of its employees, as designated or selected by a majority of employees in an appropriate unit pursuant to section 9(a), have a mutual obligation to bargain in good faith about wages, hours, and other terms and conditions of employment.[28] An employer or labor organization respectively violates section 8(a)(5) or 8(b)(3) if it does not fulfill its bargaining obligation.

1. Subject Matter for Bargaining

When either an employer or a union bargains to impasse over a nonmandatory subject of bargaining, it respectively violates section 8(a)(5) or 8(b)(3) of the Act.

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[27] 221 NLRB No 157 (Members Fanning, Jenkins, and Penello.)

[28] The scope of mandatory collective bargaining is set forth generally in sec. 8(d) of the Act It includes the mutual duty of the parties "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . ." However, neither party is compelled to agree to a proposal or make a concession

Whether "interest arbitration"[29] is a permissive or mandatory subject of bargaining was considered by the full Board in *Columbus Printing Pressmen & Assistants' Union 252 (R. W. Page Corp.)*.[30] Here, a labor organization bargained to impasse over such an interest arbitration clause. The Board majority found an 8(b)(3) violation based on its conclusion that interest arbitration, as opposed to grievance arbitration, is a nonmandatory subject of bargaining. In the view of the majority, grievance arbitration provides a method for a resolution of disputes over interpretation of the existing contract; therefore, by necessity, it relates to present terms and conditions of employment, and constitutes a mandatory subject of bargaining. Interest arbitration, by contrast, does not relate to terms and conditions of employment and therefore is not such a mandatory subject. The majority observed that the fact that such an interest arbitration clause had been present in prior collective-bargaining agreements in this case did not transform such a subject from a permissive to a mandatory subject of bargaining. In essence, such an arbitration clause constituted a waiver by both parties of recourse to traditional economic weapons in the wake of impasse in bargaining.

Member Fanning, concurring separately, for the reasons set forth in his dissenting opinion in *Mechanical Contractors Assn. of Newburgh*, 202 NLRB 1 (1973), agreed with Members Jenkins, Kennedy, and Penello that the disputed interest arbitration clause was a nonmandatory subject of bargaining and that the union's insistence to the point of impasse upon its inclusion in a new contract violated section 8(b)(3) of the Act. For the same reasons, Member Fanning disagreed with the dissenting opinion of Chairman Murphy.

Member Jenkins, concurring separately, agreed with the majority of his colleagues that the interest arbitration clause herein was not a mandatory subject of bargaining and that by bargaining to impasse concerning such clause the union violated section 8(b)(3). He expressed the view that cases interpreting section 8(d) of the Act make it clear that any contract provision, such as the one herein, which subverts the rights of the parties to negotiate to impasse and, if necessary, to resolve impasse through a test of respective economic strength of the parties, must not be deemed a mandatory subject of bargaining.

Member Jenkins pointed out that the legislative history of section 8(d) of the Act and cases relating to this section also make it clear that negotiation between employers and unions must be free of outside supervision or interference. Since Congress, by this section, has

[29] "Interest arbitration" as opposed to the more typical "grievance arbitration" involves the process in which an arbitrator, by prior mutual agreement of the parties, determines the substantive content of a contract after the parties have reached impasse in bargaining.

[30] 219 NLRB 268 (Members Kennedy and Penello, Member Fanning concurring separately, Member Jenkins concurring separately, Chairman Murphy dissenting)

specifically denied the Board the right to participate in the arena of actual negotiations, or to sit in judgment on the substantive provisions of a collective-bargaining agreement, it must be concluded that the Act does not permit either party, in a case such as this one, the right to create an impasse over a contract provision giving such authority to an arbitrator.

Chairman Murphy, dissenting, disagreed with her colleagues that the union violated section 8(b)(3) by conditioning execution of a new contract upon the continued inclusion of an interest arbitration clause, whether such clause was deemed a mandatory or nonmandatory subject of bargaining. She pointed out that the principal ground for finding a violation appeared to be that because the *quid pro quo* for the interest arbitration clause was the waiver of the employees' right to strike against the employer and, because public policy frowned upon any undue interference with the right to strike, necessarily the interest arbitration clause itself was against public policy. But, Chairman Murphy asserted, this syllogism was not valid. For, public policy also favors voluntary resolution of disputes and the elimination of economic warfare which interferes with the free flow of commerce. The interference with the right to strike which is unlawful or against public policy is that which is imposed by one party or by the Government upon another party to a dispute, not a bilateral agreement upon mutual undertakings which results from the give and take of collective bargaining. Similarly, the freedom of collective bargaining from outside interference or supervision refers to that imposed upon, not what is agreed to by, the parties. Therefore, even if the instant clause could not have been insisted upon to impasse in initial bargaining, assuming *arguendo* that it was a nonmandatory subject, the Chairman saw nothing improper in one party's seeking, by peaceful means, to require adherence by the other to the provisions which were voluntarily and freely undertaken in the first instance.

Chairman Murphy took the position that, even if an interest arbitration clause were nonmandatory, bargaining to impasse over its inclusion should not be a violation of the Act. In the Chairman's opinion, if the parties had agreed upon interest arbitration without qualification there was nothing inherently improper in seeking to secure adherence thereto. But Chairman Murphy, unlike her colleagues, took the position that interest arbitration was within the definition of a mandatory subject of bargaining, i.e., any issue which settles an aspect of the relationship between the employer and employees concerning wages, hours, working conditions, or other terms or conditions of employment. That an interest arbitration provision does so, the Chairman noted, is beyond dispute. For, according to the Chairman, by its very nature it provides a peaceful judicial-type

procedure in place of economic warfare as a means of settling any such aspect of the employment relationship upon which there may be disagreement. Its provision for the continuing effectiveness of established contract terms throughout the negotiation period for renewal thereof and the assurance of continued employment to workers and uninterrupted production to the employer are the very essence of the bargaining relationship and the protection of employer-employee interests.

It was Chairman Murphy's considered opinion that interest arbitration does not conflict with the policies of the Act where initially agreed to freely by the parties but that, rather, it is a method of resolution of disputes favored by the Act and furthers the basic statutory goal of industrial peace.[31]

Another subject matter of bargaining which the Board has addressed in the past year is performance bonds. In *Lathers Loc. 42 of Wood, Wire & Metal Lathers Intl. Union (Lathing Contractors Assn. of Southern California)*,[32] a Board majority reaffirmed its longstanding policy regarding the matter of performance bonds as a nonmandatory subject of bargaining.[33] Therefore, the majority found the union in violation of section 8(b)(3) when it insisted to the point of impasse that the employer increase the size of its performance bond, which guaranteed, *inter alia*, payment of wages, health and welfare contributions, and the pension plan, in the next collective-bargaining agreement. In so holding, the Board majority rejected the union's argument that the Board should change its position in order to accommodate to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), which provides for Federal regulation of employee benefit plans.

In a separate concurring opinion, Chairman Murphy and Member Jenkins stated that what made the performance bond a nonmandatory subject of bargaining was the scope of the bond; specifically, the bond went beyond securing payment of wages and fringe benefits, but included payments to an industry promotion fund. Chairman Murphy and Member Jenkins expressed the view that payments for such purposes were not part of the terms and conditions of employment concerning which the statute requires employers to bargain with unions representing the employees. Consequently, the union violated the Act in insisting to impasse on the bond, and on this

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[31] See also *Greensboro Printing Pressmen & Assistants' Union 819 (Greensboro News Co.)*, 222 NLRB No 144 (Members Jenkins and Penello, Member Fanning concurring, Chairman Murphy dissenting), wherein the same issue of interest arbitration was presented and the various Board members adopted the same position as in *R. W. Page, supra*

[32] 223 NLRB No 8 (Members Fanning, Penello, and Walther, Chairman Murphy and Member Jenkins concurring)

[33] Citing *Covington Furniture Mfg Corp.*, 212 NLRB 214 (1974), and cases cited therein

ground alone they concurred in a violation of section 8(b)(3) found by their colleagues.

In *Ladish Co.*,[34] a Board panel majority found an employer in violation of section 8(a)(5) for refusing to bargain with the union representing one of its employee units over a price increase in food items from vending machines located on the employer's premises. All of the employees in the unit in question received a 15-minute lunch period and were required to remain in the plant during that time. Consequently, a majority of the employees bought their lunch from the vending machines in question. While the prices of the food items were set by the owners of the vending machines, independent contractors, the employer had ultimate control over pricing by virtue of its lease agreement with the contractors which allowed it to unilaterally replace them at any time. The panel majority found that the subject of raising the vending machine prices was a mandatory subject of bargaining insofar as the union's request to bargain was concerned because it was clearly a "term and condition of employment." In so holding, the panel majority noted that vending machines at the employer's premises constituted in essence the sole source of food, unless the employees brought their own lunch from home. The panel majority rejected the employer's argument that the independent contractor's authority to set the vending machine prices made bargaining with the employer over such prices futile, arguing that the employer possessed sufficient pricing control through its right to terminate the contractor. Moreover, the fact that the bargaining demand might require the employer to change its business relationship with other contractors should not have allowed the bargaining demand to be rejected. Finally, the fact that the union only represented a fraction of the employees affected by the price increase was immaterial, since the mandatory status of a bargaining subject does not turn on whether it has an impact on employees outside the unit.

Member Jenkins, concurring, pointed out that, as he stated in his dissent in *Westinghouse*,[35] price increases in the cost of food items at an employer's facilities are best left to the voluntary action of the market place. But that contemplated that a market place existed in the sense that employees had the opportunity to use other commercial vendors. In Member Jenkins' judgment, the situation presented here was more akin to the one in *Weyerhaeuser*[36] than the one in *Westinghouse, supra*. Here, the employees were true captives to the food service being offered at the employer's plant because they received only a

[34] 219 NLRB 354 (Membes and Jenkins, Penello, and Jenkins, Member Jenkins concurring, Member Kennedy dissenting).

[35] *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966)

[36] *Weyerhaeuser Timber Co*, 87 NLRB 672 (1949).

15-minute lunch period and they were not permitted to leave the plant for lunch. There were no other food services available to the employees and their dependence on the facilities provided by the employer was demonstrated by the fact that, among the employees in the bargaining unit represented by the union, 70 percent obtained their food from these facilities and 90 percent purchased beverages from this source.

In these circumstances, Member Jenkins found in agreement with Member Penello that food prices at the employer's facilities were conditions of employment over which the employer was obligated to bargain, upon request.

Member Kennedy, dissenting, took the position that the employer had no direct or indirect pricing control in that it would never have canceled the vending machine contract when faced with a small or moderate price increase in vending machine food items. Therefore, any bargaining with the employer over prices would have been futile. Secondly, Member Kennedy expressed the view that since the union in this case was one of several unions in the employer's plant, the employer, if required to bargain over prices, would have had to do so in several separate sets of negotiations.

In *Capital Times Co.*,[37] a Board majority found an employer's unilateral promulgation of a "code of ethics" for employees to be a nonmandatory subject of bargaining, and hence not a violation of section 8(a)(5). The code of conduct designed by the employer, a newspaper, essentially prohibited reporters from accepting gifts from outside sources by virtue of their position with the paper, regardless of whether the gifts were received in performance of their duties. The code also imposed a duty to disclose any outside activity which might constitute a conflict of interest.

The Board majority observed that in the past the term "wages," as used in section 8(d) of the Act, had been interpreted quite liberally and was "construed to include emoluments of value . . . which . . . accrue[d] to employees out of their employment relationship." [38] However, the majority found that the gifts herein were not "wages," pursuant to section 8(d) of the Act, since they were not benefits flowing from the employer to the employee. Nor were they considered "tips," which the Board in the past has regarded as wages, since tips, unlike "freebies" or the gifts referred to here, are paid to employees for services rendered on behalf of the employer. Moreover, the majority noted that the union had not in the past considered the availability of "freebies" in framing its wage demands and none of the employees who testified regarded gifts from outside sources as part of their wages, as a waiter or stagehand does.

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[37] 223 NLRB No 87 (Members Jenkins, Penello, and Walther, Member Fanning dissenting)

[38] *Inland Steel Co*, 77 NLRB 1, 4 (1948), enfd 170 F 2d 247 (C A 7, 1948)

The Board majority disagreed with the administrative law judge's conclusion that the code of ethics affected terms and conditions of employment such that the employer had to bargain about it. The majority regarded any assertion that the prohibition of such gifts from third parties might cause an employee to do his job less satisfactorily—and possibly lose his job—as speculative, as was the assertion that the code might cause an employee to be less satisfied with his job. Furthermore, the Board majority believed that its holding was consistent with the Supreme Court's landmark *Fibreboard* decision,[39] where the Court held that subcontracting out of work was a mandatory subject of bargaining, since it was an economic decision by the employer which, according to industry bargaining practice, had been the subject of collective bargaining. Here, however, the imposition of the code did not involve an economic decision. Nor had codes of ethics been a subject of collective bargaining in the past. Finally, the majority was careful to note that while the code itself was not a mandatory subject of bargaining, the formulation of penalties for the code's violation was, since it had an obviously direct effect on job tenure. To the extent the employer unilaterally imposed a system of penalties, it violated section 8(a)(5).

Member Fanning, dissenting, expressed the view that the rules contained in the code of ethics clearly affected employee conduct, income, or job security in that their violation might have resulted in suspension or termination of employment. Therefore, it affected terms and conditions of employment and was a mandatory subject for bargaining. He also questioned the majority's reliance on *Fibreboard* which turned not on industry practice or economic considerations underlying subcontracting, but on the fact that subcontracting affected job security as does the code here. Finally, Member Fanning took the position that it was illogical to regard the penalty provisions as mandatory but the code itself as not, since the penalty provision was a "constituent part" of the rules themselves.

Finally, in *Winn-Dixie Stores*,[40] the Board had occasion to consider the bargainability of certain aspects of an employer's pension/profit-sharing plan. The plan involved the periodic pro rata contribution by the employer of end-of-year profits to separate accounts for each employee. The benefits, with certain exceptions, became due upon the employee's death, disability, or normal retirement. Throughout the negotiations for a current collective-bargaining agreement, the employer took an adamant position that there should have been an exclusionary clause in the plan whereby any employee subsequently

[39] *Fibreboard Paper Products Corp.* v. *N L.R.B.*, 379 U.S. 203 (1964).

[40] 224 NLRB No. 190 (Chairman Murphy and Members Fanning, Jenkins, and Penello).

covered by any other pension plan would have been excluded from the employer's plan with forfeiture of all previously vested money. The Board held that, whether the plan was characterized as a profit-sharing plan (which the Board felt it was) or a pension plan, the employer had an obligation to bargain over all aspects of the plan, including the exclusionary features of the plan. By maintaining a "take it or leave it" attitude at the bargaining table, i.e., that the employees would not be covered by both the union's and employer's pension/profit-sharing plans, the employer violated section 8(a)(5).

2. Bargaining Lockouts

In *Hooker Chemicals & Plastics Corp.*,[41] a Board panel, in construing subsections of section 8(d) of the Act, found that an employer's institution of a lockout more than 60 days after the union's initial 8(d)(1) notice to renegotiate, but less than 30 days after the union's untimely 8(d)(3) notice to the Federal Mediation and Conciliation Service (FMCS) of the existence of a dispute, was premature and thus in violation of section 8(a)(5). In so doing, the panel adhered to the Board's earlier decision in *Peoria Chapter of Painting & Decorating Contractors of America* [42] which had construed the 8(d)(4) 60-day moratorium on lockouts to include a 30-day waiting period from the time notice was given by the union to FMCS, regardless of the fact that the union's notice was untimely. The panel acknowledged the employer's position in this case, which was essentially the same as that of the Seventh Circuit in reversing the Board's decision in *Peoria Contractors*,[43] namely, that the noninitiating party's (here the employer's) access to economic self-help should not be unduly delayed due to the initiating party's (here the union's) late 8(d)(3) notice, and that both parties should be governed by the absolute 60-day period established in section 8(d)(4), regardless of the initiating party's duty to give notice under section 8(d)(3). However, the panel was of the opinion that its interpretation of section 8(d) was more in keeping with the overriding legislative policy of promoting industrial stability by establishing a definite period in which mediation was to be given an opportunity to resolve collective-bargaining disputes peacefully. The panel also reasoned that, if the employer had wanted to avoid the delay in instituting its lockout, it could have easily ascertained the untimeliness of the union's 8(d)(3) filing of notice of dispute and then filed its own notice.

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[41] 224 NLRB No 203 (Chairman Murphy and Members Fanning and Jenkins)
[42] 204 NLRB 345 (1973).
[43] 500 F 2d 54 (C A. 7, 1974)

In *Movers & Warehousemen's Assn. of Metropolitan Washington, D.C.*,[44] the Board addressed the question of whether a lockout, which was in part unlawfully motivated and thus illegal at the outset, could have been cured by the employer's mere renunciation of the unlawful motive. A Board majority answered in the negative. Here, during renegotiation of a new contract, the employer locked out its employees in support of both its substantive bargaining demands and its desire that the union adopt a contract ratification procedure to the employer's liking, the latter clearly being a nonmandatory subject of bargaining. Two days after the employees were locked out, the employer informed the union that it no longer had any objection to the union's method of ratification. However, the employer did not end the lockout until the parties executed a new agreement some 25 days later. Ruling that a lockout unlawful at its inception retained its initial tainted illegality until it was terminated and the affected employees were made whole, the Board majority found that the employer's lockout violated section 8(a)(5) even after it withdrew its objections to the union's ratification procedures, since it continued unabated for another 25 days without the employer agreeing to restore its employees to their *status quo ante*, i.e., offering backpay for the first 2 days of the lockout.

Chairman Murphy disagreed with the majority and would have found that the employer's retraction of the nonmandatory bargaining demand cured the lockout of its initial illegality. In the Chairman's opinion, it was clear that after the renunciation the lockout was solely motivated by the employer's desire to reach a contract prior to the start of the busy season. In the circumstances, she agreed with the administrative law judge that it would "exalt form over substance" to require the employer to cease the lockout and return to the *status quo ante*, only to resume the lockout a day, or perhaps even an hour, later.

Chairman Murphy would have made a distinction between continuation of activity unlawful at its inception because it violated an express statutory command, and otherwise lawful activity which constituted an unfair labor practice solely because one of its dual objectives was unlawful. In the former situation, she saw no method by which the taint of illegality would have been removed short of ceasing the unlawful conduct. The illegality in the latter situation, however, could have been cured, in the Chairman's view, by a clear showing that the unlawful motivation no longer existed. In her opinion, such a showing was unquestionably made in this case by the employer's retraction of its unlawful objective for the lockout.

[44] 224 NLRB No. 64 (Members Fanning, Jenkins, and Penello, Chairman Murphy concurring in part and dissenting in part).

Finally, a Board panel majority, in *Johns-Manville Products Corp.*,[45] held that while an employer had the right, in the midst of union negotiations, to lock out its employees pending the signing of an agreement and operate the plant with temporary employees and non-unit supervisory personnel, the full panel found that the lockout became illegal when during the lockout the employer unilaterally decided to hire permanent replacements without first consulting the union. The Board panel held that the employer's unilateral act of hiring permanent replacements without consulting or notifying the union or the employees of such intention violated section 8(a)(3) of the Act and the permanent replacement of all unit employees was also a violation of section 8(a)(5) since "it completely destroyed the bargaining unit" and constituted an unlawful withdrawal of recognition of a duly designated union. In so holding, the Board panel noted an absence of evidence that the union had engaged in an in-plant strike or other concerted improper conduct which might justify the employer's hiring of permanent replacements.

In the opinion of the panel majority, the lockout and subsequent resumption of operations on a reduced scale with temporary employees not covered by the expired contract, who were transferred from some of the employer's other operations, and others who were secured from an independent contractor, did not violate section 8(a)(3) and (1) of the Act for the same reasons fully set forth in the decision in *Ottawa Silica Co.*[46]

Member Jenkins, dissenting in part, agreed with his colleagues in finding that the employer violated section 8(a)(3), (5), and (1) of the Act by permanently replacing its entire complement of locked-out employees, but, contrary to his colleagues, he would have found in accord with his dissenting opinions in *Ottawa Silica Co.*, *supra*, and *Inter Collegiate Press, Graphic Arts Div.—Sargent Welch Scientific Co.*, 199 NLRB 177 (1972), that the employer violated section 8(a)(1) and (3) by operating its plant with temporary replacements for its locked-out employees for the period of time when it discriminatorily replaced the locked-out employees with permanent employees.

3. Other Issues

After accepting remands from the Court of Appeals for the District of Columbia, and reconsidering the respective decisions and orders in conformity with the court's opinions which the Board respectfully recognized as binding on it for the purpose of deciding the instant cases, the Board again considered each record in light of the court's

[45] 223 NLRB No 189 (Chairman Murphy and Member Penello, Member Jenkins dissenting in part).
[46] 197 NLRB 449 (1972).

opinions in *Houston Div. of Kroger Co.*[47] and *Smith's Management Corp. d/b/a Mark-It Foods*,[48] and a Board majority reversed the Board's earlier rulings. The majority held that a collective-bargaining agreement's "additional store" clauses, which essentially bound the particular employer to recognize the specific union as the exclusive bargaining representative of employees at stores later to be added to that employer's administrative division, were valid and enforceable. Thus, the employer involved violated section 8(a)(5) when, after the union's claim of recognition plus its offer to submit proof of a card majority at the new stores (it being undisputed that the union possessed valid card majorities), the employer refused to recognize the union as the representative of the employees at the new stores. The Board majority agreed with the circuit court that the "additional store" clauses as agreed to by the particular employer constituted a waiver by that employer of its right to demand an election. To allow an employer to ignore the union's recognitional demand and request an election would render the clauses meaningless. The Board majority was careful to emphasize, however, that such clauses were valid only if the employees affected were allowed to have some say in the selection of their representatives. Here, the Board regarded as crucial the existence of the union's valid card majority at both stores. Finally, the Board majority found no considerations of national labor policy which would require it to find these clauses illegal.

Member Kennedy, dissenting, in the *Kroger* case, *supra*, disagreed with the reversal of the Board's original decision that the employer could have lawfully recognized the unions involved therein since there was proof of a card majority, but it was not required to do so and instead could have lawfully insisted upon an election as a condition precedent to recognition. Further, Member Kennedy observed, the Board had held that the "additional store" clauses did not waive the employer's options. He noted that the Board had rejected the argument that the language of the "additional store" clauses constituted an advance agreement to honor a card majority and hence under *Snow & Sons*, 134 NLRB 709 (1961), enfd. 308 F. 2d 687 (C.A. 9, 1962), the employer was bound to submit to a card check.

Member Kennedy pointed out that the court of appeals reversed the Board's order and remanded the case essentially upon the ground that the "additional store" clauses could have had no purpose other than to waive the employer's right to a Board-ordered election; that the court deduced that the "true purpose of the Board's ruling was not

[47] 219 NLRB 388 (Chairman Murphy and Members Fanning and Jenkins, Member Kennedy dissenting separately, Member Penello dissenting separately).

[48] 219 NLRB 402 (Chairman Murphy and Members Fanning and Jenkins, Member Kennedy dissenting separately, Member Penello dissenting separately).

to interpret the contract but to declare that 'additional store clauses' are inconsistent with authorization card policy and, therefore, illegal"; and that it therefore remanded the case to the Board so that the Board might "overtly advance" that position and explicate why national labor policy required that "additional store" clauses be held illegal. According to Member Kennedy, the majority accepted the remand, but he had voted to seek certiorari.

Member Kennedy submitted that the court was in error in deducing that the true purpose of the original majority decision was to declare "additional store" clauses illegal. He asserted that the Board had no such intention, and that it stated explicitly that this type of clause was lawful "so long as it is not used to foreclose either the right to self-determination or free access to our processes."

In Member Kennedy's opinion, what was decided in the original majority decision was that the particular "additional store" clauses involved in this case could not have been construed as tantamount to an advance agreement to honor a card majority. He contended that nothing in the language of the "additional store" clauses suggested that the employer had surrendered its right to an election in new stores in favor of a card check.

Member Penello, dissenting, in the *Kroger* case, *supra*, expressed the view that, although it was clear that at the time the unions in this case requested recognition they possessed valid card majorities among the employees sought and the employer could certainly have recognized them in these circumstances, the employer was not *required* to do so under the terms of the so-called "additional store" clauses. Because these clauses clearly did not establish a specific method for determining union majority, a Board election was still necessary, in his opinion, to protect the section 7 rights of the employees. He did not view the clauses as precluding the employer's insistence on an election since such insistence was a matter of right in accordance with the Board decision in *Linden Lumber* [49] and *Wilder* [50] which were subsequently upheld by the Supreme Court.[51] Member Penello expressed his disagreement with the reversal of the Board's original decision, for the reasons given in his dissent, and would not have accepted the remand from the court of appeals.

Members Kennedy and Penello each dissented separately in the *Smith's Management* case, *supra*, each for the reasons set forth in his respective dissent to the supplemental decision and order in the *Kroger* case, *supra*.

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[49] *Linden Lumber Div, Summer & Co*, 190 NLRB 718 (1971)

[50] *Arthur F Derse, Sr, President, and Wilder Mfg' Co*, 198 NLRB 998 (1972)

[51] *Linden Lumber Div, Summer & Co* v *N L R B*, 419 U S 301 (1974)

In *Union-Tribune Publishing Co.*,[52] a Board panel upheld the right of an employer to refuse to disclose information to a union about its strike contingency plans. Such plans involved a periodic assignment of nonunit employees to familiarize themselves with the job routine of unit employees so that, in the event of a strike, the nonunit personnel could perform the struck work. Disclosure of the information sought should not have been forthcoming, in the view of the Board panel, as the nonunit employees did not actually perform unit work or any duties within the union's jurisdiction and the information was not relevant or necessary to the union's performance of its statutory obligation or for its intelligent processing of grievances. Therefore, bargaining unit members were not directly affected by the employer's strike contingency plans and information sought by the union regarding such a plan had no relevance.

Finally, in *Amoco Oil Co.*,[53] the Board found an employer, party to successive contracts with one union which represented separate units of production and maintenance employees and plant guards, in violation of section 8(a)(5) for refusing to recognize a plant guard as a duly selected representative of the production and maintenance employees. Preliminarily stating the general principle of law that each party to a collective-bargaining agreement has the right to designate its own individual representative for purposes of grievance handling and negotiations unless that chosen representative "is so tainted with conflict or so patently obnoxious as to negate the possibility of good-faith bargaining" (*General Electric Co.*, 173 NLRB 253, 254 (1968)), the Board was of the view that the mere plant guard status of the production and maintenance employees' designated representative was in and of itself insufficient to place the representative in that category of an unacceptable bargaining agent. Nor did section 9(b)(3) of the Act justify the employer's refusal to deal with the plant guard as the production and maintenance employees' selected representative since that section merely precludes certification of a union which seeks to represent guards and nonguards in the same unit.

E. Union Interference With Employee Rights

Even as section 8(a) of the Act imposes certain restrictions on employers, section 8(b) limits the activities of labor organizations and their agents. Section 8(b)(1)(A), which is analogous to section 8(a)(1), makes it an unfair labor practice for a union or its agent to restrain or coerce employees in the exercise of their section 7 rights

[52] 220 NLRB No 195 (Members Fanning, Jenkins, and Penello).
[53] 221 NLRB No. 184.

which generally guarantee them freedom of choice with respect to collective activities. However, an important proviso to section 8(b)(1)(A) recognizes the basic right of a labor organization to prescribe its own rules for acquisition and retention of membership. During the past fiscal year, several cases involved this section of the Act.

1. The Duty of Fair Representation

The principle that a labor organization has a duty to fairly represent all employees in a bargaining unit for which it is the statutory representative was first enunciated by the Supreme Court in three companion cases: *Steele* v. *Louisville & Nashville Railroad Co.*,[54] *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*,[55] and *Wallace Corp.* v. *N.L.R.B.*[56] In *Steele* and *Tunstall*, the Court held that a statutory representative under the Railway Labor Act "cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the [bargaining unit]." [57] In *Wallace*, the Court held that the same duty of fair representation applied to bargaining representatives selected under the National Labor Relations Act.

The Board first stated its doctrine of this duty of fair representation in *Miranda Fuel Co.*,[58] holding that section 8(b)(1)(A)

> prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair. [Footnote omitted.] [59]

Since *Miranda*, the doctrine of the duty of fair representation has been refined and discussed in numerous Board and court decisions. Three cases decided during the past fiscal year involving application of this doctrine in grievance and arbitration proceedings are *Intl. Assn. of Machinists & Aerospace Workers, Local Union 697 (H. O. Canfield Rubber Co. of Va.)*;[60] *Teamsters, Chauffeurs, Warehousemen & Helpers Local Union 542, IBT (Golden Hill Convalescent Hospital)*;[61] and *United Steelworkers of America, Local Union 2610 (Bethlehem Steel Corp.)*.[62]

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[54] 323 U.S. 192 (1944).
[55] 323 U.S. 210 (1944)
[56] 323 U.S. 248 (1944).
[57] 323 U.S at 204
[58] 140 NLRB 181 (1962).
[59] 140 NLRB at 185
[60] 223 NLRB No. 119 (Members Fanning and Jenkins, Chairman Murphy concurring in part and dissenting in part).
[61] 223 NLRB No. 72 (Chairman Murphy and Member Penello, Member Jenkins dissenting).
[62] 225 NLRB No. 54 (Members Fanning, Penello, and Walther).

In *H. O. Canfield,* the Board panel majority held that a union violated section 8(b)(1)(A) by refusing to process the grievance of a nonmember unit employee unless he paid the union the costs it incurred in processing the grievance, although no such claim was made upon members. In so holding, the majority rejected the union's contention that collection of costs from nonmembers was reasonable and necessary to protect the members' dues from being eroded by expenditures on behalf of nonmembers. The majority cited the analogous *Hughes Tool Co.* case [63] for the proposition that where, as here, a labor organization was barred by state law from obtaining compulsory membership it could not require a fee from nonmember employees for performing services to which such employees were entitled as a matter of right. The majority further found that the union by charging only nonmembers for grievance representation had discriminated against nonmembers; that a grievance procedure is vital to collective bargaining and that grievance representation is due employees as a matter of right; that, although a union is permitted wide discretion in its handling of grievances, a union cannot lawfully refuse to process a grievance of an employee in the unit because he is a nonmember; and that to discriminate against nonmembers by charging them for what is due them by right restrains them in the exercise of their statutory rights.

Chairman Murphy agreed that the union violated section 8(b)(1)(A) by requiring nonmembers to pay the costs of processing a grievance to the extent that such fees exceeded those paid by members She concluded, however, that unions should be permitted to require the grieving nonmember to pay the equivalent of dues for the remaining life of the contract, on grounds that the employees should bear some responsibility concomitant to that of the union, and that such payments would be analogous to the lawful requirement of fees for the use of an exclusive hiring hall.

In *Golden Hill Convalescent Hospital,* the panel majority, consisting of Chairman Murphy and Member Penello, held, adopting the administrative law judge's recommended dismissal of the complaint, that a union did not breach its duty of fair representation by refusing to present to the arbitrator the grievants' contention that the union business agent conspired with the employer to bring about the grievants' discharges. In so holding, the majority concluded that it was for the union attorney to determine what evidence should have been presented to the arbitrator and that a grievant had no special right to dictate what arguments should have been made. The majority also emphasized that the union acted on the advice of its counsel in proceeding to arbitration, despite the contrary recommendation of

[63] 104 NLRB 318 (1953).

the business agent, that the union attorney "vigorously and diligently represented the grievant as to each allegation made by the Employer and objected to the introduction of [the business agent's] adverse testimony," and that the grievants' interests were therefore adequately represented.[64]

Member Jenkins, dissenting, found that the union's attorney refused to even discuss with the grievants their evidence that the business agent desired their discharges and that the attorney made no attempt to impeach the agent's credibility at the arbitration hearing. Furthermore, the dissent emphasized, the grievants were unable to obtain independent counsel, although advised to do so by the union's attorney, and the union counsel cross-examined the grievants' witnesses and in his brief to the arbitrator attacked the grievants' allegations that the union had sought their discharges. On the basis of these circumstances, Member Jenkins concluded that the interest of the union conflicted with those of the grievants, that the union failed to fully and fairly represent them, and that this failure constituted a breach of the duty of fair representation in violation of section 8(b)(1)(A) of the Act.

Bethlehem Steel involved the grievances of two employees who were suspended, one for 25 days and the other for 4 days, for fighting with each other. The union processed the grievance over the 25-day suspension through the third step of the grievance procedure, resulting in a reduction of the suspension to 14 days, but withdrew the grievance over the 4-day suspension of the other employee at the second step.

The administrative law judge stated that "the real issue relative to [the union's] withdrawal of the [charging party's] grievance [over the 4-day suspension was] whether by withdrawing it [the union] failed to accord [the charging party] the fair representation to which [the charging party] was entitled." The Board panel agreed that this was the relevant issue, but held, contrary to the administrative law judge, that the union's refusal to process further the latter grievance did not constitute a violation of section 8(b)(1)(A). In so holding, the panel concluded that the union's efforts to obtain equalization of the employer-imposed discipline for the altercation, for which both employees accepted some responsibility, was reasonable. The panel further concluded that the charging party could not properly claim that his warranted reputation for engaging in offensive conduct should have played no part in the union's decision not to pursue his grievance further. In reaching this conclusion, the panel noted that some of the charging party's abusive actions had at various times been directed at the union official responsible for withdrawing the grievance, but that

[64] Chairman Murphy expressed her view that a bargaining agent should never be required to pay for counsel of a grievant's own choosing.

there was no showing that the union official's decision was motivated by personal resentment.

2. Other Forms of Coercion

In *Los Angeles County District Council of Carpenters; Electronic & Space Technicians Loc. 1553 (Hughes Helicopters, Div. of Summa Corp.)*,[65] the Board concluded that a union could lawfully discipline its members for attempting to replace it with another union, and that the record in the case failed to establish that the individual charging parties were expelled from the union for testifying against it in a Board unfair labor practice hearing, rather than for their organizing activities on behalf of a rival labor organization. The Board based its conclusion on its findings that (1) there was no evidence that the union was hostile to the alleged discriminatees because they gave adverse evidence; (2) the timing of the expulsions; and (3) the lack of sufficient evidence that the alleged discriminatees were treated disparately from other members who supported the rival union.

One case decided this past fiscal year involving a union's alleged conflict of interest with the employees it represented was *Anchorage Community Hospital*.[66] In that case a majority of the Board held that the union had not sacrificed the interest of the employees it represented in order to protect either the employer or the trust funds on the following facts: 7 of the 15 trustees of the employer, a nonprofit hospital, were business representatives or officers of the union; an eighth trustee was administrator of joint employer-union health and welfare and pension trust funds; an officer of a joint employer-union fund was on the employer's executive committee; the union had extended an interim construction loan to the hospital; and the joint health and welfare trust funds paid the hospital for medical services.

In so holding, the majority emphasized that the seven union officials constituted a minority of the hospital's board of trustees; that the trust fund administrator and officer were both responsible to the trusts, rather than to either the union or the hospital; that the union's loan to the hospital was fully secured; and that the amount paid to the hospital by the health and welfare trust comprised only 5 percent of the trust's gross receipts and 10 percent of the hospital's total revenues.

Member Walther, dissenting, took the position that the trust fund administrator's independence from the union was at least question-

[65] 224 NLRB No. 54.

[66] 225 NLRB No. 75 (Chairman Murphy and Members Fanning, Jenkins, and Penello, Member Walther dissenting).

able, and that consequently the union had "working control" of the hospital's board of trustees. He therefore found that in fact the union unlawfully sat "on both sides of the bargaining table" and that the danger of conflict of interest was not vitiated by the nonprofit nature of the employer and the fact that its directors received no compensation. Member Walther found a further conflict of interest in that four of the five members of the board of trustees' executive committee were affiliated either with the union or with funds established for the benefit of its members, and that between meetings of the board of trustees the executive committee was empowered to transact necessary business for the hospital. Since the hospital's bylaws provided that the executive committee was authorized to conduct business whenever a quorum of at least one-half (three members) of the committee was present, it was possible that official action could be taken by a majority vote of two members. The dissent also pointed to the fact that the union contract was accepted by the executive committee when only three members were in attendance as evidence that, conceivably, the hospital's labor relations policies could be controlled by only two members of the board. Finally, he concluded that although it had not been shown that the union had failed to represent the hospital's employees, the test for a union's disqualification "is not whether it in fact failed to obtain the most favorable terms and interpretations of the contract for its members, but whether there exists a serious temptation to permit this to occur," and that such temptations were present in the case.

F. Coercion of Employers in Selection of Representatives

1. Union Fines

Section 8(b)(1)(B) of the Act makes it an unfair labor practice for a union to coerce or restrain an employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances. Several cases decided by the Board in the past fiscal year involved this section of the Act. Two of these cases [67] dealt with whether or not a union violated section 8(b)(1)(B) of the Act by disciplining a supervisor-member for performing rank-and-file work during a strike. In *Associated Food Stores*, the majority held that a union could not lawfully discipline a supervisor-member if the amount

[67] *Warehouse Union Loc 6, ILWU (Associated Food Stores)*, 220 NLRB No. 123 (Chairman Murphy and Member Jenkins, Member Fanning concurring, Member Penello dissenting in part and concurring in part), and *Glaziers & Glassworkers Local Union 1621, Intl Brotherhood of Painters & Allied Trades (Glass Management Assn)*, 221 NLRB No 91 (Members Jenkins and Penello, Member Fanning concurring in part and dissenting in part)

of such work performed by the supervisor was no more than he or she had normally done prior to the strike. In so holding, the majority relied on the Board's decision in *Skippy Enterprises*,[68] in which the facts were similar, and distinguished the Supreme Court's decision in *Florida Power & Light Co.*[69] on grounds that there the supervisors, whose union-imposed discipline the court determined to be lawful, crossed the picket lines and spent a larger percentage of their time performing unit work than they had prior to the strike.

Member Fanning, concurring, emphasized that he had dissented in *Skippy*, but nonetheless reached the same result as the majority here because, in his view, the strike itself in *Associated Food Stores* constituted a violation of section 8(b)(1)(B) of the Act and, consequently, any discipline imposed on supervisors who crossed the picket line also violated that section.

In his dissenting and concurring opinion, Member Penello, who had also dissented in *Skippy*, expressed his position that supervisors who perform only a minimal amount of rank-and-file work during a strike may not be subjected to union discipline, whereas discipline may lawfully be imposed on supervisors who perform more than a minimal amount of such work. Accordingly, based on the amount of unit work performed by each of the disciplined supervisors during the strike, he agreed with the majority that the discipline meted out to two of the supervisors, one of whom performed no unit work and the other only an insubstantial amount of such work, was unlawful. Member Penello additionally reiterated his position, expressed in both *Skippy* and *Max M. Kaplan Properties*,[70] that the respective proportions of working time spent by supervisors in performing rank-and-file work prior to and during a strike was irrelevant to the determination of whether or not the union's discipline of the supervisor violated section 8(b)(1)(B) of the Act.

In *Glass Management Assn.*, a Board panel had further opportunity to apply the Supreme Court's standard that in *Florida Power:*

> [A] union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.[71]

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[68] *Wisconsin River Valley District Council, Carpenters (Skippy Enterprises)*, 218 NLRB 1063 (1975)

[69] *Florida Power & Light Co* v. *IBEW, Loc 641, et al*, 417 U.S. 790 (1974).

[70] *United Brotherhood of Carpenters & Joiners of America, Local Union 14 (Max M Kaplan Properties)*, 217 NLRB No 13 (1975).

[71] 417 U S. at 804-805

Glass Management Assn. involved 18 union supervisor-members who crossed a picket line to work for various employers during a strike against all members of a multiemployer association. The panel majority first considered the threshold issue of whether certain of the disciplined supervisors were, in fact, their own "employers," whom the union was free to discipline, regardless of how much unit work they performed during the strike, on grounds that section 8(b)(1)(B) was intended to protect employers in their selection of representatives, and not to protect the employer when acting as his or her own representative. In determining which of the supervisors were employers, the majority found that four of the supervisor-members were sole owners of their respective businesses and therefore employers. In so finding, the majority rejected the administrative law judge's finding that because these individuals performed a representative function for the multiemployer association of which they were members the union's sanctions against them coerced and restrained the association in the selection of its representatives. The majority also concluded that 11 other disciplined supervisors, who, either personally or together with other family members, held more than a 25-percent ownership interest in their companies, should be considered as employers, and therefore dismissed the 8(b)(1)(B) allegations of the complaint as to 15 of the 18 supervisors. With respect to the other three supervisor-members, the panel majority concluded, as in *Associated Food Stores*, that a determination as to whether or not the union violated section 8(b)(1)(B) by disciplining them hinged on the amount of bargaining unit work, as compared to supervisory functions, performed during the strike by each individual. As to these three, the majority held that two of them spent more than a minimal amount of their time during the strike performing struck work and that consequently the union's discipline of them was lawful. As to the third supervisor, who had performed no bargaining unit work prior to the strike, but spent 2 to 3 percent of his time doing such work during the strike, the majority found that the sanctions imposed on him would have adversely affected his performance of grievance-adjustment and collective-bargaining functions for his employer and, consequently, held that the union by citing and fining him violated section 8(b)(1)(B) of the Act.

Member Fanning, concurring in part and dissenting in part, would have dismissed the complaint in its entirety on the ground that all of the supervisors involved performed bargaining unit work behind a lawful picket line and were disciplined for that reason, and that such discipline was entirely lawful under his interpretation of the Supreme Court's decision in *Florida Power*. Member Fanning further noted that the majority had "equated 'administrative' functions with 'mana-

gerial' functions which somehow become 'supervisory' functions and, therefore (?), 8(b)(1)(B) functions."

Another union fine case was *Loc. 702, IBEW (Coulterville Tree Service)*.[72] In that case, a union supervisor-member, acting within the authority delegated to him by his employer, selected as temporary headquarters for his crew a location unacceptable to the union. The union business representative accordingly contacted the employer, whose general superintendent ordered the supervisor to move his headquarters. The supervisor complied only partially with this instruction and, although he was not disciplined by the employer, was subsequently fined $200 by the union for basing his crew in a town not designated as a headquarters town by the union.

A majority of the Board held that the fine did not violate section 8(b)(1)(B) of the Act, on the grounds that once the supervisor refused to obey the employer's order to move his location he was engaged in frolic of his own design and was no longer acting in a manner consistent with his authority as the employer's representative "for the purposes of collective bargaining or the adjustment of grievances." Indeed, in the majority's opinion, he was attempting to arrogate to himself the disposition of a matter which had already been resolved by his employer. The majority expressed the view that the supervisor acted at his peril in this regard and, citing the Supreme Court opinion in *Florida Power & Light, supra,* it found no basis for a conclusion that the union's fines "could [have] adversely affect[ed his] conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on *behalf of the employer,*" especially since such conduct was so antithetical to his employer's wishes and interest.

In their dissenting opinion, Members Kennedy and Penello expressed their view that the supervisor was performing a supervisory function when he selected his crew's headquarters and that his selection was made pursuant to a provision in the collective-bargaining agreement between the employer and the union that the "Employer shall set up headquarters in the nearest town to the job where suitable working quarters can be obtained by workmen." The dissenters argued that this provision left the designation of a headquarters solely to the discretion of the employer, and that, although at the union's instigation the employer directed the supervisor to move, the record failed to establish that the employer thereafter abandoned the supervisor or stripped him of his authority to select headquarters towns. In reaching this conclusion, the dissenters emphasized that the

[72] 219 NLRB 251 (Chairman Murphy and Members Fanning and Jenkins, Members Kennedy and Penello dissenting).

employer filed a grievance over the issue in support of the supervisor. The dissent further concluded that, even if the supervisor was no longer acting as such after he disobeyed the employer's orders to move, the union's charges against him were based in part on his original selection of the headquarters, which was made in any event when he was acting within his authority as a supervisor, and that any later revocation of that authority was irrelevant. Accordingly, the dissenters concluded that the union utilized its internal disciplinary machinery in an attempt to impose its interpretation of the collective-bargaining agreement upon the supervisor, thereby infringing on the employer's right to control the supervisor in the latter's representative capacity.

2. Picketing

Another significant decision this past fiscal year involving a union's attempt to coerce an employer in the selection of its representative was *Intl. Organization of Masters, Mates & Pilots, Marine Div., ILA (Westchester Marine Shipping Co.)*[73] In that case a majority of the Board panel held that a union violated section 8(b)(1)(B) of the Act by picketing members of a multiemployer association with the object of forcing the employers to replace their licensed deck officers, who were the employers' representatives for the purpose of adjusting grievances, with members of the union. Contrary to the administrative law judge, however, the majority additionally found that the picketing, admitted objects of which were to secure the union's recognition as bargaining agent and to impose on the employers the union's contract covering licensed deck officers, interfered with the employers' freedom to set the terms and conditions of employment of their section 8(b)(1)(B) representatives and, consequently, interfered with the selection of the representatives themselves. The majority therefore ordered the union to cease and desist from picketing not only to force the employers to replace their licensed deck officers with members of the union, but also to obtain recognition and a contract covering those officers.

Member Jenkins, dissenting in part, agreed with the majority and the administrative law judge that the union's attempt to force the employers to replace the latters' officers with union members violated section 8(b)(1)(B), but found that conduct to be the sole violation.

G. Union Bargaining Obligation

A labor organization no less than an employer has a duty imposed by the Act to bargain in good faith about wages, hours, and other terms and conditions of employment. A labor organization or an

[73] 219 NLRB 26 (Chairman Murphy and Member Kennedy, Member Jenkins dissenting in part)

employer respectively violates section 8(b)(3) or 8(a)(5) if it does not fulfill its bargaining obligation.

In *Consolidated Papers*,[74] the issue was whether the employer violated section 8(a)(5) of the Act by rejecting a union's demand for separate negotiations and insisting to impasse that bargaining continue on a multiunion basis. From 1924 until 1966, the employer had bargained jointly with locals of 4 international unions covering some 3,000 hourly paid employees at 8 plants. In 1966 two of the unions, which had represented primarily craft employees, withdrew from the joint group by mutual agreement. This action left the remaining 2 unions, i.e., various locals of the United Paperworkers International Union, and Local 1147 of the IBEW, as bargaining representatives in a joint group comprised of some 2,700 employees engaged in production of paper products (represented by the Paperworkers), and approximately 150 employees at 6 of the 8 plants who were represented by Local 1147 and performed work as electricians, electric motor tenders, and in the production, maintenance, and distribution of electric power.

In 1974, Local 1147 gave timely and unequivocal notice of its intent to withdraw from the joint group to the employer and the other unions in the group and to bargain separately for the employees it represented at the six plants. The employer, however, refused to recognize the employees represented by Local 1147 as an appropriate unit, apart from the joint group, and to bargain with that union separately. The panel majority held that by this refusal the employer violated section 8(a)(5) of the Act on grounds that (1) that union had retained its distinct identity throughout the period of joint bargaining by, *inter alia*, maintaining separate administrative facilities, seniority lists (or at least lists which separately identified its members), and stewards; (2) the most recent collective-bargaining agreement did not treat the joint group as a single entity and was ratified and signed separately by Local 1147; and (3) the unit that Local 1147 sought to represent was an appropriate bargaining unit. In reaching this last conclusion, the majority held that (1) although the unit sought by Local 1147 was "not truly a craft unit, the unit [had] a craft nucleus, and [involved] only employees engaged in . . . related work" who had a strong community of interest with each other; (2) the unit was established by a long collective-bargaining history; (3) although section 9(c)(5) of the Act prohibits the Board from finding a unit appropriate solely on the basis of the extent of organization, that factor could have been taken into consideration as one of the factors in unit determination, together with other factors, provided, of course, that it was not the governing factor. Finally, the majority found no merit

[74] 220 NLRB No 197 (Members Fanning and Jenkins, Member Penello dissenting)

to the employer's contention that it would not effectuate the purposes of the Act to allow Local 1147 to bargain separately, emphasizing that only about 150 of the more than 2,700 production and maintenance employees were affected, and that the withdrawal of the craft unions from joint bargaining in 1966 had not disrupted the employer's stable labor relations.

Member Penello dissented, finding that the unit sought by Local 1147 was inappropriate on grounds that (1) the unit was confined to employees at only six of the employer's eight plants, although there were employees at the other plants who performed the same kind of work; (2) the proposed unit did not consist of identifiable homogeneous skilled craftsmen; and (3) the interests of the employees in the unit sought were merged with those in the joint group. In making this latter finding, the dissent found that the severance criteria for a larger unit established in *Mallinckrodt Chemical Works, Uranium Div.*[75] were relevant. The dissent further emphasized that all employees in the joint group shared a community of interest, as evidenced by standardized provisions for seniority, fringe benefits, and work scheduling. Finally, Member Penello contended that even if the unit sought were appropriate the employer did not unlawfully refuse to bargain with Local 1147, citing two prior Board decisions [76] for the proposition that "where there are two units appropriate for bargaining, neither party acts in derogation of the statute by its insistence on bargaining in one of the appropriate units."

In another case [77] involving the bargaining obligation, the employer operated a chain of retail foodstores, some of which were combined with drug centers. The union represented the foodstore employees, and an independent union certified by the Board represented the employees in the drug centers. The employer remodeled five of the combined foodstore/drug centers and, *inter alia*, eliminated or modified partitions between the two types of operations and installed common checkout counters. The union thereupon demanded that the employer apply its collective-bargaining agreement with the union to the drug center employees, relying on a provision in the contract requiring the employer to establish a nonfood clerk classification and pay rate in any after-acquired nonfood departments instituted in the foodstores within the geographical jurisdiction of the contract. The employer refused to apply the union's contract to the remodeled drug centers, whereupon the latter filed a grievance and demanded arbitration. The

[75] 162 NLRB 387 (1966)

[76] *Newspaper Production Co*, 205 NLRB 738 (1973), enfd 503 F 2d 821 (C.A. 5, 1974,) *United Paperworkers Intl. Union and its Local Union 1027 (Westab—Kalamazoo Div, Mead Corp)*, 216 NLRB 486 (1975)

[77] *Retail Clerks Loc 588, Retail Clerks Intl Assn. (Raley's)*, 224 NLRB No 209 (Chairman Murphy and Members Jenkins and Walther)

employer then filed charges with the Board, alleging that the union violated section 8(b)(3) of the Act by insisting upon recognition, including the demand for arbitration, and section 8(b)(2) and 8(b)(1)(A) by seeking to force the employer to apply the terms of its contract, including the union-security clause, to the drug center employees

The Board panel rejected the union's contention that the Board should defer to the arbitral process under *Collyer* [78] as the underlying issue presented by this controversy was not contractual but, rather, related solely to a question of accretion, which the Board has held is a matter solely within its competency to decide.[79] The panel found that the remodeling did not result in an accretion of the drug center employees to the foodstore unit, inasmuch as the drug center employees continued to constitute a separate appropriate bargaining unit. In reaching this result, the panel relied on the continued separate day-to-day supervision of the foodstore and drug center employees, the lack of employee interchange, the separate administrative chains of command, the different merchandising procedures governing the two operations, the separate bargaining history, and the fact that the independent union was certified to represent the drug center employees. The panel concluded that the changes instituted by the employer had not impaired the separate community of interest shared by the drug center employees, that they remained an appropriate unit for collective bargaining, and that it would have been improper to extend the union's contract to the aforesaid employees "under the guise of accretion."

The panel found that the union's insistence upon arbitration to compel recognition was, in the circumstances of this case, insistence upon bargaining for an inappropriate unit in breach of the union's obligation to bargain in good faith and was violative of section 8(b)(3) of the Act.

In *Tool & Die Makers' Lodge 78 of District 10, IAM (Square D Co., Milwaukee Plant)*,[80] the union refused, in the course of a grievance proceeding, to allow an employer official to see undisclosed documents, allegedly signed by a company executive which the union claimed would enable it to "win" the grievance at an arbitration hearing. The majority, consisting of Members Fanning, Jenkins, and Penello, held that the union did not violate section 8(b)(3) of the Act by refusing to reveal the documents, concluding that neither an employer nor a union is statutorily required to furnish to the other party evidence of an undisclosed nature that the possessor believes relevant and con-

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[78] *Collyer Insulated Wire, a Gulf & Western Systems Co*, 192 NLRB 837 (1971)

[79] See *Hershey Foods Corp*, 208 NLRB 452 (1974), *Combustion Engineering*, 195 NLRB 909 (1972)

[80] 224 NLRB No. 18 (Members Fanning, Jenkins, and Penello, Chairman Murphy and Member Walther dissenting).

clusive with respect to its rights in an arbitration proceeding. The majority pointed out that the contrary view, logically extended, would impose a statutory obligation on an employer or a union to examine, upon request, all evidence in its possession relating to a particular grievance and to turn over for the inspection of the other party the evidence deemed "relevant" to the grievance. In concluding, the majority expressed its view that actual relevancy is the determining factor, not the mere belief or boasting of one of the parties, and that a contrary finding would lead to broader discovery than is necessary or desirable in unfair labor practice cases

Chairman Murphy and Member Walther, dissenting, took the position that, if the union's claims as to the worth of its evidence were taken at face value, furnishing the information to the employer could have resulted in a settlement of the grievance and thus the employer should at least have had the opportunity to evaluate the evidence prior to an arbitration proceeding.[81] The dissent further urged that, inasmuch as the union had proclaimed that the documents would win its case, their relevancy appeared to be indisputable, and that there was no way to determine relevancy of undisclosed evidence other than by the declaration of its possessor.

H. Prohibited Strikes and Boycotts

The statutory prohibitions against certain types of strikes and boycotts are contained in section 8(b)(4) of the Act. Clause (i) of that section forbids unions to strike, or to induce or encourage strikes or work stoppages by any individuals employed by any person engaged in commerce, or in any industry affecting commerce; and clause (ii) makes it unlawful for a union to threaten, coerce, or restrain any such person for any of the objects proscribed by subparagraphs (A), (B), (C), or (D). Provisos to the section exempt from its prohibitions "publicity, other than picketing" and "primary strike or primary picketing."

1. Court Suits and Grievance Proceedings as Proscribed Conduct

Two of the significant cases decided during the past fiscal year involved alleged violations of section 8(b)(4)(ii)(A) or (B) of the Act arising out of a court action or grievance proceeding filed by a union.

[81] In this connection, Chairman Murphy noted that in her view full disclosure by all parties should be required to any proceeding in accord with the Federal Rules of Civil Procedure

In *Intl. Union of Operating Engineers, Local Union 12 (Robt. E. Fulton)*,[82] a Board panel concluded that the union committed no unfair labor practice by bringing a lawsuit against a general construction contractor to enforce provisions in a collective-bargaining agreement which violated section 8(e) of the Act. The pertinent provisions, when taken together, essentially permitted the union to resort to "legal or economic procedures" and allowed employees to honor any picket line authorized by the union if the contractor utilized a subcontractor who did not have a contract with the union or who employed members of a different union. When the general contractor engaged a subcontractor who had no collective-bargaining agreement with the union, the latter filed a lawsuit against the general contractor to enforce the subcontracting clauses of the contract between the union and the general contractor. The Board panel found that the subcontracting clauses, standing alone, were lawful under the construction site exemption from section 8(e)'s proscription of agreements whereby an employer agrees not to handle products of, or agrees to cease doing business with, any other person. The panel further found, however, that the self-help provisions permitted the union to enforce the agreement through means prohibited by section 8(b)(4)(B) and therefore took the subcontracting clauses outside the protection of the 8(e) proviso. Consequently, the panel held that the contract provisions when considered together violated section 8(e) of the Act. However, it further concluded that although portions of the contract were unlawful the filing of a lawsuit to enforce them was not, on grounds that such action, even if punitive damages are requested, did not constitute impermissible restraint or coercion within the meaning of section 8(b)(4)(ii).

In *Sheet Metal Workers Intl. Assn., Loc. 28 (Carrier Air Conditioning Co., Div. of Carrier Corp.)*,[83] the Board panel held that the union, whose collective-bargaining agreement with an air-conditioning contractor permitted subcontracting of unit work only to employers that were signatories to contracts with the union, did not violate section 8(b)(4)(i) or (ii)(B) by bringing charges before a joint union-employer association grievance board alleging that the contractor breached a no-subcontracting clause. The air-conditioning contractor took the position that the design of one of its products required that these parts be fabricated and installed only by specially trained personnel working under the supervision of the contractor's engineers. The air-conditioning contractor's position on this issue led to a number of disputes between various contractors which utilized the air-con-

[82] 220 NLRB No 91 (Chairman Murphy and Members Jenkins and Penello)
[83] 222 NLRB No. 110 (Chairman Murphy and Members Fanning and Penello)

ditioning contractor's unit and the union, resulting in the grievance proceedings mentioned above. In holding that this action did not violate section 8(b)(4)(B), the panel found that by filing the grievance the union merely "sought to enforce certain provisions of [its] bargaining agreement against a party to that agreement through the peaceful means provided by the agreement and by no other means." [84]

2. Ally Doctrine

Three of the significant cases decided during this fiscal year involved the issue of whether an allegedly neutral employer is in fact an ally of the primary employer and consequently unprotected by section 8(b)(4)(B) of the Act.

In *Graphic Arts Intl. Union (GAIU), Loc. 277; Graphic Arts Intl. Union (S & M Rotogravure Service)*,[85] an affilate of the international union struck a printing house, preventing the printing company from performing rotogravure preparatory work. The printing house then suggested to one of its customers that it engage a rotogravure front-end shop which performed preparatory work to do that phase of the printing house's work for that customer and, consequently, the latter entered into a contract with the rotogravure front-end shop for the work. The customer also agreed with the printing company that the latter would deduct from the customer's total bill the amount the customer paid to the front-end shop. Thereafter, the international union and its local advised the front-end shop that performance of the work could lead to establishment of a picket line. The rotogravure front-end shop acceded to the threat and did not do the work.

The Board panel held that the front-end shop was an "ally" of the printing company and that, therefore, the unions' threat did not violate section 8(b)(4)(B) of the Act. In so holding, the panel stated that the "'ally doctrine' . . . rests upon the assumption that where an employer attempts to avoid the economic impact of a strike by securing the services of others to do his struck work . . . the striking union has a legitimate interest in preventing those services from being rendered." The panel predicated its conclusion that there was an alliance between the printing house and the front-end shop on its finding that that arrangement was undertaken principally to assist the printing house, rather than the customer. In so finding, the panel emphasized that the printing company initiated the arrangement between the front-end shop and its customer and the front-end shop was to perform only a portion of the work the printing house

[84] Quoting *Southern California Pipe Trades Council 16 of the United Assn. et al. (Associated General Contractors of Calif.)*, 207 NLRB 698, 699 (1973)

[85] 219 NLRB 1053 (Chairman Murphy and Members Jenkins and Penello)

had contracted to do, but that this portion, the rotogravure preparation, was essential in order for the printing company to substantially comply with its contract with the customer.

Another case involving the same parties, *inter alia*, *Graphic Arts Intl. Union; Loc. 277, Graphic Arts Intl. Union (S & M Rotogravure Service)*,[86] arose as a result of the printing house's announcement, after the strike involved in the earlier cases, that it had decided to terminate altogether its rotogravure preparatory operation in which the striking employees had previously worked.

A majority of the Board panel dismissed the consolidated complaints, on grounds that the "ally" doctrine had been properly invoked as defense as there was no clear and convincing proof that the printing company ever in fact permanently closed down its rotogravure preparatory operation regardless of its announced decision to do so. The majority observed that the record was unclear with respect to the amount of rotogravure work performed by the printing company following the strike, but what was clear, however, was that, regardless of the printing house's good or bad faith in announcing that it had decided to terminate all such operations, at no time material to these proceedings did the printing company, in fact, entirely cease processing rotogravure cylinders.

In response to the General Counsel's contention that the so-called "ally" doctrine should have been suspended here because the printing house's decision was irrevocable, the majority stated that such an abridgement of the doctrine should not have been sustained short of clear and convincing proof concerning the permanency of the primary employer's (the printing company's) closing. The majority pointed out that, clearly, a decision is not irrevocable when made by one with the power to revoke. The majority took the position that, if any conclusion was warranted with respect to the printing company's future method of processing rotogravure cylinders, it was that the method of the future was speculative and nothing more. The majority was of the opinion that in cases such as the instant one the more important consideration was not the announcement of an intention to terminate operations, but its accomplishment.[87]

Chairman Murphy, dissenting, expressed the view that the printing company decided to discontinue the rotogravure preparatory operation out of economic necessity and that its only feasible course of action was to subcontract that work to others, integrating their

[86] 222 NLRB No 57 (Members Fanning and Penello, Chairman Murphy dissenting)

[87] Member Fanning further noted, *inter alia*, his view that an employer's decision to permanently close down part of his business affected by a strike, accompanied by a partial cessation of work, does not terminate the strike, but leaves the striking employees free to protest the performance of the struck work by employees of other employers.

product into its remaining printing operations. Accordingly, she concluded that the striking employees no longer could reasonably foresee performing such work for the printing house in the future and that it was thus not "struck work which the union could legitimately pursue." She further found that the printing house had in fact done all it could to implement its decision and concluded that the subcontractors were therefore neutral employees protected by section 8(b)(4)(B) of the Act.

In another case involving the "ally" doctrine, *Oil, Chemical & Atomic Workers Intl. Union, Loc. 1-128 (Petroleum Maintenance Co.)*,[88] a maintenance company had an agreement with a petroleum company whereby the maintenance company furnished maintenance personnel to the petroleum company. While on the job, the employees of the petroleum and maintenance companies performed the same work. The maintenance company's employees' wages and fringe benefits were based on those of the petroleum company's employees, and the location where a maintenance company employee worked on any given day was determined by the petroleum company. When a sister local of the union struck the petroleum company, the union refused to make further referrals to the maintenance company for work at the petroleum company's jobsite. A Board panel found that the union did not thereby violate section 8(b)(4)(B) of the Act, on grounds that both prior to and during the strike the work performed by the maintenance company's employees was indistinguishable from that performed by the petroleum company's employees, and that during the strike the maintenance company's employees in fact performed struck work. Accordingly, the panel concluded that the maintenance company was an ally of the petroleum company and therefore unprotected by section 8(b)(4)(B).

3. Reserved Gate Picketing

Two significant cases decided during this past year involved issues concerning whether or not a union violated section 8(b)(4)(i) and (ii)(B) of the Act by failing to limit picketing to gates reserved for the use of the primary employer at a construction site.

In *Carpenters Local Union 470, United Brotherhood of Carpenters (Mueller-Anderson)*,[89] the union had a dispute with a general contractor engaged in construction of an apartment complex on land it owned. One of the two entrance gates to the site, as of April 2, 1975, was designated for the use of the general contractor's employees and

[88] 223 NLRB No 82 (Members Jenkins, Penello, and Walther).

[89] 224 NLRB No. 21 (Chairman Murphy and Members Penello and Walther, Members Fanning and Jenkins dissenting).

suppliers as well as those of several subcontractors, and the other was reserved only for certain other subcontractors. The general contractor's employees had, however, until April 9, used both gates. From April 2 to 6 the union picketed only the gate used by the general contractor's employees, with signs directed at the general contractor. On April 7 and 8, the union picketed both gates, again with signs directed at the general contractor. At the end of the day on April 8, the general contractor established a new entrance gate system, reserving the gates and updating them to accommodate new subcontractors, and notified the union in writing of the changes on April 9. Notwithstanding, the union continued to picket both gates from April 9 through 15, although on and after April 9 the general contractor's employees and suppliers used only the gate reserved for them, along with employees and suppliers of the subcontractors named on the sign at that gate.

A majority of the Board held that by picketing at both gates the union violated section 8(b)(4)(i) and (ii)(B) of the Act, despite the fact that the general contractor had not properly adhered to the reserved gate system prior to April 9. The majority concluded that "if a reserved gate system initially breaks down, an employer should be allowed to establish a revised reserve gate system and still be protected from secondary picketing so long as the revised system is honored and the labor organization involved is notified of the revision."

Members Fanning and Jenkins took the position in their dissent that after receipt of the general contractor's letter the union had a right to continue to picket both gates until it had satisfied itself that the gates were reestablished in good faith. The dissenters expressed the view that the majority holding constituted a "sweeping extension" of the majority view in *Markwell and Hartz*,[90] in which Members Fanning and Jenkins had also dissented and which had held that the legality of common situs picketing in the construction industry was to be determined under the *Moore Dry Dock* standards.[91] In their *Mueller-Anderson* dissent, Members Fanning and Jenkins found that *Markwell & Hartz* was inapposite in a case where the primary employer was a general contractor engaged in its normal business of

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[90] *Building & Construction Trades Council of New Orleans (Markwell & Hartz)*, 155 NLRB 319 (1965), enfd 387 F. 2d 79 (C.A 5, 1967), cert denied 391 U S 914 (1968)

[91] *Sailors' Union of the Pacific (Moore Dry Dock Co.)* 92 NLRB 547 (1950), in which the Board, in order to accommodate lawful primary picketing while shielding secondary employers and their employees from pressures in controversies not their own, laid down certain tests to establish common situs picketing as primary: (1) the picketing must be strictly limited to times when the situs of the dispute is located on the secondary employer's premises, (2) at the time of the picketing the primary employer must be engaged in its normal business at the situs, (3) the picketing must be reasonably close to the location of the situs, and (4) the picketing must clearly disclose that the dispute is with the primary employer.

real estate development on its own premises, rather than a contractor constructing buildings for others. Accordingly, Members Fanning and Jenkins were of the view that the rule enunciated in *General Electric*,[92] permitting appeals to employees of other contractors engaged in work related to the primary employer's normal business operations, was applicable, and that the picketing was therefore lawful throughout its duration.

The majority found no merit in either position of the dissent, concluding that nothing in the record indicated that the union's reason for picketing at both gates after April 9 was to satisfy itself that the general contractor had reestablished the gates in good faith. The majority further concluded that there was no legal significance in the fact that the general contractor was erecting an apartment complex on land it owned, on grounds that the determinative fact was that the picketing occurred at a common situs in the construction industry, and that the identity of the site's owner was irrelevant.

Intl. Union of Operating Engineers, Local Union 450 (Linbeck Construction Corp.)[93] involved, *inter alia*, the issue of whether picketing at a common situs was unlawful because it was not limited to times when the primary employer was engaged in its normal business at the site. In that case, the union was notified by the secondary employer, the general contractor, that the primary employer would be at the site from 5 p.m. to 7 a.m. on weekdays, and around the clock on weekends, and also that the primary's employees, materials, and suppliers would use the gate reserved exclusively for them. At about the same time, the general contractor placed a chain across the gate reserved for the primary and covered the sign designating the gate. When the union asked the meaning of these actions, the general contractor explained that the gate would be barricaded and the sign covered whenever the primary was not at the site. During the next weekend and on one evening the following week, the primary adhered to its arranged work schedule and there was no picketing. The next evening the union picketed the primary at the latter's reserved gate while the primary was working at the site and continued picketing throughout the next day, albeit with the picket signs covered, even though the primary had stopped work at its usual time the evening before and removed its equipment from the site. In response to the general contractor's question, the union stated that it would cover its sign whenever the primary employer's gate was covered,

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[92] *Loc 761, Intl Union of Electrical, Radio & Machine Workers [General Electric] v N L R B*, 366 U.S 667 (1961)

[93] 219 NLRB 997 (Chairman Murphy and Members Fanning and Penello).

and that it intended to picket as long as the primary was on the job. The picketing resulted in the shutdown of the entire job for a week.

The Board panel held that the picketing did not violate section 8(b)(4)(i) or (ii)(B), on grounds that the primary did not observe the time schedule provided to the union by the general contractor. The panel found that supervisors of the primary employer entered the jobsite through the general contractors gate during the day to prepare for the scheduled evening work, that materials for the primary were delivered during the day, and that, accordingly, the primary's presence at the site at times other than those scheduled justified the union's continued picketing. The panel further found that, although the picket signs when covered did not comply with the *Moore Dry Dock* standard requiring identification of the primary employer, under the circumstances this sporadic breach of the standard did not reflect a secondary object in the picketing and consequently did not render it unlawful. Finally, the panel concluded that the union's statement that it would picket with a covered sign whenever the gate was covered was not an unlawful threat, inasmuch as the union could lawfully picket the site as long as the primary employer was working there.

4. Status as a Labor Organization

The proscriptions of section 8(b) of the Act apply only to entities which meet the definition of "labor organization" in section 2(5) of the Act. One of the significant cases decided during this past fiscal year, *Center for United Labor Action* (*Sibley, Lindsay & Curr Co.*),[94] involved the question of whether or not an alleged violator of section 8(b)(4) of the Act was in fact a labor organization subject to that section. The general aim of the Center for United Labor Action (CULA) and its branches was to assist minorities, women, consumers, and workers in opposing organizations allegedly adverse to their rights or interests. In support of employees protesting alleged employer injustices, CULA engaged in such activities as picketing and leafletting employers, but neither the parent organization nor its branches had ever sought to deal directly with employers concerning the latters' employees. The Board majority found that CULA was not a labor organization, on grounds that "the evidence clearly indicates that [CULA] in no way exists for the purpose of dealing with employers over employee problems," emphasizing that CULA had only represented employees before state agencies and that such representation was not relevant in determining its status as a labor organization under

[94] 219 NLRB 873 (Chairman Murphy and Members Fanning, Jenkins, and Penello, Member Kennedy dissenting).

the Act. The majority also found that while individual members of CULA had served on employee committees which dealt with employers on employee problems, such action did not bind either the parent organization or its branches.

Member Kennedy, dissenting, concluded that CULA did exist "in part for the purpose of dealing with employers with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work," and was therefore a labor organization within the meaning of section 2(5) of the Act. Member Kennedy based this conclusion on CULA's activities, including picketing for reinstatement of discharged employees, consumer boycotts of certain employers, and financial aid for organizing activities.

I. Jurisdictional Dispute Proceedings

Section 8(b)(4)(D) of the Act prohibits a labor organization from engaging in or inducing strike action for the purpose of forcing any employer to assign particular work to "employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . . ."

An unfair labor practice charge under this section, however, must be handled differently from a charge alleging any other type of unfair labor practice. Section 10(k) requires that parties to a jurisdictional dispute be given 10 days, after notice of the filing of the charge with the Board, to adjust their dispute. If at the end of that time they are unable to "submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute," the Board is empowered to hear the dispute and make an affirmative assignment of the disputed work.[95]

Section 10(k) further provides that pending 8(b)(4)(D) charges shall be dismissed where the Board's determination of the underlying dispute has been complied with or the parties have voluntarily adjusted the dispute. An 8(b)(4)(D) complaint issues if the party charged fails to comply with the Board's determination. A complaint may also be issued by the General Counsel in the event recourse to the method agreed upon to adjust the dispute fails to result in an adjustment.

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[95] *N L R B.* v. *Radio & Television Broadcast Engineers Union, Loc. 1212, IBEW* [*CBS*], 364 U S. 573 (1961); 26 NLRB Ann. Rep 152 (1961)

1. Availability of Agreed-Upon Method of Adjustment

In three of the significant cases issued during the report year,[96] the Board considered whether to quash notices of hearing issued under section 10(k) on grounds that the parties were contractually bound to submit their dispute to the Impartial Jurisdictional Disputes Board (IJDB), an entity established to determine work assignment disputes in the construction industry.

In *Capitol Air Conditioning*, the majority, consisting of Chairman Murphy and Members Fanning and Penello, held that the parties were required, by virtue of the unions' membership in the Building and Construction Trades Department, AFL–CIO (a signatory of the agreement establishing the IJDB) and the employer's membership in a signatory employer association, to submit their dispute to the IJDB. The majority further held that the unions had executed an agreement in 1956 settling jurisdictional issues in regard to certain work and binding the unions to settle such disputes with respect to other work according to a prescribed procedure, and that the employer was also bound to the 1956 agreement under its collective-bargaining agreement with one of the unions. Accordingly, the majority concluded that all parties were bound to an agreed-upon method for the voluntary adjustment of the dispute and, therefore, quashed the notice of hearing.

Member Jenkins, dissenting, took the position that the Board should have determined the dispute, on grounds that no agreed-upon method in fact existed. In so concluding, Member Jenkins expressed the view that, by the time the issues were presented to the IJDB, the work would have been completed and that the IJDB's decision in other cases indicated that it would therefore refuse to decide the dispute. Member Jenkins further concluded that the 1956 agreement did not constitute an "agreed-upon method" within the meaning of sections 10(k) and 8(b)(4)(D) of the Act because the procedures specified in the agreement, by its terms, could be initiated only by the unions, not the employer, whom the Board's jurisdictional dispute proceedings were designed to protect.

Member Walther dissented separately, contending that, although the Board may not determine a jurisdictional dispute where the parties have agreed upon a method for its adjustment, the mere existence of such a method is not enough to warrant quashing a notice

[96] *United Assn of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States & Canada, Local Union 447 (Capitol Air Conditioning)*, 224 NLRB No 55 (Chairman Murphy and Members Fanning and Penello, Member Jenkins dissenting, Member Walther dissenting), *Glass Workers Local 740, Intl. Brotherhood of Painters & Allied Trades (Tom Benson Glass Co)*, 224 NLRB No 62 (Members Fanning and Penello; Member Jenkins dissenting), and *Local Union 418, Sheet Metal Workers (Young Plumbing & Supply)*, 224 NLRB No 60 (Chairman Murphy and Member Penello; Member Jenkins concurring)

of hearing. On the contrary, in Member Walther's view, in order for the notice to be quashed it must be shown that the parties either have or will utilize the voluntary method to settle the dispute. Thus, he would interpret the 10(k) requirement that the Board hear and determine a dispute, unless within 10 days after notice of a charge having been filed under section 8(b)(4)(D) the parties submit evidence that they have either adjusted or agreed upon methods for the voluntary adjustment of the dispute, to mean that the Board must proceed to hear the dispute unless the parties submit evidence within the 10-day period that they have either settled or initiated procedures to settle the dispute. Accordingly, while Member Walther disagreed with Member Jenkin's position that no voluntary method existed, he also concluded that the Board should determine the dispute.

The majority, in response to Member Jenkins' dissent, argued that the delay in deciding the dispute, which could result in completion of the work prior to submission of the dispute to the IJDB, was totally due to the parties' refusal to present the dispute to that forum in the first instance, and that the parties' failure in this regard did not give the Board authority to substitute its own procedures for the agreed-upon method. With respect to Member Jenkins' concern that the procedures provided by the 1956 agreement could not be invoked by the employer, the majority pointed out that the employer bound itself to that agreement voluntarily, and that the Board's function is not to correct deficiencies in the parties' own agreed-upon methods.

The majority also responded to Member Walther's dissent, contending that, under his view, any party could avoid its contractual obligations merely by failing to activate the procedures to which it had agreed in order to resolve the dispute, and that permitting such conduct would undermine the private dispute resolution mandated by section 10(k).

Tom Benson Glass Co. similarly involved the issue of whether the parties were contractually bound to submit their jurisdictional dispute to the IJDB. In that case, the unions agreed that they were bound by their membership in the Building and Construction Trades Department of the AFL–CIO. One of the unions and the employer contended, however, that the employer was not so bound. The employer was a subcontractor whose agreement with the general contractor provided that any jurisdictional dispute would be determined by the " 'National Joint Board for Settlement of Jurisdictional Disputes,' [NJB] or its successor" and argued that this language was not equivalent to a stipulation binding it to submit a dispute to the IJDB. A majority of the Board panel consisting of Members Fanning and Penello disagreed with this contention, and concluded that, as the NJB was abolished prior to June 1, 1973, and the IJDB became effective on

that date, the successorship language in the contract between the employer and the general contractor referred to the IJDB. Accordingly, the majority found that there was an agreed-upon method for the resolution of the dispute and quashed the notice of hearing.

Member Jenkins adhered to his dissenting view in *Capitol Air Conditioning*, but also dissented on the further ground that the clause which the majority found binding on the employer was not negotiated through collective bargaining but was unilaterally imposed on the employer by the general contractor. Finally, Member Jenkins expressed his view that it was unlikely that the IJDB would accept jurisdiction in view of the fact that any commitment made by the employer to be bound by an IJDB award was only for the duration of one job, and that, if the IJDB refused to determine the dispute, the issues could be raised again before the Board, resulting in still further delay.

Young Plumbing was a continuation of an earlier proceeding [97] in which a Board panel quashed the notice of hearing on grounds that all parties had agreed to be bound by a determination of the IJDB. Thereafter, after the dispute was submitted to it, the IJDB declined to take any action on grounds that the construction project at which the disputed work was performed had been completed. Consequently, the employer filed another charge alleging a violation of section 8(b)(4)(D).

In the second *Young Plumbing* decision, a majority of the Board panel held that the dispute should be determined, on grounds that the Board, apparently unlike the IJDB, does not consider a jurisdictional dispute moot even if the disputed work is completed if there is evidence of similar past disputes between the parties and no evidence that such disputes will not arise in the future. Accordingly, the majority concluded that the IJDB refusal to determine the dispute was not a determination on the merits and that it was appropriate for the Board to make a determination awarding the disputed work.[98]

Member Jenkins concurred in the result, citing his dissent in *Capitol Air Conditioning* and noting that he would have determined the dispute when it was first presented to the Board.

2. Dispute Determinations

In *Brady-Hamilton Stevedore Co.*,[99] a Board panel, after a remand by a court of appeals, reaffirmed the Board's original determination

[97] *Sheet Metal Workers Intl. Assn. & Local 418 (Young Plumbing & Supply)*, 209 NLRB 1177 (1974)

[98] In a concurring footnote, Chairman Murphy expressed her view that it would be far better procedure for the IJDB to resolve cases in which the Board deferred to it, on grounds that the IJDB's present practice resulted in unconscionable delay.

[99] *Intl. Longshoremen's & Warehousemen's Union, Loc. 50 (Brady-Hamilton Stevedore Co & Williamette Western Corp)* 223 NLRB No. 153 (Chairman Murphy and Members Jenkins and Penello).

that employees represented by the longshoremen's union were not entitled to perform the disputed work. The court had remanded the case to the Board for reconsideration of the latter's decision in light of both a bipartite arbitration proceeding resulting in an award of the disputed work to employees represented by the longshoremen's union and the employer's assignment of the work to such employees after the longshoremen's union engaged in a work stoppage.

The panel adopted as the law of the case the court's findings that the collective-bargaining agreement between the employer association, of which the employer was a member, and the longshoremen's union required assignment of the work in dispute to employees represented by the longshoremen's union and that the employer's post-work stoppage preference was to assign the work to such employees. The panel nonetheless held that these factors did not warrant reversing the Board's prior determination and pointed out that, indeed, the court recognized this possibility. In so holding, the panel agreed with the court that frequently the Board's approach in jurisdictional disputes results in an assignment of the work in accordance with the employer's preference, which is one factor to be considered in making an assignment, but noted that usually that preference is based on the other factors utilized by the Board, such as past practice; relative skills of the competing groups of employees; efficiency, economy, and safety; area and industry practice; collective-bargaining agreements; Board certifications; and arbitration awards. The panel further emphasized that under the circumstances the relative weight of both the arbitration award and the employer's preference was substantially diminished, noting that in the arbitration proceeding the fact that both parties (the employer association and the longshoremen's union) advocated the same result, and that the employer's reassignment of the work to employees represented by the longshoremen's union was a direct consequence of that union's work stoppage. Accordingly, the panel affirmed its prior determination of the dispute.

J. Recognitional Picketing

Section 8(b)(7) of the Act makes it an unfair labor practice for a labor organization which is not the certified employee representative to picket or threaten to picket for an object of recognition or organization in the situations delineated in subparagraphs (A), (B), and (C) of that section. Such picketing is prohibited as follows: (A) where another union is lawfully recognized by the employer and a question concerning representation may not be appropriately raised under section 9(c); (B) where a valid election has been held within the preceding 12 months; or (C) where no petition for a board election

has been filed "within a reasonable period of time not to exceed thirty days from the commencement of such picketing." This last subparagraph (C) has two provisos: The first provides that if a timely petition is filed the representation proceeding shall be conducted on an expedited basis; the second provides, however, that picketing for informational purposes, as set forth therein, is exempted from the prohibition of that subparagraph unless it has the effect of inducing work stoppages by employees of persons doing business with the picketed employer.[1]

Two of the significant cases decided during the past fiscal year[2] involved violations of section 8(b)(7)(C) of the Act by unions who admitted both guards and nonguard employees to membership and, therefore, under section 9(b)(3) of the Act could not be certified by the Board as exclusive bargaining representative for a unit of guards.

In *A-1 Security Service*, the majority concluded, *inter alia*, that the union threatened to picket the employer for the purpose of obtaining recognition and not for a merely informational purpose, relying on the findings that (1) the union's attorney, during his discussions with the employer's president, presented the union's standard contract without being asked to do so, repeatedly referred to the employer's lack of association with the union, and attempted to persuade the employer's president of the benefits of such an association; (2) in these conversations noneconomic items were discussed; (3) the attorney intemperately reacted to the employer's president's statement that the employer had a contract with another union; (4) the attorney threatended the employer that if no agreement were signed with the union the latter would attempt to restrict the employer's business opportunities; and (5) at the times the union threatened to picket it lacked sufficient information to determine whether or not the employer actually paid substandard wages and benefits, as the union claimed.

The majority further concluded that a threat to picket may violate section 8(b)(7)(C) of the Act as well as actual picketing, on grounds that the legislative history indicated that that section, which refers only to "picketing," must be read in conjunction with the introductory language of section 8(b)(7), which proscribes threats to picket also. Finally, the majority concluded that, inasmuch as the union was

[1] The second proviso to sec. 8(b)(7)(C) states "That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

[2] *General Service Employees Union Loc. 73, SEIU (A-1 Security Service Co.)*, 224 NLRB No 43 (Members Jenkins, Penello, and Walther, Chairman Murphy concurring in part and dissenting in part, Member Fanning dissenting); and *Drivers, Chauffeurs, Warehousemen & Helpers, Local Union 71, IBT (Wells Fargo Armored Service Corp.)*, 221 NLRB No. 212 (Members Jenkins and Penello, Member Fanning dissenting)

ineligible for certification in a guard unit because it admitted both guard and nonguard employees to membership, any petition it filed for a Board-conducted election would be dismissed and, consequently, recognitional picketing for any period of time would violate section 8(b)(7)(C). Accordingly, the majority held that the union's threat to picket violated that subsection.

Chairman Murphy, concurring in part and dissenting in part, took the position that a violation of section 8(b)(7)(C) must be predicated soley on actual picketing with a proscribed object for more than a reasonable period. In the Chairman's view the inclusion in subsection (c) of the introductory words "where such picketing has been conducted" expressed the congressional intent to exclude threats to picket. Chairman Murphy particularly noted the rule of statutory construction that "none of the language should be disregarded and all terms should be given their usual and ordinary meaning and signification except where the lawmaking body has indicated that the language is not so used."

Member Fanning dissented, concluding both that any picketing the union might have undertaken would have been protected primary area standards picketing and would therefore not violate section 8(b)(7)(C), and that, in any event, section 8(b)(7)(C) does not apply to mere threats to picket. In reaching the former conclusion, Member Fanning relied on his findings that other guard services had complained that the employer was not providing benefits in accord with area standards and was thereby undermining them, and that the union's principal objective was that the employer meet area standards. Member Fanning emphasized that while the union would have liked the employer to sign its contract, if the area standards objectives were accomplished, which was possible without recognition of the union, there would have been no need for picketing.

With respect to his conclusion that a threat to picket does not violate section 8(b)(7)(C), Member Fanning urged that such a threat does not fall *per se* within the proscription of that subsection and, further, that subsection (C) unlike subsections (A) and (B), only proscribes picketing which continues for more than a reasonable time. He therefore concluded that if short-term recognitional or organizational picketing is ordinarily lawful, then a mere threat to engage in such picketing must also be permissible.

In *Wells Fargo*, a majority of the Board panel, consisting of Members Jenkins and Penello, concluded that the union violated section 8(b)(7)(C) of the Act by picketing the employer, an armored car service, for recognition, on grounds that the union could not be certified as representative of the employees in the guard unit sought because the union admitted to membership both guard and nonguard

employees. In so holding, the majority rejected the union's contention that armored car guards are not guards within the meaning of section 9(b)(3), relying on the Board's denial of the union's request for review of the regional director's dismissal, on grounds that the employees sought were guards, of the petition filed by the union shortly after it began picketing. Thus, the majority found that the picketing violated section 8(b)(7)(C), notwithstanding that a petition was filed and the picketing discontinued in less than 30 days.

Member Fanning dissented on grounds that, although section 9(b)(3) of the Act precluded the Board from certifying the union, neither that section nor section 8(b)(7)(C) barred the Board from conducting an election and certifying its arithmetical result. In Member Fanning's view, given the express wording of section 8(b)(7)(C), wherein an expedited election is provided for without regard to the provisions of section 9(c)(1) of the Act, such an election can be held in the absence of a showing of interest by a "certifiable" petitioner. Accordingly, Member Fanning found that, as a petition had been filed and an election could be held, the union's picketing did not violate section 8(b)(7)(C).

K. Hot Cargo Clauses

Section 8(e) makes it an unfair labor practice for an employer and a union 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. It also provides that any contract "entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void." Exempted by its provisos, however, are agreements between unions and employers 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," and certain agreements in the "apparel and clothing industry." Several cases decided by the Board during the past fiscal year involved this section.

1. Sale of Asset Clauses

Four important cases decided during this past fiscal year [3] involved issues of whether or not provisions of collective-bargaining agreements

[3] *District 71, IAM (Harris Truck & Trailer Sales)*, 224 NLRB No 10, *Loc. 814, IBT (Bader Bros Warehouses)*, 225 NLRB No 78 (Chairman Murphy and Members Fanning and Jenkins), *Intl Union of Operating Engineers, Loc 701 (Cascade Employers Assn)*, 221 NLRB No 124 (Members Fanning and Jenkins, Chairman Murphy concurring), and *Intl Organization of Masters, Mates & Pilots (Seatrain Lines)*, 220 NLRB No. 52 (Members Fanning, Jenkins, and Penello).

which required the employer to make any sale or lease of its business conditional on the purchaser's obligations under such agreements were lawful under section 8(e).

In *Harris Truck*, the Board unanimously held such a clause to be lawful, rejecting the General Counsel's contention that the clause constituted an agreement to cease "doing business" within the meaning of section 8(e). On the contrary, the Board found that such a clause was not within the literal language of section 8(e) and that, therefore, neither the provision itself nor the union's attempts to enforce it was unlawful. In so finding, the Board noted that the employer sold only a portion of its business, but concluded that that portion constituted a separate business enterprise, and continued under the new owner without any apparent disruption of the business.

In *Bader Bros.*, a Board panel, consisting of Chairman Murphy and Members Fanning and Jenkins, concluded that a collective-bargaining agreement provision, that if all or part of the employer's operation were transferred by any means the operation would continue to be subject to the terms of the agreement, did not violate section 8(e). In so concluding, the panel found that the objective of the provision was the protection and preservation of the jobs of unit employees, and that there was no evidence that the clause was aimed at fostering the union's own organizational interests distinct from the unit employees' job security. The panel unanimously decided that the complaint should be dismissed. In so holding, the panel noted that the Board's decision in *Harris Truck* constituted an alternative ground for dismissing the complaint.

Cascade Employers Assn. similarly involved a contract provision which allegedly violated section 8(e) by permitting the employer to sell its capital assets only to purchasers willing to adopt all terms of the contract between the employer and the union. In holding that the provision was not unlawful, a majority of the Board panel emphasized that the legislative history of the Act indicated that the purpose of both section 8(e) and section 8(b)(4) was to "protect genuinely neutral employers and their employees," and that sale of the employer's assets would not involve a contractually required refusal to deal in "hot goods" or an agreement to withhold services from an "unfair" employer, avoidance of which was the purpose of Congress in enacting these sections. The majority further held that the Board's decision in *Commerce Tankers*,[4] which held that the sale of capital assets in the maritime industry was "doing business" within the meaning of section 8(e), was distinguishable, on grounds that the sale of

[4] *National Maritime Union, Commerce Tankers Corp. (Vantage Steamship Corp.)*, 196 NLRB 1100 (1972), enfd. 486 F. 2d 907 (C.A. 2, 1973), cert. denied 416 U S. 970 (1974).

vessels in that industry occurred fairly commonly in the normal course of business, which was not the situation in *Cascade Employers Assn.*

Chairman Murphy concurred in the dismissal of the complaint, on grounds that the clause in question sought to apply automatically to the purchaser of a business, but required no affirmative action by the contracting employer. Accordingly, she found that the clause by its terms did not even impliedly seek to compel the employer to cease doing business with any potential purchaser and, therfore, did not reach the issue of whether a sale of a business would be "doing business" within the meaning of section 8(e).

Seatrain Lines, unlike the other three 8(e) cases discussed above, involved a clause in a collective-bargaining agreement by which an employer in the maritime industry agreed that, in the event any of the employer's vessels were transferred in any manner, the transferee would be required to execute a collective-bargaining agreement with the union. The Board panel, consisting of Members Fanning, Jenkins, and Penello, found that the issue was whether the provision was aimed at protecting unit employees against displacement or whether its real purpose was to ensure that if unit work were transferred elsewhere the union itself would not suffer. In concluding that the latter object was the purpose of the clause, the panel relied on *Commerce Tankers, supra*, noting that that case was factually almost identical. The panel further noted that *Commerce Tankers* involved the sale of manned vessels, the employees on which could, according to industry practice, lose their jobs whenever a vessel was sold. The panel thus found that, inasmuch as *Seatrain* involved new vessels which had never had a crew, the factual circumstances in *Seatrain* lent additional support to the conclusion that the purpose of the contract clause was not work preservation. Accordingly, the panel held that the provision violated section 8(e) of the Act. It further held that the union's demand for arbitration of the employer's alleged violation of that provision constituted a reaffirmance of that clause which separately violated section 8(e). The panel considered as additional support for its findings the union's demand for damages when invoking arbitration proceedings, noting that while that demand did not in fact prevent the employer from selling its vessels it made the sale subject to such onerous conditions as to impliedly prevent the employer from doing business.

2. Other Issues

A significant case decided this report year, *Intl. Longshoremen's Assn. (Consolidated Express)*,[5] involved the issue of whether the

[5] 221 NLRB No. 144 (Chairman Murphy and Members Fanning, Jenkins, and Penello).

"Rules on Containers," adopted by the International Longshoremen's Association (ILA) and the New York Shipping Association (NYSA) in 1969 and modified by ILA and another shipping association of which NYSA was a member in 1973, violated section 8(e) of the Act.

The charging parties were common carriers, known as consolidators, engaged, prior to 1973, in the business of consolidating less-than-container-load cargo at their off-pier facilities and "stuffing" the cargo into containers which the consolidators trucked to the pierside facilities of the steamship companies with which they did business. The containers were then loaded onto the ships by employees of the steamship companies. In the reverse process, incoming containers were unloaded by the steamship companies and trucked by the consolidators to the latters' facilities, where they were unpacked, or "stripped," and the cargo separated for delivery to the ultimate consignee. Because vessels were designed to accommodate certain types of containers, any user of containers, including consolidators, was required to obtain the containers the user stuffed from the steamship companies with which it dealt.

The "Rules on Containers" required that all containers to be loaded on vessels under their jurisdiction be stripped or stuffed at the pier by ILA labor and prohibited steamship companies from supplying their containers to any "facilities," including consolidators, who operated in violation of the rules. The rules further provided for liquidated damages for violations. As a result of the rules' penalty provisions and their enforcement, the steamship companies which had dealt with the charging party consolidators stopped furnishing containers to them and, consequently, the consolidators filed charges alleging, *inter alia*, violations of section 8(e) of the Act.

The Board agreed, finding that the consolidators had traditionally been engaged in stuffing and stripping containers, and that such work was not within the traditional functions performed by ILA members. Accordingly, the Board found that the purpose of the rules was not work preservation but, rather, that they had an unlawful secondary purpose and therefore violated section 8(e) of the Act.

In *Gunnar I. Johnson & Son*,[6] the employees of both a general contractor and a subcontractor refused to cross a picket line established at a construction site and directed at another subcontractor. The collective-bargaining agreements of three of the unions (the Laborers, the Operating Engineers, and the Bricklayers) with the general contractor contained a provision prohibiting the employer from requesting "any Employee . . . to go through a picket line,"

[6] *Bricklayers & Stone Masons Union, Loc 2, Bricklayers, Masons & Plasterers' Intl Union of America (Gunnar I Johnson & Son)*, 224 NLRB No. 132 (Chairman Murphy and Member Penello, Member Fanning dissenting).

while the fourth union's (the Plumbers) agreement with the neutral subcontractor provided that "refusal to pass through a lawfully permitted picket line will not constitute a violation of the agreement." The issue before the Board panel was whether or not these provisions on their face, or when used to protect a refusal to work caused by the presence of a secondary picket line, violated section 8(e) of the Act. Before charges were filed with the Board, the issues had been presented to an arbitrator who found that the picketing was primary and that, as section 8(e) protects only against secondary activity, the contract provisions were not unlawful under that section. The arbitrator further found that all of the allegedly unlawful clauses were broad enough to protect the refusal to work by the neutral employers' employees, and, therefore, ruled in favor of the unions.

A majority of the panel held that the clauses in the Laborers, Bricklayers, and Operating Engineers contracts violated section 8(e) on their face because they were broad enough to apply to secondary picketing and did not come under the construction site proviso to that section. In so holding, the majority found that, even if, as they claimed, either union had attempted to have clauses interpreted and applied in a lawful manner before the arbitrator, such an application would not have changed the fact that the clauses were overly broad on their face. The majority further concluded that all four of the contract provisions (including that of the Plumbers, which was not alleged to have been unlawful on its face) violated section 8(e) as interpreted by the arbitrator. In so concluding, the majority found that, as interpreted, all four clauses extended beyond protection of work and work standards of employees represented by the unions and did not fall within the construction site proviso, on grounds that, while that proviso rendered certain "hot cargo" provisions in the construction industry lawful, it did not permit strikes or other self-help economic action, such as that taken by the unions to enforce such provisions.

Member Fanning, dissenting, would have dismissed the complaint. With respect to the allegedly unlawful clauses in the Operating Engineers, Bricklayers, and Laborers contracts, Member Fanning emphasized that (1) the clauses all prohibited the *employer* from requesting employees to cross a picket line, and were therefore merely restrictions on employers which were amenable to judicial enforcement, and not self-help provisions; and (2) under the construction site proviso these same clauses, even if interpreted as applicable to secondary picket lines, were lawful, inasmuch as they were not enforced by means proscribed by section 8(b)(4)(B) but, rather, by means of an arbitration proceeding. As to the clause in the Plumbers contract, Member Fanning concluded that it referred only to the right of the

individual employee to refuse to cross a lawful picket line without directing him or her to do so, and thus, as it did not give the Plumbers any contractual right to induce its members not to cross a picket line, did not violate section 8(e).

L. Picketing of Health Care Institutions

Included in the 1974 amendments to the Act, which expanded the Board's jurisdiction to cover health care institutions, was one new unfair labor practice section, section 8(g), which provides that before "engaging in any strike, picketing, or other concerted refusal to work at any health care institution," a labor organization must give 10 days' notice in writing of its intention to engage in such action to both the institution and the Federal Mediation and Conciliation Service. A longer notice period, that required by section 8(d)(B) of the Act, applies in the case of bargaining for an initial agreement following certification or recognition. Under an amendment to section 8(d), any employee who engages in a strike within the notice period provided by either that section or section 8(g) loses "his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act . . . ."

Several of the important cases decided this past fiscal year were concerned with issues arising under these amendments. Three companion cases [7] involved the issue of whether section 8(g) and 8(d), as amended, applied to picketing by employees of construction contractors engaged in remodeling, or erection, of additions to existing hospitals. In *Lein-Steenberg*, the union had a dispute with a subcontractor working on alterations at a hospital and engaged in area standards picketing at the gate reserved for the subcontractor's use, without giving any prior notice to either the hospital or the FMCS. No hospital employees were required to cross the picket line to enter the hospital or engaged in any work stoppage, although some employees of the general contractor and other subcontractors at the hospital jobsite occasionally honored the picket line.

A majority of the Board held that the union violated section 8(g) by failing to give the notices provided by that section, notwithstanding the fact that the picketing did not in any way disrupt the hospital's normal operations. In so holding, the majority relied upon the

[7] *United Assn of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Loc 630 (Lein-Steenberg)*, 219 NLRB 837 (Chairman Murphy and Members Kennedy and Penello, Members Fanning and Jenkins dissenting, Member Jenkins further dissenting), *Laborers' Intl Union of North America, Local Union 1057 (Mercy Hospital of Laredo)*, 219 NLRB 846 (Chairman Murphy and Members Kennedy and Penello, Members Fanning and Jenkins dissenting), and *Casey & Glass*, 219 NLRB 698 (Chairman Murphy and Members Kennedy and Penello, Members Fanning and Jenkins dissenting).

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legislative history of the health care amendments, particularly Senator Taft's comment during the Senate debates that section 8(g) applied to "any picket or strike," [8] and Senator Williams' statement that the Board should not "read into this act by implication—or general logical reasoning—something that is not contained in the bill, its report and the explanation thereof," [9] and concluded that the intent of Congress was that the Board interpret section 8(g) according to its plain language. The majority therefore further concluded that *any* strike at the premises of a health care institution was proscribed in the absence of proper notices. In further support of its holding the majority emphasized that a contrary view would require a case-by-case analysis of whether 8(g) picketing would be likely to disrupt medical services, and found that Congress viewed any strike or picketing at a health care institution as constituting sufficient potential for disruption of patient care to require the notices. Finally, the majority found that its interpretation of the section would not impose any undue burden on labor organizations, particularly as unions gained awareness of their obligations with respect to the giving of notice.

Members Fanning and Jenkins dissented on grounds that (1) the majority had not undertaken a truly literal reading of section 8(g), and (2) assuming the majority was correct in its literal reading, such a reading did not comport with the intent of Congress in enacting that section. With respect to their first contention, the dissenters argued that the word "at," in the clause "A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution" did not necessarily mean "at the premises of," as the majority assumed, but, rather, was associated with the verb "work," and therefore did not have the connotation which the majority ascribed to it. The majority found no merit to this assertion, concluding that, had Congress intended to limit only conduct *against* a health care institution, that word or a similarly qualified preposition would have been utilized in section 8(g). In support of their second contention, the dissenters urged that the legislative history of the amendments clearly indicated that section 8(g) was intended to apply only to action directed against a health care institution. In so concluding, the dissenters emphasized, *inter alia*, that the notice provision was first suggested in 1973 by then Under Secretary of Labor Schubert, who proposed "a 10-day strike notice . . . before a union could go on strike against a private health care facility" [10] and also that the

[8] 120 Cong Rec S6941 (daily ed., May 2, 1974)

[9] 120 Cong Rec S12104 (daily ed , July 10, 1974)

[10] Hearings on S. 794, S. 2292 before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 3 (1973) at 428, 429.

committee reports mentioned that section 8(g) "generally prohibits a labor organization from striking or picketing a health care institution. . . ." [11] The dissenters further cited remarks by Senator Taft to the effect that section 8(g) "will substantially aid health care institutions and *their* employees settle *their* disputes while not significantly restricting *either party's* freedom of action." (Emphasis supplied.) (120 Cong. Rec. 12108.) Finally, the dissenters expressed their view that the majority's construction of section 8(g) was inconsistent with section 13 of the Act, which provides that, except as otherwise specified, no provision of the Act shall be construed so as to impede the right to strike.

Member Jenkins further dissented on grounds that, unless picketing at a construction site adjacent to a hospital can be shown to have interfered with the hospital's functions, such construction should not be considered part of the hospital.

In *Mercy Hospital of Laredo*, which presented a similar factual situation to that in *Lein-Steenberg*, the majority adhered to its position in the latter case and concluded that the union, by picketing a construction contractor on the premises of a hospital without giving the notices required by section 8(g), violated that section of the Act.

Member Fanning and Jenkins again dissented, relying on their positions expressed in *Lein-Steenberg* and additionally emphasizing that in *Mercy Hospital* the union alleged that it unsuccessfully attempted to discuss with the contractor how to minimize any potential adverse effect on the hospital and that the union took all possible action to clarify that it had no dispute with the hospital. In the dissenter's view, the Board majority never addressed or resolved this crucial factual issue, opting instead for a disposition of the case on the basis of a motion for summary judgment. The majority, however, found that the pertinent facts were not in dispute.

Casey & Glass involved the issue of the status of the striking employees in *Mercy Hospital*. In *Casey & Glass*, the ballots of these individuals were challenged in a Board-conducted representation election and the question was whether the challenges should be sustained. The Board majority found, relying on its decision in *Mercy Hospital*, that the strikers had lost their employee status by participating in a strike violative of section 8(g) and it, consequently, sustained the challenges to their ballots.

Members Fanning and Jenkins again dissented, for the reasons set forth in their opinions in *Lein-Steenberg* and *Mercy Hospital* and would have directed the opening and counting of the challenged ballots of the strikers. They did not believe that the strikers had lost their

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[11] S. Rept. 93-766, 93d Cong., 2d Sess. 4-5 (1974); H. Rept. 93-1051, 93d Cong., 2d Sess. 5-6 (1974).

"employee status" under the Act because they did not believe that it had been even marginally established that Congress intended these particular employees to be subject of 8(g) complaints.

In another case involving application of section 8(g), *First Healthcare Corp.*,[12] a majority of the Board held that sympathy picketing at a health care institution was unlawful in the absence of the 8(g) notices. In that case a union, after timely giving the 8(g) notices, went out on strike against a health care institution. Approximately 2 weeks into the strike, four officers of another union, which did not represent any employees at the institution, joined the picket line in sympathy and picketed for 1½ hours, without providing the 8(g) notices. The majority, consisting of Members Jenkins, Penello, and Walther, held that the sympathy picketing violated section 8(g). In so holding, the majority emphasized that that section provides that "'a labor organization . . . *shall*' give written notice," that the section applies to "*any* . . . picketing"; and that the section contains no modifying language. Accordingly, the majority concluded that the second union could not rely on the earlier notice supplied by the other union as a basis for avoiding the notice requirement. Chairman Murphy and Member Fanning, dissenting, relied on the fact that "the brief presence of [the other union's] pickets did not basically change the character of the picketing, did not broaden its objectives, and did not generate any new or different economic pressures on [the employer]." Accordingly, the dissenters concluded, it would be a distortion of Congress' intent to require the other union to supplement the 10-day notice previously given with a notice of its own.

Yet another case involving section 8(g) was *Methodist Hospital of Kentucky*.[13] In that case, the charging union commenced a strike in 1972, which lasted until October 10, 1974, against the hospital. On October 7, 1974, and again on October 12, the union sent letters to the hospital, advising that the union was terminating the strike and making an unconditional offer on behalf of all the strikers to return to work. The Board panel held that, because the strike commenced prior to the effective date of the health care amendments to the Act, section 8(g) was inapplicable, relying on the specific language of that section requiring notice "before engaging in any strike," and concluding that the use of such wording indicated that the section was intended to apply only to activity *commencing* after the effective date of the amendments.

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[12] *District 1199, Natl Union of Hospital & Healthcare Employees, RWDSU (First Healthcare Corp d/b/a Parkway Pavilion Healthcare)*, 222 NLRB No. 15 (Members Jenkins, Penello, and Walther, Chairman Murphy and Member Fanning dissenting).

[13] 221 NLRB No 87 (Members Fanning, Jenkins, and Penello).

M. Remedial Orders

During the report year, the Board was confronted in a number of cases with the task of designing a remedy appropriate to the circumstances presented by the violations found and capable of effectuating the purposes of the Act.

1. Remedies for Violence

In three companion cases [14] issued during the report year, a Board majority refused to award backpay to employees who "putatively" were coerced by the union into joining a strike. The decision by the majority in this regard was made despite the fact that the union "repeatedly and flagrantly" violated the section 7 rights of the employees involved therein. In rejecting the backpay remedy in these cases, the majority noted the availability of preliminary injunctive relief and of the judicial remedy for actions in contempt of Board orders, and concluded that those remedies would be more prompt and more effective than reimbursement of pay. In addition, the majority cited as a further advantage for the use of the above remedies the fact that their utilization would not burden the Board's administrative proceedings "with the difficult, exhausting, and potentially divisive task of determining which employees were absent from work because of union coercion." The majority also pointed out that employees affected by the tortious conduct of unions "might be better served by pursuing those private remedies traditionally used for the recovery of such damages" since their cases would be considered by tribunals with vast experience in assessing the impact of tortious conduct and in devising appropriate remedial relief.

In dissenting in part in all three cases, Member Kennedy expressed his outrage at what he called "reprehensible conduct on the part of union officials," and his displeasure with the failure of the majority to award backpay to those employees who were prevented from working by the union's unlawful restraint and coercion. In his view, "[a] notice [was] no substitute for lost wages," and "our notices and cease-and-desist orders [would] be meaningless as a deterrent to the commission of similar unlawful conduct in the future." Noting that an 8(b)(1)(A) violation standing alone was a sufficient prerequisite

[14] *Union Nacional de Trabajadores & its agent, Alcides Serrano (Jacobs Constructors Co of Puerto Rico)*, 219 NLRB 405 (Chairman Murphy and Members Fanning, Jenkins, and Penello, Member Kennedy dissenting in part), *Union Nacional de Trabajadores & Comite Organizador Obreros en Huelga de Catalytic (Catalytic Industrial Maintenance Co)*, 219 NLRB 414 (Chairman Murphy and Members Fanning, Jenkins, and Penello, Member Kennedy dissenting in part); and *Union Nacional de Trabajadores & its agent Arturo Grant (Macal Container Corp.)*, 219 NLRB 429 (Chairman Murphy and Members Fanning, Jenkins, and Penello, Member Kennedy dissenting in part).

for the issuance of a backpay order against a labor organization, Member Kennedy vigorously contended that the Board should have granted such a remedy in these cases to the "real victims" of the statutory violations committed by the union.

In another case involving the same Union National de Trabajadores,[15] a Board panel majority consisting of Members Jenkins and Penello revoked the union's certification as the exclusive bargaining representative of the company's production and maintenance employees. This action was deemed appropriate by the majority because of the union's "brutal and unprovoked violence" therein and in other cases,[16] which evidenced a total disregard for the peaceful methods commonly accepted by other labor organizations and employers throughout the country. The union in this case engaged in numerous acts of "self-help through violence." While recognizing the importance of "the right of employees to be represented by their duly selected bargaining representative," the majority nevertheless concluded that the Board should not continue to certify a labor organization which openly defied the Board's authority and ignored the policies and purposes of the Act. In addition to revoking the union's certification, the majority denied the union the right to invoke its statutory processes in furtherance of the union's demand for recognition with respect to the company's employees until such time "when the employees are able to demonstrate their desires anew in an atmosphere free of coercion," and the union established proof of its majority among the same company employees by means of the Board's election process. Member Kennedy concurred in the decision of his colleagues in the majority to revoke the union's certification.[17]

2. Bargaining Orders

In *Trading Port*,[18] a case decided during the report year, a Board majority considered and reexamined the policies and principles set forth in the Board's *Steel-Fab* doctrine,[19] and decided that it would no longer follow the doctrine insofar as it dispensed with finding 8(a)(5) violations in cases where employers reject recognition demands based on signed authorization cards while at the same time they embark on a clear course of conduct designed to undermine the union.

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[15] *Union Nacional de Trabajadores and its agent Arturo Grant (Carborundum Co of Puerto Rico & Carborundum Caribbean)*, 219 NLRB (Members Jenkins and Penello, Member Kennedy concurring)

[16] See cases cited above in fn. 14. See also *Union Nacional de Trabajadores and its agent Radames Acosta-Cepeda (Surgical Appliances Mfg)*, 203 NLRB 106 (1973)

[17] Member Kennedy also concurred in the remedy in this case, which did not provide for backpay to the victims of the union's 8(b)(1)(A) conduct, because there was no indication therein that employees had lost wages as a result of the union's unlawful conduct

[18] 219 NLRB 298 (Chairman Murphy and Members Jenkins and Penello, Member Fanning concurring, Member Kennedy dissenting)

[19] *Steel-Fab*, 212 NLRB 363 (1974). See 39 NLRB Ann. Rep. 22, 86 (1974).

The critical determination in *Trading Port*, however, was not simply that the Board would henceforth find 8(a)(5) violations under the circumstances described above, but that it would, in order to provide a more effective remedy, order that an employer's bargaining obligation "should commence as of the time the employer has embarked on a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the union's majority status," instead of making the bargaining obligation prospective only from the time the Board order is issued and thus leaving unremedied violations occurring prior to that time. In the *Steel-Fab* decision, a majority of the Board concluded that it was not necessary to find a violation of section 8(a)(5) "in fashioning a bargaining order remedy for an employer's 8(a)(1) violations." The decision in the *Steel-Fab* case had the effect in some instances of leaving unremedied an employer's unilateral changes in working conditions, which were made after a union had established its majority status, because the bargaining order was effective only from the date of the Board's decision. Upon reflection, the majority, in *Trading Port*, concluded that the Board's prospective bargaining order in *Steel-Fab* "fell short of reinstating the situation as it would have been" had the employer in that case "obeyed the law and allowed a fair election to proceed." To provide a more effective remedy, consistent with the Supreme Court's opinion in *N.L.R.B.* v. *Gissel Packing Co.*,[20] the majority, in *Trading Port*, concluded that "an employer's obligation under a bargaining order remedy should commence as of the time the employer has embarked on a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the union's majority status " The rationale for the new approach taken by the majority therein was that once an employer has impeded the electoral process "he has forfeited his right to a Board election, and must bargain with the union on the basis of other clear indications of employees' desires." Specifically, in the *Trading Port* case, the majority determined that the bargaining obligation began 3 days after the employer embarked on its unlawful course of conduct inasmuch as the union's recognition demand was made on the latter date, and inasmuch as all of the employer's violations of section 8(a)(1) were otherwise individually remedied by the Board's order.

Relying on the Supreme Court's decision in *Gissel, supra*, and citing his dissenting opinion in *Steel-Fab, supra*, and in subsequent cases, Member Fanning concurred in the majority's decision finding violations of section 8(a)(1), (3), and (5) of the Act

In his dissent, Member Kennedy adhered to the *Steel-Fab* precedent

[20] 395 U S. 575 (1969).

and indicated that he would not give retroactive effect to the bargaining order which he agreed was a proper remedy in this case.

In *Baker Machine & Gear*,[21] the Board found, consistent with its decision in *Trading Port, supra*, that an employer's obligation to bargain with the union began on the date on which the employer received the union's demand for recognition and on which the employer's course of unlawful conduct might well have undermined the union's majority status and made the holding of a fair election "improbable." [22]

In *Ludwig Fish & Produce*,[23] a Board panel ordered an employer to bargain upon request with the union which represented a majority of the employer's employees despite the fact that the union had made no demand for bargaining. Such a bargaining order was considered to be appropriate by the panel because the employer's threat of plant closure and its discriminatory discharge of two of the five employees in the unit "rendered 'a fair and reliable election' impossible." Acknowledging that there are situations where an employer "may effectively remedy its own unfair labor practices," the panel found no such evidence in the record before it and thus concluded that there was no basis to deny the bargaining order on that ground.

In *Bandag, Inc.*,[24] a Board majority found that the crucial precondition for a bargaining order—the existence of meritorious objections—was missing and thus refused to issue a *Gissel* bargaining order[25] despite the fact that the administrative law judge found, with Board approval, merit in the charging party's 8(a)(1) charge alleging postelection misconduct by the employer and in additional allegations derived from the regional director's postelection investigation of objections. A set of unusual facts evolved in this case when the charging party withdrew its objections during the course of the regional director's postelection investigation, in which he found additional evidence of preelection misconduct by the employer, but prior to his decision. The majority, relying on *Irving Air Chute Co.*,

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[21] 220 NLRB No. 40.

[22] In recommending the issuance of a bargaining order in this case, the administrative law judge relied on *Steel-Fab, supra*, in concluding that it was unnecessary for him to find a violation of sec 8(a)(5) in order to recommend such an order While the complaint, which issued before the *Steel-Fab* decision, alleged a violation of sec 8(a)(5) of the Act, neither the General Counsel nor the charging party filed exceptions with regard to the administrative law judge's failure to find such a violation. In the absence of any exceptions on this issue, and in view of the "full and complete remedy for the unfair labor practices on which the bargaining order is based," the majority, excluding Member Fanning, found it unnecessary to reach or pass on whether the bargaining order should be based on an 8(a)(5) violation Member Fanning, adhering to his dissenting position in *Steel-Fab*, indicated in a footnote that he would find an 8(a)(5) violation based on the employer's refusal to bargain with the union

[23] 220 NLRB No 160 (Chairman Murphy and Members Fanning and Jenkins)

[24] 225 NLRB No 11 (Members Penello and Walther, Chairman Murphy concurring, Members Fanning and Jenkins dissenting in part)

[25] *N.L.R.B.* v. *Gissel Packing Co*, *supra*.

Marathon Div.,[26] concluded that, absent meritorious objections, "an election is deemed valid; and the union, having failed to demonstrate its majority status, is obviously not entitled to a Board order compelling the employer to bargain with it." Specifically, in *Bandag*, the majority reasoned that the withdrawal of the objections by the charging party, with the approval of the regional director, was a clear indication that it (the charging party) did not want "to contest the election any longer." Since there was no question as to the finality of the election, the majority held that "the election must stand," and that a bargaining order was unwarranted.

Chairman Murphy concurred in finding a bargaining order inappropriate in this case. Consistent with the view expressed by Members Penello and Walther, the Chairman concluded that "where the election results are final and they show that a majority of the employees have voted against representation by the union, there is no way to overcome that lack of majority status.

In dissenting in part on the failure of their colleagues to issue a *Gissel* bargaining order in this case, Members Fanning and Jenkins stated that the "issuance of a bargaining order does not turn on the narrow question of existence of 'meritorious objections,' but rather on the broader question of whether the Board is faced with the results of a valid election." Relying on numerous cases where the Board has issued *Gissel* bargaining orders based upon preelection misconduct not alleged in the petitioner's objections which themselves were found not to be meritorious, the dissenters concluded that the majority erred by taking "too mechanistic" an approach—requiring the "technical existence of meritorious objections"—in denying the union a bargaining order simply because it withdrew its objections. The dissenters further disputed the majority's claim that the charging party, by withdrawing its specific objections, no longer wished to contest the election, noting that the charging party vigorously litigated the validity of the election and its entitlement to a bargaining order both at the hearing and in its posthearing briefs.

In *Rennselaer Polytechnic Institute*,[27] a Board majority concluded that a bargaining order was not warranted even though the employer therein violated section 8(a)(2) of the Act by dominating, assisting, and interfering with the administration of the Non-Exempt Personnel Advisory Committee, and section 8(a)(1) of the Act by various acts of interference with the efforts of employees on behalf of the petitioning union, as well as by granting benefits to employees during the pendency of the election petition. In so concluding, the majority,

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[26] 149 NLRB 627 (1964), enfd. 350 F 2d 176 (C.A 2, 1965)

[27] 219 NLRB 712 (Chairman Murphy and Members Kennedy and Penello, Members Fanning and Jenkins dissenting in part)

based on all the circumstances in the case, determined that the effects of the employer's unfair labor practices could be remedied by traditional means and that a free election could be held. The circumstances viewed by the majority in determining that a bargaining order was unwarranted included the fact that it was the employees themselves, and not the employer, who began the effort to abandon the union campaign; that the committee, whose membership included many more employees than those in the unit in question, was in existence long before the union appeared on the scene; and that there was basically a "free and open atmosphere" at the university where all views with regard to the union campaign were expressed openly on or off working time. Under these circumstances, the majority considered each incident of unlawful conduct to be relatively minor, "and even when added together," they concluded that all the misconduct did "not constitute such egregious conduct as to warrant a bargaining order."

In dissenting, Members Fanning and Jenkins argued that the employer's unlawful conduct warranted a more meaningful remedy than a cease-and-desist order and an order directing the employer to disestablish the committee as the bargaining representative of its employees. In their view, a *Gissel* bargaining order was warranted based on the employer's unlawful conduct as detailed in their opinion and on the fact that the union represented a majority of the employer's employees in the bargaining unit in question at all times pertinent. While acknowledging that the remedy provided by the majority might prevent the employer's unlawful conduct from "continuing or reoccurring," the dissenters concluded nevertheless that such a remedy was insufficient to redress the damage to the union's majority status which existed prior to the employer's unfair labor practices.

3. Remedy for Refusal To Process Grievances

In *Federal Electric Corp.*,[28] a Board panel found that the union violated section 8(b)(1)(A) and (2) of the Act by failing to process an employee's promotion grievance because of his nonmembership in the union while at the same time it processed similar promotion grievances for members. On January 20, 1974, all promotion grievances filed by the union on behalf of its members were found to be meritorious and the employees involved in those grievances received retroactive promotions to July 1973. For the purpose of providing appropriate remedial relief for the employee whose grievance was not processed by the union, the panel presumed that the employee's "grievance, if

[28] *Local Union 2088, IBEW (Federal Electric Corp.)*, 218 NLRB 396 (Members Jenkins, Kennedy, and Penello).

processed, would have been found to be meritorious on or about January 20, 1974, and that his promotion to A technician would have been retroactive to July 1973." The promotion would have resulted in a permanent wage increase for the employee involved, and thus the employee's "loss of earnings [was] a continuing one which [could not have been] rectified unless and until an actual determination [was] made on the question of [the employee's] right to promotion." To remedy the employer's unfair labor practices therein, the panel directed the union to treat the employee as if he had been promoted retroactive to July 1973 and to make him whole for all loss of earnings resulting from his failure to be promoted "for the period from July 1973 to the time an actual determination is made as to [the employee's] current right to such a promotion." By an "actual determination," the panel indicated that it was referring to the time when all parties, including the employee involved "[reached] an amicable settlement of [the employee's] promotion claim or the matter [was] resolved on the merits pursuant to a full utilization of the grievance and arbitration procedures of the collective-bargaining agreement." The remedy further provided that if the original or a new grievance was ever determined to be meritorious and, as a result, the employer was obligated to make retroactive payments, such payments could be used as an offset to the union's liability. The remedy also provided, however, that if the grievance was found to be meritorious, but no retroactive backpay was ordered, or the grievance was dismissed on the merits, the union's backpay liability would cease "as of the date of such final disposition of the grievance."

In *Interroyal Corp.*,[29] a Board panel found that a union [30] violated section 8(b)(1)(A) of the Act by refusing to consider and process a meritorious grievance filed by an employee who was, in effect, discharged for allegedly overstaying a medical leave of absence. To remedy this unfair labor practice, the panel ordered the union to make the employee whole for any losses she suffered by reason of the union's failure to promptly file and process her grievance. In granting such a backpay remedy, the panel noted that the proceeding was "rooted in little more than a clerical error," and that if the union had acted as an advocate in good faith the grievance could have easily been resolved in the employee's favor. It was determined by the panel that the union's backpay liability would terminate when and if the employee was reinstated by the employer or obtained substantially equivalent employment, or when the union secured con-

[29] *United Steelworkers of America (Interroyal Corp.)*, 223 NLRB No. 177 (Members Fanning, Penello, and Walther).

[30] While we refer to the "union" in the text herein, we note that there were actually two respondents in this case, Local 3784, United Steelworkers of America, AFL-CIO, and its parent.

sideration of the employee's grievance by the employer and thereafter pursued it "in good faith with all due diligence."

4. Other Issues

In *Crest Door Co.*,[31] a Board majority refused to order the reinstitution of a night shift which was discriminatorily eliminated by the employer in response to the union's successful campaign. The majority decision in this regard was based primarily on the fact that when the night shift was eliminated all night shift employees were transferred to the day shift without any resultant loss in pay. In addition, the majority noted and also relied on the fact that the employees in the plant had no special skills, that job assignments were interchangeable, and that the same kind of work was performed on both shifts. In a moreover argument, the majority further noted that the resumption of the night shift could have resulted in "further hardship" to the employer since part of the employer's operations had been moved to a location some 400 miles away.

In dissenting from the refusal of the majority to order reinstatement of the night shift, Members Fanning and Jenkins argued that the Board should have issued a remedial order for the violation found which would have preserved the right of the night shift employees to return to their jobs. In their view, the fact that the "discriminatory deprival of work embraced the entire shift rather than only a few employees on the shift" was not grounds for ignoring the employer's reinstatement obligation, and for "allowing [the company] to escape the usual and complete remedy solely because its violations were sweepingly broad, rather than limited to one or a few individuals." Such a reinstatement order, in the view of Members Fanning and Jenkins, would have prevented possible hardship to employees who may have had to work the night shift for one good reason or another.

In *Platt Electric Supply*,[32] a Board panel majority found, *inter alia*, that an employer did not breach a union-security agreement in violation of section 8(a)(5) and (1) of the Act when it refused to discharge striker replacements who failed to tender union dues and initiation fees.[33] The employer therein received a demand from the union to discharge striker replacements pursuant to the provisions of the union-security agreement and a request from the union to reinstate economic strikers. The employer rejected both the union's demand and

[31] 219 NLRB 648 (Chairman Murphy and Members Kennedy and Penello, Members Fanning and Jenkins concurring and dissenting in part).

[32] 224 NLRB No 194 (Members Penello and Walther, Member Jenkins dissenting in part)

[33] The Board panel found that the employer violated sec 8(a)(5) and (1) of the Act by repudiating the contract and withdrawing recognition of the charging party for violating the contract's no-strike clause, when, in fact, the contract contained no such provision

its request, however, based on its unlawful repudiation of the collective-bargaining agreement, including the union-security agreement, which it mistakenly believed contained a no-strike clause. Consistent with its view that the contract had been terminated by an unlawful strike, the employer refused to forward letters sent by the union to the striker replacements, in care of the employer, advising them of their obligations under the union-security clause. Accordingly, the majority concluded that, since the union did not fulfill its fiduciary duty to give actual notice to the replacements of their obligation to tender dues and initiation fees, no violation could be found against the employer for refusing to discharge the striker replacements. The order issued by the majority required the employer to "forward any subsequent communications from the Union to the striker replacements concerning the replacements' obligation under the contract to tender union dues." The order further provided that the employer reinstate the economic strikers if the striker replacements failed to fulfill their obligation under the union-security agreement 30 days after they were given notice of that obligation.

In dissenting in part, Member Jenkins agreed with the majority that "a union is required to notify employees of their obligations under the union-security clause of the contract before it can perfect a lawful request for their discharge." However, he concluded that the union, by mailing letters addressed to each of the striker replacements in care of the employer, "took reasonable steps to satisfy its legal obligation." In his view, the fact that the striker replacements did not receive the union's letters, which were sent return receipt requested and were signed for and accepted by the employer, was only the result of efforts by the employer to thwart the union in fulfilling its fiduciary duty. Accordingly, Member Jenkins would not have rewarded the wrongdoer therein, the employer, but would have found that "by signing for and accepting the letters mailed to the striker replacements, [the employer] became the Union's agent for purposes of delivery and that [the employer] thereby assumed full responsibility for seeing that the striker replacements received actual notification of their obligations under the contract." For purposes of providing an adequate remedy in this case, Member Jenkins would have presumed that the union was legally entitled to require the discharge of the striker replacements and the reinstatement of the striking employees, and thus would have held the employer liable for backpay to the strikers "until such time as the [employer had] satisfied its legal obligations to the Union, the striking employees, and the striker replacements."

In *Trustees of Boston University*,[34] a Board panel found, contrary to the administrative law judge, that an employee who was discharged in violation of section 8(a)(1) of the Act was entitled to the traditional Board remedy of reinstatement to her fomer job, if that still existed. Based on a personality conflict between the discriminatee and her supervisor which predated the discharge, the administrative law judge concluded that the appropriate remedy would be "[reinstatement] to a position substantially equivalent to her former one but in another department of Boston University." In rejecting the administrative law judge's recommended order, the panel relied on the longstanding Board policy behind section 10(c) of the Act, namely, that an employer can restore a discriminatee to a substantially equivalent position only when the discriminatee's former position is no longer available.

[34] 224 NLRB No. 179 (Members Fanning, Penello, and Walther).

VII

Supreme Court Litigation

During fiscal year 1976, the Supreme Court decided two cases in which the Board was a party. The Board participated as *amicus curiae* in two additional cases.

A. Peaceful Primary Picketing Within Privately Owned Shopping Center

In *Hudgens*,[1] the Board held that the owner of a shopping center violated section 8(a)(1) of the Act by threatening to cause the arrest of the warehouse employees of Butler, one of its tenants, who, in support of an economic strike, sought to picket in front of Butler's store within the shopping center. The court of appeals, applying the constitutional criteria enunicated in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972),[2] enforced the Board's cease-and-desist order. The Supreme Court,[3] holding that the respective rights of the parties were to be determined solely under the criteria of the Act, rather than by reference to first amendment standards, remanded the case to the Board for reconsideration.

Acknowledging that "the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*" (424 U.S. at 518), the Court concluded that "under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." (*Id.* at 521.) Rather, the rights and liabilities of the parties "are dependent exclusively upon the National Labor Relations Act." In accordance with the standard enunciated in *Babcock & Wilcox*,[4] it is the Board's task to achieve an "accommodation of § 7 rights and private property rights 'with as

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[1] *Hudgens* v. *N.L.R.B.*, 424 U.S. 507, vacating and remanding 501 F.2d 161 (C.A. 5, 1974), enfg 205 NLRB 628 (1973)

[2] In *Lloyd*, the Court qualified its earlier ruling in *Amalgamated Food Employees Union, Loc. 590* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), that a large self-contained shopping center is the functional equivalent of a municipality. It held that the first amendment accorded the right to engage in peaceful picketing and handbilling at such a shopping center, but only if the activity were "directly related in its purpose to the use to which the shopping center property [is] put," and "no other reasonable opportunities for the pickets to convey their message to their intended audience [are] available." (407 U S at 563)

[3] Justice Stewart delivered the opinion of the Court, Justice Powell, joined by Chief Justice Burger, filed a concurring opinion, Justice White concurred in the judgment. Justice Marshall, joined by Justice Brennan, dissented

[4] *N.L.R.B.* v. *Babcock & Wilcox*, 351 U.S. 105 (1956).

little destruction of one as is consistent with the maintenance of the other.' " (*Id.* at 522.) The Court added that "[t]he locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." (*Ibid.*) [5]

B. Court of Appeals Erred in Determining in First Instance Appropriate Unit Question

In *South Prairie*,[6] the Board contended that the Court of Appeals for the District of Columbia Circuit had exceeded its reviewing function in setting aside the Board's finding that two affiliated construction firms, one which operated with unionized employees and the other as a nonunion shop, constituted separate employers rather than a single employer. The Board also contended that, after finding a single employer, the court of appeals further erred in deciding for itself that a single unit, composing the employees of both firms, was an appropriate unit for collective-bargaining purposes.

The Supreme Court, in a *per curiam* opinion, affirmed the lower court's determination that the two firms constituted a single employer, but agreed that it had overstepped its reviewing function by "tak[ing] upon itself the initial determination of [the unit] issue . . . ." (96 S. Ct. at 1844.) Accordingly, the Court vacated the judgment below insofar as it directed the Board to issue a bargaining order, and it remanded the case for further proceedings.

C. Coverage of Blue Water Seamen Under State Right-to-Work Laws

Mobil Oil Corp.[7] involved the question whether Texas could apply its right-to-work laws to nullify an agency-shop agreement covering blue water seamen most of whose work took place on the high seas.

The Board, as *amicus curiae*, urged that section 14(b) of the Act [8]

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[5] Thus, the Court noted that the instant case "involved lawful economic strike activity rather than organizational activity," that "the § 7 activity here was carried on by Butler's employees (albeit not employees of its shopping center store), not by outsiders," and that "the property interests impinged upon . were not those of the employer against whom the § 7 activity was directed, but of another "

[6] *South Prairie Construction Co.* v. *Loc. 627, Operating Engineers*, 96 S Ct 1842, vacating in part and remanding in part 518 F 2d 1040 (C.A D C , 1975), granting review of 206 NLRB 562 (1973)

[7] *Oil, Chemical & Atomic Workers Intl. Union* v *Mobil Oil Corp* , 96 S.Ct 2140, reversing 504 F 2d 272 (C A 5, 1974)

[8] Sec. 14(b) provides that

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

does not permit application of state restrictions on union-security provisions to those who perform most of their work outside the state's borders. Rather, a State has sufficient interest in a particular group of employees to warrant application of such restrictions to them only if the employees' jobsite is within the State.[9] Since, in the instant case, the employees' jobsite was the high seas, Texas could not apply its right-to-work laws to them.

The Supreme Court[10] agreed with the Board's position. The Court stated:

> Because most of the employees' work is done on the high seas, outside the territorial bounds of the State of Texas, Texas' right-to-work laws cannot govern the validity of the agency-shop provision at issue here. It is immaterial that Texas may have more contacts than any other State with the employment relationship in this case, since there is no reason to conclude under § 14(b) that in every employment situation *some* State or Territory's law with respect to union security agreements must be applicable. Federal policy favors permitting such agreements unless a State or Territory with a sufficient interest in the relationship expresses a contrary policy via right-to-work laws. It is therefore fully consistent with national labor policy to conclude, if the predominant job situs is outside the boundary of any State, that no State has a sufficient interest in the employment relationship and that no State's right-to-work laws can apply. [Footnote omitted.] [96 S. Ct. at 2147.]

D. Prohibition by States of Self-Help Economic Activities Unregulated by the Act

In *Lodge 76, IAM* v. *Wisconsin Employment Relations Commission*,[11] the Court,[12] in agreement with the position urged by the Board as *amicus curiae*, held that the State of Wisconsin could not prohibit a concerted refusal by union members to work overtime in order to put pressure on an employer during collective-bargaining negotiations. The Court overruled *Briggs-Stratton*,[13] which had sustained the power of the State to regulate similar activity on the theory that it was

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[9] The Board relied on *Northland Greyhound Lines*, 80 NLRB 288 (1948), and *Western Electric Co*, 84 NLRB 1019 (1949), where it defined "job site as [being] where [the employees] report for work, receive their instructions, and are paid their wages" (84 NLRB at 1022)

[10] Justice Marshall delivered the opinion of the Court, Chief Justice Burger and Justices Stevens and Powell concurred separately. Justice Stewart, joined by Justice Rehnquist, dissented

[11] 96 S Ct. 2548, reversing 67 Wisc 2d 13, 226 N W 2d 203 (1975).

[12] Justice Brennan delivered the opinion of the Court, Justice Powell, joined by Chief Justice Burger, concurred. Justice Stevens, joined by Justices Rehnquist and Stewart, dissented.

[13] *Intl. Union of Automobile Workers* v. *Wisconsin Employment Relations Board*, 336 U S. 245 (1949).

neither prohibited by section 8, nor protected by section 7, of the Act. The Court found that holding undermined by its subsequent decision in *N.L.R.B.* v. *Insurance Agents Intl. Union* [*Prudential Insurance Co.*], 361 U.S. 477 (1960), that Congress had intended to leave such activity to the free play of economic forces. The "'use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining.' " (96 S. Ct. at 2557.)

VIII

Enforcement Litigation

Board orders in unfair labor practice proceedings were the subject of judicial review by the courts of appeals in 280 court decisions issued during fiscal 1976. Some of the more important issues decided by the respective courts are discussed in this chapter.

A. Board and Court Procedure

Section 10(b) of the Act provides that no complaint shall issue based upon any unfair labor practice occurring "more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." In *N.L.R.B.* v. *Loc. 264, Laborers' Intl. Union* [*D & G Construction Co.*],[1] the principal issue was whether service of the charge was effective on mailing or only on receipt by the charged party. The court noted that the legislative history of section 10(b) is relatively unenlightening on this issue and that in construing that section the Board applied its own rule of practice—namely, that where service is by mail the "date of service shall be the day when the matter served is deposited in the United States mail . . . ." [2] In approving the Board's construction, the court observed that service of a charge simply initiates an informal investigation during which the respondent is afforded an opportunity to express his position and to discuss settlement before complaint issues, so that no prejudice adheres in a procedure under which the charge might be received a short time after the 6-month period expires. Further, the Board's approach permits the Board and the charging party to control the time of service, while a requirement of receipt would create difficulties of proof and might allow egregious unfair labor practices to go unremedied simply because of minimal and unanticipated delay in the delivery of the charge. The court also recognized that service effective on mailing is incorporated not only in the Federal Rules of Civil Procedure but also in various statutory schemes and in the rules of a number of administrative agencies.

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[1] 529 F. 2d 778 (C.A 8).

[2] Board Rules and Regulations, Series 8 (29 C.F.R.), sec 102.113(a).

The Second Circuit approved the Board's deferral to arbitration in *United Aircraft Corp.*,[3] over the charging unions' objections that the employer "has exhibited a history of enmity toward its employees' exercise of rights protected by the NLRA" and that the "incidents alleged in the [current] complaints . . . are so similar to those found in the past . . . to have evidenced a pattern of anti-union activity that they represent a continuation of that pattern." [4] Although the court held that these factors are relevant in determining the appropriateness of deferral, it approved the Board's statement that "[t]he crucial determinant is . . . the reasonableness of the assumption that the arbitration procedure will resolve this dispute in a manner consistent with the standards of *Spielberg* [112 NLRB 1080 (1955)]." [5]

Relying on evidence that some of the parties' disputes had already been resolved through the contractual grievance and arbitration procedure and that the employer remained willing to arbitrate and comply with adverse arbitral awards, the court found support for the Board's conclusion that "the parties' voluntary machinery for resolving disputes functions 'effectively and fairly and has continued to be utilized by the parties to their satisfaction.'" [6] That determination, the court held, was sufficient to overcome the employer's "anti-union" history for the Board's deferral purposes. Accordingly, the court approved the Board's deferral, under *Spielberg* and *Collyer*,[7] of the 8(a) (1), (3), and (5) allegations of the complaint.

Finally, the court found without merit the union's argument that the Board should have made unfair labor practice findings, based on the arbitrators' breach of contract findings, and should have fashioned its own appropriate remedy in addition to the arbitration awards. In the court's view, although the Board had discretion to order such additional relief, it did not abuse its discretion in failing to do so on the facts of this case.

The issue of sequestration of witnesses in Board proceedings was considered by the Second Circuit in a case [8] in which the administrative law judge had denied a motion to sequester six alleged discriminatees. He followed the Board rule that such persons are not mere witnesses, but are parties whose interests are directly affected and hence are entitled to be present throughout the proceeding. The court criticized the inflexibility of the Board's rule, noting that sequestration is often an important method for helping to discover the truth. Thus, in situations where witnesses are likely to have discussed their

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[3] *Lodges 700, 743, 1746, Intl. Assn. of Machinists* [*United Aircraft Corp.*] v. *N.L R B*, 525 F. 2d 237.
[4] 525 F. 2d at 244.
[5] 525 F. 2d at 245, quoting *National Radio Co*, 198 NLRB 527, 531 (1972).
[6] 525 F. 2d at 246.
[7] *Collyer Insulated Wire*, 192 NLRB 837 (1971).
[8] *N.L.R.B.* v. *Fred Stark, et al.*, 525 F. 2d 422.

proposed testimony among themselves, sequestration allows the adverse party an opportunity to develop inconsistencies. A discriminatee, in the court's view, is not like a party in a private suit whose presence may be necessary to guide his attorney, since Board cases are prosecuted by the General Counsel who seeks to vindicate the public interest, not the interests of an individual discriminatee. The court of appeals concluded that an administrative law judge should have the authority to sequester discriminatees, and that where several discriminatees are to be called as witnesses to the same incident the presumption in favor of sequestration should be rebuttable only infrequently, if at all, by a particularized showing of need for the discriminatees to hear each other's evidence.

In *D'Youville Manor* [9] after reaffirming its view that discovery is not ordinarily available in Board cases, the First Circuit also rejected the contention that special circumstances constituting "good cause" existed. The employer contended that, since two employees involved in the incident giving rise to the unfair labor practice charge had left their employment, it was inconvenient to obtain their statements before hearing. The court observed that turnover was so commonplace that accepting it as providing good cause for discovery would make discovery the rule rather than the exception.

B. Representation Proceedings

1. Conduct Affecting Election

In considering the impact of alleged union misrepresentation in an election campaign, the Board considers the surrounding circumstances in determining the likely impact on employee free choice. In one of these cases, *Aircraft Radio Corp.*,[10] the company filed objections to the election including an allegation that on the eve of the election the union passed out a leaflet attributing the annual profit of the company's parent corporation to the company and accusing the company of distorting its profit picture in response to earlier union claims concerning company profits. The regional director dismissed all the company's objections, noting that as to the alleged material misrepresentations the company utilized the opportunity to make an effective reply, since the company gave a speech concerning profits after the initial union pamphlets concerning profits. The Board upheld the regional director's determination, but the Third Circuit reversed, concluding that the regional director's refusal to overturn the election was "arbitrary and capricious" because the misstatement concerning

[9] *D'Youville Manor, Lowell, Mass* v. *N.L R B*, 526 F. 2d 3.
[10] *Aircraft Radio Corp. (Div. of Cessna Aircraft Co.)* v *N.L.R.B.*, 519 F.2d 590 (C.A. 3).

company profits was "material and flagrant" and the election was close. Although the court recognized that the company did respond to the union's initial leaflets concerning company profits, it disagreed with the regional director's conclusion that the reply stood as an effective rebuttal to the union's election eve misrepresentation; in the court's view, the company should have been given the opportunity to have the "last word" on the subject in response to the union's second misrepresentation of the subject.

In *Santee River Wool Combing Co.*,[11] the Board refused to set aside an election because of an election eve statement by the union that an employee had been discharged by the company on account of the employee's union activities. The Board recognized that the union knew that the election eve statement was false and that it would ordinarily set aside an election in such circumstances, but concluded that in this case the particular misrepresentation did not have a significant impact on the election because the company had already "doubly earned" a reputation for discharging employees for union activities by the dismissal of two other prounion employees. The Fourth Circuit reversed, holding that where a party in an authoritative position intentionally misrepresents material facts without giving the other party an opportunity to reply a significant impact on the election will be presumed. The court noted that, although it did not condone the company's earlier unfair labor practices, the union's act of misconduct "independently" required the election to be set aside.

2. Other Issues

In *Detroit Edison*,[12] the Sixth Circuit, overturning a Board finding to the contrary, held that so-called system supervisory personnel of an electric utility company are supervisors within the meaning of the Act and hence not entitled to collective-bargaining rights. The system supervisors monitor visual displays and operate controls which determine the distribution of electricity to various parts of the company's system and, in turn, to its customers. When problems arise, the system supervisors take appropriate action such as energizing or de-energizing power lines, identifying equipment breakdowns, requesting repair crews, and coordinating the activities of field personnel. The Board found that in the performance of their duties the system supervisors follow delineated company policies, and do not possess authority to hire, fire, or discipline other employees, or to adjust their grievances. In refusing to enforce the Board's order requiring the company to bargain with their majority representative, the court

[11] *N.L.R.B.* v. *Santee River Wool Combing Co.*, 537 F 2d 1208 (C.A. 4)
[12] *N.L.R B.* v *Detroit Edison Co* , 537 F 2d 239.

held that the system supervisors often instruct field personnel as to what work they are to perform and such instructions are almost invariably complied with. Further, the court found, there are a number of potential situations, including emergencies, when the system supervisors are called upon to exercise independent judgment Accordingly, the court held that these individuals are supervisors under the statutory definition.

C. Unfair Labor Practices

1. Employer Interference With Employee Rights

Among the employee rights protected by the Act is the right to engage in concerted activities for the purpose of "mutual aid or protection." Two cases treated that right in circumstances where the employee interests involved extended well beyond the immediate employment relationship. In one case[13] Kaiser engineer employees, meeting as members of the Civil Engineering Society, discussed an effort by Bechtel, one of the company's major competitors, to have the Department of Labor ease restrictions on entry of foreign engineers. At the Society's direction, employee Allen drafted a letter which was signed by the Society's executive committee and mailed to three United States Senators and two Congressmen. The letter asserted that the competitor's effort was "short-sighted," for while engineers were currently in demand, "the market is bound to ease [and] engineers will be made redundant . . . ." In conclusion, the letter requested the legislators to afford the engineer employees "some protection from the indiscriminate importation of engineers by large companies." A few days later, Kaiser officials interviewed all the signers about the letter, making clear to Allen that the company considered the letter embarrassing because it might be construed as indicating that Kaiser Engineers advocated discrimination against foreign engineers. Allen offered to write the legislators to clarify any ambiguities, but the officials indicated they would write their own letters. Shortly afterward, Allen was given the option of resigning or being discharged; he resigned. In holding that the engineers' activities were protected, the court observed that although the appeal to legislators involved no request for action on the part of the employer, did not concern a matter over which the company held control, and was outside the strict confines of the employment relationship, the members of the Society "had a legitimate concern in national immigration policy insofar as it might affect their job security."

[13] *Kaiser Engineers* v. *N.L.R B*, 538 F 2d 1379 (C A 9)

In the other case,[14] Verrochi, a printing trades employee on temporary layoff from Trembly Trade, a union shop, took a job at Circle Bindery, a nonunion shop. 'n the course of his duties the first day on the job, he noticed a booklet being bound which bore a union label or "bug," the use of which was controlled by a licensing agreement with the local printing trades council. The licensing agreement prohibited Excelsior from subcontracting work to a nonunion bindery if the work bore the union label. On leaving work at the end of the day, Verrochi took copies of the booklet without permission and left a copy on the desk of the council's business agent, with a note stating that the binding was being done at Circle. The next day Verrochi called Rawson to point out that if the job were being done in accordance with the agreement he and other laid-off employees "could be working in jobs like this in a union shop, enjoying the pay rates and benefits." The next morning Rawson called Excelsior, which was identified as the licensee by a number on the bug, and told its president to pull the job from Circle, a call which resulted in Verrochi's discharge. The court agreed with the Board that Verrochi's activity, while directed not at improving the conditions for Circle's nonunion employees, but "solely to protecting himself and his fellow members of the Union by preventing misuse of the union label which could undercut the Union's standards," was nonetheless within section 7. The court noted that, in determining whether conduct harmful to an employer is within section 7, it may be appropriate to take into account whether the presumed beneficiaries are fellow employees or a more remote class, but that the balancing of employer and employee interest still falls within the area of the Board's expertise. In approving the balance struck here, the court noted that Verrochi did not attack his employer's business in any other respect, acted within union channels, and confined his protests to a suitable complaint, while the harm Circle sustained was merely to lose work, which under Excelsior's union contract it should not have had in the first place.

In another case[15] which dealt with employer interference, after complaint issued alleging violations of section 8(a)(1) and (3), the company president called each of his four employees into his office individually and asked each if he "would mind" supplying the company with a copy of the statement the employee had given to the Board during the investigation of the case, indicating that he was "not requiring" this action. Each employee obtained a copy of his statement from the Board's regional office and turned it over to the president. The Board found that the requests violated section 8(a)(1) notwithstanding their voluntary character and the willingness of the

[14] *N L.R B.* v. *Circle Bindery*, 536 F.2d 447 (C.A. 1)

[15] *N.L.R.B.* v. *Martin A. Gleason & Gutterman Funeral Home*, 534 F.2d 466 (C.A 2).

employees' compliance, because such employer conduct would naturally inhibit its employees' desire to cooperate with the Board. The Second Circuit, denying enforcement, rejected what it characterized as the Board's "per se" rule and held that "mere" requests, "not threatening in themselves" and made at a time when the employer was preparing for trial, were not violative of the Act. Chief Judge Kaufman, dissenting, would have found that the "coercion and chilling effect" latent in any request for statements and the availability to the employer of less drastic alternatives justify the Board's finding of violation here.

In *N.L.R.B.* v. *Dover Corp.*,[16] the Tenth Circuit upheld the findings of the Board that the employer's efforts to repudiate discharge threats made by a supervisor during an organizing campaign to two employees who supported the union were insufficient to remove the coercive impact of the threats. When management had learned of threats of reprisal allegedly made by a supervisor, the assistant plant superintendent and one of the employer's attorneys were sent around to a number of employees to assure them that the employer did not condone such remarks, that the employer would "take action" if the report of threats were true, and that the employees were free to engage in union activities without fear of reprisals. In addition, the employer posted a notice identifying its supervisors as the "only people who can make statements on behalf of the company" and stating, *inter alia*, that they had all been instructed not to interfere with employee rights. The court disagreed with the Board's characterization of the employer' repudiation efforts as "little more than . . . general bromides . .. . about [its] aims and good intentions," but it nevertheless declined to overrule the Board's finding that the repudiation attempt was inadequate, in view of the "strong" character of the supervisor's remarks—warnings of possible discharges for union activity. Similar findings as to the inadequacy of a repudiation had been upheld by courts in previous cases,[17] but as the court noted, the attempted repudiation in this case was "more specific" than those rejected as insufficient in the other cases.

2. Employer Assistance to Labor Organizations

In *American Can Co.*,[18] the Second Circuit sustained the application of the Board's *Midwest Piping* doctrine,[19] which holds that an em-

[16] 535 F 2d 1205

[17] *Furr's* v. *N L R.B*, 381 F 2d 562 (C A 10, 1967), cert denied, 389 U S 840 (1967), *N L.R B* v *Gerbes Super Markets*, 436 F 2d 19 (C A. 8, 1971), *U S Rubber Co* v *N L.R B*, 384 F. 2d 660 (C A. 5, 1967), *N.L R.B* v. *Austin Powder Co.*, 350 F 2d 973 (C A 6, 1965), *A P Green Fire Brick Co* v. *N L R B*, 326 F 2d 910 (C.A. 8, 1964).

[18] *American Can Co.* v. *N L R B*, 535 F. 2d 180, enfg. 218 NLRB 102 (1975), 40 Ann Rep. 94 (1975)

[19] *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945)

ployer violates section 8(a) (2) and (1) of the Act by recognizing one of two rival unions whose competing claims give rise to a real question concerning representation, to a situation where the competing claims related to a group of employees not yet hired. The employer closed a plant at which lithographic employees had been represented for 30 years in a separate unit and opened a new plant 25 miles away. The lithographers' union demanded recognition at the new plant on the ground that most of the lithographers wanted to transfer and tendered a petition to this effect, signed by the lithographers. The employer refused to recognize the union, stating that, if the new plant was to be organized, it preferred a single unit of all employees. After the new plant opened, but before any lithographers were hired, the union which had represented production and maintenance employees at the old plant filed a petition for an election in a plantwide unit. On the day before the election, the lithographers' union informed the Board's regional office that it had had an interest in representing the lithographers and objected to their inclusion in the plantwide unit. The regional office contacted the general supervisor of employee relations, who, despite his knowledge of the petition signed by the lithographers at the old plant, denied knowing that the lithographers' union had any interest in the election. The election was won by the union seeking the overall unit. The lithographers' union was not on the ballot, and no lithographers voted, because none had been hired at the new plant. When the employer offered employment at the new plant to lithographers working at the old plant, it conditioned the offer on their joining the union representing the overall unit and working under its nationwide contract with the employer.

On these facts, the court concluded that the Board had properly found that the employer violated section 8(a) (2) and (1) of the Act by recognizing the union representing the overall unit as representative of the lithographers. The court noted that cases which hold that no real question concerning representation exists where one union has clearly demonstrated its majority status were not controlling; no such demonstration could be made here, since the lithographers had not been hired when a union was recognized as their representative. Although the Board and the court rejected the lithographers' union's claim to represent the lithographers at the new plant on the theory that their work was a continuation of work previously performed at the old plant, the theory was by no means frivolous. Moreover, in view of the 30-year history of separate representation of lithographers at the employer's plants in the area, the Board might well have found a separate lithographers' unit at the new plant appropriate and given the lithographers a choice between the two unions. Under these circumstances, the claim raised a real question concerning representa-

tion, and the lithographers could not be accreted into the overall unit until that question was resolved by the Board.

3. Employer Discrimination Against Employees

Two nonstruck members of an employer association locked out their employees in response to the union's whipsaw strike.[20] The parties had a long history of collective bargaining and there were no indicia of subjective union animus. When the first employer's president, Gleason, announced the lockout, one of his employees asked how he could remain at work; the record evidence is conflicting concerning whether the company president solicited union resignations or only responded to the employees' offer to resign. Thereafter, two of the four unit employees returned to work after presenting evidence of their resignation from the union. The second employer, Gutterman, announced the lockout by stating to its employees that "no member of the local" could work; the evidence is conflicting as to whether the employer suggested union resignation as a way to return to work. None of Gutterman's employees resigned. After the lockout ended, Gleason's two remaining unit employees and all of Gutterman's employees returned to work. After analyzing the Supreme Court's decisions in *Buffalo Linen*, *Brown*, and *American Ship Building*,[21] the Board found that Gleason had violated section 8(a)(3) and (1) by locking out its employees and "conditioning" their return to work during the lockout on resignation from the union. The Board also found that Gutterman had similarly violated the Act, noting that the plain import of its statement that no members of the local could work was that nonmembers of the local could work. In light of these findings, the Board found it unnecessary to make credibility determinations regarding direct solicitations of union resignations in the employers' announcements of the lockout. Disagreeing with the Board, the court held that the lockout was a legitimate response to the whipsaw strike and that whether the employers' subsequent action was unlawful depended on a resolution of testimonial conflicts concerning what the employers said to their employees about the post-lockout situation. In the court's view, the employers could discuss with their employees the "natural result" of a lawful lockout—namely, that it was only in the event that locked-out union employees became nonunion members of the labor market that the employers could take them back for the duration of the lawful lockout. On the other hand, the court noted it would be a different matter if the facts showed

[20] *N.L.R.B* v *Martin A Gleason & Gutterman Funeral Home*, 534 F.2d 466 (C.A 2)

[21] *N L R B* v *Truck Drivers Loc Union 449 IBT [Buffalo Linen Supply Co]*, 353 U S 87 (1957), *N L R B* v. *Brown Food Store*, 380 U.S. 278 (1965), and *American Ship Building Co* v *N L.R B*, 380 U S 300 (1965).

that the two employers decided to use their locked-out employees with the understanding that their employees would resign the union for the lockout period and then rejoin the union with the further understanding that the employers would insist on a no-recrimination clause in the new contract so that the resigning employees would not be subject to fine or sanction by the union. Accordingly, the court remanded the case to the Board to make these credibility determinations.

In *United Steelworkers of America* [*Dow Chemical Co.*] v. *N.L.R.B.*,[22] the Board found that the company violated section 8(a)(5) and (1) of the Act by unilaterally announcing and scheduling a change in the work schedule of its latex employees. The Board further found that the union's subsequent strike to protest the work change violated the no-strike clause of the collective-bargaining agreement because the "contract grievance procedure was available for the peaceful resolution of the dispute," but the union "failed to submit the dispute in accordance with" that procedure. The Board applied the rule of *Mastro Plastics* [23] as interpreted in *Arlan's* [24] that "only strikes in protest against serious unfair labor practices should be held immune from general no-strike clauses." It held that the company's unilateral conduct, although an unfair labor practice, "was not of such serious nature as to be 'destructive of the foundation on which collective bargaining must rest'" (quoting from *Mastro Plastics*, *supra*, 350 U.S. at 281). The union's breach of the no-strike provision therefore was not excused by the company's unfair labor practice, and the strike was "unprotected from its inception." Finding that the union's breach of the no-strike clause was material, the Board, relying on *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (1953), enfd. 223 F.2d 338 (C.A.D.C., 1955), cert. denied 350 U.S. 981 (1956), concluded that the company did not violate section 8(a)(5) and (1) of the Act by rescinding the collective-bargaining agreement. Finally, since the strike in violation of the no-strike clause was unprotected, the Board found that the company did not violate section 8(a)(3) and (1) of the Act by terminating the strikers. And, since the company had validly terminated the strikers, it was entitled to withdraw recognition from the union based upon a petition signed by a majority of the employees then employed.

The court of appeals sustained the Board's findings that the company committed an unfair labor practice by unilaterally announcing a work change and that the strike was improper because the union failed to exhaust the grievance procedure and did not file a written

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[22] 530 F.2d 266 (C.A. 3).

[23] *Mastro Plastics Corp.* v. *N.L.R.B*, 350 U.S. 270 (1956).

[24] *Arlan's Department Store of Michigan*, 133 NLRB 802, 807 (1961).

request for arbitration. The court remanded the case to the Board, however, to consider the effect of *Boys Markets* v. *Retail Clerks Union, Loc. 770,* 398 U.S. 235 (1970), and other recent developments, on the propriety of the company's post-strike actions. The court declined "to resolve this case by simply pigeonholing it as within the rule of *Mastro Plastics* or that of *Arlan's,*" writing that it perceived fundamental developments in national labor policy since those cases were decided that "militate against reliance solely on *Mastro Plastics* or *Arlan's* in determining whether the Company's post-strike actions were permissible." The court acknowledged that a *Boys Markets* injunction would have been unavailable to the company in the instant case, because the arbitration provision of the contract was elective. The court concluded, however, that "compliance with the grievance procedure was mandatory" even though arbitration was not compulsory. In the court's view, the company had not fully discharged its obligations under this procedure and "the Board should have considered as a factor the company's failure to seek peaceful resolution through the grievance procedure and in the arbitral forum."

4. The Bargaining Obligation

A successor employer's bargaining obligation was considered in a case [25] in which the unit was greatly reduced. The predecessor, Paulis Silk, which at the peak of its production had 300 employees, reduced its force to 80 employees in 1973 and closed its plant at the end of that year. A month later, Band-Age leased one-fourth of Paulis Silk's floor-space and began producing a similar product with 35 former Paulis Silk employees. The Board, with Member Kennedy dissenting, found that Band-Age, a successor to Paulis Silk, had violated section 8(a)(5) and (1) of the Act by refusing to bargain with the union, which had represented Paulis Silk's employees for many years. The court, emphasizing the "difficulty of the successorship question" enforced the Board's order, finding that the "essential nature" of the business remained unchanged and that a presumption of the union's continued majority status was warranted. Judge Campbell, dissenting, would have found that changes in size and operational methods of the new employer made it unreasonable to presume that the old union still represented an employee majority.

In *N.L.R.B.* v. *Beck Engraving Co.,*[26] the Third Circuit rejected the Board's rule that an employer may not unilaterally withdraw from a multiemployer bargaining unit following an impasse in negotiations. After 4 months of unsuccessful negotiations with the 11-member

[25] *N.L.R.B.* v. *Band-Age,* 534 F. 2d 1 (C.A. 1).
[26] 522 F. 2d 475.

association for a new contract, the union struck Beck and four other members. About the same time, the association and the union agreed to allow a sixth member to leave the unit. Later, after a 10-day hiatus in negotiations, Beck's employees resigned from the union and returned to work. Beck then notified the union, through the association, that it was withdrawing from the unit, but the union denied its consent. The Board found Beck's refusal to accept the contract ultimately agreed to by the association and the union to be violative of section 8(a)(5) and (1), since Beck's purported withdrawal was untimely and was not justified by "unusual circumstances" within the rules of *Retail Associates*.[27] The court agreed with the Board that the withdrawal of the sixth member did not justify Beck's refusal because consent "to the withdrawal of one employer does not amount to tacit consent to other withdrawals" and because the single withdrawal did not "fragmentize" the unit. The court further recognized that the "selective strikes" were not a basis for Beck's withdrawal since "the appropriate response to the selective strike, and the one which best preserves the stability and integrity of the multiemployer bargaining unit, is the lockout." The court found, however, that since the Board permits unions to reach "individual, interim" agreements with members still in the unit while negotiating with the other members,[28] the Board's standard of equal treatment enunciated in *Evening News Assn.*[29] compelled a holding that impasse is a circumstance which frees employers to withdraw, since the union "should not have been given two weapons for its economic arsenal (i.e., the selective strike and individual negotiations) while the employers are given only one (viz., the lockout)." The court went on to state that it was only "redress[ing] an imbalance created by the Board's decisions," leaving the door open to Board reformulation of its rules.

5. Union Interference With Employee Rights

Although section 8(b)(1)(A) makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of rights guaranteed in section 7, the proviso states that the section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." In *N.L.R.B.* v. *Retail Clerks Union, Loc. 1179* [*Alpha-Beta Acme Markets*],[30] the Ninth Circuit affirmed the Board's finding

[27] 120 NLRB 388 (1958).

[28] See *Plumbers & Steamfitters Union 323 (P.H C Mechanical Contractors)*, 191 NLRB 592 (1971), *Sangamo Construction Co*, 188 NLRB 159 (1971), *Associated Shower Door Co*, 205 NLRB 677, 681–682 (1973), enfd. 512 F. 2d 230 (C A 9, 1975)

[29] 154 NLRB 1494, 1501 (1965), enfd *sub nom. Detroit Newspaper Publishers Assn.*, 372 F 2d 569 (C.A. 6, 1967).

[30] 526 F. 2d 142.

that the proviso did not privilege disciplining a member for failing to observe another union's picket line, where that picketing was subsequently found to be violative of section 8(b)(7) of the Act. The court acknowledged that normally the consensual basis of union membership makes disciplining members not coercive within the meaning of section 8(b)(1)(A) and that "a union has a 'particularly vital' interest in disciplining members who failed to support its own valid economic strike . . . [or] . . . a sister union's lawful economic strike." The court further observed that, as summarized in *Scofield*,[31] "Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." The court noted, however, "the Labor Board continues to be responsible for determining whether a rule impairs national labor policy so that it is no longer substantively an internal matter." The court, in agreement with the Board, rejected as immaterial the union's contention that, when it ordered the picket lines observed and fined its members who declined to do so, it believed in good faith that the picketing was lawful. Accordingly, while the union at the time it called the sympathy strike had an "apparently legitimate interest" in seeking observance of the other union's picket lines, and the sympathy strike was not itself illegal, its purpose was, nevertheless, "to lend support to picketing which was found to violate Section 8(b)(7) of the Act," and hence the discipline "to some extent impair[ed] national labor policy."

6. Union Coercion of Employer in Selection of Representative

Section 8(b)(1)(B) provides that it shall be an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In its 1974 decision in *Florida Power*,[32] the Supreme Court held that a union did not violate section 8(b)(1)(B) by disciplining supervisor-members who crossed union picket lines to perform rank-and-file struck work. A post-*Florida Power* Board decision involving union discipline of strike-breaking supervisors first reached the courts during the fiscal year in *Skippy Enterprises*.[33] The Seventh Circuit there enforced a Board decision and order finding that the union had violated section 8(b)(1)(B) by fining a supervisor who had crossed union picket lines to perform principally supervisory

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[31] *Scofield* v. *N L R B.*, 394 U S 423, 428–430 (1969).

[32] *Florida Power & Light Co* v. *I B.E W., Loc. 641, et al*, 417 U.S 790 (1974)

[33] *Wisconsin River Valley District Council, Carpenters [Skippy Enterprises]* v *N.L.R.B.*, 532 F 2d 47.

functions. Adopting the Board's reasoning, the court held that under *Florida Power* the nature of the supervisor's duties when the discipline is imposed determines the lawfulness of the discipline; since the supervisor here was performing principally supervisory functions, the discipline violated section 8(b)(1)(B) because the discipline threatened to deprive the employer of the services of an 8(b)(1)(B) representative for the duration of the work stoppage and because the supervisor might reasonably have anticipated further discipline if his future performance of 8(b)(1)(B) functions did not meet with union approval. The court distinguished *Florida Power* on the ground that since the supervisors there were performing only rank-and-file functions when they were disciplined, the discipline had merely threatened to deprive the employer of services normally rendered by rank-and-file employees.[34]

7. Union Causation of Employer Discrimination

In the landmark case of *Radio Officers' Union [A. H. Bull Steamship Co.]* v. *N.L.R.B.*,[35] the Supreme Court held that while ordinarily a showing of subjective motivation is necessary to prove a case of unlawful discrimination under section 8(a)(3) and 8(b)(2) of the Act certain types of discrimination by their nature inherently encourage or discourage union membership and are unlawful regardless of the parties' intent or their effect upon the employees. During the past year, the Second Circuit in *N.L.R.B.* v. *Milk Drivers & Dairy Employees, Loc. 338*,[36] *IBT*, had occasion to apply that principle in a case involving provisions in collective-bargaining agreements which grant "super-seniority" to union stewards with respect to terms and conditions of employment other than layoff and recall, preference which is justified by the need to provide continuity in representation. The court sustained the Board's position that it is reasonable to infer that a union in selecting persons to be stewards would choose only those who are active union supporters. Thus, to award benefits in working conditions to such persons—in this case preference in selecting routes—while denying them to other employees necessarily results in the inherent encouragement of unionism described in *Radio Officers'* which is prohibited by the Act. The court also upheld the Board's finding that the union had failed to show any legitimate business justification for such discrimination and concluded that a violation of the Act had been proven.

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[34] A similar Board decision and order, *Chicago Typographical Union 16 (Hammond Publishers)*, 216 NLRB 903 (1975), was enforced without opinion on June 21, 1976, by the Court of Appeals for the District of Columbia

[35] 347 U.S. 17 (1954).

[36] 531 F.2d 1162.

8. Secondary Boycotts and Strikes

In determining whether an employer subjected to alleged secondary boycott action by a union is a neutral employer entitled to the protection of section 8(b)(4)(B), the Board employs a "right to control" doctrine. In essence, the doctrine is that an employer—generally a subcontractor—who is struck because of its failure to assign its employees work of a type they have traditionally performed is *prima facie* a neutral protected by the Act's secondary boycott ban if, under the contract for the job, it never had the power to assign his employees the work in dispute. This doctrine, recently accepted by the Fourth Circuit,[37] was again rejected by the Court of Appeals for the District of Columbia Circuit in *Enterprise Assn.*[38] Sitting en banc, the court divided five to four, remanded the case to the Board, holding that reliance on the subcontractor's power to assign the disputed work to its employees as the decisive factor was contrary to the principles enunciated in *National Woodwork* [39] for determining whether a work preservation and its enforcement violate section 8(b)(4)(B).[40]

9. Jurisdictional Dispute Issues

In *Bigge Drayage*,[41] the disputed work was driving equipment especially designed for hauling exceptionally long and heavy prestressed concrete girders from a dock to which the girders had been barged over highways to construction sites in the San Francisco area. The manufacturer of the girders contracted for their transportation and erection with Bigge Crane, which in turn contracted with Bigge Drayage for their transportation. Bigge Drayage, which, through the California Trucking Association (CTA), had a contract with Teamsters Locals 70 and 85, assigned a composite crew of members of those locals to transport the girders. Local 216, which had a contract through the Associated General Contractors of America (AGC) with Bigge Crane, claimed the hauling work, threatening to picket the dock unless the hauling was performed by employees represented by that union. In response to 8(b)(4)(D) charges filed by Bigge Drayage, Local 216 contended that the Board should not assign the work because the parties had agreed upon a method for "voluntary adjustment" of the dispute.[42] It was undisputed that the CTA and

[37] *George Koch Sons* v *N.L.R.B*, 490 F.2d 323 (C.A 4, 1973), 39 NLRB Ann Rep. 156 (1974).

[38] *Enterprise Assn., Pipefitters Loc. 638, Plumbers [Austin Co]* v *N.L.R.B*, 521 F 2d 885.

[39] *Natl. Woodwork Manufacturers Assn* v. *N.L R.B*, 386 U S 612 (1967).

[40] On February 23, 1976, the Supreme Court granted certiorari to review the decision.

[41] *Bldg. Material & Construction Teamsters Union Loc 216, IBT [Bigge Drayage Co.]* v. *N.L.R.B.*, 520 F.2d 172 (C A.D C)

[42] Sec 10(k) provides that the Board is to determine jurisdictional disputes made subject to an 8(b)(4)(D) unfair labor practice charge "unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, and agreed upon methods for the voluntary adjustment of, the dispute."

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the AGC contracts, construed together, provided for a method of adjustment of jurisdictional disputes among Teamsters Locals through the International Union. In addition the three locals had an agreement under which Local 216 ceded the work of "hauling concrete prestressed girders over public highways for delivery to construction sites where such work is performed by Bigge Drayage Company" and is assigned to employees represented by Teamsters Locals 70 or 85. The court agreed with the Board that these provisions did not provide an "actual adjustment" of the dispute because Local 216's business agent, while ultimately agreeing that the members of Local 70 and 85 would perform the work, continued to insist that the drivers should be paid, not under the CTA contract, but at Local 216's scale. The court agreed that this position was "a refusal to comply with the voluntary agreement" and hence the Board was correct in refusing to dismiss.

10. Consumer Picketing

In *Tree Fruits*,[43] where the union picketed Safeway stores requesting that consumers not buy Washington State apples, the Supreme Court, noting that the picketing was not designed to shut off all trade with Safeway, upheld the rights of unions to engage in product picketing—that is, picketing which is aimed at inducing consumers not to buy the products from a neutral employer which have been produced by the primary employer. In *Loc. 14055, United Steelworkers of America [Dow Chemical Co.]* v. *N.L.R.B.*,[44] the District of Columbia Circuit Court was required to consider the applicability of *Tree Fruits* in the situation where the union's product picketing was likely to induce customers not to trade at all with the neutral parties. The Steelworkers struck the primary employer, Bay Refining Division of Dow Chemical, and picketed six retail gasoline stations, the neutral employers, that marketed Bay gasoline, which was produced by the primary employer. The union's picket signs requested that customers of the retail gasoline stations not "Buy Bay Gas." All six stations marketed products other than Bay gas, but the sale of Bay gas accounted for 50 percent to 98 percent of the various stations' gross revenues. The Board's view was that the predictability of the picketing's impact distinguished this consumer picketing from that held lawful under *Tree Fruits*, since by the very nature of the business and of the picketing it was likely that customers who were persuaded to respect the picket signs would not trade at all with the neutral parties. The court, reversing the Board,

[43] *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Loc. 760, et al. [Tree Fruits Labor Relations Committee]*, 377 U.S. 58 (1964).

[44] 524 F.2d 853, petition for writ of certiorari pending.

held that the Board had failed to accord to peaceful product picketing the favorable consideration to which it is entitled under *Tree Fruits*. In the court's view, the *Tree Fruits* doctrine does not turn on differences in the degrees of possible economic impact on the neutral employer but extends to all cases where the object of the picketing can be said to be limited to the struck product. Thus, since the union requested customers not to buy Bay gasoline but did not ask them to abstain from all trade with the neutral employers, the court held that the picketing was not unlawful secondary picketing.

11. Hot Cargo Agreements

Section 8(e) makes it an unfair labor practice for a union and an employer to enter into an agreement whereby the latter agrees not to handle or transport any of the products of any other employer, or agrees to cease doing business with any other person. In *Intl. Longshoremen's Assn.*,[45] the Second Circuit affirmed the Board's finding that the International Longshoremen's Association (ILA) violated section 8(e) by enforcing its rules on containers. These rules were directed at containerized cargo, where the containers were stuffed by off-pier freight consolidators, who solicited less than container loads (LCL) from the consolidator's customers. The rules required that all LCL containers already stuffed by off-pier consolidators prior to delivery to the piers had to be stripped by ILA labor at the pier and restuffed into a different container by ILA labor before loading aboard ship, or else liquidated damages were to be assessed. Inbound LCL cargo was to be unstuffed by ILA labor and stacked loose on the pier where it could be picked up by off-pier consolidators. Finally, to prevent evasion of these rules, steamship lines were forbidden to supply empty containers to off-pier consolidators who attempted to operate as they had in the past. This case arose in early 1973 when two containership companies operating between the Port of New York and Puerto Rico stripped and restuffed off-pier consolidators' containers and, eventually, ceased to supply empty containers to them.

The court of appeals accepted the Board's analysis that ILA's activities and contractual arrangements would be lawful if they were designed to preserve work to which ILA-represented employees working in the Port of New York were entitled and would be proscribed by section 8(e) (and section 8(b)(4)(ii)(B)) if the real object was to obtain work traditionally performed by employees not represented by ILA.[46] The court also agreed with the Board that the work

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[45] *Intl Longshoremen's Assn. & New York Shipping Assn* [*Twin Express, et al.*] v. *N.L R B*, 537 F 2d 706.

[46] See *Natl. Woodwork Manufacturers Assn* v. *N.L.R B*, 386 U.S. 612 (1967), 32 NLRB Ann Rep. 139 (1967).

in controversy was the LCL container work performed by off-pier consolidators at their own off-pier premises. For, as the Board noted, while longshoremen represented by the ILA had traditionally stuffed and unstuffed LCL containers on the piers as part of their work in loading and unloading ships, the work of consolidators had its own separate, although parallel, history. Since ILA's demand could only be met if the work traditionally performed off the pier by employees outside the ILA unit were taken over and performed by ILA-represented longshoremen at the pier, the court enforced the Board's order which required the ILA and the New York Shipping Association to cease enforcing the rules on containers. Judge Feinberg, dissenting, would have found that work in question was the work ILA members used to do on the pier before containerization moved most of it off the pier and, therefore, that the rules on containers was a lawful work preservation agreement.

12. Prehire Contracts

Section 8(f) of the Act permits a construction industry employer to enter into a contract with a construction industry union covering the terms and conditions of employment of construction site employees, notwithstanding the fact that the majority status of the union has not been established. However, under the second proviso to section 8(f), such "prehire" agreements do not bar the filing of representation petitions under section 9(c) and (e). The relationship of the exemption provided the construction industry in section 8(f) to the prohibitions against recognitional and organizational picketing enumerated in section 8(b)(7) of the Act was explored in one case this year. In *Loc. 103, Iron Workers* [*Higdon Construction Co.*] v. *N.L.R.B.*,[47] a construction industry employer, after work on a jobsite was twice shut down by picketing, entered into a prehire contract with Local 103 covering ironworkers within the geographic jurisdiction of the union for a period of years. After the employer refused to apply the prehire agreement to other jobsites, the union began picketing at two of the employer's jobsites. The union did not represent a majority of the employer's ironworkers and no representation petition was filed. In reversing the Board's finding of a violation of section 8(b)(7)(C), which proscribes recognitional or organizational picketing for unreasonable periods of time without a representation petition being filed, the court relied on its previous decision in *Loc. 150, Intl. Union of Operating Engineers*,[48] which held, contrary to the Board, that an employer violates section

[47] 535 F 2d 87 (C.A D.C)

[48] *Loc. 150, Intl Union of Operating Engineers* [*R. J. Smith Construction Co*] v. *N.L R.B* , 480 F. 2d 1186 (C.A.D.C., 1973).

8(a)(5) by refusing to honor a prehire agreement with a minority union unless the employer files a representation petition to challenge the union's minority status. In the *Local 103* case, the court reasoned that the picketing did not violate section 8(b)(7)(C) because, in its opinion, the employer's failure to honor the prehire agreement violated section 8(a)(5). The Board had found that the picketing did violate section 8(b)(7)(C) because the union's admitted minority status prevented it from enforcing the prehire agreement under section 8(a)(5) of the Act.

D. Remedial Order Provisions

In *N.L.R.B.* v. *Loc. 445, IUE* [*Sperry Rand Corp.*],[49] the Second Circuit sustained a provision of the Board's order requiring the union to cease and desist from attempting to expand its bargaining unit through the grievance and arbitration procedures in its contract with the employer. In a previous review of this case,[50] the Second Circuit had held that the union violated section 8(b)(3) of the Act by attempting through grievance arbitration to apply the contract covering its New York metropolitan area unit to the company's employees in California, whom it did not represent. This, the court reasoned, was an attempt to expand the certified bargaining unit through arbitration regardless of the wishes of the affected employees. On remand, the Board ordered the union to cease and desist from using the arbitration procedures in the New York contract to bargain over the wages of the California employees. The Board further ordered the union to cease and desist "attempting in any like or related manner to expand its established collective bargaining relationship beyond the bounds of [the existing New York unit]." The union contended that the order was overly broad because it restrained arbitration over other job classifications in New York while the unfair labor practice had been an attempt to expand the unit to California. Rejecting this argument, the Second Circuit reasoned that "in terms of the policies behind § 8(b)(3), it makes no difference whether bargaining unit boundary changes are made on a geographical or occupational basis. Either type of challenge if used in bad faith undermines the stability of the bargaining unit's boundaries and therefore undermines the collective bargaining process." Accordingly, it concluded that any attempt to expand the unit through arbitration is "like or related" to the union's previous attempt and that the Board could reasonably conclude that the union might attempt to do with new job classifications what it had done with other locations.

[49] 529 F.2d 502

[50] *Sperry Systems Management Div., Sperry Rand Corp* v *N.L.R.B.*, 492 F. 2d 63 (1974), cert. denied 419 U.S. 831 (1974).

IX

Injunction Litigation

Section 10(j) and (l) authorizes application to the U.S. district courts, by petition on behalf of the Board, for injunctive relief pending hearing and adjudication of unfair labor practice charges by the Board.

A. Injunctive Litigation Under Section 10(j)

Section 10(j) empowers the Board, in its discretion, after issuance of an unfair labor practice complaint against an employer or a labor organization, to petition a U.S. district court for appropriate temporary relief or restraining order in aid of the unfair labor practice proceeding pending before the Board. In fiscal 1976, the Board filed 20 petitions for temporary relief under the discretionary provisions of section 10(j): 14 against employers and 6 against unions.[1] Injunctions were granted by the courts in six cases, and denied in three. Of the remaining cases, four were settled prior to court action, one was dismissed, four were in inactive status at the close of the report period, and seven were pending further processing in court at the close of the period.[2]

Injunctions were obtained against employers in five cases and against a union in the other. The case against employers variously involved the discharging of employees and refusals to bargain with a designated employee representative or other actions taken to frustrate the collective-bargaining process. The case against the union involved picketing to require a maritime employer to hire additional supervisors, to be represented by the union. Among the cases decided by the courts was *Am-Del-Co*,[3] where the court enjoined, pending resolution of the issues by the Board, the employer's action taken unilaterally to convert the status of its drivers from that of employees to independent contractors. The court agreed that the employer's actions taken to circumvent the drivers' representative would result in changes difficult to remedy if permitted to be carried out before Board con-

[1] In addition, five petitions filed during fiscal 1975 were pending at the beginning of fiscal 1976.

[2] See Table 20 of the appendix

[3] *Solien* v. *Am-Del-Co & Compton Service Co., Jointly*, unreported, Civil Docket 75-1103C(3) (D.C. Mo.).

sideration of the complaint, and issued the injunction to maintain the status quo in the interim.

In the *Newport Tankers* case,[4] the court enjoined picketing whereby the union sought to have the employer place an additional third mate, to be represented by the picketing union, aboard ship. Another union represented the second and third mates already employed. The mates were viewed as supervisors, wherefore the picketing designed to require the employer to hire an additional third mate would violate section 8(b)(1)(B) by coercing the employer in his selection of representatives for bargaining and processing grievances. The employer, whose ship was to load wheat at the situs of the picketing for transport to Russia, was subject to severe financial penalties and pressures from the inability to load.

The court granted injunctive relief since relegating the employer to the choice of facing financial ruin or submitting to the union's demand to hire an additional supervisor would frustrate the objectives of the Act and Board remedial action could not come in time.

In another case [5] the court declined to enjoin continuation of a strike begun by the union without having informed the Federal Mediation and Conciliation Service of the dispute as required by section 8(d) of the Act. The court concluded that, even if there were reasonable cause to believe the union had violated the Act, its failure to comply with this section would be only a technical violation, and injunctive relief would not be just and proper. The court rejected the argument that without an injunction to restore the *status quo ante* and to remedy the violation a Board order issued months later would be deleterious to the public policy considerations contained in the notice provisions of section 8(d).

In *Loc. 248, Meat & Allied Food Workers*,[6] the Seventh Circuit held that the district court properly issued a temporary restraining order under section 10(j) enjoining the union from engaging in violence and threats of violence in violation of section 8(b)(1)(A). The court stated, "We hold that federal district courts have the power to grant temporary restraining orders under section [10(j)]." (534 F.2d at 743.) With regard to the standard to be applied in determining whether or not to enter a temporary restraining order under section 10(j), the court said, "It is difficult, if not impossible, to articulate a universally applicable standard; nevertheless, it is clear to us that courts should consider such factors as the need for an injunction to prevent frustration of the basic remedial purpose of the act and the degree

[4] *Humphrey* v. *Intl. Organization of Masters, Mates & Pilots* [*Newport Tankers*], unreported, Civil Docket 76-239N (D.C. Va.).

[5] *Johansen* v *Dar San Commissary*, unreported, Civil Docket CV-7513-WGP (D C Calif.)

[6] *Squillacote* v. *Loc. 248, Meat & Allied Food Workers* [*Milwaukee Independent Meat Packers Assn.*], 534 F.2d 734 (C.A. 7).

to which the public interest is affected by a continuing violation as well as more traditional equitable considerations such as the need to restore the status quo ante or preserve the status quo." (*Id.* at 744.) The court added, "In this case the question of whether the Board had reasonable cause to believe the act was being violated tends to merge with the question of the propriety of equitable relief. The violations alleged were principally acts of violence. Few, if any, types of violations would present a more compelling case for immediate injunctive relief. Prevention of labor violence is one of the basic purposes of the federal labor acts." The court also held that the district court did not abuse its discretion in finding the union and certain picket captains in civil contempt of its temporary restraining order and in directing the union to pay a $500 compensatory fine. The court stated, "Judicial sanctions in a civil contempt proceeding may be imposed either to coerce a defendant into compliance with the court's order or to compensate a complainant for losses sustained. . . . Increasing daily fines and even jail sentences may be used by the district court to compel compliance with its orders. . . . Attorneys' fees and expenses, including the salaries of Board personnel in preparing and prosecuting a contempt petition, may be awarded as compensation." (Id. at 748.) The court further held that the district court did not abuse its discretion in entering a preliminary injunction. The court rejected the union's argument that the preliminary injunction was improperly entered because the district court did not hold an evidentiary hearing but rather entered the injunction on the basis of oral argument, affidavits, and the transcript of a hearing before an administrative law judge on the underlying complaint.[7]

B. Injunctive Litigation Under Section 10(l)

Section 10(l) imposes a mandatory duty on the Board to petition for "appropriate injunctive relief" against a labor organization or its agent charged with a violation of section 8(b)(4) (A), (B), and (C),[8] or section 8(b)(7),[9] and against an employer or union charged

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[7] The appeal was not taken from the order entering the injunction but from the denial of a motion to vacate the injunction Accordingly, the court held that it was not squarely deciding the issue of the appropriateness of entering an injunction without a hearing

[8] Sec 8(b)(4)(A), (B), and (C), as enacted by the Labor Management Relations Act of 1947, prohibited certain types of secondary strikes and boycotts, strikes to compel employers or self-employed persons to join labor or employer organizations, and strikes against Board certifications of bargaining representatives These provisions were enlarged by the 1959 amendments of the Act (Title VII of Labor Management-Reporting and Disclosure Act) to prohibit not only strikes and the inducement or work stoppages for these objects but also to proscribe threats, coercion, and restraint addressed to employers for these objects and to prohibit conduct of this nature where an object was to compel an employer to enter into a hot cargo agreement declared unlawful in another section of the Act, sec. 8(e)

[9] Sec. 8(b)(7), incorporated in the Act by the 1959 amendments, makes organizational or recognitional picketing under certain circumstances an unfair labor practice.

with a violation of section 8(e),[10] whenever the General Counsel's investigation reveals "reasonable cause to believe that such charge is true and a complaint should issue." In cases arising under section 8(b)(7), however, a district court injunction may not be sought if a charge under section 8(a)(2) of the Act has been filed alleging that the employer had dominated or interfered with the formation or administration of a labor organization and, after investigation, there is "reasonable cause to believe such charge is true and that a complaint should issue." Section 10(l) also provides that its provision shall be applicable, "where such relief is appropriate," to violations of section 8(b)(4)(D) of the Act, which prohibits strikes and other coercive conduct in support of jurisdictional disputes. In addition, under section 10(l) a temporary restraining order pending the hearing on the petition for an injunction may be obtained, without notice to the respondent, upon a showing that "substantial and irreparable injury to the charging party will be unavoidable" unless immediate injunctive relief is granted. Such *ex parte* relief, however, may not extend beyond 5 days.

In fiscal 1976, the Board filed 143 petitions for injunctions under section 10(l). Of the total caseload, comprised of this number together with the 12 cases pending at the beginning of the period, 49 cases were settled, 4 dismissed, 14 continued in an inactive status, 9 withdrawn, and 18 pending court action at the close of the report year. During this period, 61 petitions went to final order, the courts granting injunctions in 49 cases and denying them in 12 cases. Injunctions were issued in 27 cases involving secondary boycott action proscribed by section 8(b)(4)(B), as well as violations of section 8(b)(4)(A) which proscribes certain conduct to obtain hot cargo agreements barred by section 8(e). Injunctions were granted in 11 cases involving jurisdictional disputes in violation of section 8(b)(4)(D). Injunctions were issued in nine cases to proscribe alleged recognitional or organizational picketing in violation of section 8(b)(7). The remaining two cases in which injunctions were granted arose out of charges involving violations of section 8(e).

Of the 12 injunctions denied under section 10(l), 5 involved alleged secondary boycott situations under section 8(b)(4)(B), and 2 involved alleged jurisdictional disputes under section 8(b)(4)(D). Two were predicated on alleged violations of section 8(b)(7)(C), and three on alleged violations of section 8(e).

Almost without exception the cases going to final order were disposed of by the courts upon findings that the established facts under

[10] Sec. 8(e), also incorporated in the Act by the 1959 amendments, makes hot cargo agreements unlawful, with certain exceptions for the construction and garment industries

applicable legal principles either did or did not suffice to support a "reasonable cause to believe" that the statute had been violated. Such being the basis for their disposition, the precedence value of the case is limited primarily to a factual rather than a legal nature. The decisions are not *res judicata* and do not foreclose the subsequent proceedings on the merits before the Board.

In *Altemose Construction Co.*,[11] the Third Circuit held that the district court was not clearly erroneous in finding that the regional director had reasonable cause to believe that the union was violating section 8(b)(4)(i) and (ii)(B) and 8(b)(7)(C), and in entering an injunction under section 10(l). The court made clear that the regional director has a light burden of proof in a 10(l) proceeding. The court stated, "Since the § 10(l) proceeding is thus ancillary to the main unfair labor practice action committed to the Board's exclusive jurisdiction, the Regional Director faces a relatively insubstantial burden of proof when he petitions a district court for temporary injunctive relief pursuant to § 10(l). He need not prove that a violation of the NLRA has in fact occurred. Nor must he convince the district court of the validity of the legal theory upon which he predicates his charges. Both questions are for the Board's determination in the first instance, subject to the right of appellate review. Rather, he need only demonstrate that he has reasonable cause to believe that the elements of an unfair labor practice are present and that the legal theory upon which he proceeds is 'substantial and not frivolous.' " The court added that "the scope of appellate review is extremely limited in the event the district court determines that the Regional Director has satisfied his burden of proof and enjoins the challenged activities. Its finding will not be disturbed on appeal unless they can be said to be 'clearly erroneous'." (530 F.2d at 302–303.) Additionally, the appellate court denied the charging party's motion to intervene, holding that the plain language of section 10(l) and the congressional policy embodied therein made it clear that intervention would never be proper, no matter what the factual setting. The charging party had contended that the regional director had failed to adequately protect its interest in the litigation. The court pointed out that section 10(l) was enacted as a narrow exception to the Norris-LaGuardia Act's prohibition against issuance of injunctions by Federal courts in labor disputes. The court emphasized that in a 10(l) proceeding Congress has strictly circumscribed the role of the charging party to an appearance by counsel and an opportunity to present testimony. This limitation reflects the congressional

[11] *Hirsch* v. *Bldg & Construction Trades Council of Phila & Vicinity* [*Altemose Construction Co*], 530 F.2d 298.

desire that 10(l) injunctions should be utilized only in the public interest. If the intervention motion were granted, the charging party would acquire full party status and thus secure rights indirectly which Congress deemed to deny it in the first instance.

In *National Maritime Union*,[12] a case arising under section 10(l), the district court found that the regional director had reasonable cause to believe that the National Maritime Union (NMU) was engaging in picketing violative of section 8(b)(4)(i) and (ii) (B) and (D) and 8(b)(7)(A). The gravamen of the charges and the court's findings were that NMU was picketing the facilities of Puerto Rico Marine Management, Inc. (PRMMI), in the port of San Juan (1) to induce the employees of PRMMI and of certain neutral employees to engage in work stoppages, and to threaten and coerce PRMMI, with an object of causing the neutral employers to cease doing business with PRMMI and to force PRMMI to cease doing business with the Puerto Rico Marine Shipping Authority (PRMSA), a violation of section 8(b)(4)(B); (2) to force PRMMI to assign the work of manning four roll-on vessels transferred to it from Marine Transportation Management, Inc. (MTM), to employees represented by NMU rather than employees represented by Seafarers' International Union (SIU), a violation of section 8(b)(4)(D); and (3) to force PRMMI to recognize NMU as the representative of the employees manning the four vessels even though PRMMI had recognized SIU as the bargaining representative of its employees and no question concerning the representation of those employees could be raised, a violation of section 8(b)(7)(A). In so concluding, the district court also found reasonable cause to believe that PRMMI was an employer within the meaning of section 2(2) of the Act, rejecting the NMU's contention that PRMMI was a government entity over which the Board had no jurisdiction The district court enjoined the picketing pending the Board's final disposition of the case. The district court further concluded that "it is also just and proper that PRMMI . . . be directed to man the [four roll-on, roll-off vessels] with the unlicensed seamen who were employed on those ships on September 30, 1975 [the day before the consolidation of MTM and PRMMI operations], until such time as this matter is finally resolved under the procedures specified in the National Labor Relations Act. . . ."

Upon motion by the SIU, the First Circuit stayed, pending a hearing in the district court, that portion of the order requiring PRMMI to retain the NMU-represented seamen. Thereafter, the district court reaffirmed its ruling, concluding that "there is a serious question as to the jurisdiction of the . . . Board over this dispute, and that if it is

[12] *Compton* v *Natl Maritime Union of America* [*Puerto Rico Marine Management*], 533 F. 2d 1270 (C.A. 1).

ultimately determined that the Board is without jurisdiction the [NMU] crews will have been improperly deprived of their jobs without having any remedy therefore." The court held that "[i]n balancing the equities with respect to molding an appropriate remedy under the circumstances" the NMU seamen's jobs "should be preserved while this dispute is being determined" by the Board.

Upon joint motion by the SIU and the Board, Chief Judge Coffin of the First Circuit issued his order granting a stay of the disputed portion of the district court's order pending appeal. While expressing sympathy with the district court's concern that the NMU seamen might be left without a remedy if the Board lacked jurisdiction over the controversy, Judge Coffin observed that the lower court's order that PRMMI retain the NMU crews did not comport with the purposes of injunctive relief under section 10(l). Judge Coffin explained, "The order does not work to prevent disruptions to commerce because the picketing activity is otherwise enjoined" by other provisions of the injunction. Moreover, "the entire theory upon which the relief is ordered is irrelevant to the only proper concern of the court in this small area of permissible labor injunction activity, the prevention of unfair labor practices within the meaning of § 8 of the Act. By definition, were there to apear no Board jurisdiction, acts could not be considered unfair labor practices." (533 F. 2d at 1277.) Judge Coffin noted that, since reasonable cause to believe the Board has jurisdiction is a predicate to the court's jurisdiction to grant injunctive relief, "[t]o let a court give relief on the assumption that the Board is wrong on [such] reasonable cause, while issuing an injunction because it feels there is reasonable cause is internally inconsistent." (*Ibid.*) Finally, Judge Coffin noted that, even if the Board did lack jurisdiction, NMU might have access to other remedial agencies.

On the appeal, the First Circuit held that the district court had reasonable cause to believe that PRMMI was an employer within the meaning of the Act, and reasonable cause to believe that the NMU violated the Act. The court further held, for essentially the same reasons articulated by Chief Judge Coffin in his order in the stay, that the district court erred in requiring the retention of the NMU seamen on the vessels. The court stated that, "Given the objectives of the Norris-La Guardia Act, the limited exception to its anti-injunction policies carved out by § 10(l), the limited precedent available—which supports the Board, and the Board's claim that the policies of the Act would be undermined by the injunction as now entered, we conclude with some reluctance that that part of the court's order requiring the retention of NMU seamen on the [roll-on, roll-off] vessels must be reversed."

In *Coors Distributing Co. of San Jose*,[13] the district court found and adjudicated a union and labor council in civil contempt of court by reason of their having engaged in numerous acts of secondary boycott conduct including picketing and threats directed against retail establishments selling the disputed product, their suppliers, and consumers, all in violation of an underlying 10(l) injunction. In the contempt proceeding, the court fined each respondent $5,000, which was suspended providing the respondents purged themselves of the contempt by complying with the injunction. A prospective fine of $1,000 for each further violation was also provided. In further proceedings the court amended the injunction, providing a hiatus in picketing and limiting the number of pickets, and because the secondary activity had continued and the contempt had not been purged, it imposed fines of $43,000 and $7,000 against the union and the labor council, respectively, based upon the formula as set out in the initial adjudication in contempt. It was ordered that the union and labor council pay $10,000 and $2,000, respectively, and the remainders of the fines were suspended. Once again, because of the seriousness and continuation of the conduct by the union, the court ordered even further injunctive relief in the form of a further hiatus and notice requirements and ordered that $10,000 of the fines, previously imposed but suspended, be paid. The court of appeals affirmed the initial adjudication in contempt, finding that it was an interlocutory order and nonappealable. The court also affirmed the first order providing further injunctive relief. As to the first imposition of fines, the court affirmed the order directing payment of $10,000, but because the district court had made five findings based on activity that occurred before the unon had notice of the initial adjudication in contempt, it reduced the total amount of the fine from $43,000 to $38,000. Since the temporary injunction on which the subsequent contempt orders were based enjoined certain acts against the named retailers and "any other person engaged in commerce or in an industry affecting commerce" and not simply "any person," the court found it necessary that it be proved that each of the retailers named in the district court's findings met the commerce criteria. Although it found that there was sufficient proof in the record to show commerce as to the retailers involved in the order directing the payment of the first $10,000 fine, it found that such proof was lacking in regard to the retailers involved in the order reimposing the suspended $10,000 fine, the court thus remanded that order to the district court for further evidence and findings on the commerce issue, leaving the amount of the fine to the discretion of that court.

[13] *Hoffman* v *Beer Drivers & Salesmen's Local Union 888, IBT* [*Coors Distributing Co of San Jose*], 536 F. 2d 1268 (C.A. 9).

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Contempt Litigation

During fiscal 1976, petitions for adjudication in civil contempt for noncompliance with decrees enforcing Board orders were filed in 34 cases. In seven of these, petitions were granted and civil contempt adjudicated.[1] A like number were discontinued upon full compliance.[2] In eight cases, the courts referred the issues to special masters for trials and recommendations, one to one of its senior judges,[3] three to U.S. district judges,[4] two to U.S. magistrates,[5] and two to other experienced

[1] *N L.R B.* v. *Loc 295, IBT [Container Systems Corp]*, order of Jan 13, 1976, in civil contempt of the secondary boycott judgments of June 26, 1974, in No 74-1631 and of 521 F.2d 1166 (C A. 2, 1975), *N.L R B* v. *Steak Loft International*, order of May 11, 1976, in civil contempt of the backpay provisions of the order of Nov. 20, 1975, in No 75-4250 (C.A. 2), *N.L.R B* v. *Twin County Transit Mix*, order of Feb 29, 1976, in civil contempt of 8(a)(1) and (3) judgment of Oct 10, 1968, and order of Feb. 14, 1974, in No 32-856 (C A 2). *N.L R.B* v. *Atlantic Marine*, order of May 24, 1976, in civil contempt of backpay judgment of May 22, 1975, in No. 74-2917 (C A. 5), *N L R B* v *Modern Mold & Engineering*, order of Feb 6, 1976, in civil contempt of bargaining provisions of judgment of Dec. 10, 1974, in No 74-1918 (C.A. 7), *N L R B* v *Southwest Janitorial & Maintenance Corp* , order of April 14, 1976, in civil contempt of the discovery and posting provisions of the judgment of April 23, 1974, and Oct. 3, 1974, in Nos 73-2116 and 74-1406 (C A. 7), *N L R B* v *Merchants Delivery & Warehouse Corp* , order of June 21, 1976, in civil contempt of the backpay judgment of April 9, 1974, and the contempt adjudication of Feb 25, 1975, in No 74-1209 (C A 8).

[2] Upon deposit of backpay with the regional director, in *N L R B* v *Local 294, International Brotherhood of Teamsters*, in civil contempt of judgment of July 26, 1974, in No. 74-1924 (C A 2), upon company becoming totally defunct in *N.L R.B* v *Marquis Elevator Co* in civil contempt of bargaining judgment of Nov 4, 1975, in No. 75-3126 (C A 5) upon honoring and implementing the union-security clause in *N L R B* v *ARC Industries*, in civil contempt of judgment of March 21, 1975, in No. 74-1203 (C A. 7), upon signing of collective-bargaining agreement in *N L R.B* v. *Bosch Die Casting Co* , in civil contempt of judgment of Jan 13, 1975, in No. 74-1804 (C A 7), upon stipulation and order for reinstatement and backpay in *N.L.R B.* v *Federal Prescription Service*, in civil contempt of 496 F.2d 813 (C A 8, 1974), upon payment of backpay and distribution of notices in *N L R B.* v *Hoke Janitorial Service*, in civil contempt of judgment of June 16, 1975, in No 75-1204 (C.A. 9), upon posting and distribution of notices in *N.L R B.* v. *Intl Longshoremen's & Warehousemen's Union, Locs. 13, 63, 10 & 34*, in civil contempt of 515 F.2d 1071 (C A D C , 1975)

[3] *N L R B* v *Helrose Bindery & Graphic Arts Finishing*, in civil contempt of the bargaining, reinstatement and backpay provisions of the judgment of Dec. 19, 1973, in No. 76-1216 (C A 3), referred to Judge Albert B Maris. A protective restraining order was issued by the court on Aug. 11 1975

[4] *N.L.R.B.* v. *Mr. Electric Service Co.*, in civil contempt of the antidiscrimination and anticoercion provisions of the judgment of July 24, 1974, in No 74-1961 (C A 2), referred to U.S.D J. Jack B Weinstein (E.D. N.Y.), *N L.R B* v. *Richard T. & Naomi P Furtney, Co-partners d/b/a Mr F's Beef and Bourbon*, in civil contempt of the bargaining provisions of the judgment of Feb. 26, 1975, in No. 74-2018 (C A 6), referred to U.S.D J. Thomas P Thornton (E D Mich), *N L R.B.* v *Construction & General Laborers, Union Loc 1140*, in civil contempt of the secondary boycott provisions of the judgment of May 13, 1968, and the purgation provisions of the contempt adjudication of Feb 9, 1972, in No 19297 (C A. 8), referred to U S.D J. Robert Van Pelt (D Neb).

[5] *N.L.R B.* v. *Associated Musicians of Greater New York, Local 802, AFL-CIO*, in civil contempt of the hot cargo provisions of the judgment of Sept. 28, 1973, in No 73-2432 (C A 2), referred to U.S Mag. A Simon Chrein (E.D. N.Y.), *N.L R.B.* v. *Jerome Begin Contracting Co* , in civil contempt of the reinstatement and backpay provisions of the judgment and supplemental judgment of Aug 13, 1974, and Dec. 15, 1974, respectively, in No. 74-1551 (C.A. 8), referred to U.S. Mag. J. Earl Cudd (D.C. Minn.).

triers.[6] Four cases are awaiting referral to a special master.[7] The remaining eight cases are before the courts in various stages of litigation; two await the issuance of orders to show cause,[8] three are awaiting disposition of the Board's motions for summary adjudication,[9] one has been suspended pending respondent's compliance,[10] in another backpay has been paid in full but a writ of execution has been issued to recover costs on enforcement,[11] while in the last discovery is in progress to test respondents' continued assertion of financial inability, notwithstanding that contempt for nonpayment has been adjudicated against them.[12]

With respect to the cases which were commenced prior to fiscal 1976, but were disposed of during the period, contempt was adjudicated in nine civil proceedings,[13] while seven were discontinued: one upon payment of backpay in full,[14] three upon valid reinstatement

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[6] *N L R B* v *Alterman Transport Lines*, in civil contempt of the bargaining provisions of 465 F 2d 95' (C.A. 5, 1972), referred to an administrative law judge, *N L R.B.* v *Sequoia District Council of Carpenters AFL-CIO*, in civil contempt of the secondary boycott provisions of 499 F.2d 129 (C A. 9, 1974), referred to a retired state court judge

[7] *N.L R.B* v. *J P Stevens*, in further civil contempt of the 8(a)(1) provisions of 380 F.2d 292 and 388 F 2d 893, and the purgation provisions of 464 F 2d 1326 (C A 2, 1967, 1968, 1972) See 38 NLRB Ann Rep. 175 (1973), *N L.R B* v. *Berger Electric Co.*, in civil contempt of the 8(a)(1) provisions of the judgment of Dec 15, 1975, in No 75-4193 (C A. 5), *N L.R.B.* v. *Covington Furniture Mfg Corp*, in civil contempt of the bargaining, reinstatement, and posting provisions of 514 F 2d 995 (C.A 6, 1975), *N L.R.B* v. *Doctors' Hospital of Modesto*, in civil contempt of the bargaining provisions of 489 F 2d 772 (C.A 9, 1973)

[8] *N.L R.B.* v. *Clinch Valley Clinic Hospital*, in civil contempt of the reinstatement provisions of 516 F 2d 996 (C A 4, 1975), *N.L R.B* v *Stay Plastics*, in civil contempt of the notice-mailing provision of the judgment of April 10, 1975, in No. 75-1497 (C.A. 9).

[9] *N.L.R.B* v. *Difco Laboratories*, in civil contempt of the posting provisions of 522 F.2d 1275 (C A. 6, 1975), *N L R.B.* v. *R. J Smith Construction Co.*, in civil contempt of the bargaining provisions of the supplemental judgment issued after remand pursuant to 480 F 2d 1186 (C A D C., 1973), *N L R B.* v. *Southland Mfg. Corp*, in civil contempt of the backpay provisions of 475 F 2d 414 (C A D C., 1973)

[10] *N L R B.* v *Loc 798 of Nassau County of N Y*, *Brotherhood of Painters, AFL-CIO*, in civil contempt of the 8(b)(2) provisions of the judgment of Jan. 9, 1976, in No 75-4095 (C A 2)

[11] *N L R.B.* v. *Ohio Hoist Mfg Co*, in civil contempt of the backpay and costs provisions of 496 F 2d 14 (C.A 6, 1974).

[12] *N.L.R.B.* v. *Superior Micro Film Systems*, civil contempt adjudicated and discovery in aid thereof ordered March 15, 1976, in No 76-1071 (C.A 3)

[13] *N.L.R.B* v *Union de Tronquistas de Puerto Rico, Loc 901, IBT*, order of March 2, 1976, holding the union in contempt of the 8(b)(1)(A) provisions of the judgment of Feb 15, 1972, in No. 71-1371 (C A. 1), *N L.R.B.* v *Diamond Motors*, order of Jan 26, 1976, holding the company in contempt of the backpay provisions of the judgment of Jan 31, 1975, in No. 75-4019 (C A. 2), *N L R B* v. *S. E Nichols of Shillington Corp*, order of Jan. 15, 1976, holding the company in contempt of the reinstatement provisions of 475 F.2d 1395 (C A. 3, 1973), *N.L R.B.* v. *Iron Workers, Loc 16, Intl Assn. of Bridge, Structural & Ornamental Iron Workers, AFL-CIO*, holding the union in contempt of 8(b)(1)(A) and secondary boycott provisions of the judgment of Oct. 2, 1973, in No. 73-2134 (C.A 4), *N L.R.B* v *Finesilver Mfg Co.*, order of Feb. 20, 1976, sustaining, in part, contempt of the 8(a)(1) provisions of 400 F.2d 644 (C A. 5, 1968), *N L R B* v *Good Foods Mfg & Processing Corp.*, order of March 15, 1976, holding the company in contempt of the discovery provisions of 492 F.2d 1302 (C.A 7, 1974), *N L R B.* v. *George Masiakowski*, order of Sept 6, 1975, holding the respondent in contempt of the bargaining provisions of the order of Jan 13, 1975, in No 74-1793 (C.A. 7) Upon issuance of a writ of body attachment on Dec 24, 1975, compliance was achieved and a collective-bargaining agreement consummated, *N.L.R.B* v *Clinton Packing Co*, contempt adjudicated in part, 525 F.2d 1365 (C A. 8), *N.L.R B* v. *Inter-Polymer Industries*, order of Jan. 14, 1976, holding the company in contempt of the bargaining provisions of 83 LRRM 2735 (C A 9, 1973)

[14] *N L.R.B* v. *Hickman Garment Co*, upon completion of installment payments per order of Oct 8, 1975, in civil contempt of judgment of June 4, 1974, in No 73-2182 (C.A. 6).

and full reimbursement of the discriminatees,[15] and three upon meeting and bargaining to contract or good-faith impasse with the designated union.[16] In one case the Board's petition was dismissed.[17]

Two decisions rendered during fiscal 1976 warrant comment. In *Hendell Mfg. Co.*,[18] the Second Circuit dismissed the Board's civil contempt petition, finding that the employer's unilateral grants of discretionary merit wage adjustments did not violate its bargaining duty. The Board had charged that the company's merit increase policy was not sufficiently automatic to fall within the past practice exception as enunciated by the Supreme Court in *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1972). However, applying its *Patent Trader* interpretation[19] of *Katz*, the court held that, although the wage increases were somewhat discretionary both as to time and amount, they existed as a working condition in the shop. Dissenting District Judge Wyzanski (sitting by designation) would have found the company's contempt "clearly proven" under *Katz*.

Also of interest was the decision of the District of Columbia Circuit in *Oil, Chemical & Atomic Workers* [*Kansas Refined Helium Co.*] v. *N.L.R.B.*,[20] in which the court discussed at length the scope of review of findings by a special master. While holding that in its circuit the "clearly erroneous" standard of F.R.C.P. Rule 53(e)(2) applies "even to findings based on documentary evidence or inferences from undisputed facts" (but not to conclusions of law which are entitled to "no special deference"), the court also recognized the universally accepted principle that a master's findings may, even though supported by substantial evidence, properly be overturned if the reviewing court is firmly convinced that a mistake has been committed. Moreover, it noted that where the master fails to make findings, and the record evidence is uncontroverted, the court is free to make its own. Applying these principles, the court substantially rejected the master's report in which he wholly absolved the employer of civil contempt and instead found that respondent had engaged in flagrant violations of the judgment.

Also noteworthy was the court's rejection of the employer's suggestion that stricter standards govern a respondent's liability in con-

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[15] *N.L.R.B.* v. *Contempocomp Div of Linguistic Systems*, in civil contempt of the judgment of April 23, 1974, in No 74-1101 (C.A. 1), *N.L.R.B* v *G & S Metal Products Co.*, in civil contempt of 489 F 2d 441 (C A. 6, 1973); *N.L.R.B* v. *ITCO, d/b/a Indian Trail IGA Foodliner*, in civil contempt of the judgment of Oct. 1, 1973, in No 75-1848 (C A. 9).

[16] *N L.R.B* v. *DePalma Printing Co.*, in civil contempt of the judgment of Feb. 22, 1974, in No 75-1538 (C A 3); *N L.R B* v *Groendyke Transport*, in civil contempt of 438 F.2d 981 (C.A. 5, 1971)

[17] *N.L R.B* v *Hendel Mfg. Co.*, 523 F.2d 133 (C A. 2, 1975)

[18] See fn. 17 above.

[19] *N L R.B.* v. *Patent Trader*, 415 F.2d 190 (C.A 2, 1969)

[20] 92 LRRM 3059 (petitions for rehearing pending). Civil contempt adjudicated June 7, 1976, in Nos 23,295, 23,300, 23,750, and 23,751, rejecting major part of the report of Senior U S. District Judge Arthur J. Stanley, Jr. (D. Kan.), as special master

tempt than in administrative proceedings, and its reaffirmation of the longstanding rule that good faith or lack of willfulness is not a defense to a charge of civil contempt. Noting that civil contempt is usually a three-stage process, the court left open whether at the third stage, when prospective fines are actually imposed, the proceedings are of such a purely penal nature as to require a showing of willfulness.

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XI

Special and Miscellaneous Litigation

A. Judicial Intervention in Board Proceedings

In *Bays* v. *Miller*,[1] plaintiffs sought two injunctions, one to enjoin the Board from holding an election, another to direct the General Counsel to reconsider his prior dismissal of their unfair labor practice charges. The controversy began when various Teamsters locals tried to apply their collective-bargaining agreements to certain work performed by owner-operators of dumptrucks in California. The employers and some drivers opposed this effort. Contending that the owner-operators were independent contractors, not "employees" within the meaning of section 2(3) of the Act, the Associated Independent Owner-Operators, Inc. (AIOO) and several owner-operators filed charges alleging that the unions had violated sections 8(b)(4)(i) and (ii) (A) and (B) and 8(e).[2] The same contention was made by owner-operators (including Bays) who filed petitions seeking to decertify the unions as bargaining representatives of the employer's construction industry drivers. However, the Board found that the owner-operators were statutory employees and remanded the petitions to the respective regional directors for resolving other issues "preparatory to directing elections." [3] Based essentially upon the Board's finding, the regional directors dismissed the unfair labor practice charges and the General Counsel upheld the dismissals. Thereafter, AIOO and some of its members brought the instant action in district court. The complaint was dismissed for lack of jurisdiction and the court of appeals affirmed. The court noted that there is a " 'basic presumption' of the availability of judicial review" [4] and that the owner-operators apparently did not have the same recourse to challenge a Board certification as would an employer (who can refuse

[1] 524 F.2d 631 (C.A. 9).

[2] Board Cases 21-CC-1242, 21-CC-1414, 21-CC-1356, 21-CE-104, and 20-CE-84.

[3] *Contractor Members of the Associated General Contractors of California*, 201 NLRB 311, 314 (1973) See 38 NLRB Ann. Rep. 54 (1973)

[4] 524 F.2d at 632, quoting *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967).

to bargain with the certified representative). Nonetheless, the court held that it had no jurisdiction to review the Board's determinations in the representation proceeding, since the Board had "complied with at least the form of the statute." [5] With respect to the General Counsel's dismissal of plaintiffs' charges, the court of appeals asserted that the "refusal to issue an unfair labor practice complaint is not reviewable in the court of appeals, and neither is the certification decision in this case; an aggrieved party cannot combine the two to create jurisdiction in the district court." 524 F. 2d at 634.[6]

In *Intl. Assn. of Machinists, District 27* v. *Anaconda Co.*,[7] the plaintiff brought an action to compel the company's compliance with an arbitration decision awarding it jurisdiction over certain work and to enjoin the Board from adjudicating a work assignment dispute pursuant to the company's 8(b)(4)(D) charge. Plaintiff contended that the Board lacked jurisdiction to proceed under section 10(k) because the alleged strike threat by the other union claiming the work, the Aluminum Workers, was a sham. However, the court dismissed the complaint, finding that "the Board has the authority and jurisdiction to determine whether, in fact, there was a strike threat made by the Aluminum Workers against Anaconda" [8] and that this jurisdiction was not displaced by the arbitration award in plaintiff's favor. The court noted that the Board has "superior authority" over arbitration decisions, which may be invoked at any time.[9]

In *Eastover Mining Co.* v. *N.L.R.B.*,[10] the Southern Labor Union (SLU), the collective-bargaining representative, levied fines against its members who had joined in the organizational and picketing activities of a rival union, the United Mine Workers (UMW). When

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[5] 524 F. 2d at 633 Cf *Leedom* v. *Kyne*, 358 U S 184 (1958), *Boire* v *Greyhound Corp* , 376 U.S. 473 (1964). Following the district court's decision, the Board directed elections in *Contractor Members of the Associated General Contractors of California*, 209 NLRB 363 (1974), 209 NLRB 366 (1974) See 39 NLRB Ann Rep. 63-64 (1974). However, before the ballots in one case were returned for counting and before the ballots were mailed to the employees for the other election, the construction companies entered new contracts with the Teamsters and, for this conduct, were charged with violating sec. 8(a)(2) and (1). The Board found merit to the charges *Associated General Contractors of California*, 220 NLRB No 93 (1975), petitions for review pending, C A. 9, Dockets 75-3157, 3370, 3580.

[6] See *Henderson* v. *Intl Longshoremen's & Warehousemen's Union, Loc 50*, 457 F 2d 572, 578 (C.A. 9, 1972); *Vaca* v *Sipes*, 386 U.S. 171, 182 (1967). Cf. *Southern California District Council of Laborers, Loc 1184* v. *Ordman*, 318 F.Supp. 633 (D.C. Calif , 1970).

[7] 91 LRRM 2557 (D C. Ky).

[8] 91 LRRM at 2558, citing *Newark Typograhical Union 103, ITU (Elizabeth Daily Journal)*, 220 NLRB No. 2 (1975)

[9] 91 LRRM at 2558, quoting *Carey* v *Westinghouse*, 375 U S. 261, 272 (1964) Ultimately, in the 10(k) proceeding, the Board found that the Aluminum Workers had informed the company it "definitely intended to strike" if the arbitration award were put into effect, that, under *N.L R B.* v *Plasterers' Local Union 79*, 404 U S. 116 (1971), the award did not settle the dispute, since the Aluminum Workers was not a party to the arbitration proceeding, and that the employees who were members of the Aluminum Workers should continue to be assigned the disputed work *Local 130, Aluminum Workers Intl Union (Anaconda Co.)*, 222 NLRB No 120 (1976).

[10] 90 LRRM 2993 (D.C. Ky.), appeal pending, C A. 6, Docket 75-1064.

the fined employees refused to pay, the SLU asked the company to deduct the fines from their paychecks, pursuant to the contract's dues-checkoff provision. However, the fined employees filed a complaint in the district court, alleging that the SLU had violated the employees' rights under section 101(a)(2) and (5) of the Labor Management Reporting and Disclosure Act[11] and asking that the SLU and the company be enjoined from collecting any fines levied against them.[12] In response, the company asked that it be permitted to deduct the funds and deposit them in the court's registry, pending the outcome of the litigation; the court granted the motion. The UMW then filed unfair labor practice charges, and the regional director issued a complaint, alleging that the company had violated section 8(a)(2) and (1) by deducting the fines from the employees' pay.[13] Thereafter, the company filed the instant complaint, seeking to enjoin the Board, the regional director, and the General Counsel from conducting a hearing on the unfair labor practice complaint. The district court granted the injunction. While recognizing the "general rule . . . that a federal district court does not have the authority to enjoin proceedings of the National Labor Relations Board," the court held that it had jurisdiction to enjoin the Board's unfair labor practice proceeding, on the theory that this rule "applies when the action is first instituted before the National Labor Relations Board and the injunction is later sought to halt the National Labor Relations Board's proceeding." [14] The court noted that the "problem here is one of burdensome or double litigation [against the company], in that the remedy sought before both forums is identical" and that it had " 'possession of property necessary to the litigation' "—the funds deposited by the company into the court's registry.[15]

In *Silverman* v. *N.L.R.B.*,[16] the court granted a writ of mandamus requiring the Board to determine the backpay claims of the petitioner and other employees who had been unlawfully locked out by their employers in 1967.[17] The court had issued its judgment enforcing the Board's order, in relevant part, in 1971. The Board explained that the delay was caused by difficulties in gathering necessary information, the departure of the Board's attorney who had handled the case, a backlog of work, and the complexity of the determinations. However, the court of appeals found that the 5-year delay was not excusable; that it had jurisdiction to entertain the employee's petition under the

[11] 29 U.S.C. sec. 411(a)(2), (5).

[12] *Davis, et al.* v. *Southern Labor Union et al.*, No. 74-299 (D.C Ky.)

[13] Board Case 9-CA-9008.

[14] 90 LRRM at 2994

[15] 90 LRRM at 2994 ,quoting *Princess Lida* v *Thompson*, 305 U.S. 456, 466 (1939).

[16] 92 LRRM 2919 (C.A. 2).

[17] See *Bagel Bakers Council of Greater New York*, 174 NLRB 622 (1969), enfd in pertinent part 434 F.2d 884 (C.A. 2, 1970), cert. denied 402 U.S. 908 (1971).

All Writs Act; [18] and that granting the petition would not interfere with the Board's exercise of discretion.[19] The court thereupon directed the Board to determine the claimants' backpay awards within 60 days from the date of its opinion.

B. Board Intervention in Court Proceedings

In *Local Union 639, IBT* v. *Jacobs Transfer Co.*,[20] the Board intervened to urge dismissal of a union's section 301 proceeding to enforce two arbitration awards. The Board had found that the company violated section 8(a)(3) and (1) by discharging an employee, Daniel George, because of his activities within Local 639 (opposing the incumbent officers) and his effort to promote the company's compliance with the contract.[21] The Board's order required that George be offered "immediate and full reinstatement to his former job, without prejudice to his former rights or privileges . . . ." [22] However, before the order issued, the company permanently closed the Ardmore, Maryland, terminal where George had worked and transferred some employees to its Baltimore terminal. Those transferring were dovetailed into the Baltimore seniority list; others were placed on layoff status at either Baltimore or Ardmore. In attempting to comply with the Board's order, the company offered to reinstate George at the Baltimore terminal, but George declined the transfer, which would have put him in another local's jurisdiction, thus rendering him ineligible to continue his candidacy for office in Local 639. After he was placed on layoff status at Ardmore, George filed a grievance asserting that the company's contract with the union required the company to offer him employment at one of its facilities in the Washington, D.C., area.

Although the Teamsters Eastern Conference Joint Committee heard and denied George's grievance, the regional director advised the company that its offer to reinstate George in Baltimore did not satisfy the Board's order, since it "appears questionable" under the contract. After the regional director issued a backpay specification and notice of hearing, the company informally agreed to reinstate George in the Washington area. The regional director approved the settlement, George was reinstated in a nearby Virginia terminal, and he was tendered the backpay due him. However, another employee was

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[18] 28 U.S.C. sec 1651(a). See also *N.L R.B* v *Oman Construction Co.*, 338 F.2d 125 (C.A 6, 1964), cert denied 381 U S. 925 (1965), *Northern Virginia Sun Publishing Co* v *N.L R.B.*, 330 F 2d 231 (C A.D C., 1964)

[19] 92 LRRM at 2920. Cf *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967).

[20] 407 F.Supp. 125 (D.C.D.C.)

[21] *Jacobs Transfer*, 201 NLRB 210 (1973).

[22] *Id* at 222.

displaced by George's reinstatement, and Local 639 processed a grievance on his behalf. The local Joint Area Committee upheld the union's claims that the company had violated the contract by giving George preferential employment rights and that the Eastern Conference decision should have governed the assignment. When George refused to revoke his compliance agreement with the company, Local 639 filed an action to enforce the arbitration awards of the Eastern Conference and the Joint Area Committee. Later, the joint union-management health and welfare trust and pension trust refused to accept payments tendered by the company pursuant to the compliance agreement, and this conduct became the subject of new unfair labor practice charges filed by George.[23]

Intervening in district court, the Board argued that the decisions of the Eastern Conference Committee and the Joint Area Committee were repugnant to the compliance agreement between the company and George. However, the court noted that, while the regional director negotiated and approved the agreement, "the Board could [instead] have issued a supplemental order directing that George be reinstated in Washington." [24] Such an order, the court stated, "would presumably have constituted an exercise of its authority to interpret and give effect to the terms of a collective bargaining agreement" and "would clearly prevail" over the arbitration decisions.[25] Rejecting the Board's contention that the regional director's approval of the compliance agreement was a "mere administrative determination" to effectuate the original order,[26] the court found "no indication . . . in the statute, the case law, or Board regulations that this compliance agreement does have the status of a Board order, entitling it to supersede an arbitration decision." [27] Nevertheless, the court recognized that the complaint then pending before the Board (fn 23, *supra*) alleged that the union was "engaging in an unfair labor practice by bringing this very suit" and declared that, if the Board affirmed the administrative law judge's decision, "the Court would be most reluctant to permit itself to be used in such a manner." [28] Accordingly, the court stayed the matter pending the outcome of the Board proceeding.

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[23] The administrative law judge found that the union violated sec. 8(b)(1)(A) and (2) through the following conduct the Joint Area Committee's initial act of upholding George's discharge, the union's unsuccessful attempts to make him and others ineligible to run for union office, its election irregularities (see *Brennan* v. *Teamsters, Local 639*, 84 LRRM 2266 (D C.D.C , 1973), affd. 494 F. 2d 1092 (C A D C., 1974)), its attempts to cause George to withdraw from the local, its processing of the grievance against him, and the filing of the instant suit. *Jacobs Transfer Co* , Board Cases 5-CA-5308, 5-CB-1639 (JD-653-75, November 14, 1975), pending exceptions to the Board.

[24] 407 F.Supp at 131

[25] *Ibid.* citing *N L.R B.* v *Strong Roofing & Insulating Co.*, 393 U.S 357 (1969), *N L R B.* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967), *Carey* v. *Westinghouse*, 375 U.S 261 (1963).

[26] See *Wallace Corp* v. *N.L R.B.*, 159 F 2d 952 (C.A. 4, 1947), *N.L.R B.* v *Bird Machine Co.*, 174 F 2d 404 (C.A. 1, 1949).

[27] 407 F.Supp. at 131.

[28] *Id.* at 132.

C. Freedom of Information Act Litigation

The courts of appeals decided for the Board in three significant cases arising under the Freedom of Information Act.[29] In *Title Guarantee Co.* v. *N.L.R.B.*[30] and *Goodfriend Western Corp.* v. *Fuchs*,[31] the Second and First Circuits, respectively, held that the FOIA does not require the Board to disclose investigative statements which it has obtained from employees or their union representatives in connection with a pending unfair labor practice case.[32] The companies in both cases were seeking statements of prospective witnesses to prepare for scheduled unfair labor practice hearings, and the Board maintained that the statements fell within several FOIA exemptions. In a landmark opinion, the court held in *Title Guarantee* that nondisclosure of such statements was privileged not only by the Board's rules,[33] but also by exemption 7(A) of the FOIA, which exempts production of "investigatory records compiled for law enforcement purposes . . . to the extent that the production of such records would (A) interfere with enforcement proceedings. . . ." [34] The court agreed with the Board that disclosure of employees' statements "could well" interfere with unfair labor practice proceedings against their employer: "suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied" and "second, employees who are interviewed [by Board agents] may be reluctant, for fear of incurring employer displeasure, to have it known that they have given information . . . or union officials might not want to volunteer information for fear of compromising the union's position in negotiations." [35] Noting the pre-FOIA rules against pre-

[29] 5 U S.C. sec. 552 (FOIA)

[30] 534 F.2d 484 (C.A 2), petition for certiorari filed June 28, 1976, Docket 75-1880

[31] 92 LRRM 2466 (C A. 1), petition for certiorari filed July 15, 1976, Docket 76-51

[32] Accord *Climax Molybdenum Co* v. *N.L R B*, 92 LRRM 3466 (C A 10, 1976), *Roger J Au & Son, Inc.* v *N L.R B*, 92 LRRM 3193 (C A 3, 1976). See also *Wellman Industries, Inc.* v. *N L.R B.*, 490 F.2d 427 (C A 4, 1974), cert denied 419 U S 834 (1974), discussed in 39 NLRB Ann Rep 179 (1974), *Clement Bros Co* v *N.L R B*, 282 F Supp. 540 (D.C Ga, 1968), *Barceloneta Shoe Corp* v. *Compton*, 271 F Supp. 591 (D.C. P R, 1967).

[33] 534 F 2d at 487 See NLRB Rules and Regulations, Series 8, as amended, secs 102 30, 102 118(b) and (d); *N L R B* v *Interboro Contractors*, 432 F 2d 854, 858-859 (C A 2, 1970), cert. denied 402 U S 915 (1971), *Electromec Design & Development Co* v *N.L R B*, 409 F 2d 631, 635 (C A 9, 1969)

[34] 5 U S C sec 552(b)(7)(A) The court therefore found it unnecessary to determine whether the Board was privileged in relying upon exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency", exemption 7(C), which exempts "investigatory records compiled for law enforcement purposes" if their disclosure would "constitute an unwarranted invasion of personal privacy", and exemption 7(D), which privileges nondisclosure of such records where they "disclose the identity of a confidential source" 534 F 2d at 489, 492 In dicta, however, the court questioned the applicability of exemptions 7(C) and (D), given the nature of the affidavits involved in the case and the district court's adverse findings of fact *Id* at 489, fns. 10, 11, and 492-493, fn 15

[35] 534 F.2d at 491. Accord *Climax Molybdenum Co.* v *N.L R.B*, *supra*, 92 LRRM at 3468

trial discovery, the court expressed doubt "that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or a blanket enactment pertaining to discovery in pending administrative enforcement proceedings." [36]

In *Goodfriend Western*, the First Circuit adopted the reasoning of *Title Guarantee* and rejected the company's argument that exemption 7(A) should not apply to witnesses who were already committed to testifying at an imminent hearing.[37] While conceding the possibility that interference is minimized in such a circumstance, the court stressed that the determination "whether such a possibility justifies denying all discovery of an employee's statements until after he testifies is a question that Congress has left to the Board." [38] The court also stated, "Whatever our own view of the desirability of disclosure in this instance, we do not believe that Congress intended to transfer from the Board to the courts the case-by-case adjudication of discovery disputes in unfair labor practice proceedings." [39]

In *Kent Corp.* v. *N.L.R.B.*,[40] the court agreed with the Board that it was not required by the FIOA to disclose "Final Investigation Reports" (FIR's), which summarize the investigation of unfair labor practice charges by regional office staff members and make recommendations regarding disposition of the charges. Reversing a district court,[41] the Fifth Circuit held that these memoranda do not constitute "final opinions" of the agency which are "made in the adjudication of cases" and which must be produced pursuant to section 552(a)(2) of the FOIA, but are "intra-agency memoranda" protected by exemption 5.[42] Thus, among the common law privileges incorporated in exemption 5, the court pointed out, are the "' executive privilege' protecting predecisional communications" and the "attorney work product privilege announced in *Hickman* v. *Taylor* . . ." [43] The court found both privileges applicable to FIR's: They are predecisional because "they express the tentative views of the . . . attorneys who wrote them. They state reasons that could account for [the regional director's] decisions, but there is no assurance that [he]

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[36] 534 F 2d at 491–492.

[37] 92 LRRM at 2466, 2467.

[38] *Id* at 2467. Accord· *Title Guarantee* v. *N.L.R.B.*, *supra*, 534 F.2d at 492; *Roger J. Au & Son* v. *N.L.R.B.*, *supra*, 92 LRRM at 3195.

[39] 92 LRRM at 2467, citing *Sheehan* v. *Doyle*, 513 F.2d 895 (C.A. 1, 1975), cert. denied 423 U.S. 874 (1975)

[40] 530 F.2d 612 (C.A. 5), petition for certiorari filed July 29, 1976, Docket 76–140.

[41] 86 LRRM 2801 (D.C. Ala , 1974). See 39 NLRB Ann. Rep. 178 (1974).

[42] 530 F.2d at 619. See *N.L R.B* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975), discussed in 40 NLRB Ann. Rep. 140 (1975); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975)

[43] 329 U.S. 495 (1947).

accepted those reasons." [44] And they constitute work product because they are prepared by Board lawyers "in anticipation of litigation or for trial" within the meaning of rule 26(b)(3) of the Federal Rules of Civil Procedure , which now codifies the work product privilege.[45] The court went on to hold that exemption 5 shielded the documents in their entirety since disclosure even of factual materials contained in the FIR's would violate the work product privilege by making it more difficult for a Board attorney to "discuss doctrinal theories" and "'assemble information,' [and sift what he considers to be the relevant from the irrelevant facts' without feeling that he is working for his adversary at the same time. *Hickman* v. *Taylor*, 329 U.S. at 511." [46]

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[44] 530 F 2d at 619-620 See *Wu* v. *Nat Endowment For Humanities*, 460 F 2d 1030, 1032 (C A 5, 1972).

[45] The regional director issued a complaint based upon some of the charges, and the Board ultimately found that the company had committed many of the unfair labor practices alleged *Kent Corp.*, 212 NLRB 595 (1974), enfd. in substantial part 530 F.2d 610 (C.A 5, 1976). However, in the FOIA case, the court asserted that the work product privilege it recognized "cannot properly be made to turn on whether litigation actually ensued," since the reports are prepared in the knowledge that "any given charge *might* become enmeshed in litigation." *Kent Corp.* v. *N.L.R.B.*, *supra*, 530 F.2d at 623

[46] *Id.* at 624.

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APPENDIX

Statistical Tables for Fiscal Year 1976

Readers are encouraged to communicate with the Agency as to questions on the tables by writing to the Office of Statistical Reports and Evaluations, National Labor Relations Board, 1717 Pennsylvania Avenue NW., Washington, D.C. 20570.

GLOSSARY OF TERMS USED IN STATISTICAL TABLES

The definitions of terms contained in this glossary are not intended for general application but are specially directed toward increasing comprehension of the statistical tables that follow. Thus the definitions are keyed directly to the terms used in such tables.

Adjusted Cases

Cases are closed as "adjusted" when an informal settlement agreement is executed and compliance with its terms is secured (See "Informal Agreement," this glossary) In some instances, a written agreement is not secured but appropriate remedial action is taken so as to render further proceeding unnecessary. A central element in an "adjusted" case is the agreement of the parties to settle differences without recourse to litigation

Advisory Opinion Cases

See "Other Cases—AO" under "Types of Cases "

Agreement of Parties

See "Informal Agreement" and "Formal Agreement," this glossary The term "agreement" includes both types

Amendment of Certification Cases

See "Other Cases—AC" under "Types of Cases."

Backpay

Amounts of money paid or to be paid employees as reimbursement for wages lost because they were discriminatorily discharged or unlawfully denied employment, plus interest on such money. Also included is payment for bonuses, vacations, other fringe benefits, etc., lost because of the discriminatory acts, as well as interest thereon. All moneys noted in table 4 have been reported as paid or owing in cases closed during the fiscal year (Installment payments may protract some payments beyond this year and some payments may have actually been made at times considerably in advance of the date a case was closed; i e , in a prior fiscal year.)

Backpay Hearing

A supplementary hearing to receive evidence and testimony as to the amount of backpay due discriminatees under a prior Board order or court decree.

Backpay Specification

The formal document, a "pleading," which is served on the parties when the regional director and the respondent are unable to agree as to the amounts of backpay due discriminatees pursuant to a Board order or court decree requiring payment of such backpay. It sets forth in detail the amount held by the regional director to be owing each discriminatee and the method of computation employed. The specification is accompanied by a notice of hearing setting a date for a backpay hearing.

Case

A "case" is the general term used in referring to a charge or petition filed with the Board. Each case is numbered and carries a letter designation indicating the type of case. See "Types of Cases."

Certification

A certification of the results of an election is issued by the regional director or the Board. If a union has been designated as the exclusive bargaining representative by a majority of the employees, a certification of representative is issued. If no union has received a majority vote, a certification of result of election is issued.

Challenges

The parties to an NLRB election are entitled to challenge any voter. At the election site, the challeged ballots are segregated and not counted when the other ballots are tallied. Most frequently, the tally of unchallenged ballots determines the election and the challenged ballots are insufficient in number to affect the result of the election. The challenges in such a case are never resolved, and the certification is based on the tally of (unchallenged) ballots.

When challenged ballots are determinative of the result, a determination as to whether or not they are to be counted rests with the regional director in the first instance, subject to possible appeal to the Board. Often, however, the "determinative" challenges are resolved informally by the parties by mutual agreement. No record is kept of nondeterminative challenges or determinative challenges which are resolved by agreement prior to issuance of the first tally of ballots.

Charge

A document filed by an employee, an employer, a union, or an individual alleging that an unfair labor practice has been committed. See "C Cases" under "Types of Cases."

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Complaint

The document which initiates "formal" proceedings in an unfair labor practice case. It is issued by the regional director when he concludes on the basis of a completed investigation that any of the allegations contained in the charge have merit and adjustment or settlement has not been achieved by the parties. The complaint sets forth all allegations and information necessary to bring a case to hearing before an administrative law judge pursuant to due process of law. The complaint contains a notice of hearing, specifying the time and place of hearing.

Compliance

The carrying out of remedial action as agreed upon by the parties in writing (see "Formal Agreement," "Informal Agreement"); as recommended by the administrative law judge in his decision, as ordered by the Board in its decision and order; or as decreed by the court.

Dismissed Cases

Cases may be dismissed at any stage. They are dismissed informally when, following investigation, the regional director concludes that there has been no violation of the law, that there is insufficient evidence to support further action, or for a variety of other reasons. Before the charge is dismissed, however, the charging party is given the opportunity to withdraw the charge voluntarily. (See also "Withdrawn Cases.") Cases may also be dismissed by the administrative law judge, by the Board, or by the courts through their refusal to enforce orders of the Board.

Dues

See "Fees, Dues, and Fines."

Election, Consent

An election conducted by the regional director pursuant to an agreement signed by all parties concerned. The agreement provides for the waiving of a hearing, the establishment of the appropriate unit by mutual consent, and the final determination of all postelection issues by the regional director.

Election, Directed

Board-Directed

An election conducted by the regional director pursuant to a decision and direction of election by the Board. Postelection rulings are made by the regional director or by the Board.

Regional Director-Directed

An election conducted by the regional director pursuant to a decision and direction of election issued by the regional director after a hearing. Postelection rulings are made by the regional director or by the Board.

Election, Expedited

An election conducted by the regional director pursuant to a petition filed within 30 days of the commencement of picketing in a situation in which a meritorious 8(b)(7)(C) charge has been filed. The election is conducted under priority conditions and without a hearing unless the regional director believes the proceeding raises questions which cannot be decided without a hearing.

Postelection rulings on objections and/or challenges are made by the regional director and are final and binding unless the Board grants an appeal on application by one of the parties.

Election, Rerun

An election held after an initial election has been set aside either by the regional director or by the Board.

Election, Runoff

An election conducted by the regional director after an initial election, having three or more choices on the ballot, has turned out to be inconclusive (none of the choices receiving a majority of the valid votes cast). The regional director conducts the runoff election between the choices on the regional ballot which received the highest and the next highest number of votes.

Election, Stipulated

An election held by the regional director pursuant to an agreement signed by all the parties concerned. The agreement provides for the waiving of hearing and the establishment of the appropriate unit by mutual consent. Postelection rulings are made by the Board.

Eligible Voters

Employees within an appropriate bargaining unit who were employed as of a fixed date prior to an election, or are otherwise qualified to vote under the Board's eligibility rules.

Fees, Dues, and Fines

The collection by a union or an employer of dues, fines, and referral fees from employees may be found to be an unfair labor practice under section 8(b) (1)(A) or (2) or 8(a) (1) and (2) or (3), where, for instance, such moneys were collected pursuant to an illegal hiring hall arrangement, or an invalid or unlawfully applied union-security agreement; where dues were deducted from employees' pay without their authorization; or, in the case of fines, where such fines restrained or coerced employees in the exercise of their rights. The remedy for such unfair labor practices usually requires the reimbursements of such moneys to the employees.

Fines

See "Fees, Dues, and Fines."

Formal Action

Formal actions may be documents issued or proceedings conducted when the voluntary agreement of all parties regarding the disposition of all issues in a case cannot be obtained, and where dismissal of the charge or petition is not warranted. Formal actions are, further, those in which the decision-making authority of the Board (the regional director in representation cases), as provided in sections 9 and 10 of the Act, must be exercised in order to achieve the disposition of a case or the resolution of any issue raised in a case. Thus, formal action takes place when a Board decision and consent order is issued pursuant to a stipulation, even though the stipulation constitutes a voluntary agreement.

Formal Agreement (in unfair labor practice cases)

A written agreement between the Board and the other parties to a case in which hearing is waived and the specific terms of a Board order agreed upon. The agreement may also provide for the entry of a consent court decree enforcing the Board order.

Informal Agreement (in unfair labor practice cases)

A written agreement entered into between the party charged with committing an unfair labor practice, the regional director, and (in most cases) the charging party requiring the charged party to take certain specific remedial action as a basis for the closing of the case. Cases closed in this manner are included in "adjusted" cases.

Injunction Petitions

Petitions filed by the Board with respective U.S. district courts for injunctive relief under section 10(j) or section 10(e) of the Act pending hearing and adjudication of unfair labor practice charges before the Board. Also, petitions filed with the U.S. court of appeals under section 10(e) of the Act.

Jurisdictional Disputes

Controversies between unions or groupings of employees as to which employees will perform specific work. Cases involving jurisdictional disputes are received by the Board through the filing of charges alleging a violation of section 8(b)(4)(D). They are initially processed under section 10(k) of the Act which is concerned with the determination of the jurisdictional dispute itself rather than with a finding as to whether an unfair labor practice has been committed. Therefore, the failure of a party to comply with the Board's determination of dispute is the basis for the issuance of an unfair labor practice complaint and the processing of the case through usual unfair labor practice procedures.

Objections

Any party to an election may file objections alleging that either the conduct of the election or the conduct of a party to the election failed to meet the Board's standards. An election will be set aside if eligible employee-voters have not been given an adequate opportunity to cast their ballots, in secrecy and without hindrance from fear or other interference with the expression of their free choice.

Petition

See "Representation Case." Also see "Other Cases—AC, UC, and UD" under "Types of Cases."

Proceeding

One or more cases included in a single litigated action. A "proceeding" may be a combination of C and R cases consolidated for the purposes of hearing.

Representation Cases

This term applies to cases bearing the alphabetical designations RC, RM, or RD. (See "R Cases" under "Types of Cases," this glossary, for specific definitions of these terms.) All three types of cases are included in the term "representation" which deals generally with the problem of which union, if any, shall represent employees in negotiations with their employer. The cases are initiated by the filing of a petition by a union, an employer, or a group of employees.

Representation Election

An election by secret ballot conducted by the Board among the employees in an appropriate collective-bargaining unit to determine whether the employees wish to be represented by a particular labor organization for purposes of collective bargaining. The tables herein reflect only final elections which result in the issuance of a certification of representative if a union is chosen, or a certification of results if the majority has voted for "no union."

Situation

One or more unfair labor practice cases involving the same factual situation. These cases are processed as a single unit of work. A situation may include one or more CA cases, a combination of CA and CB cases, or a combination of other types of C cases. It does not include representation cases.

Types of Cases

General: Letter designations are given to all cases depending upon the subsection of the Act allegedly violated or otherwise describing the general nature of each case. Each of the letter designations appearing below is descriptive of the case it is associated with.

C Cases (unfair labor practice cases)

A case number which contains the first letter designation C, in combination with another letter, i.e., CA, CB, etc , indicates that it involves a charge that an unfair labor practice has been committed in violation of one or more subsections of section 8.

CA: A charge that an employer has committed unfair labor practices in violation of section 8(a) (1), (2), (3), (4), or (5), or any combination thereof

CB: A charge that a labor organization has committed unfair labor practices in violation of section 8(b) (1), (2), (3), (5), or (6), or any combination thereof

CC: A charge that a labor organization has committed unfair labor practices in violation of section 8(b) (4) (i) and/or (ii) (A), (B), or (C), or any combination thereof

CD: A charge that a labor organization has committed an unfair labor practice in violation of section 8(b)(4) (i) or (ii)(D) Preliminary actions under section 10(k) for the determination of jurisdictional disputes are processed as CD cases (See "Jurisdictional Disputes" in this glossary.)

CE: A charge that either a labor organization or an employer, or both jointly, have committed an unfair labor practice in vioation of section 8(e).

CG: A charge that a labor organization has committed unfair labor practices in violation of section 8(g).

CP: A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(7) (A), (B), or (C), or any combination thereof

R Cases (representation cases)

A case number which contains the first letter designation R, in combination with another letter, i.e., RC, RD, RM, indicates that it is a petition for investigation and determination of a question concerning representation of employees, filed under section 9(c) of the Act.

RC: A petition filed by a labor organization or an employee alleging that a question concerning representation has arisen and seeking an election for the determination of a collective-bargaining representative

RD: A petition filed by employees alleging that the union previously certified or currently recognized by the employer as their collective-bargaining representative no longer represents a majority of the employees in the appropriate unit and seeking an election to determine this

RM: A petition filed by an employer alleging that a question concerning representation has arisen and seeking an election for the determination of a collective-bargaining representative.

Other Cases

AC: (Amendment of Certification cases): A petition filed by a labor organization or an employer for amendment of an existing certification to reflect changed circumstances, such as changes in the name or affiliation of the labor organization involved or in the name or location of the employer involved.

AO: (Advisory Opinion cases): As distinguished from the other types of cases described above, which are filed in and processed by regional offices of the Board, AO or "advisory opinion" cases are filed directly with the Board in Washington and seek a determination as to whether the Board would or would not assert jurisdiction, in any given situation on the basis of its current standards, over the party or parties to a proceeding pending before a state or territorial agency or a court. (See subpart H of the Board's Rules and Regulations, Series 8, as amended.)

UC: (Unit Clarification cases): A petition filed by a labor organization or an employer seeking a determination as to whether certain classifications of employees should or should not be included within a presently existing bargaining unit.

UD: (Union Deauthorization cases): A petition filed by employees pursuant to section 9(e)(1) requesting that the Board conduct a referendum to determine whether a union's authority to enter into a union-shop contract should be rescinded.

UD Cases

See "Other Cases—UD" under "Types of Cases."

Unfair Labor Practice Cases

See "C Cases" under "Types of Cases."

Union Deauthorizing Cases

See "Other Cases—UD" under "Types of Cases."

Union-Shop Agreement

An agreement between an employer and a labor organization which requires membership in the union as a condition of employment on or after the 30th day following (1) the beginning of such employment or (2) the effective date of the agreement, whichever is the later.

Unit, Appropriate Bargaining

A grouping of employees in a plant, firm, or industry recognized by the employer, agreed upon by the parties to a case, or designated by the Board or its regional director as appropriate for the purposes of collective bargaining.

Valid Vote

A secret ballot on which the choice of the voter is clearly shown.

Withdrawn Cases

Cases are closed as "withdrawn" when the charging party or petitioner, for whatever reasons, requests withdrawal of the charge or the petition and such request is approved.

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	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	All cases						
Pending July 1, 1975	14,797	5,951	1,498	532	505	4,536	1,775
Received fiscal 1976	49,335	16,080	6,364	1,377	1,671	18,736	5,107
On docket fiscal 1976	64,132	22,031	7,862	1,909	2,176	23,272	6,882
Closed fiscal 1976	46,136	14,976	5,838	1,291	1,367	17,740	4,924
Pending June 30, 1976	17,996	7,055	2,024	618	809	5,532	1,958
	Unfair labor practice cases[2]						
Pending July 1, 1975	11,156	4,042	852	345	245	4,183	1,489
Received fiscal 1976	34,509	9,344	2,637	736	770	16,968	4,054
On docket fiscal 1976	45,665	13,386	3,489	1,081	1,015	21,151	5,543
Closed fiscal 1976	32,406	8,626	2,425	655	624	16,125	3,951
Pending June 30, 1976	13,259	4,760	1,064	426	391	5,026	1,592
	Representation cases[3]						
Pending July 1, 1975	3,471	1,869	636	183	253	291	239
Received fiscal 1976	14,189	6,582	3,706	627	875	1,513	886
On docket fiscal 1976	17,660	8,451	4,342	810	1,128	1,804	1,125
Closed fiscal 1976	13,184	6,219	3,392	625	721	1,393	834
Pending June 30, 1976	4,476	2,232	950	185	407	411	291
	Union-shop deauthorization cases						
Pending July 1, 1975	58	----------	----------	----------	----------	58	----------
Received fiscal 1976	235	----------	----------	----------	----------	235	----------
On docket fiscal 1976	293	----------	----------	----------	----------	293	----------
Closed fiscal 1976	209	----------	----------	----------	----------	209	----------
Pending June 30, 1976	84	----------	----------	----------	----------	84	----------
	Amendment of certification cases						
Pending July 1, 1975	26	12	5	4	4	1	0
Received fiscal 1976	64	41	2	3	8	3	7
On docket fiscal 1976	90	53	7	7	12	4	7
Closed fiscal 1976	58	34	5	2	9	2	6
Pending June 30, 1976	32	19	2	5	3	2	1
	Unit clarification cases						
Pending July 1, 1975	86	28	5	0	3	3	47
Received fiscal 1976	338	113	19	11	18	17	160
On docket fiscal 1976	424	141	24	11	21	20	207
Closed fiscal 1976	279	97	16	9	13	11	133
Pending June 30, 1976	145	44	8	2	8	9	74

[1] See Glossary for definitions of terms. Advisory Opinion (AO) cases not included. See table 22.
[2] See table 1A for totals by types of cases.
[3] See table 1B for totals by types of cases.

Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 1976 [1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	CA cases						
Pending July 1, 1975	8,119	4,005	848	338	196	2,702	30
Received fiscal 1976	23,496	9,262	2,628	671	647	10,225	63
On docket fiscal 1976	31,615	13,267	3,476	1,009	843	12,927	93
Closed fiscal 1976	21,762	8,558	2,413	600	540	9,592	59
Pending June 30, 1976	9,853	4,709	1,063	409	303	3,335	34
	CB cases						
Pending July 1, 1975	1,924	25	4	3	6	1,415	471
Received fiscal 1976	8,097	71	6	10	41	6,638	1,331
On docket fiscal 1976	10,021	96	10	13	47	8,053	1,802
Closed fiscal 1976	7,803	53	9	8	31	6,425	1,277
Pending June 30, 1976	2,218	43	1	5	16	1,628	525
	CC cases						
Pending July 1, 1975	621	4	0	4	19	34	560
Received fiscal 1976	1,819	4	1	43	43	62	1,666
On docket fiscal 1976	2,440	8	1	47	62	96	2,226
Closed fiscal 1976	1,762	5	1	39	27	63	1,627
Pending June 30, 1976	678	3	0	8	35	33	599
	CD cases						
Pending July 1, 1975	200	4	0	0	1	7	188
Received fiscal 1976	446	4	0	6	7	17	412
On docket fiscal 1976	646	8	0	6	8	24	600
Closed fiscal 1976	441	6	0	3	6	13	413
Pending June 30, 1976	205	2	0	3	2	11	187
	CE cases						
Pending July 1, 1975	128	2	0	0	23	23	80
Received fiscal 1976	115	2	1	0	16	3	93
On docket fiscal 1976	243	4	1	0	39	26	173
Closed fiscal 1976	109	3	1	0	11	11	83
Pending June 30, 1976	134	1	0	0	28	15	90
	CG cases						
Pending July 1, 1975	35	0	0	0	0	0	35
Received fiscal 1976	92	0	0	0	0	0	92
On docket fiscal 1976	127	0	0	0	0	0	127
Closed fiscal 1976	70	0	0	0	0	0	70
Pending June 30, 1976	57	0	0	0	0	0	57
	CP cases						
Pending July 1, 1975	129	2	0	0	0	2	125
Received fiscal 1976	444	1	1	6	16	23	397
On docket fiscal 1976	573	3	1	6	16	25	522
Closed fiscal 1976	459	1	1	5	9	21	422
Pending June 30, 1976	114	2	0	1	7	4	100

[1] See Glossary for definitions of terms.

Table 1B.—Representation Cases Received, Closed, and Pending, Fiscal Year 1976 [1]

	Total	Identification of filing party					
		AFL-CIO Unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	RC cases						
Pending July 1, 1975	2,973	1,869	636	183	252	33	----------
Received fiscal 1976	11,846	6,572	3,700	626	866	82	----------
On docket fiscal 1976	14,819	8,441	4,336	809	1,118	115	----------
Closed fiscal 1976	11,024	6,210	3,388	624	713	89	----------
Pending June 30, 1976	3,795	2,231	948	185	405	26	----------
	RM cases						
Pending July 1, 1975	239	----------	----------	----------	----------	----------	239
Received fiscal 1976	886	----------	----------	----------	----------	----------	886
On docket fiscal 1976	1,125	----------	----------	----------	----------	----------	1,125
Closed fiscal 1976	834	----------	----------	----------	----------	----------	834
Pending June 30, 1976	291	----------	----------	----------	----------	----------	291
	RD cases						
Pending July 1, 1975	259	0	0	0	1	258	----------
Received fiscal 1976	1,457	10	6	1	9	1,431	----------
On docket fiscal 1976	1,716	10	6	1	10	1,689	----------
Closed fiscal 1976	1,326	9	4	1	8	1,304	----------
Pending June 30, 1976	390	1	2	0	2	385	----------

[1] See Glossary for definitions of terms

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1976

	Number of cases showing specific allegations	Percent of total cases
A. Charges filed against employers under sec. 8(a)		
Subsections of sec. 8(a) Total cases	23,496	100 0
8(a)(1)	3,358	14.3
8(a)(1)(2)	329	1 4
8(a)(1)(3)	12,108	51.4
8(a)(1)(4)	124	0 5
8(a)(1)(5)	4,444	18 9
8(a)(1)(2)(3)	328	1 4
8(a)(1)(2)(4)	4	0 0
8(a)(1)(2)(5)	118	0 5
8(a)(1)(3)(4)	489	2 1
8(a)(1)(3)(5)	1,896	8.1
8(a)(1)(4)(5)	12	0 1
8(a)(1)(2)(3)(4)	27	0 1
8(a)(1)(2)(3)(5)	157	0 7
8(a)(1)(2)(4)(5)	17	0 1
8(a)(1)(3)(4)(5)	62	0 3
8(a)(1)(2)(3)(4)(5)	23	0 1
Recapitulation [1]		
8(a)(1) [2]	23,496	100 0
8(a)(2)	1,003	4 3
8(a)(3)	15,090	64 2
8(a)(4)	758	3 2
8(a)(5)	6,729	28.6
B. Charges filed against unions under sec 8(b)		
Subsections of sec. 8(b) Total cases	10,806	100 0
8(b)(1)	5,403	50 0
8(b)(2)	267	2.5
8(b)(3)	524	4 8
8(b)(4)	2,265	21 1
8(b)(5)	5	0 0
8(b)(6)	15	0 1
8(b)(7)	444	4 1
8(b)(1)(2)	1,520	14 1
8(b)(1)(3)	205	1 9
8(b)(1)(5)	11	0 1
8(b)(1)(6)	6	0 1
8(b)(2)(3)	13	0 1
8(b)(2)(5)	1	0 0
8(b)(2)(6)	3	0 0
8(b)(3)(5)	2	0 0
8(b)(3)(6)	1	0 0
8(b)(1)(2)(3)	103	1 0
8(b)(1)(2)(5)	8	0 1
8(b)(1)(2)(6)	3	0 0
8(b)(1)(3)(5)	1	0.0
8(b)(1)(3)(6)	3	0 0
8(b)(1)(2)(3)(5)	1	0 0
8(b)(1)(2)(3)(6)	1	0 0
8(b)(1)(2)(5)(6)	1	0 0
Recapitulation [1]		
8(b)(1)	7,266	67.2
8(b)(2)	1,921	17 8
8(b)(3)	854	7 9
8(b)(4)	2,265	21 1
8(b)(5)	30	0 3
8(b)(6)	33	0 3
8(b)(7)	444	4 1
B1. Analysis of 8(b)(4)		
Total cases 8(b)(4)	2,265	100 0
8(b)(4)(A)	92	4 1
8(b)(4)(B)	1,694	74.7
8(b)(4)(C)	3	0 1
8(b)(4)(D)	446	19 7
8(b)(4)(A)(B)	24	1 1
8(b)(4)(B)(C)	6	0 3
Recapitulation [1]		
8(b)(4)(A)	116	5.1
8(b)(4)(B)	1,724	76 1
8(b)(4)(C)	9	0 4
8(b)(4)(D)	446	19 7
B2. Analysis of 8(b)(7)		
Total cases 8(b)(7)	444	100 0
8(b)(7)(A)	101	22 7
8(b)(7)(B)	21	4 7
8(b)(7)(C)	313	70 6
8(b)(7)(A)(B)	1	0.2
8(b)(7)(A)(B)(C)	8	1.8
Recapitulation [1]		
8(b)(7)(A)	110	24 8
8(b)(7)(B)	30	6.8
8(b)(7)(C)	321	72 3
C. Charges filed under sec. 8(e)		
Total cases 8(e)	115	100 0
Against unions alone	106	92 2
Against employers alone	3	2 6
Against unions and employers	6	5 2
D Charges filed under sec 8(g)		
Total cases 8(g)	92	100 0

[1] A single case may include allegations of violations of more than one subsection of the Act Therefore, the total of the various allegations is greater than the total number of cases

[2] Sec. 8(a)(1) is a general provision forbidding any type of employer interference with the rights of the employees guaranteed by the Act, and therefore is included in all charges of employer unfair labor practices

Table 3A.—Formal Actions Taken in Unfair Labor Practice Cases, Fiscal Year 1976 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by tpye of case											
		Total formal actions taken	CA	CB	CC	CD		CE	CG	CP	CA combined with CB	C combined with representation cases	Other C combinations
						Jurisdictional disputes	Unfair labor practices						
10(k) notices of hearings issued	110	92				92				14a			
Complaints issued	4,918	3,793	2,983	362	120		8	7	11	27	123	125	27
Backpay specifications issued	89	60	50	6	0		1	0	0	0	2	1	0
Hearings completed, total	1,902	1,349	930	138	21	88	2	3	1	12	62	78	14
Initial ULP hearings	1,811	1,295	887	132	21	88	2	3	1	12	59	77	13
Backpay hearings	48	31	25	4	0		0	0	0	0	2	0	0
Other hearings	43	23	18	2	0		0	0	0	0	1	1	1
Decisions by administrative law judges, total	1,606	1,115	812	128	19		2	4	1	11	52	66	20
Initial ULP decisions	1,522	1,066	772	124	19		2	4	1	11	50	64	19
Backpay decisions	51	25	21	3	0		0	0	0	0	1	0	0
Supplemental decisions	33	24	19	1	0		0	0	0	0	1	2	1
Decisions and orders by the Board, total	1,964	1,474	1,055	148	42	59	7	9	6	17	42	58	31
Upon consent of parties.													
Initial decisions	211	131	75	20	15		2	1	0	5	1	4	8
Supplemental decisions	11	3	3	0	0		0	0	0	0	0	0	0
Adopting administrative law judges' decisions (no exceptions filed)													
Initial ULP decisions	373	294	229	30	6		0	2	0	2	11	13	1
Backpay decisions	16	13	10	2	0		1	0	0	0	0	0	0
Contested													
Initial ULP decisions	1,241	953	682	86	18	59	4	5	4	9	27	41	18
Decisions based on stipulated record	39	33	22	4	2		0	1	2	0	1	0	1
Supplemental ULP decisions	9	8	4	2	0		0	0	0	0	0	0	2
Backpay decisions	64	39	30	4	1		0	0	0	1	2	0	1

[1] See Glossary for definitions of terms.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1976 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case				
		Total formal actions taken	RC	RM	RD	UD
Hearings completed, total	2,694	2,460	2,217	107	136	6
Initial hearings	2,357	2,143	1,919	98	126	4
Hearings on objections and/or challenges	337	317	298	9	10	2
Decisions issued, total	2,551	2,347	2,105	98	144	7
By regional directors	2,282	2,113	1,894	84	135	6
Elections directed	1,997	1,845	1,667	67	111	6
Dismissals on record	285	268	227	17	24	0
By Board	269	234	211	14	9	1
Transferred by regional directors for initial decision	147	122	108	10	4	0
Elections directed	107	91	82	6	3	0
Dismissals on record	40	31	26	4	1	0
Review of regional directors' decisions Requests for review received	652	588	528	30	30	2
Withdrawn before request ruled upon	16	16	15	0	1	0
Board action on requests ruled upon, total	599	536	481	29	26	2
Granted	101	95	83	5	7	0
Denied	494	437	395	24	18	2
Remanded	4	4	3	0	1	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	121	112	103	4	5	1
Regional directors' decision:						
Affirmed	50	45	41	2	2	0
Modified	35	32	29	1	2	0
Reversed	36	35	33	1	1	1
Outcome						
Election directed	98	90	84	2	4	1
Dismissals on record	23	22	19	2	1	0

[1] See Glossary for definitions of terms.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1976 [1]—Contd.

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case				
		Total formal actions taken	RC	RM	RD	UD
Decisions on objections and/or challenges, total	1,377	1,310	1,217	48	45	6
By regional directors	376	344	301	30	13	3
By Board	1,001	966	916	18	32	3
In stipulated elections	957	924	875	13	31	3
No exceptions to regional directors' reports	589	563	530	11	22	3
Exceptions to regional directors' reports	368	361	345	7	9	0
In directed elections (after transfer by regional director)	37	35	35	0	0	0
Review of Regional directors' supplemental decisions						
Request for review received	74	66	56	5	5	0
Withdrawn before request ruled upon	0	0	0	0	0	0
Board action on request ruled upon, total	60	52	45	4	3	0
Granted	14	13	12	0	1	0
Denied	45	38	32	4	2	0
Remanded	1	1	1	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decisions after review, total	7	7	6	0	1	0
Regional directors' decisions						
Affirmed	0	0	0	0	0	0
Modified	0	0	0	0	0	0
Reversed	7	7	6	0	1	0

[1] See Glossary for definitions of terms.

Table 3C.—Formal Actions Taken in Amendment of Certification and Unit Clarification Cases, Fiscal Year 1976 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	129	10	104
Decision issued after hearing	111	8	95
By regional directors	103	5	91
By Board	8	3	4
Transferred by regional directors for initial decision	7	3	3
Review of regional directors' decisions	12	0	12
Requests for review received	12	0	12
Withdrawn before request ruled upon	0	0	0
Board action on requests ruled upon, total	8	0	8
Granted	2	0	2
Denied	6	0	6
Remanded	0	0	0
Withdrawn after request granted, before Board review	0	0	0
Board decision after review, total	1	0	1
Regional directors' decisions			
Affirmed	1	0	1
Modified	0	0	0
Reversed	0	0	0

[1] See Glossary for definitions of terms.

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1976 [1]

Action taken	Total all	Remedial action taken by—											
		Employer						Union					
		Total	Pursuant to—					Total	Pursuant to—				
			Agreement of parties		Recommendation of administrative law judge	Order of—			Agreement of parties		Recommendation of administrative law judge	Order of—	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
A. By number of cases involved	[2] 8,684												
Notice posted	4,191	3,097	2,147	100	3	564	283	1,094	803	79	0	97	115
Recognition or other assistance withdrawn	70	70	50	8	0	7	5						
Employer-dominated union disestablished	29	29	28	0	0	1	0						
Employees offered reinstatement	1,355	1,355	867	43	1	278	166						
Employees placed on preferential hiring list	114	114	93	7	0	10	4						
Hiring hall rights restored	38							38	22	9	0	3	4
Objections to employment withdrawn	73							73	51	11	0	11	0
Picketing ended	667							667	643	15	0	5	4
Work stoppage ended	153							153	147	4	0	2	0
Collective bargaining begun	1,668	1,512	1,193	29	0	166	124	156	135	1	0	3	17
Backpay distributed	2,149	1,993	1,530	57	2	281	123	156	94	12	0	22	28
Reimbursement of fees, dues, and fines	120	63	46	5	0	6	6	57	47	1	0	6	3
Other conditions of employment improved	2,216	1,459	1,442	0	1	6	10	757	745	2	0	9	1
Other remedies	7	6	6	0	0	0	0	1	1	0	0	0	0
B. By number of employees affected													
Employees offered reinstatement, total	4,440	4,440	2,830	136	4	645	825						
Accepted	2,976	2,976	2,075	71	4	358	468						
Declined	1,464	1,464	743	65	0	287	357						

See footnote at end of table.

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Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1976 [1]—Contd.

Action taken	Total all	Remedial action taken by—											
		Employer						Union					
		Total	Pursuant to—					Total	Pursuant to—				
			Agreement of parties		Recommendation of administrative law judge	Order of—			Agreement of parties		Recommendation of administrative law judge	Order of—	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
B. By number of employees affected—Continued													
Employees placed on preferential hiring list	906	906	807	45	0	14	40						
Hiring hall rights restored	106							106	37	53	0	3	13
Objections to employment withdrawn	179							179	105	59	0	15	0
Employees receiving backpay.													
From either employer or union	7,227	6,822	4,683	359	6	936	838	405	185	46	0	27	147
From both employer and union	11	11	10	0	0	1	0	11	10	0	0	1	0
Employees reimbursed for fees, dues, and fines													
From either employer or union	3,047	2,047	1,043	584	0	126	294	1,000	693	13	0	126	168
From both employer and union	6							6	0	0	0	6	0
C. By amounts of monetary recovery, total	$11,796,664	$11,295,364	$7,554,094	$571,480	$12,250	$794,710	$2,362,830	$501,300	$293,330	$70,790	0	$87,310	$49,870
Backpay (includes all monetary payments except fees, dues, and fines)	11,635,885	11,189,245	7,500,505	550,140	12,250	775,000	2,351,350	446,640	260,800	70,310	0	71,250	44,280
Reimbursement of fees, dues, and fines	160,779	106,119	53,589	21,340	0	19,710	11,480	54,660	32,530	480	0	16,060	5,590

[1] See Glossary for definitions of terms Data in this table are based on unfair labor practice cases that were closed during fiscal year 1976 after the company and/or union had satisfied all remedial action requirements.

[2] A single case usually results in more than one remedial action, therefore, the total number of actions exceeds the number of cases involved

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1976 [1]

Industrial group [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Food and kindred products	2,363	1,625	1,133	438	35	5	4	0	10	709	593	39	77	10	6	13
Tobacco manufacturers	32	30	21	8	1	0	0	0	0	2	2	0	0	0	0	0
Textile mill products	476	353	283	61	3	1	0	0	5	120	103	8	9	3	0	0
Apparel and other finished products made from fabric and similar materials	587	434	307	111	8	0	0	0	8	151	129	9	13	2	0	0
Lumber and wood products (except furniture)	743	442	361	67	9	1	3	0	1	292	245	15	32	5	1	3
Furniture and fixtures	479	329	257	67	4	0	0	0	1	148	126	7	15	0	0	2
Paper and allied products	614	424	286	120	8	5	0	0	5	171	149	4	18	7	3	9
Printing, publishing, and allied products	1,437	1,007	749	217	24	14	0	0	3	403	307	26	70	7	3	17
Chemicals and allied products	936	613	450	137	23	2	0	0	1	302	253	9	40	2	2	17
Petroleum refining and related industries	361	265	180	65	15	2	1	0	2	93	79	7	7	1	1	1
Rubber and miscellaneous plastic products	809	494	407	65	16	2	0	0	4	305	270	8	27	5	0	5
Leather and leather products	163	112	78	31	1	1	0	0	1	51	47	2	2	0	0	0
Stone, clay, glass, and concrete products	993	722	502	166	32	11	0	0	11	259	223	12	24	3	0	9
Primary metal industries	1,736	1,369	882	462	17	4	0	0	4	352	294	16	42	8	1	6
Fabricated metal products (except machinery and transportation equipment)	1,751	1,206	863	285	31	16	2	0	9	528	450	19	59	6	3	8
Machinery (except electrical)	2,028	1,406	1,067	319	11	8	0	0	1	595	509	18	68	8	4	15
Electrical and electronic machinery, equipment, and supplies	1,452	1,078	781	272	13	7	1	0	4	356	297	13	46	6	5	7
Aircraft and parts	298	238	138	97	3	0	0	0	0	53	48	2	3	2	1	4
Ship and boat building and repairing	257	207	140	58	5	2	2	0	0	49	45	0	4	0	0	1
Automotive and other transportation equipment	1,338	1,028	669	350	6	2	0	0	1	291	258	8	25	9	0	10
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods, watches and clocks	281	178	139	38	1	0	0	0	0	98	85	6	7	2	1	2
Miscellaneous manufacturing industries	1,298	948	549	373	16	3	2	0	5	341	291	14	36	4	1	4
Manufacturing	20,432	14,508	10,242	3,807	282	86	15	0	76	5,669	4,803	242	624	90	32	133

See footnotes at end of table.

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1976 [1]—Continued

Industrial group [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Metal mining	84	60	39	21	0	0	0	0	0	20	19	1	0	1	0	3
Coal mining	345	291	215	48	15	8	1	0	4	54	48	4	2	0	0	0
Oil and gas extraction	37	22	16	1	4	1	0	0	0	13	11	1	1	1	0	1
Mining and quarrying of nonmetallic minerals (except fuels)	158	115	78	20	12	2	0	0	3	40	33	2	5	0	1	2
Mining	624	488	348	90	31	11	1	0	7	127	111	8	8	2	1	6
Construction	4,351	3,905	1,569	1,061	842	240	42	0	151	433	317	82	34	2	4	7
Wholesale trade	2,433	1,363	997	253	70	12	4	0	27	1,040	838	89	113	17	5	8
Retail trade	5,538	3,469	2,581	576	178	19	7	0	108	2,004	1,521	212	271	51	3	11
Finance, insurance, and real estate	690	403	331	59	12	0	0	0	1	280	246	15	19	2	0	5
U.S. Postal Service	1,038	1,027	806	221	0	0	0	0	0	10	7	2	1	0	0	1
Local and surburban transit and interurban highway passenger transportation	619	457	325	119	8	1	2	0	2	155	138	7	10	4	1	2
Motor freight transportation and warehousing	3,630	2,597	1,743	694	111	14	6	0	29	1,008	815	82	111	11	0	14

Water transportation	369	326	128	145	26	13	6	0	8	43	35	2	6	0	0	0
Other transportation	138	96	60	18	18	0	0	0	0	40	35	3	2	0	2	0
Communication	1,089	717	513	153	31	15	1	0	4	355	304	15	36	4	1	12
Electric, gas, and sanitary services	684	462	320	102	29	6	1	0	4	208	191	4	13	2	3	9
Transportation, communication, and other utilities	6,529	4,655	3,089	1,231	223	49	16	0	47	1,809	1,518	113	178	21	7	37
Hotels, rooming houses, camps, and other lodging places	722	499	385	78	20	3	3	0	10	215	183	11	21	6	1	1
Personal services	294	177	133	42	2	0	0	0	0	111	93	5	13	0	0	6
Automotive repair, services, and garages	447	208	164	35	6	0	0	0	3	237	205	7	25	1	0	1
Motion pictures	289	230	137	79	7	2	3	0	2	56	53	1	2	1	0	2
Amusement and recreation services (except motion pictures)	302	204	120	46	22	0	14	0	2	94	60	25	9	2	0	2
Health services	2,974	1,721	1,404	187	32	5	0	92	1	1,138	1,033	44	61	20	3	92
Educational services	380	224	184	23	13	2	2	0	0	138	123	5	10	2	3	13
Membership organizations	244	211	141	56	7	4	3	0	0	31	27	3	1	1	0	1
Business services	1,738	1,029	722	221	65	11	3	0	7	679	610	15	54	15	4	11
Miscellaneous repair services	105	61	49	9	2	0	0	0	1	43	36	3	4	1	0	0
Legal services	12	6	6	0	0	0	0	0	0	6	4	0	2	0	0	0
Museums, art galleries, botanical and zoological gardens	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
Social services	133	80	60	11	5	1	2	0	1	52	42	4	6	0	1	0
Services	7,641	4,650	3,505	787	181	28	30	92	27	2,800	2,469	123	208	49	12	130
Public administration	59	41	28	12	0	1	0	0	0	17	16	0	1	1	0	0
Total, all industrial groups	49,335	34,509	23,496	8,097	1,819	446	115	92	444	14,189	11,846	886	1,457	235	64	338

[1] See Glossary for definitions of terms.
[2] Source Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, 1972.

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1976 [1]

Division and State [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Maine	174	81	62	16	3	0	0	0	0	91	85	1	5	1	1	0
New Hampshire	101	65	55	9	0	0	0	0	1	35	30	2	3	0	0	1
Vermont	43	24	20	4	0	0	0	0	0	19	19	0	0	0	0	0
Massachusetts	1,489	1,044	702	250	60	21	1	3	7	415	382	16	17	12	4	14
Rhode Island	160	107	72	25	6	2	0	0	2	51	39	6	6	1	0	1
Connecticut	513	357	261	79	13	2	0	0	2	149	129	11	9	3	0	4
New England	2,480	1,678	1,172	383	82	25	1	3	12	760	684	36	40	17	5	20
New York	4,473	3,051	1,772	965	153	63	19	13	66	1,328	1,180	80	68	24	1	69
New Jersey	1,662	1,130	683	327	70	24	8	3	15	509	444	21	44	12	2	9
Pennsylvania	2,996	2,150	1,408	549	113	46	5	2	27	812	707	30	75	8	8	18
Middle Atlantic	9,131	6,331	3,863	1,841	336	133	32	18	108	2,649	2,331	131	187	44	11	96
Ohio	3,321	2,380	1,640	591	103	22	1	1	22	899	771	46	82	17	4	21
Indiana	2,086	1,641	1,139	457	24	11	1	4	5	435	371	13	51	4	2	4
Illinois	3,378	2,627	1,685	725	126	27	7	12	45	719	585	45	89	14	5	13
Michigan	2,232	1,430	1,091	257	58	9	0	2	13	770	647	25	98	17	3	12
Wisconsin	1,077	706	514	150	24	4	1	10	3	352	285	17	50	6	1	12
East North Central	12,094	8,784	6,069	2,180	335	73	10	29	88	3,175	2,659	146	370	58	15	62
Iowa	459	271	193	44	22	5	0	1	6	188	176	2	10	0	0	0
Minnesota	690	375	258	43	49	10	3	4	8	303	235	22	46	4	1	7
Missouri	1,755	1,345	932	268	101	23	1	2	18	392	330	17	45	11	0	7
North Dakota	80	32	22	5	4	0	1	0	0	48	41	3	4	0	0	0
South Dakota	56	29	19	3	3	3	0	1	0	26	23	2	1	0	0	1
Nebraksa	237	168	130	25	10	1	0	0	2	69	57	6	6	0	0	0
Kansas	388	274	208	53	7	4	0	0	2	112	93	7	12	1	0	1
West North Central	3,665	2,494	1,762	441	196	46	5	8	36	1,138	955	59	124	16	1	16
Delaware	106	73	50	12	3	1	0	1	6	30	20	2	8	2	1	0
Maryland	701	492	324	135	17	8	1	4	3	198	174	6	18	3	1	7
District of Columbia	294	198	136	33	22	1	4	1	1	92	80	4	8	1	0	3

Virginia	464	336	251	68	13	1	1	0	2	120	101	12	7	1	4	3
West Virginia	427	335	200	90	38	0	1	0	6	87	77	2	8	0	0	5
North Carolina	537	409	334	74	1	0	0	0	0	125	110	6	9	0	0	3
South Carolina	236	175	155	17	3	0	0	0	0	61	58	0	3	0	0	0
Georgia	718	499	416	67	11	2	0	0	3	214	194	8	12	0	1	4
Florida	1,055	766	551	171	28	9	0	0	7	283	257	7	19	0	1	5
South Atlantic	4,538	3,283	2,417	667	136	22	7	6	28	1,210	1,071	47	92	7	8	30
Kentucky	663	499	388	90	12	4	0	2	3	157	139	6	12	3	2	2
Tennessee	1,028	749	566	142	23	1	0	9	8	272	235	12	25	0	0	7
Alabama	520	348	277	49	18	1	0	0	3	171	155	2	14	0	1	0
Mississippi	257	181	136	37	6	1	0	0	1	72	62	5	5	0	1	3
East South Central	2,468	1,777	1,367	318	59	7	0	11	15	672	591	25	56	3	4	12
Arkansas	294	191	153	34	4	0	0	0	0	100	80	3	17	0	0	3
Louisiana	548	378	275	75	14	13	0	0	1	161	137	5	19	0	5	4
Oklahoma	417	260	189	57	12	0	0	0	2	150	120	12	18	4	0	3
Texas	1,791	1,374	921	325	82	20	0	5	21	402	342	21	39	1	4	10
West South Central	3,050	2,203	1,538	491	112	33	0	5	24	813	679	41	93	5	9	20
Montana	195	119	85	20	9	1	0	0	4	73	50	8	15	1	1	1
Idaho	149	90	73	12	4	1	0	0	0	55	39	4	12	2	0	2
Wyoming	65	45	33	6	5	0	0	0	1	19	17	1	1	1	0	0
Colorado	652	455	322	83	35	11	2	1	1	190	153	12	25	5	1	1
New Mexico	226	148	116	21	8	2	0	1	0	69	56	5	8	0	1	8
Arizona	516	392	268	92	21	4	0	0	7	120	104	6	10	0	0	4
Utah	123	71	58	6	6	0	0	0	1	48	38	5	5	1	0	3
Nevada	356	275	173	70	22	3	1	0	6	80	42	31	7	0	0	1
Mountain	2,282	1,595	1,128	310	110	22	3	2	20	654	499	72	83	10	3	20
Washington	1,323	871	617	172	57	7	7	0	11	422	281	64	77	11	1	18
Oregon	558	276	192	41	28	10	3	0	2	264	172	53	39	9	0	9
California	6,755	4,696	3,014	1,154	322	59	46	10	91	1,983	1,534	191	258	40	6	30
Alaska	261	149	103	28	16	1	0	0	1	108	94	7	7	4	0	0
Hawaii	349	187	127	37	17	3	0	0	3	153	134	8	11	4	0	5
Guam	11	5	5	0	0	0	0	0	0	6	6	0	0	0	0	0
Pacific	9,257	6,184	4,058	1,432	440	80	56	10	108	2,936	2,221	323	392	68	7	62
Puerto Rico	344	169	114	31	13	5	1	0	5	167	141	6	20	7	1	0
Virgin Islands	26	11	8	3	0	0	0	0	0	15	15	0	0	0	0	0
Outlying areas	370	180	122	34	13	5	1	0	5	182	156	6	20	7	1	0
Total, all States and areas	49,335	34,509	23,496	8,097	1,819	446	115	92	444	14,189	11,846	886	1,457	235	64	338

[1] See Glossary for definitions of terms.
[2] The States are grouped according to the method used by the Bureau of the Census, U.S Department of Commerce

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1976[1]

Standard Federal Regions[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Connecticut	513	357	261	79	13	2	0	0	2	149	129	11	9	3	0	4
Maine	174	81	62	16	3	0	0	0	0	91	85	1	5	1	1	0
Massachusetts	1,489	1,044	702	250	60	21	1	3	7	415	382	16	17	12	4	14
New Hampshire	101	65	55	9	0	0	0	0	1	35	30	2	3	0	0	1
Rhode Island	160	107	72	25	6	2	0	0	2	51	39	6	6	1	0	1
Vermont	43	24	20	4	0	0	0	0	0	19	19	0	0	0	0	0
Region I	2,480	1,678	1,172	383	82	25	1	3	12	760	684	36	40	17	5	20
Delaware	106	73	50	12	3	1	0	1	6	30	20	2	8	2	1	0
New Jersey	1,662	1,130	683	327	70	24	8	3	15	509	444	21	44	12	2	9
New York	4,473	3,051	1,772	965	153	63	19	13	66	1,328	1,180	80	68	24	1	69
Puerto Rico	344	169	114	31	13	5	1	0	5	167	141	6	20	7	1	0
Virgin Islands	26	11	8	3	0	0	0	0	0	15	15	0	0	0	0	0
Region II	6,611	4,434	2,627	1,338	239	93	28	17	92	2,049	1,800	109	140	45	5	78
District of Columbia	294	198	136	33	22	1	4	1	1	92	80	4	8	1	0	3
Maryland	701	492	324	135	17	8	1	4	3	198	174	6	18	3	1	7
Pennsylvania	2,996	2,150	1,408	549	113	46	5	2	27	812	707	30	75	8	8	18
Virginia	464	336	251	68	13	1	1	0	2	120	101	12	7	1	4	3
West Virginia	427	335	200	90	38	0	1	0	6	87	77	2	8	0	0	5
Region III	4,882	3,511	2,319	875	203	56	12	7	39	1,309	1,139	54	116	13	13	36
Alabama	520	348	277	49	18	1	0	0	3	171	155	2	14	0	1	0
Florida	1,055	766	551	171	28	9	0	0	7	283	257	7	19	0	1	5
Georgia	718	499	416	67	11	2	0	0	3	214	194	8	12	0	1	4
Kentucky	663	499	388	90	12	4	0	2	3	157	139	6	12	3	2	2
Mississippi	257	181	136	37	6	1	0	0	1	72	62	5	5	0	1	3
North Carolina	537	409	334	74	1	0	0	0	0	125	110	6	9	0	0	3
South Carolina	236	175	155	17	3	0	0	0	0	61	58	0	3	0	0	0
Tennessee	1,028	749	566	142	23	1	0	9	8	272	235	12	25	0	0	7
Region IV	5,014	3,626	2,823	647	102	18	0	11	25	1,355	1,210	46	99	3	6	24

Illinois	3,378	2,627	1,685	725	126	27	7	12	45	719	585	45	89	14	5	13
Indiana	2,086	1,641	1,139	457	24	11	1	4	5	435	371	13	51	4	2	4
Michigan	2,232	1,430	1,091	257	58	9	0	2	13	770	647	25	98	17	3	12
Minnesota	690	375	258	43	49	10	3	4	8	303	235	22	46	4	1	7
Ohio	3,321	2,380	1,640	591	103	22	1	1	22	899	771	46	82	17	4	21
Wisconsin	1,077	706	514	150	24	4	1	10	3	352	285	17	50	6	1	12
Region V	12,784	9,159	6,327	2,223	384	83	13	33	96	3,478	2,894	168	416	62	16	69
Arkansas	294	191	153	34	4	0	0	0	0	100	80	3	17	0	0	3
Louisiana	548	378	275	75	14	13	0	0	1	161	137	5	19	0	5	4
New Mexico	226	148	116	21	8	2	0	1	0	69	56	5	8	0	1	8
Oklahoma	417	260	189	57	12	0	0	0	2	150	120	12	18	4	0	3
Texas	1,791	1,374	921	325	82	20	0	5	21	402	342	21	39	1	4	10
Region VI	3,276	2,351	1,654	512	120	35	0	6	24	882	735	46	101	5	10	28
Iowa	459	271	193	44	22	5	0	1	6	188	176	2	10	0	0	0
Kansas	388	274	208	53	7	4	0	0	2	112	93	7	12	1	0	1
Missouri	1,755	1,345	932	268	101	23	1	2	18	392	330	17	45	11	0	7
Nebraska	237	168	130	25	10	1	0	0	2	69	57	6	6	0	0	0
Region VII	2,839	2,058	1,463	390	140	33	1	3	28	761	656	32	73	12	0	8
Colorado	652	455	322	83	35	11	2	1	1	190	153	12	25	5	1	1
Montana	195	119	85	20	9	1	0	0	4	73	50	8	15	1	1	1
North Dakota	80	32	22	5	4	0	1	0	0	48	41	3	4	0	0	0
South Dakota	56	29	19	3	3	3	0	1	0	26	23	2	1	0	0	1
Utah	123	71	58	6	6	0	0	0	1	48	38	5	5	1	0	3
Wyoming	65	45	33	6	5	0	0	0	1	19	17	1	1	1	0	0
Region VIII	1,171	751	539	123	62	15	3	2	7	404	322	31	51	8	2	6
Arizona	516	392	268	92	21	4	0	0	7	120	104	6	10	0	0	4
California	6,755	4,696	3,014	1,154	322	59	46	10	91	1,983	1,534	191	258	40	6	30
Hawaii	349	187	127	37	17	3	0	0	3	153	134	8	11	4	0	5
Guam	11	5	5	0	0	0	0	0	0	6	6	0	0	0	0	0
Nevada	356	275	173	70	22	3	1	0	6	80	42	31	7	0	0	1
Region IX	7,987	5,555	3,587	1,353	382	69	47	10	107	2,342	2,820	236	286	44	6	40
Alaska	261	149	103	28	16	1	0	0	1	108	94	7	7	4	0	0
Idaho	149	90	73	12	4	1	0	0	0	55	39	4	12	2	0	2
Oregon	558	276	192	41	28	10	3	0	2	264	172	53	39	9	0	9
Washington	1,323	871	617	172	57	7	7	0	11	422	281	64	77	11	1	18
Region X	2,291	1,386	985	253	105	19	10	0	14	849	586	128	135	26	1	29
Total, all Federal regions	49,335	34,509	23,496	8,097	1,819	446	115	92	444	14,189	11,846	886	1,457	235	64	338

[1] See Glossary for definitions of terms.
[2] The States are grouped according to the 10 Standard Federal Administrative regions.

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1976[1]

Method and stage of disposition	All C cases			CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number	Percent of total closed	Percent of total method	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed
Total number of cases closed	32,406	100 0	-------	21,762	100 0	7,803	100 0	1,762	100 0	441	100.0	109	100 0	70	100 0	459	100 0
Agreement of the parties	7,390	22 8	100.0	5,189	23 9	1,190	15 2	797	45 2	5	1.1	23	21 0	42	60 0	144	31 4
Informal settlement	7,213	22 3	97.6	5,089	23 4	1,149	14 7	769	43 6	4	0.9	22	20 1	42	60 0	138	30 1
Before issuance of complaint	5,388	16 7	72 9	3,575	16 4	965	12 4	689	39 1	(2)	-------	15	13 7	34	48.6	110	24.0
After issuance of complaint, before opening of hearing	1,713	5 3	23.2	1,415	6 5	174	2 2	78	4 4	4	0.9	7	6 4	8	11.4	27	5 9
After hearing opened, before issuance of administrative law judge's decision	112	0.3	1.5	99	0.5	10	0 1	2	0.1	0	-------	0	-------	0	-------	1	0.2
Formal settlement	177	0.5	2 4	100	0.5	41	0 5	28	1 6	1	0 2	1	0 9	0	-------	6	1.3
After issuance of complaint, before opening of hearing	141	0 4	1 9	71	0 3	36	0.4	27	1 5	0	-------	1	0 9	0	-------	6	1.3
Stipulated decision	32	0 1	0 4	18	0 1	4	0 0	8	0 4	0	-------	0	-------	0	-------	2	0.4
Consent decree	109	0 3	1 5	53	0 2	32	0 4	19	1 1	0	-------	1	0 9	0	-------	4	0 9
After hearing opened	36	0 1	0.5	29	0 2	5	0 1	1	0 1	1	0 2	0	-------	0	-------	0	-------
Stipulated decision	6	0.0	0 1	6	0 0	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------
Consent decree	30	0 1	0 4	23	0 2	5	0.1	1	0 1	1	0.2	0	-------	0	-------	0	-------
Compliance with	1,096	3 4	100 0	920	4 2	122	1.6	37	2 1	1	0 2	8	7 4	0	-------	8	1 7
Administrative law judge's decision	3	0 0	0.3	3	0 0	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------
Board decision	690	2 1	63.0	595	2 6	69	0 9	17	1 0	0	-------	4	3.7	0	-------	5	1 1
Adopting administrative law judge's decision (no exceptions filed)	148	0.5	13 5	127	0 5	15	0 2	5	0 3	0	-------	0	-------	0	-------	1	0.2
Contested	542	1.6	49.5	468	2 1	54	0.7	12	0.7	0	-------	4	3 7	0	-------	4	0.9

Circuit court of appeals decree	373	1.2	34.0	298	1.4	52	0 7	17	1.0	1	0 2	3	2.8	0	-------	2	0.4
Supreme Court action	30	0 1	2.7	24	0.2	1	0 0	3	0 1	0	-------	1	0 9	0	-------	1	0 2
Withdrawal	11,598	35.8	100 0	7,819	35.9	2,915	37.4	626	35.5	5	1.1	48	44.1	11	15.7	174	37 9
Before issuance of complaint	11,367	35 2	98 0	7,639	35 1	2,889	37.1	616	34.9	(2)	-------	40	36.7	10	14.3	173	37.7
After issuance of complaint, before opening of hearing	208	0 6	1 8	164	0 8	23	0.3	10	0.6	1	0.2	8	7.4	1	1.4	1	0 2
After hearing opened, before administrative law judge's decision	6	0 0	0 1	6	0.0	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------
After administrative law judge's decision, before Board decision	4	0 0	0.0	4	0 0	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------
After Board or court decision	13	0 0	0.1	6	0.0	3	0.0	0	-------	4	0.9	0	-------	0	-------	0	-------
Dismissal	11,884	36 7	100 0	7,826	36.0	3,575	45.8	301	17 1	2	0 5	30	27 5	17	24 3	133	29.0
Before issuance of complaint	11,586	35.8	97 5	7,619	35.0	3,520	45 1	277	15 7	(2)	-------	25	22 9	17	24.3	128	27.9
After issuance of complaint, before opening of hearing	30	0.1	0.3	22	0.2	6	0.1	1	0.1	0	-------	1	0 9	0	-------	0	-------
After hearing opened, before administrative law judge's decision	0	-------	-------	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------
By administrative law judge's decision	3	0 0	0.0	2	0 0	1	0 0	0	-------	0	-------	0	-------	0	-------	0	-------
By Board decision	247	0.7	2.1	174	0 8	47	0.6	15	0.9	2	0.5	4	3 7	0	-------	5	1 1
Adopting administrative law judge's decision (no exceptions filed)	72	0 2	0 6	58	0.3	13	0.2	1	0 1	0	-------	0	-------	0	-------	0	-------
Contested	175	0.5	1 5	116	0.5	34	0.4	14	0.8	2	0.5	4	3 7	0	-------	5	1.1
By circuit court of appeals decree	17	0.1	0 1	8	0 0	1	0 0	8	0.4	0	-------	0	-------	0	-------	0	-------
By Supreme Court action	1	0.0	0 0	1	0 0	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------
10(k) actions (see table 7A for details of dispositions)	428	1.3	-------	-------	-------	-------	-------	-------	-------	428	97.1	-------	-------	-------	-------	-------	-------
Otherwise (compliance with order of administrative law judge or Board not achieved—firm went out of business)	10	0.0	-------	8	0.0	1	0 0	1	0.1	0	-------	0	-------	0	-------	0	-------

[1] See table 8 for summary of disposition by stage. See Glossary for definitions of terms.
[2] CD cases closed in this stage are processed as jurisdictional disputes under sec 10(k) of the Act. See table 7A

Table 7A.—Analysis of Methods of Disposition of Jurisdictional Dispute Cases Closed Prior to Unfair Labor Practice Proceedings, Fiscal Year 1976 [1]

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	428	100.0
Agreement of the parties—informal settlement	173	40 4
Before 10(k) notice	152	35.5
After 10(k) notice, before opening of 10(k) hearing	18	4.2
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	3	0.7
Compliance with Board decision and determination of dispute	25	5.8
Withdrawal	168	39 3
Before 10(k) notice	145	33 9
After 10(k) notice, before opening of 10(k) hearing	10	2 4
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	0	
After Board decision and determination of dispute	13	3 0
Dismissal	62	14.5
Before 10(k) notice	49	11.4
After 10(k) notice, before opening of 10(k) hearing	3	0 7
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	2	0.5
By Board decision and determination of dispute	8	1.9

[1] See Glossary for definitions of terms.

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1976 [1]

Stage of disposition	All C cases		CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed	32,406	100 0	21,762	100.0	7,803	100.0	1,762	100 0	441	100.0	109	100 0	70	100.0	459	100.0
Before issuance of complaint	28,769	88 8	18,833	86 6	7,374	94 4	1,582	89 9	428	97.1	80	73 3	61	87 1	411	89 6
After issuance of complaint, before opening of hearing	2,092	6.4	1,672	7.7	239	3.1	116	6.6	5	1 1	17	15.6	9	12 9	34	7.4
After hearing opened, before issuance of administrative law judge's decision	154	0 5	134	0.6	15	0.2	3	0.1	1	0.2	0	--------	0	--------	1	0.2
After administrative law judge's decision, before issuance of Board decision	10	0.0	9	0.0	1	0.0	0	--------	0	--------	0	--------	0	--------	0	--------
After Board order adopting administrative law judge's decision in absence of exceptions	220	0 7	185	0.9	28	0.4	6	0.3	0	--------	0	--------	0	--------	1	0.2
After Board decision, before circuit court decree	732	2 3	592	2.6	91	1 2	26	1 5	6	1.4	8	7.4	0	--------	9	2 0
After circuit court decree, before Supreme Court action	398	1.2	312	1.4	54	0.7	26	1.5	1	0.2	3	2.8	0	--------	2	0.4
After Supreme Court action	31	0 1	25	0 2	1	0.0	3	0.1	0	--------	1	0 9	0	--------	1	0.2

[1] See Glossary for definitions of terms.

Table 9.—Disposition by Stage of Representation and Union Deauthorization Cases Closed, Fiscal Year 1976 [1]

Stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed	13,184	100.0	11,024	100.0	834	100.0	1,326	100.0	209	100.0
Before issuance of notice of hearing	5,087	38.6	3,784	34.3	518	62 1	785	59 2	141	67.5
After issuance of notice before close of hearing	5,836	44 3	5,229	47 4	187	22 4	420	31.7	8	3.8
After hearing closed before issuance of decision	60	0.5	54	0.5	6	0.7	0	----------	2	1.0
After issuance of regional director's decision	2,037	15.4	1,816	16.5	105	12.6	116	8 7	58	27.7
After issuance of Board decision	164	1.2	141	1.3	18	2.2	5	0.4	0	----------

[1] See Glossary for definitions of terms.

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1976 [1]

Method and stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total, all	13,184	100 0	11,024	100 0	834	100 0	1,326	100 0	209	100 0
Certification issued, total	8,710	66.1	7,732	70 1	359	43.1	619	46.7	103	49 2
After Consent election	885	6.7	777	7.0	28	3 4	80	6.1	17	8.1
Before notice of hearing	500	3.8	425	3 8	21	2.6	54	4 1	16	7 6
After notice of hearing, before hearing closed	385	2.9	352	3 2	7	0 8	26	2.0	1	0.5
After hearing closed, before decision	0	----------	0	----------	0	----------	0	----------	0	----------
Stipulated election	6,121	46 5	5,444	49 4	223	26 7	454	34 2	29	13 9
Before notice of hearing	2,343	17 8	1,973	17 9	136	16 3	234	17.6	26	12 4
After notice of hearing, before hearing closed	3,755	28.5	3,449	31.3	86	10 3	220	16.6	1	0 5
After hearing closed, before decision	23	0.2	22	0 2	1	0 1	0	----------	2	1 0
Expedited election	32	0 2	4	0 0	28	3 4	0	----------	0	----------
Regional director directed election	1,572	11.9	1,418	12 9	73	8 8	81	6 1	57	27.2
Board directed election	100	0 8	89	0.8	7	0 8	4	0 3	0	----------
By withdrawal, total	3,459	26 2	2,654	24.1	317	38.0	488	36 8	81	38.8
Before notice of hearing	1,724	13.1	1,150	10 4	227	27 1	347	26.2	76	36 4
After notice of hearing, before hearing closed	1,545	11 7	1,338	12.1	78	9 4	129	9 7	5	2.4
After hearing closed, before decision	31	0 2	28	0 3	3	0 4	0	----------	0	----------
After regional director's decision and direction of election	151	1.1	131	1 2	8	1 0	12	0 9	0	----------
After Board decision and direction of election	8	0.1	7	0 1	1	0 1	0	----------	0	----------
By dismissal, total	1,015	7.7	638	5 8	158	18 9	219	16.5	25	12.0
Before notice of hearing	492	3.8	233	2 1	109	13 1	150	11 3	23	11 0
After notice of hearing, before hearing closed	149	1.1	90	0 8	14	1 6	45	3.4	1	0 5
After hearing closed, before decision	4	0.0	3	0 0	1	0 1	0	----------	0	----------
By regional director's decision	314	2.4	267	2 5	24	2 9	23	1 7	1	0 5
By Board decision	56	0.4	45	0 4	10	1.2	1	0.1	0	----------

[1] See Glossary for definitions of terms.

Table 10A.—Analysis of Methods of Disposition of Amendment of Certification and Unit Clarification Cases Closed, Fiscal Year 1976

	AC	UC
Total, all	58	279
Certification amended or unit clarified	20	43
Before hearing	14	7
By regional director's decision	14	7
By Board decision	0	0
After hearing	6	36
By regional director's decision	4	32
By Board decision	2	4
Dismissed	11	87
Before hearing	5	26
By regional director's decision	5	26
By Board decision	0	0
After hearing	6	61
By regional director's decision	5	59
By Board decision	1	2
Withdrawn	27	149
Before hearing	26	132
After hearing	1	17

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1976 [1]

Type of case	Total	Type of election				
		Consent	Stipulated	Board-directed	Regional director-directed	Expedited elections under 8(b)(7)(C)
All types, total						
Elections	8,749	907	6,081	117	1,616	28
Eligible voters	480,673	25,754	332,421	17,192	104,617	689
Valid votes	422,635	21,877	295,738	13,191	91,261	568
RC cases						
Elections	7,736	777	5,430	108	1,417	4
Eligible voters	435,171	21,498	302,358	15,835	95,405	75
Valid votes	383,601	18,283	269,405	12,276	83,583	54
RM cases						
Elections	291	27	178	6	56	24
Eligible voters	11,807	1,127	7,581	1,146	1,339	614
Valid votes	9,859	927	6,511	722	1,185	514
RD cases						
Elections	611	78	449	3	81	0
Eligible voters	28,426	2,219	21,469	211	4,527	0
Valid votes	24,887	1,969	19,000	193	3,725	0
UD cases						
Elections	111	25	24	0	62	----------
Eligible voters	5,269	910	1,013	0	3,346	----------
Valid votes	4,288	698	822	0	2,768	----------

[1] See Glossary for definitions of terms.

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Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1976

Type of election	All R elections				RC elections				RM elections				RD elections			
	Elections conducted				Elections conducted				Elections conducted				Elections conducted			
	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification [1]	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification
All types	8,899	60	201	8,638	7,982	58	188	7,736	300	1	8	291	617	1	5	611
Rerun required			151				142				6				3	
Runoff required			50				46				2				2	
Consent elections	903	2	19	882	797	2	18	777	28	0	1	27	78	0	0	78
Rerun required			17				16				1				0	
Runoff required			2				2				0				0	
Stipulated elections	6,228	44	127	6,057	5,591	42	119	5,430	183	1	4	178	454	1	4	449
Rerun required			93				87				4				2	
Runoff required			34				32				0				2	
Regional director-directed	1,614	12	48	1,554	1,474	12	45	1,417	58	0	2	56	82	0	1	81
Rerun required			38				36				1				1	
Runoff required			10				9				1				0	
Board-directed	125	2	6	117	116	2	6	108	6	0	0	6	3	0	0	3
Rerun required			3				3				0				0	
Runoff required			3				3				0				0	
Expedited—Sec. 8(b)(7)(C)	29	0	1	28	4	0	0	4	25	0	1	24	0	0	0	0
Rerun required			0								0				0	
Runoff required			1								1				0	

[1] The total of representation elections resulting in certification excludes elections held in UD cases which are included in the totals in table 11.

Table 11B.—Representation Elections in Which Objections and/or Determinative Challenges Were Ruled On in Cases Closed, Fiscal Year 1976

	Total elections	Objections only		Challenges only		Objections and challenges		Total objections [1]		Total challenges [2]	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
All representation elections	8,899	717	8.1	311	3.5	100	2 2	917	10 3	511	5.7
By type of case,											
In RC cases	7,982	669	8 4	288	3.6	180	2.3	849	10.6	468	5.9
In RM cases	300	26	8 7	9	3 0	10	3.3	36	12.0	19	6.3
In RD cases	617	22	3 6	14	2.3	10	1.6	32	5 2	24	3.9
By type of election,											
Consent elections	903	38	4.2	16	1.8	2	0 2	40	4.4	18	2 0
Stipulated elections	6,228	482	7.7	194	3.1	127	2.0	609	9 8	321	5 2
Expedited elections	29	5	17 2	0	----------	0	----------	5	17 2	0	----------
Regional director-directed elections	1,614	191	11 8	77	4.8	52	3.2	243	15.1	129	8.0
Board-directed elections	125	1	0 8	24	19.2	19	15 2	20	16.0	43	34 4

[1] Number of elections in which objections were ruled on, regardless of number of allegations in each election.
[2] Number of elections in which challenges were ruled on, regardless of individual ballots challenged in each election.

Table 11C.—Objections Filed in Representation Cases Closed, by Party Filing, Fiscal Year 1976 [1]

	Total		By employer		By union		By both parties [2]	
	Number	Percent by type	Number	Percent by type	Number	Percent by type	Number	Percent by type
All representation elections	1,145	100 0	467	40 8	652	56 9	26	2 3
By type of case:								
RC cases	1,058	100.0	452	42.7	586	55.3	20	2.0
RM cases	42	100 0	10	23.8	29	69 1	3	7 1
RD cases	45	100 0	5	11 1	37	82 2	3	6.7
By type of election								
Consent elections	55	100 0	19	34.6	35	63 6	1	1.8
Stipulated elections	751	100 0	303	40.4	432	57.5	16	2.1
Expedited elections	9	100.0	0	--------	7	77 8	2	22.2
Regional director-directed elections	307	100 0	136	44.3	168	54.7	3	1.0
Board-directed elections	23	100 0	9	39.1	10	43.5	4	17.4

[1] See Glossary for definitions of terms.
[2] Objections filed by more than one party in the same cases are counted as one

Table 11D.—Disposition of Objections in Representation Cases Closed, Fiscal Year 1976 [1]

	Objections filed	Objections withdrawn	Objections ruled upon	Overruled		Sustained [2]	
				Number	Percent of total ruled upon	Number	Percent of total ruled upon
All representation elections	1,145	228	917	761	83 0	156	17.0
By type of case:							
RC cases	1,058	209	849	702	82 7	147	17.3
RM cases	42	6	36	30	83 3	6	16.7
RD cases	45	13	32	29	90.6	3	9.4
By type of election							
Consent elections	55	15	40	33	82.5	7	17 5
Stipulated elections	751	142	609	499	81.9	110	18.1
Expedited elections	9	4	5	5	100.0	0	----------
Regional director-directed elections	307	64	243	206	84 8	37	15.2
Board-directed elections	23	3	20	18	90.0	2	10.0

[1] See Glossary for definitions of terms

[2] See table 11E for rerun elections held after objections were sustained In 17 elections in which objections were sustained, the cases were subsequently withdrawn. Therefore, in these cases no rerun elections were conducted.

Table 11E.—Results of Rerun Elections Held in Representation Cases Closed, Fiscal Year 1976 [1]

	Total rerun elections [2]		Union certified		No union chosen		Outcome of original election reversed	
	Number	Percent by type	Number	Percent by type	Number	Percent by type	Number	Percent by type
All representation elections	137	100.0	47	34.3	90	65 7	54	39 4
By type of case.								
RC cases	129	100.0	44	34.1	85	65 9	51	39.5
RM cases	5	100 0	3	60.0	2	40 0	3	60 0
RD cases	3	100 0	0	----------	3	100 0	0	----------
By type of election								
Consent elections	7	100 0	1	14 3	6	85 7	2	28.6
Stipulated elections	95	100.0	37	38.9	58	61.1	42	44 2
Expedited elections	0	----------	0	----------	0	----------	0	----------
Regional director-directed elections	33	100 0	9	27.3	24	72.7	10	30 3
Board-directed elections	2	100 0	0	----------	2	100 0	0	----------

[1] See Glossary for definitions of terms.
[2] Includes only final rerun elections, i.e., those resulting in certification. Excluded from the table are 14 rerun elections which were conducted and subsequently set aside pursuant to sustained objections. The 14 invalid rerun elections were followed by valid rerun elections which are included in the table.

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 1976

Affiliation of union holding union-shop contract	Number of polls					Employees involved (number eligible to vote) [1]						Valid votes cast		
	Total	Resulting in deauthorization		Resulting in continued authorization		Total eligible	In polls				Total	Percent of total eligible	Cast for deauthorization	
							Resulting in deauthorization		Resulting in continued authorization					
		Number	Percent of total	Number	Percent of total		Number	Percent of total	Number	Percent of total			Number	Percent of total eligible
Total	111	62	55.9	49	44.1	5,269	1,631	31.0	3,638	69 0	4,288	81 4	1,443	27 4
AFL-CIO unions	74	39	52 7	35	47.3	3,030	1,332	44.0	1,698	56.0	2,528	83 4	1,164	38 4
Teamsters	22	16	72.7	6	27.3	702	157	22.4	545	77.6	598	85.2	145	20 7
Other national unions	5	3	60.0	2	40.0	1,010	80	7 9	930	92.1	795	49.0	77	7 6
Other local unions	10	4	40 0	6	60.0	527	62	11.8	465	88 2	367	69 6	57	10.8

[1] Sec. 8(a)(3) of the Act requires that to revoke a union-shop agreement a majority of the employees eligible to vote must vote in favor of deauthorization.

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1976 [1]

Participating unions	Total elections [2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL-CIO unions	Teamsters	Other national unions	Other local unions	
A. All representation elections															
AFL-CIO	4,695	46.4	2,179	2,179				2,516	279,190	89,867	89,867				189,323
Teamsters	2,543	44.3	1,126		1,126			1,417	78,133	23,470		23,470			54,663
Other national unions	468	50.6	237			237		231	34,673	12,576			12,576		22,097
Other local unions	355	56.6	201				201	154	23,601	10,460				10,460	13,141
1-union elections	8,061	46.4	3,743	2,179	1,126	237	201	4,318	415,597	136,373	89,867	23,470	12,576	10,460	279,224
AFL-CIO v. AFL-CIO	145	55.9	81	81				64	13,657	4,317	4,317				9,340
AFL-CIO v. Teamsters	185	72.4	134	62	72			51	19,915	11,831	4,483	7,348			8,084
AFL-CIO v. national	42	83.3	35	15		20		7	3,126	1,821	714		1,107		1,305
AFL-CIO v. local	109	84.4	92	45			47	17	9,817	8,271	3,718			4,553	1,546
Teamsters v. national	15	80.0	12		7	5		3	986	507		353	154		479
Teamsters v. local	27	81.5	22		7		15	5	2,218	2,090		549		1,541	128
Teamsters v. Teamsters	1	100.0	1		1			0	28	28		28			0
National v. local	13	61.5	8			4	4	5	1,194	925			308	617	269
National v. national	1	100.0	1			1		0	39	39			39		0
Local v. local	19	89.5	17				17	2	4,554	4,123				4,123	431
2-union elections	557	72.4	403	203	87	30	83	154	55,534	33,952	13,232	8,278	1,608	10,834	21,582
AFL-CIO v. AFL-CIO v. AFL-CIO	3	66.7	2	2				1	444	168	168				276
AFL-CIO v. AFL-CIO v. Teamsters	3	66.7	2	2	0			1	450	233	233	0			217
AFL-CIO v. AFL-CIO v. local	5	60.0	3	2			1	2	364	295	215			80	69
AFL-CIO v. Teamsters v. national	1	0.0	0	0	0	0		1	81	0	0	0	0		81
AFL-CIO v. Teamsters v. local	3	100.0	3	2	0		1	0	1,011	1,011	900	0		111	0
AFL-CIO v. Local v. local	3	33.3	1	1			0	2	938	368	368			0	570
National v. Local v. local	1	100.0	1			1	0	0	24	24			24	0	0

AFL-CIO v Teamsters v national v. local	1	100.0	1	0	0	0	1	0	961	961	0	0	0	961	0
3 (or more)-union elections	20	65.0	13	9	0	1	3	7	4,273	3,060	1,884	0	24	1,152	1,213
Total representation elections	8,638	48 1	4,159	2,391	1,213	268	287	4,479	475,404	173,385	104,983	31,748	14,208	22,446	302,019

B. Elections in RC cases

AFL-CIO	4,179	49.1	2,050	2,050				2,129	253,695	80,705	80,705				172,990
Teamsters	2,273	47.1	1,071		1,071			1,202	72,066	22,027		22,027			50,039
Other national unions	427	51 8	221			221		206	32,244	10,852			10,852		21,392
Other local unions	332	57 5	191				191	141	22,977	10,051				10,051	12,926
1-union elections	7,211	49 0	3,533	2,050	1,071	221	191	3,678	380,982	123,635	80,705	22,027	10,852	10,051	257,347
AFL-CIO v. AFL-CIO	134	54 5	73	73				61	13,170	3,929	3,929				9,241
AFL-CIO v. Teamsters	163	69 9	114	55	59			49	16,531	8,927	3,412	5,515			7,604
AFL-CIO v. national	42	83 3	35	15		20		7	3,126	1,821	714		1,107		1,305
AFL-CIO v. local	96	84 4	81	36			45	15	8,447	6,986	2,826			4,160	1,461
Teamsters v. national	14	78 6	11		6	5		3	835	356		202	154		479
Teamsters v. local	25	80 0	20		7		13	5	2,185	2,057		549		1,508	128
Teamsters v Teamsters	1	100 0	1		1			0	28	28		28			0
National v. local	12	66 7	8			4	4	4	1,184	925			308	617	259
National v. national	1	100 0	1			1		0	39	39			39		0
Local v. local	17	94 1	16				16	1	4,371	4,021				4,021	350
2-union elections	505	71.3	360	179	73	30	78	145	49,916	29,089	10,881	6,294	1,608	10,306	20,827
AFL-CIO v. AFL-CIO v. AFL-CIO	3	66 7	2	2				1	444	168	168				276
AFL-CIO v. AFL-CIO v. Teamsters	3	66 7	2	2	0			1	450	233	233	0			217
AFL-CIO v. AFL-CIO v. local	5	60.0	3	2			1	2	364	295	215			80	69
AFL-CIO v. Teamsters v. national	1	0 0	0	0	0	0		1	81	0	0	0	0		81
AFL-CIO v Teamsters v. local	3	100.0	3	2	0		1	0	1,011	1,011	900	0		111	0
AFL-CIO v local v local	3	33 3	1	1			0	2	938	368	368			0	570
National v. local v. local	1	100.0	1			1	0	0	24	24			24	0	0
AFL-CIO v Teamsters v. national v. local	1	100 0	1	0	0	0	1	0	961	961	0	0	0	961	0
3 (or more)-union elections	20	65 0	13	9	0	1	3	7	4,273	3,060	1,884	0	24	1,152	1,213
Total RC elections	7,736	50 5	3,906	2,238	1,144	252	272	3,830	435,171	155,784	93,470	28,321	12,484	21,509	279,387

See footnotes at end of table.

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1976 [1]—Continued

Participating unions	Total elections [2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL-CIO unions	Teamsters	Other national unions	Other local unions	
C. Elections in RM cases															
AFL-CIO	171	28.1	48	48				123	8,678	3,419	3,419				5,259
Teamsters	90	23.3	21		21			69	1,877	243		243			1,634
Other national unions	8	12.5	1			1		7	441	43			43		398
Other local unions	9	66.7	6				6	3	281	254				254	27
1-union elections	278	27.3	76	48	21	1	6	202	11,277	3,959	3,419	243	43	254	7,318
AFL-CIO v. AFL-CIO	4	75.0	3	3				1	230	224	224				6
AFL-CIO v. Teamsters	3	100.0	3	2	1			0	93	93	60	33			0
AFL-CIO v. local	6	83.3	5	5			0	1	207	202	202			0	5
2-union elections	13	84.6	11	10	1	0	0	2	530	519	486	33	0	0	11
Total RM elections	291	29.9	87	58	22	1	6	204	11,807	4,478	3,905	276	43	254	7,329

D. Elections in RD cases

AFL-CIO	345	23.5	81	81				264	16,817	5,743	5,743				11,074
Teamsters	180	18 9	34		34			146	4,190	1,200		1,200			2,990
Other national unions	33	45 5	15			15		18	1,988	1,681			1,681		407
Other local unions	14	28 6	4				4	10	43	155				155	88
1-union elections	572	23 4	134	81	34	15	4	438	23,338	8,779	5,743	1,200	1,681	155	14,559
AFL-CIO v. AFL-CIO	7	71 4	5	5				2	257	164	164				93
AFL-CIO v Teamsters	19	89 5	17	5	12			2	3,291	2,811	1,011	1,800			480
AFL-CIO v local	7	85.7	6	4			2	1	1,163	1,083	690			393	80
Teamsters v national	1	100 0	1		1	0		0	151	151		151	0		0
Teamsters v. local	2	100 0	2		0		2	0	33	33		0		33	0
National v local	1	0 0	0			0	0	1	10	0			0	0	10
Local v local	2	50 0	1				1	1	183	102				102	81
2-union elections	39	82 1	32	14	13	0	5	7	5,088	4,344	1,865	1,951	0	528	744
Total RD elections	611	27 2	166	95	47	15	9	445	28,426	13,123	7,608	3,151	1,681	683	15,303

[1] See Glossary for definitions of terms

[2] Includes each unit in which a choice as to collective-bargaining agent was made, for example, there may have been more than one election in a single case, or several cases may have been involved in one election unit.

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1976 [1]

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
A. All representation elections													
AFL-CIO	246,871	53,227	53,227				25,184	55,178	55,178				113,282
Teamsters	69,078	14,492		14,492			6,450	15,373		15,373			32,763
Other national unions	31,349	7,171			7,171		4,038	6,729			6,729		13,411
Other local unions	19,898	6,339				6,339	2,273	4,214				4,214	7,072
1-union elections	367,196	81,229	53,227	14,492	7,171	6,339	37,945	81,494	55,178	15,373	6,729	4,214	166,528
AFL-CIO v. AFL-CIO	11,694	3,169	3,169				473	2,967	2,967				5,085
AFL-CIO v. Teamsters	17,210	9,650	4,184	5,466			622	2,491	869	1,622			4,447
AFL-CIO v. national	2,886	1,479	680		799		160	410	242		168		837
AFL-CIO v. local	8,381	6,730	3,472			3,258	331	487	202			285	833
Teamsters v. national	886	433		209	224		9	205		53	152		239
Teamsters v. local	1,890	1,721		697		1,024	56	38		34		4	75
Teamsters v. Teamsters	27	27		27			0	0		0			0
National v. local	1,028	816			324	492	10	75			65	10	127
National v. national	36	36			36		0	0			0		0
Local v local	3,394	2,937				2,937	223	83				83	151
2-union elections	47,432	26,998	11,505	6,339	1,383	7,711	1,884	6,756	4,280	1,709	385	382	11,794
AFL-CIO v. AFL-CIO v. AFL-CIO	363	82	82				6	110	110				165
AFL-CIO v. AFL-CIO v. Teamsters/	442	222	178	44			9	100	84	16			111
AFL-CIO v. AFL-CIO v. Local	243	159	110			49	26	19	19			0	39
AFL-CIO v. Teamsters v. National	66	0	0	0	0		0	24	0	18	6		42
AFL-CIO v. Teamsters v. Local	850	845	456	21		368	5	0	0	0		0	0
AFL-CIO v. Local v. Local	845	205	187			18	127	191	179			12	322

National v. Local v. Local	23	23			13	10	0	0			0	0	0
AFL-CIO v. Teamsters v. National v. Local	887	887	61	338	0	488	0	0	0	0	0	0	0
3 (or more)-union elections	3,719	2,423	1,074	403	13	933	173	444	392	34	6	12	679
Total representation elections	418,347	110,650	65,806	21,294	8,567	14,983	40,002	88,694	59,850	17,116	7,120	4,608	179,001

B Elections in RC cases

AFL-CIO	225,100	47,808	47,808				22,338	51,124	51,124				103,830
Teamsters	63,646	13,597		13,597			6,057	14,306		14,306			29,686
Other national unions	29,193	6,233			6,233		3,436	6,531			6,531		12,993
Other local unions	19,358	6,083				6,083	2,169	4,161				4,161	6,945
1-union elections	337,297	73,721	47,808	13,597	6,233	6,083	34,000	76,122	51,124	14,306	6,531	4,161	153,454
AFL-CIO v AFL-CIO	11,274	2,874	2,874				443	2,936	2,936				5,021
AFL-CIO v. Teamsters	14,269	7,263	3,219	4,044			439	2,365	864	1,501			4,202
AFL-CIO v. National	2,886	1,479	680		799		160	410	242		168		837
AFL-CIO v. Local	7,242	5,721	2,805			2,916	260	463	178			285	798
Teamsters v. National	747	295		123	172		8	205		53	152		239
Teamsters v Local	1,859	1,690		688		1,002	56	38		34		4	75
Teamsters v. Teamsters	27	27		27			0	0		0			0
National v Local	1,018	816			324	492	10	74			65	9	118
National v. National	36	36			36		0	0			0		0
Local v Local	3,227	2,877				2,877	188	62				62	100
2-union elections	42,585	23,078	9,578	4,882	1,331	7,287	1,564	6,553	4,220	1,588	385	360	11,390
AFL-CIO v. AFL-CIO v AFL-CIO	363	82	82				6	110	110				165
AFL-CIO v. AFL-CIO v Teamsters	442	222	178	44			9	100	84	16			111
AFL-CIO v. AFL-CIO v. Local	243	159	110			49	26	19	19			0	39
AFL-CIO v Teamsters v. National	66	0	0	0	0		0	24	0	18	6		42
AFL-CIO v. Teamsters v. Local	850	845	456	21		368	5	0	0	0		0	0
AFL-CIO v Local v local	845	205	187			18	127	191	179			12	322
National v Local v local	23	23			13	10	0	0			0	0	0
AFL-CIO v. Teamsters v. national v local	887	887	61	338	0	488	0	0	0	0	0	0	0
3 (or more)-union elections	3,719	2,423	1,074	403	13	933	173	444	392	34	6	12	679
Total RC elections	383,601	99,222	58,460	18,882	7,577	14,303	35,737	83,119	55,736	15,928	6,922	4,533	165,523

See footnote at end of table

Table 14.— Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed Fiscal Year 1976[1] —Continued

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
C. Elections in RM cases													
AFL-CIO	7,047	2,101	2,101				903	941	941				3,102
Teamsters	1,717	154		154			61	370		370			1,132
Other national unions	381	26			26		7	141			141		207
Other local unions	243	164				164	55	9				9	15
1-union elections	9,388	2,445	2,101	154	26	164	1,026	1,461	941	370	141	9	4,456
AFL-CIO v. AFL-CIO	187	179	179				2	0	0				6
AFL-CIO v. Teamsters	85	85	45	40			0	0	0	0			0
AFL-CIO v. Local	199	194	142			52	1	1	1			0	3
2-union elections	471	458	366	40	0	52	3	1	1	0	0	0	9
Total RM elections	9,859	2,903	2,467	194	26	216	1,029	1,462	942	370	141	9	4,465

D Elections in RD cases

AFL-CIO	14,724	3,318	3,318				1,943	3,113	3,113				6,350
Teamsters	3,715	741		741			332	697		697			1,945
Other national unions	1,775	912			912		595	57			57		211
Other local unions	297	92				92	49	44				44	112
1-union elections	20,511	5,063	3,318	741	912	92	2,919	3,911	3,113	697	57	44	8,618
AFL-CIO v. AFL-CIO	233	116	116				28	31	31				58
AFL-CIO v Teamsters	2,856	2,302	920	1,382			183	126	5	121			245
AFL-CIO v Local	940	815	525			290	70	23	23			0	32
Teamsters v. National	139	138		86	52		1	0		0	0		0
Teamsters v. Local	31	31		9		22	0	0		0		0	0
National v. Local	10	0			0	0	0	1			0	1	9
Local v Local	167	60				60	35	21				21	51
2-union elections	4,376	3,462	1,561	1,477	52	372	317	202	59	121	0	22	395
Total RD elections	24,887	8,525	4,879	2,218	964	464	3,236	4,113	3,172	818	57	66	9,013

[1] See Glossary for definitions of terms.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1976

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Maine	59	27	22	4	0	1	32	4,263	3,920	1,555	1,302	94	45	114	2,365	963
New Hampshire	28	10	7	2	1	0	18	1,412	1,328	514	419	59	36	0	814	197
Vermont	20	4	3	0	0	1	16	1,335	1,202	475	182	43	1	249	727	107
Massachusetts	256	126	66	32	8	20	130	14,235	12,390	5,826	3,419	747	111	1,549	6,564	5,271
Rhode Island	21	12	8	4	0	0	9	1,152	1,059	454	275	167	0	12	605	372
Connecticut	102	50	28	11	3	8	52	7,231	6,335	2,901	1,502	563	431	405	3,434	2,553
New England	486	229	134	53	12	30	257	29,628	26,234	11,725	7,099	1,673	624	2,329	14,509	9,463
New York	573	298	179	59	11	49	275	29,041	23,990	12,689	7,760	1,565	331	3,033	11,301	11,881
New Jersey	281	154	85	46	10	13	127	15,858	13,548	6,961	4,787	1,124	270	780	6,587	6,793
Pennsylvania	520	263	168	59	21	15	257	25,302	21,807	10,829	7,684	1,684	751	710	10,978	10,651
Middle Atlantic	1,374	715	432	164	42	77	659	70,201	59,345	30,479	20,231	4,373	1,352	4,523	28,866	29,325
Ohio	594	290	157	94	20	19	304	29,679	26,589	12,866	7,724	1,980	2,119	1,043	13,723	11,090
Indiana	283	120	51	53	15	1	163	15,582	14,214	6,645	3,122	1,338	1,718	467	7,569	5,932
Illinois	410	177	102	53	11	11	233	23,745	20,901	9,622	5,490	2,296	728	1,108	11,279	7,138
Michigan	534	260	122	68	58	12	274	25,607	22,307	10,825	5,907	1,630	2,622	666	11,482	10,707
Wisconsin	211	101	57	34	6	4	110	10,162	8,748	3,878	2,445	756	354	323	4,870	3,045
East North Central	2,032	948	489	302	110	47	1,084	104,775	92,759	43,836	24,688	8,000	7,541	3,607	48,923	37,912
Iowa	127	73	37	29	5	2	54	5,670	5,123	2,478	1,142	537	710	89	2,645	2,785
Minnesota	177	89	53	31	1	4	88	7,777	6,735	3,492	1,928	1,052	77	435	3,243	3,475
Missouri	210	113	60	46	5	2	97	9,367	8,023	3,756	2,587	948	171	50	4,267	2,603
North Dakota	32	12	7	4	0	1	20	827	743	285	133	134	0	18	458	188
South Dakota	16	10	4	5	0	1	6	531	511	249	96	126	0	27	262	223
Nebraska	46	23	14	8	0	1	23	2,398	2,182	1,122	811	281	0	30	1,060	1,179
Kansas	76	35	26	5	2	2	41	2,950	2,608	1,382	875	330	43	134	1,226	1,118
West North Central	684	355	201	128	13	13	329	29,520	25,925	12,764	7,572	3,408	1,001	783	13,161	11,571
Delaware	18	7	5	2	0	0	11	527	466	204	132	72	0	0	262	219
Maryland	110	43	24	15	0	4	67	7,522	6,931	2,889	2,377	365	0	147	4,042	1,313

District of Columbia	58	35	32	1	1	1	23	3,288	2,588	1,701	1,056	10	56	579	887	1,949
Virginia	59	26	20	6	0	0	33	5,938	5,383	2,426	2,180	246	0	0	2,957	2,278
West Virginia	67	31	19	7	5	0	36	5,216	4,592	2,041	910	394	99	638	2,551	1,091
North Carolina	82	35	24	10	0	1	47	6,342	5,869	2,490	2,144	285	0	61	3,379	1,446
South Carolina	40	20	16	3	0	1	20	4,857	4,392	2,036	1,815	217	0	4	2,356	1,594
Georgia	131	58	37	18	3	0	73	11,325	10,094	4,142	2,967	1,050	114	11	5,952	2,777
Florida	162	68	42	21	2	3	94	8,089	7,320	3,339	2,368	646	112	213	3,981	3,163
South Atlantic	727	323	219	83	11	10	404	53,104	47,635	21,268	15,949	3,285	381	1,653	26,367	15,830
Kentucky	118	41	20	13	3	5	77	8,435	7,540	3,220	1,695	630	486	409	4,320	2,397
Tennessee	197	91	48	28	3	12	106	20,941	18,854	8,077	5,215	2,035	373	454	10,777	5,670
Alabama	140	63	49	10	4	0	77	15,037	13,652	5,551	5,060	310	170	11	8,101	3,249
Mississippi	62	24	18	4	1	1	38	7,304	6,877	2,675	2,267	118	287	3	4,202	1,835
East South Central	517	219	135	55	11	18	298	51,717	46,923	19,523	14,237	3,093	1,316	877	27,400	13,151
Arkansas	75	31	20	11	0	0	44	7,666	6,973	2,984	2,554	368	62	0	3,989	1,887
Louisiana	100	42	21	18	1	2	58	5,748	5,161	2,465	1,437	827	93	108	2,696	1,951
Oklahoma	95	46	32	9	3	2	49	5,594	5,064	2,434	1,825	406	146	57	2,630	1,831
Texas	284	140	88	43	6	3	144	21,049	18,273	9,218	5,356	2,805	931	126	9,055	8,844
West South Central	554	259	161	81	10	7	295	40,057	35,471	17,101	11,172	4,406	1,232	291	18,370	14,513
Montana	42	15	6	5	0	4	27	1,448	1,176	470	230	99	0	141	706	489
Idaho	28	7	3	4	0	0	21	1,023	882	349	228	121	0	0	533	71
Wyoming	12	7	4	0	1	2	5	456	425	254	156	1	67	30	171	288
Colorado	126	73	49	18	3	3	53	5,277	4,525	2,346	1,626	256	96	368	2,179	2,709
New Mexico	52	22	15	5	2	0	30	2,127	1,850	726	476	168	82	0	1,124	446
Arizona	78	37	20	15	1	1	41	2,993	2,632	1,189	843	315	11	20	1,443	1,013
Utah	23	9	2	6	1	0	14	763	692	345	140	156	49	0	347	264
Nevada	32	16	11	4	1	0	16	1,299	1,165	509	435	37	15	22	656	274
Mountain	393	186	110	57	9	10	207	15,386	13,347	6,188	4,134	1,153	320	581	7,159	5,554
Washington	267	136	80	41	3	12	131	8,620	7,472	3,713	1,971	1,060	143	539	3,759	3,576
Oregon	154	73	43	23	0	7	81	6,834	6,075	3,272	1,482	979	0	811	2,803	3,148
California	1,228	603	336	197	38	32	625	54,163	47,337	23,579	14,408	6,118	1,600	1,453	23,758	22,943
Alaska	45	21	6	13	1	1	24	996	838	415	138	243	10	24	423	390
Hawaii	88	47	29	7	8	3	41	3,873	3,273	1,621	1,239	164	158	60	1,652	1,745
Pacific	1,782	880	494	281	50	55	902	74,486	64,995	32,600	19,238	8,564	1,911	2,887	32,395	31,802
Puerto Rico	81	40	11	9	0	20	41	5,799	5,070	3,509	1,004	455	9	2,041	1,561	3,913
Virgin Islands	8	5	5	0	0	0	3	731	643	351	332	0	0	19	292	351
Outlying Areas	89	45	16	9	0	20	44	6,530	5,713	3,860	1,336	455	9	2,060	1,853	4,264
Total, all States and areas	8,638	4,159	2,391	1,213	268	287	4,479	475,404	418,347	199,344	125,656	38,410	15,687	19,591	219,003	173,385

[1] The States are grouped according to the method used by the Bureau of the Census, U S. Department of Commerce.

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Table 15B.—Standard Federal Administrative Regional Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1976

Standard Federal regions [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Connecticut	102	50	28	11	3	8	52	7,231	6,335	2,901	1,502	563	431	405	3,434	2,553
Maine	59	27	22	4	0	1	32	4,263	3,920	1,555	1,302	94	45	114	2,365	963
Massachusetts	256	126	66	32	8	20	130	14,235	12,390	5,826	3,419	747	111	1,549	6,564	5,271
New Hampshire	28	10	7	2	1	0	18	1,412	1,328	514	419	59	36	0	814	197
Rhode Island	21	12	8	4	0	0	9	1,152	1,059	454	275	167	0	12	605	372
Vermont	20	4	3	0	0	1	16	1,335	1,202	475	182	43	1	249	727	107
Region I	486	229	134	53	12	30	257	29,628	26,234	11,725	7,099	1,673	624	2,329	14,509	9,463
Delaware	18	7	5	2	0	0	11	527	466	204	132	72	0	0	262	219
New Jersey	281	154	85	46	10	13	127	15,858	13,548	6,961	4,787	1,124	270	780	6,587	6,793
New York	573	298	179	59	11	49	275	29,041	23,990	12,689	7,760	1,565	331	3,033	11,301	11,881
Puerto Rico	81	40	11	9	0	20	41	5,799	5,070	3,509	1,004	1,455	9	2,041	1,561	3,913
Virgin Islands	8	5	5	0	0	0	3	731	643	351	332	0	0	19	292	351
Region II	961	504	285	116	21	82	457	51,956	43,717	23,714	14,015	3,216	610	5,873	20,003	23,157
District of Columbia	58	35	32	1	1	1	23	3,288	2,588	1,701	1,056	10	56	579	887	1,949
Maryland	110	43	24	15	0	4	67	7,522	6,931	2,889	2,377	365	0	147	4,042	1,313
Pennsylvania	520	263	168	59	21	15	257	25,302	21,807	10,829	7,684	1,684	751	710	10,978	10,651
Virginia	59	26	20	6	0	0	33	5,938	5,383	2,426	2,180	246	0	0	2,957	2,278
West Virginia	67	31	19	7	5	0	36	5,216	4,592	2,041	910	394	99	638	2,551	1,091
Region III	814	398	263	88	27	20	416	47,266	41,301	19,886	14,207	2,699	906	2,074	21,415	17,282
Alabama	140	63	49	10	4	0	77	15,037	13,652	5,551	5,060	310	170	11	8,101	3,249
Florida	162	68	42	21	2	3	94	8,089	7,320	3,339	2,368	646	112	213	3,981	3,163
Georgia	131	58	37	18	3	0	73	11,325	10,094	4,142	2,967	1,050	114	11	5,952	2,777
Kentucky	118	41	20	13	3	5	77	8,435	7,540	3,220	1,635	630	486	409	4,320	2,397
Mississippi	62	24	18	4	1	1	38	7,304	6,877	2,675	2,267	118	287	3	4,202	1,835
North Carolina	82	35	24	10	0	1	47	6,342	5,869	2,490	2,144	285	0	61	3,379	1,446
South Carolina	40	20	16	3	0	1	20	4,857	4,392	2,036	1,815	217	0	4	2,356	1,594
Tennessee	197	91	48	28	3	12	106	20,941	18,854	8,077	5,215	2,035	373	454	10,777	5,670

Region IV	932	400	254	107	16	23	532	82,330	74,598	31,530	23,531	5,291	1,542	1,166	43,068	22,131
Illinois	410	177	102	53	11	11	233	23,745	20,901	9,622	5,490	2,296	728	1,108	11,279	7,138
Indiana	283	120	51	53	15	1	163	15,582	14,214	6,645	3,122	1,338	1,718	467	7,569	5,932
Michigan	534	260	122	68	58	12	274	25,607	22,307	10,825	5,907	1,630	2,322	666	11,482	10,707
Minnesota	177	89	53	31	1	4	88	7,777	6,735	3,492	1,928	1,052	77	435	3,243	3,475
Ohio	594	290	157	94	20	19	304	29,679	26,589	12,866	7,724	1,980	2,119	1,043	13,723	11,090
Wisconsin	211	101	57	34	6	4	110	10,162	8,748	3,878	2,445	756	354	323	4,870	3,045
Region V	2,209	1,037	542	333	111	51	1,172	112,552	99,494	47,328	26,616	9,052	7,618	4,042	52,166	41,387
Arkansas	75	31	20	11	0	0	44	7,666	6,973	2,984	2,554	368	62	0	3,989	1,887
Louisiana	100	42	21	18	1	2	58	5,748	5,161	2,465	1,437	827	93	108	2,696	1,951
New Mexico	52	22	15	5	2	0	30	2,127	1,850	726	476	168	82	0	1,124	446
Oklahoma	95	46	32	9	3	2	49	5,594	5,064	2,434	1,825	406	146	57	2,630	1,831
Texas	284	140	88	43	6	3	144	21,049	18,273	9,218	5,356	2,805	931	126	9,055	8,844
Region VI	606	281	176	86	12	7	325	42,184	37,321	17,827	11,648	4,574	1,314	291	19,494	14,959
Iowa	127	73	37	29	5	2	54	5,670	5,123	2,478	1,142	537	710	89	2,645	2,785
Kansas	76	35	26	5	2	2	41	2,950	2,608	1,382	875	330	43	134	1,226	1,118
Missouri	210	113	60	46	5	2	97	9,367	8,023	3,756	2,587	948	171	50	4,267	2,603
Nebraska	46	23	14	8	0	1	23	2,398	2,182	1,122	811	281	0	30	1,060	1,179
Region VII	459	244	137	88	12	7	215	20,385	17,936	8,738	5,415	2,096	924	303	9,198	7,685
Colorado	126	73	49	18	3	3	53	5,277	4,525	2,346	1,826	256	96	368	2,179	2,709
Montana	42	15	6	5	0	4	27	1,448	1,176	470	230	99	0	141	706	489
North Dakota	32	12	7	4	0	1	20	827	743	285	133	134	0	18	458	188
South Dakota	16	10	4	5	0	1	6	531	511	249	96	126	0	27	262	223
Utah	23	9	2	6	1	0	14	763	692	345	140	156	49	0	347	264
Wyoming	12	7	4	0	1	2	5	456	425	254	156	1	67	30	171	288
Region VIII	251	126	72	38	5	11	125	9,302	8,072	3,949	2,381	772	212	584	4,123	4,161
Arizona	78	37	20	15	1	1	41	2,993	2,632	1,189	843	315	11	20	1,443	1,013
California	1,228	603	336	197	38	32	625	54,163	47,337	23,579	14,408	6,118	1,600	1,453	23,758	22,943
Hawaii	88	47	29	7	8	3	41	3,873	3,273	1,621	1,239	164	158	60	1,652	1,745
Nevada	32	16	11	4	1	0	16	1,299	1,165	509	435	37	15	22	656	274
Region IX	1,426	703	396	223	48	36	723	62,328	54,407	26,898	16,925	6,634	1,784	1,555	27,509	25,975
Alaska	45	21	6	13	1	1	24	996	838	415	138	243	10	24	423	390
Idaho	28	7	3	4	0	0	21	1,023	882	349	228	121	0	0	533	71
Oregon	154	73	43	23	0	7	81	6,834	6,075	3,272	1,482	979	0	811	2,803	3,148
Washington	267	136	80	41	3	12	131	8,620	7,472	3,713	1,971	1,060	143	539	3,759	3,576
Region X	494	237	132	81	4	20	257	17,473	15,267	7,749	3,819	2,403	153	1,374	7,518	7,185
Total, all Federal regions	8,638	4,159	2,391	1,213	268	287	4,479	475,404	418,347	199,344	125,656	38,410	15,687	19,591	219,003	173,385

[1] The States are grouped according to the 10 standard Federal administrative regions.

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1976

Industrial group [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employee in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Food and kindred products	496	239	118	107	4	10	257	30,456	27,083	13,534	8,576	3,914	204	840	13,549	12,881
Tobacco manufacturers	4	0	0	0	0	0	4	964	901	332	332	0	0	0	569	0
Textile mill products	63	26	19	5	1	1	37	9,779	8,892	3,617	3,027	525	61	4	5,275	2,189
Apparel and other finished products made from fabrics and similar materials	85	29	21	4	1	3	56	10,895	10,017	4,008	3,420	453	19	116	6,009	2,729
Lumber and wood products (except furniture)	209	96	74	16	5	1	113	12,280	11,055	51,121	4,132	668	264	57	5,934	3,897
Furniture and fixtures	107	42	32	8	1	1	65	6,354	5,564	2,723	1,887	609	158	69	2,841	2,409
Paper and allied products	118	52	34	15	1	2	66	7,507	6,697	3,702	2,556	849	47	250	2,995	3,664
Printing, publishing, and allied industries	263	134	103	12	6	13	129	11,871	10,597	51,161	3,928	615	133	485	5,436	5,101
Chemicals and allied products	226	98	48	39	4	7	128	14,394	13,107	6,452	3,335	2,523	176	418	6,655	4,416
Petroleum refining and related industries	67	27	15	9	0	3	40	4,343	3,828	2,089	922	87	0	1,080	1,739	1,351
Rubber and miscellaneous plastics products	201	99	60	32	7	0	102	16,932	15,441	6,704	5,117	992	484	111	8,737	5,239
Leather and leather products	31	16	12	3	1	0	15	3,618	3,245	1,300	1,120	63	117	0	1,945	689
Stone, clay, glass, and concrete products	181	91	43	41	3	4	90	6,762	6,159	3,067	1,838	780	343	106	3,092	2,951
Primary metal industries	231	102	64	25	8	5	129	18,091	16,289	8,271	4,501	1,674	1,054	1,042	8,018	5,948
Fabricated metal products (except machinery and transportation equipment)	344	145	93	30	13	9	199	19,264	17,440	8,232	5,958	1,197	710	367	9,208	6,001
Machinery (except electrical)	404	190	108	35	39	8	214	27,618	25,237	11,768	6,656	1,743	2,859	510	13,469	8,506
Electrical and electronic machinery, equipment, and supplies	241	96	60	21	14	1	145	27,798	25,639	10,623	7,981	1,260	1,163	219	15,016	5,545
Aircraft and parts	219	117	46	27	44	0	102	20,336	18,335	8,305	3,224	819	3,988	274	10,030	7,435
Ship and boat building and repairing	28	13	6	3	2	2	15	2,521	2,133	880	575	153	112	40	1,253	828
Automotive and other transportation equipment	34	17	9	4	3	1	17	4,436	4,144	1,597	1,301	239	40	17	2,547	890
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods; watches and clocks	76	33	21	8	3	1	43	4,884	4,399	1,881	1,036	600	233	12	2,518	1,848
Miscellaneous manufacturing industries	143	68	30	26	7	5	75	8,127	7,173	3,537	1,761	756	529	491	3,636	3,620
Manufacturing	3,771	1,730	1,016	470	167	77	2,041	269,230	243,375	112,904	73,183	20,519	12,694	6,508	130,471	88,137

Metal mining	12	3	1	1	1	0	9	543	491	201	170	16	15	0	290	130
Coal mining	43	25	4	0	17	4	18	2,744	2,476	1,602	228	0	752	622	874	1,501
Crude petroleum and natural gas production	8	4	3	1	0	0	4	259	226	97	82	15	0	0	129	52
Mining and quarrying of nonmetallic minerals (except fuels)	27	11	7	3	0	1	16	623	563	265	99	138	0	28	298	156
Mining	90	43	15	5	18	5	47	4,169	3,756	2,165	579	169	767	650	1,591	1,839
Construction	226	108	83	14	4	7	118	5,387	4,362	2,440	1,683	399	138	220	1,922	2,687
Wholesale trade	703	335	103	203	20	9	368	15,259	13,894	6,699	2,469	3,774	289	167	7,195	6,345
Retail trade	1,077	460	292	137	17	14	617	34,435	29,584	13,041	8,860	3,269	465	447	16,543	12,178
Finance, insurance, and real estate	149	78	68	7	1	2	71	10,789	9,979	4,354	2,873	569	600	312	5,625	2,133
U.S. Postal Service	10	7	2	1	0	4	3	2,500	1,819	1,597	216	29	0	1,352	222	2,307
Local and suburban transit and interurban highway passenger transportation	59	27	13	10	0	4	32	3,422	2,810	1,425	433	620	21	351	1,385	1,462
Transportation services	528	262	44	200	10	8	266	11,445	9,992	5,353	1,347	3,728	86	192	4,639	5,451
Water transportation	21	10	5	4	0	1	11	715	580	382	199	120	0	63	198	434
Other transportation	19	10	5	5	0	0	9	691	575	294	224	70	0	0	281	380
Communication	258	142	125	7	5	5	116	9,714	8,744	4,784	4,126	445	47	166	3,960	5,119
Electric, gas, and sanitary services	137	66	41	24	0	1	71	5,073	4,685	2,216	1,581	619	1	15	2,469	1,904
Transportation, communication, and other utilities	1,022	517	233	250	15	19	505	31,060	27,386	14,454	7,910	5,602	155	787	12,932	14,750
Hotels, rooming houses, camps, and other lodging places	130	50	40	6	3	1	80	8,821	7,046	2,689	2,469	45	41	134	4,357	1,738
Personal services	58	33	16	17	0	0	25	1,805	1,604	934	487	433	0	14	670	1,084
Automotive repair, services, and garages	132	65	29	32	3	1	67	2,457	2,183	1,117	449	615	28	25	1,066	1,130
Motion pictures	56	35	27	4	0	4	21	905	613	468	247	29	21	171	145	683
Amusement and recreation services (except motion pictures)	32	19	14	3	2	0	13	859	654	314	206	58	39	11	340	350
Health services	710	416	289	21	4	102	294	65,293	53,671	25,913	18,141	1,942	77	5,753	27,758	26,640
Educational services	89	57	33	3	2	19	32	10,373	8,570	5,177	2,695	199	38	2,245	3,393	6,054
Membership organizations	13	9	4	0	1	4	4	430	386	270	111	1	26	132	116	397
Business services	306	164	103	32	10	19	142	9,921	7,923	4,148	2,619	645	304	580	3,775	4,418
Miscellaneous repair services	35	22	15	7	0	0	13	775	716	294	210	78	1	5	422	291
Miscellaneous services	23	6	5	1	0	0	17	698	620	274	225	35	2	12	346	189
Services	1,584	876	575	126	25	150	708	102,337	83,986	41,598	27,859	4,080	577	9,082	42,388	42,974
Public administration	6	5	4	0	1	0	1	238	206	92	24	0	2	66	114	35
Total, all industrial groups	8,638	4,159	2,391	1,213	268	287	4,479	475,404	418,347	199,344	125,056	38,410	15,687	19,591	219,003	173,385

[1] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington 1972.

Table 17.—Size of Units in Representation Election Cases Closed, Fiscal Year 1976 [1]

Size of unit (number of employees)	Number eligible to vote	Total elections	Percent of total	Cumulative percent of total	Elections in which representation rights were won by: AFL-CIO unions		Teamsters		Other national unions		Other local unions		Elections in which no representative was chosen	
					Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class
A. Certification elections (RC and RM)														
Total RC and RM elections	446,978	8,027	100 0	---------	2,296	100 0	1,166	100 0	253	100 0	278	100 0	4,034	100 0
Under 10	11,467	2,007	25 2	25 2	573	25.0	512	43 8	52	20 3	40	14 3	830	20 6
10 to 19	25,770	1,858	23 2	48 4	593	25 8	323	27 7	63	24.9	52	18 6	827	20.5
20 to 29	23,981	997	12 4	60 8	282	12 3	121	10 4	36	14 2	29	10 4	529	13.1
30 to 39	22,850	669	8 3	69 1	187	8.1	70	6 0	29	11.5	33	11.9	350	8 7
40 to 49	19,080	434	5 4	74 5	128	5 6	27	2 3	18	7 1	19	6 8	242	6 0
50 to 59	17,497	325	4 0	78 5	104	4 5	27	2 3	8	3 2	15	5 4	171	4.2
60 to 69	14,608	228	2 8	81 3	70	3.0	9	0 8	8	3 2	16	5 8	125	3.1
70 to 79	14,983	202	2 5	83 8	55	2 4	8	0 7	10	4 0	12	4 3	117	2 9
80 to 89	13,332	158	2 0	85 8	38	1 7	13	1 1	3	1 2	8	2 9	96	2 4
90 to 99	12,032	128	1 6	87 4	39	1 7	5	0 4	2	0 8	4	1 4	78	1 9
100 to 109	9,421	90	1 1	88 5	28	1.2	4	0 3	0	---------	2	0 7	56	1 4
110 to 119	11,271	99	1 2	89 7	36	1 6	4	0 3	1	0 4	7	2.5	51	1.3
120 to 129	9,526	77	1 0	90 7	19	0.8	2	0 2	3	1 2	1	0 4	52	1 3
130 to 139	9,151	68	0.8	91 5	11	0 5	2	0 2	3	1 2	4	1 4	48	1 2
140 to 149	8,233	57	0 7	92 2	21	0 9	5	0 4	0	---------	3	1 1	28	0 7
150 to 159	8,801	57	0 7	92 9	10	0.4	5	0 4	1	0 4	3	1 1	38	0.9
160 to 169	7,367	45	0.6	93 5	13	0 6	3	0 3	0	---------	2	0 7	27	0 7
170 to 179	5,767	33	0 4	93.9	6	0.3	2	0 2	3	1 2	1	0 4	21	0 5
180 to 189	4,780	26	0 3	94 2	4	0.2	3	0 3	0	---------	1	0 4	18	0 4
190 to 199	5,636	29	0 4	94 6	8	0.3	1	0 1	1	0 4	0	---------	19	0 5
200 to 299	43,600	180	2 2	96 8	40	1.7	10	0 9	2	0 8	11	4 0	117	2 9
300 to 399	37,116	108	1.3	98 1	13	0 6	6	0 5	3	1 2	6	2.2	80	2 0
400 to 499	18,300	41	0 5	98 6	4	0 2	3	0 3	5	2 0	2	0.7	27	0 7
500 to 599	15,971	29	0 4	99 0	4	0.2	1	0 1	0	---------	1	0 4	23	0.6
600 to 799	25,077	37	0 5	99 5	8	0 3	0	---------	2	0 8	2	0 7	25	0 6
800 to 999	17,214	19	0 2	99 7	2	0 1	0	---------	0	---------	3	1 1	14	0 3
1,000 to 1,999	27,523	23	0 3	100 0	0	---------	0	---------	0	---------	1	0 4	22	0 5
2,000 to 2,999	6,624	3	0 0	100 0	0	---------	0	---------	0	---------	0	---------	3	0.1

B Decertification elections (RD)

Total RD elections	28,426	611	100 0	----------	95	100 0	47	100.0	15	100 0	9	100.0	445	100 0
Under 10	953	171	28 1	28.1	7	7.4	7	14 9	1	6 7	1	11 1	155	34.9
10 to 19	1,976	143	23.3	51 4	16	16 7	12	25.6	2	13.3	1	11 1	111	25 0
20 to 29	1,876	79	12.9	64 3	15	15.7	4	8.5	3	20 0	2	22.3	55	12.5
30 to 39	1,439	43	7 0	71.3	8	8.3	5	10 6	0	----------	1	11.1	29	6 5
40 to 49	1,312	30	4 9	76.2	11	11 5	3	6.4	0	----------	1	11 1	15	3 4
50 to 59	1,138	21	3 4	79.6	3	3 2	2	4.3	1	6 7	1	11 1	14	3 1
60 to 69	1,546	24	3.9	83 5	7	7.4	3	6 4	2	13 3	0	----------	12	2 7
70 to 79	1,048	14	2 3	85 8	7	7 4	0	----------	0	----------	0	----------	7	1 6
80 to 89	747	9	1.5	87 3	0	----------	3	6 4	0	----------	0	----------	6	1 3
90 to 99	831	9	1.5	88 8	5	5 3	1	2.1	1	6 7	0	----------	2	0 4
100 to 109	532	5	0 8	89 6	0	----------	0	----------	0	----------	1	11 1	4	0 9
110 to 119	570	5	0.8	90 4	0	----------	0	----------	0	----------	0	----------	5	1 1
120 to 129	865	7	1.1	91 5	0	----------	1	2 1	0	----------	0	----------	6	1.3
130 to 139	810	6	1 0	92 5	2	2 1	1	2 1	0	----------	0	----------	3	0 7
140 to 149	292	2	0 3	92.8	1	1 1	0	----------	0	----------	0	----------	1	0 2
150 to 159	922	6	1 0	93 8	2	2 1	1	2 1	0	----------	0	----------	3	0 7
160 to 169	499	3	0 5	94 3	1	1 1	0	----------	0	----------	0	----------	2	0 4
170 to 199	1,261	7	1.1	95 4	3	3.2	0	----------	2	13 3	0	----------	2	0 4
200 to 299	2,851	12	2 0	97.4	0	----------	1	2 1	2	13 3	0	----------	9	2 0
300 to 399	5,070	13	2 1	99 5	5	5 3	3	6 4	1	6 7	1	11.1	3	0.7
500 to 799	1,086	2	0.3	99.8	1	1 1	0	----------	0	----------	0	----------	1	0 2
800 and over	802	1	0.2	100 0	1	1.1	0	----------	0	----------	0	----------	0	----------

[1] See Glossary for definitions of terms.

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1976 [1]

Size of establishment (number of employees)	Total number of situations	Total		Type of situation																	
		Percent of all situations	Cumulative percent of all situations	CA		CB		CC		CD		CE		CG		CP		CA-CB combinations		Other C combinations	
				Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
Total	[2]30,993	100 0	------	20,731	100.0	6,135	100 0	1,484	100 0	339	100 0	99	100 0	86	100 0	388	100 0	1,537	100 0	194	100 0
Under 10	8,792	28 4	28 4	5,589	27 1	1,868	30 3	628	42.4	110	32 3	58	58 7	2	2 3	155	39.8	305	19 9	77	39 8
10-19	2,950	9 5	37 9	2,176	10 5	348	5 6	172	11 7	51	14.9	8	8.1	2	2.3	88	22 7	74	4 8	31	16.1
20-29	2,037	6 6	44 5	1,484	7 2	283	4 6	112	7 6	24	7 1	3	3 0	2	2 3	38	9 8	76	4 9	15	7.8
30-39	1,569	5 1	49.6	1,125	5 4	247	4 0	59	4 0	26	7 7	5	5 1	6	7 0	21	5 4	70	4 6	10	5.2
40-49	1,110	3.6	53 2	810	3 9	162	2 6	56	3 8	14	4 1	1	1.0	3	3 5	19	4.9	42	2 7	3	1.5
50-59	1,213	3 9	57 1	840	4.1	222	3 6	71	4.8	9	2.7	2	2.0	2	2 3	6	1 5	54	3 5	7	3.6
60-69	783	2 5	59.6	568	2.7	135	2 2	20	1.3	9	2 7	3	3.0	2	2 3	13	3 4	29	1 9	4	2.1
70-79	588	1 9	61 5	417	2 0	100	1 6	14	0.9	3	0 9	0	------	5	5 8	7	1 8	40	2 6	2	1.0
80-89	527	1.7	63 2	400	1 9	85	1 4	8	0.5	7	2 1	0	------	5	5 8	2	0 5	18	1.2	2	1.0
90-99	251	0 8	64 0	183	0.9	47	0 8	6	0 4	1	0 3	0	------	0	------	2	0 5	10	0 7	2	1.0
100-109	1,125	3 6	67 6	703	3 4	250	4 1	55	3 7	12	3 5	2	2 0	12	14 0	2	0 5	85	5 5	4	2 1
110-119	197	0 6	68 2	152	0 7	30	0 5	6	0.4	1	0 3	1	1.0	1	1 2	1	0 3	4	0 3	1	0.5
120-129	374	1 2	69 4	279	1 3	61	1 0	11	0.7	2	0 6	1	1 0	3	3 5	1	0 3	16	1.0	0	------
130-139	176	0 6	70 0	132	0 6	22	0 4	9	0 6	0	------	0	------	1	1 2	0	------	11	0.7	1	0 5
140-149	146	0 5	70 5	114	0.5	22	0 4	6	0 4	0	------	0	------	0	------	2	0 5	2	0 1	0	------
150-159	576	1 9	72 4	396	1.9	108	1 8	12	0 8	4	1 2	1	1 0	1	1 2	4	1 0	43	2 8	7	3 6
160-169	147	0 5	72 9	118	0 6	16	0 3	2	0 1	0	------	0	------	0	------	4	1 0	6	0.4	1	0 5
170-179	189	0 6	73 5	132	0 6	39	0 6	2	0.1	2	0 6	0	------	0	------	3	0 8	9	0 6	2	1 0
180-189	138	0 9	73 9	98	0.5	24	0 4	4	0.3	2	0 6	0	------	1	1 2	1	0 3	8	0 5	0	------
190-199	47	0 2	74 1	32	0.2	8	0 1	3	0.2	1	0 3	0	------	0	------	1	0 3	1	0 1	1	0 5
200-299	1,622	5 2	79 3	1,086	5 2	346	5 6	44	3 0	13	3 8	1	1.0	3	3 5	1	0 3	123	8 0	5	2.6
300-399	1,058	3 4	82 7	671	3 2	264	4 3	22	1.5	6	1 8	2	2.0	2	2 3	1	0.3	84	5.5	6	3.1
400-499	649	2 1	84 8	458	2 2	121	2 0	17	1 1	3	0.9	0	------	0	------	2	0 5	46	3.0	2	1.0
500-599	590	1 9	86 7	356	1 7	158	2.6	14	0.9	7	2 1	1	1 0	1	1 2	4	1 0	47	3.1	2	1 0
600-699	329	1 1	87 8	208	1 0	83	1 4	11	0 7	1	0 3	0	------	2	2 3	1	0 3	23	1.5	0	------
700-799	268	0 9	88 7	189	0 9	53	0 9	5	0 3	3	0 9	0	------	0	------	2	0.5	16	1 0	0	------
800-899	220	0 7	89.4	145	0.7	54	0 9	3	0 2	1	0 3	1	1.0	2	2 3	0	------	13	0.8	1	0.5
900-999	136	0 4	89.8	91	0 4	30	0 5	6	0 4	0	------	0	------	1	1 2	0	------	7	0 5	1	0 5
1,000-1,999	1,225	3.9	93 7	725	3 5	344	5.6	31	2.1	10	2 9	5	5 1	8	9.3	2	0 5	98	6.4	2	1 0
2,000-2,999	448	1 4	95 1	243	1.2	128	2 1	19	1 3	5	1.5	1	1.0	1	1.2	1	0 3	48	3.1	2	1 0
3,000-3,999	326	1.1	96 2	179	0 9	109	1.8	2	0 1	1	0 3	0	------	1	1.2	0	------	33	2.1	1	0.5
4,000-4.999	171	0 6	96 8	106	0 5	49	0 8	4	0 3	0	------	0	------	0	------	0	------	12	0 8	0	------
5,000-5,999	417	1 3	98 1	204	1.0	135	2 2	19	1.3	4	1 2	0	------	2	2.3	0	------	53	3.4	0	------
Above 9,999	599	1 9	100 0	322	1 6	184	3 0	31	2.1	7	2 1	3	3.0	15	17 3	4	1.0	31	2.0	2	1.0

[1] See Glossary for definitions of terms.

[2] Based on revised situation count which absorbs companion cases, cross-filing, and multiple filings as compared to situations shown in Charts 1 and 2 of Chapter I, which are based on single and multiple filings of same type of case.

Table 19.—Litigation for Enforcement and/or Review of Board Orders, Fiscal Year 1976; and Cumulative Totals, Fiscal Years 1936–1976

	Fiscal year 1976									July 5, 1935–June 30, 1976	
	Number of proceedings [1]					Percentages					
	Total	Vs. employers only	Vs. unions only	Vs. both employers and unions	Board dismissal [2]	Vs employers only	Vs. unions only	Vs. both employers and unions	Board dismissal	Number	Percent
Proceedings decided by U.S. courts of appeals	280	221	49	0	10						
On petitions for review and/or enforcement	250	196	44	0	10	100 0	100.0		100 0	6,208	100 0
Board orders affirmed in full	185	148[4]	32	0	5	75 5	72.7		50 0	3,918	63.1
Board orders affirmed with modification	17	13	4	0	0	6.6	9.1			1,021	16.5
Remanded to Board	20	11	5	0	4	5.6	11.4		40.0	273	4.4
Board orders partially affirmed and partially remanded	8	7	1	0	0	3.6	2.3			97	1.6
Board orders set aside	20	17	2	0	1	8 7	4 5		10.0	899	14.4
On petitions for contempt	30	25	5	0	0	100.0	100.0				
Compliance after filing of petition, before court order	30	25	5	0	0	100.0	100.0				
Court orders holding respondent in contempt	0	0	0	0	0						
Court orders denying petition	0	0	0	0	0						
Proceedings decided by U.S. Supreme Court [3]	2	2	0	0	0	100 0				215	100 0
Board orders affirmed in full	0	0	0	0	0					128	59 5
Board orders affirmed with modification	0	0	0	0	0					16	7.4
Board orders set aside	1	1	0	0	0	50 0				34	15.8
Remanded to Board	1	1	0	0	0	50.0				18	8.4
Remanded to court of appeals	0	0	0	0	0					16	7.4
Board's request for remand or modification of enforcement order denied	0	0	0	0	0					1	0 5
Contempt cases remanded to courts of appeals	0	0	0	0	0					1	0.5
Contempt cases enforced	0	0	0	0	0					1	0.5

[1] "Proceedings" are comparable to "cases" reported in annual reports prior to fiscal year 1964. This term more accurately describes the data inasmuch as a single "proceeding" often includes more than one "case." See Glossary for definitions of terms.
[2] A proceeding in which the Board had entered an order dismissing the complaint and the charging party appealed such dismissal in the courts of appeals.
[3] The Board filed *amicus* briefs in two cases, *Oil, Chemical and Atomic Workers* v. *Mobil Oil Corp.*, and *Lodge 76, Machinists* v. *Wisconsin Employment Relations Commission*. The Board's position was sustained in both cases

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1976, Compared With 5-Year Cumulative Totals, Fiscal Years 1971 Through 1975 [1]

Circuit courts of appeals (headquarters)	Total fiscal year 1976	Total fiscal years 1971–75	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal year 1976		Cumulative fiscal years 1971–75		Fiscal year 1976		Cumulative fiscal years 1971–75		Fiscal year 1976		Cumulative fiscal years 1971–74		Fiscal year 1976		Cumulative fiscal years 1971–75		Fiscal year 1976		Cumulative fiscal years 1971–75	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total all circuits	250	1,621	185	74 0	1,185	73 1	17	6 8	169	10.4	20	8 0	68	4.2	8	3.2	20	1.2	20	8.0	179	11 0
1. Boston, Mass	11	52	7	63 6	40	76.9	3	27 3	3	5 8	1	9.0	2	3 9	0	------	0	------	0	------	7	13 4
2. New York, N Y	34	125	28	82.4	99	79.2	1	2 9	13	10.4	2	5.9	1	0 8	2	5.9	0	------	1	2.9	12	9 6
3 Philadelphia, Pa	15	87	8	53.3	68	78.2	0	------	5	5.8	3	20.0	4	4.6	1	6.7	0	------	3	20 0	10	11.4
4. Richmond, Va	9	105	7	77.8	75	71 4	1	11 1	13	12.4	0	------	4	3.8	0	------	0	------	1	11.1	13	12.4
5. New Orleans, La	41	257	34	82 9	200	77.8	3	7 4	20	7.8	1	2 4	11	4.3	2	4.9	1	0.4	1	2.4	25	9.7
6 Cincinnati, Ohio	31	255	25	80.7	183	71 8	0	------	28	11 0	2	6 5	8	3.1	1	3.2	3	1 2	3	9.6	33	12.9
7. Chicago, Ill	28	158	21	75 0	120	76 0	1	3 6	18	11 4	3	10.7	4	2 5	0	------	0	------	3	10.7	16	10.1
8. St. Louis, Mo	14	142	11	78 6	79	55 6	2	14.3	38	26.8	0	------	5	3.5	1	7.1	1	0.7	0	------	19	13.4
9. San Francisco, Calif	39	248	25	64 1	181	73 0	5	12 8	19	7.7	4	10.3	16	6.5	0	------	5	2 0	5	12 8	27	10.8
10. Denver, Colo	8	75	6	75.0	60	80 0	1	12 5	2	2.7	0	------	0	------	0	------	1	1 3	1	12 5	12	16.0
Washington, D.C	20	117	13	65 0	80	68.3	0	------	10	8.6	4	20 0	13	11.1	1	5.0	9	7.7	2	10.0	5	4.3

[1] Percentages are computed horizontally by current fiscal year and total fiscal years.

Table 20.—Injunction Litigation Under Section 10(e), 10(j), and 10(l), Fiscal Year 1976

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions						Pending in district court June 30, 1976
		Pending in district court July 1, 1975	Filed in district court fiscal year 1976		Granted	Denied	Settled	Withdrawn	Dismissed	Inactive	
Under sec. 10(e), total	[1] 2	0	2	2	1	1	0	0	0	0	0
Under sec. 10(j), total	25	5	20	18	6	3	4	0	1	4	7
8(a)(1)	4	0	4	4	0	1	1	0	0	2	0
8(a)(1)(3)	1	1	0	1	1	0	0	0	0	0	0
8(a)(1)(2)(3), 8(b)(1)(2)	1	0	1	0	0	0	0	0	0	0	1
8(a)(1)(5)	2	1	1	2	1	0	0	0	1	0	0
8(a)(1)(3)(5)	5	2	3	5	3	1	1	0	0	0	0
8(a)(1)(2)(3)(5)	5	0	5	1	0	0	0	0	0	1	4
8(b)(1)	1	1	0	1	1	0	0	0	0	0	0
8(b)(1)(A)	1	0	1	0	0	0	0	0	0	0	1
8(b)(1)(B)	1	0	1	0	0	0	0	0	0	0	1
8(b)(1)(A)(2)	1	0	1	1	0	0	0	0	0	1	0
8(b)(3)	1	0	1	1	0	0	1	0	0	0	0
8(b)(1)(A)(3)	1	0	1	1	0	0	1	0	0	0	0
8(b)(1)(A)(B)(3)	1	0	1	1	0	1	0	0	0	0	0
Under sec. 10(l), total	155	12	143	137	49	12	49	9	4	14	18
8(b)(4)(A)	17	4	13	15	5	3	5	0	1	1	2
8(b)(4)(B)	72	7	65	64	21	1	29	5	2	6	8
8(b)(4)(B), 8(e)	2	0	2	0	0	0	0	0	0	0	2
8(b)(4)(A)(B)	1	0	1	1	0	1	0	0	0	0	0
8(b)(4)(A)(B), 8(e)	2	0	2	1	1	0	0	0	0	0	1
8(b)(4)(D)	27	0	27	26	11	2	8	3	0	2	1
8(b)(4)(D), 7(A)	1	0	1	1	0	0	0	0	0	1	0
8(b)(4)(D), 4(B)	1	0	1	1	0	0	1	0	0	0	0
8(b)(7)(A)	10	0	10	7	2	1	2	0	0	2	3
8(b)(7)(B)	4	0	4	4	2	1	0	0	1	0	0
8(b)(7)(C)	13	1	12	12	5	0	4	1	0	2	1
8(e)	5	0	5	5	2	3	0	0	0	0	0

[1] In Courts of Appeals.

Table 21.—Miscellaneous Litigation Involving NLRB; Outcome of Proceedings in Which Court Decision Issued in Fiscal Year 1976

Type of litigation	Number of proceedings								
	Total—all courts			In courts of appeals			In district courts		
	Number decided	Court determination		Number decided	Court determination		Number decided	Court determination	
		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position
Totals—all types	101	78	23	20	18	2	81	60	21
NLRB-initiated actions or interventions	11	9	2	2	2	0	9	7	2
To enforce subpena	2	2	0	2	2	0	0	0	0
To restrain dissipation of assets by respondent	0	0	0	0	0	0	0	0	0
To defend Board's jurisdiction	4	2	2	0	0	0	4	2	2
To lift bankruptcy stay	5	5	0	0	0	0	5	5	0
Action by other parties	90	69	21	18	16	2	72	53	19
To review 10(k) determination	1	1	0	1	1	0	0	0	0
To restrain NLRB from	18	15	3	5	5	0	13	10	3
Proceeding in R case	14	12	2	4	4	0	10	8	2
Proceeding in unfair labor practice case	3	2	1	1	1	0	2	1	1
Proceeding in backpay case	0	0	0	0	0	0	0	0	0
Proceeding in 10 (k) case	1	1	0	0	0	0	1	1	0
Other	0	0	0	0	0	0	0	0	0
To compel NLRB to	69	52	17	10	9	1	59	43	16
Issue complaint	7	7	0	4	4	0	3	3	0
Seek injunction	0	0	0	0	0	0	0	0	0
Take action in R Case	1	1	0	1	1	0	0	0	0
Comply with Freedom of Information Act [1]	59	43	16	3	3	0	56	40	16
Other	2	1	1	2	1	1	0	0	0
Other	2	1	1	2	1	1	0	0	0

[1] FOIA cases are categorized as to court determination depending on whether NLRB substantially prevailed

Table 22.—Advisory Opinion Cases Received, Closed, and Pending, Fiscal Year 1976 [1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State boards
Pending July 1, 1975	1	1	0	0	0
Received fiscal 1976	13	12	1	0	0
On docket fiscal 1976	14	13	1	0	0
Closed fiscal 1976	13	12	1	0	0
Pending June 30, 1976	1	1	0	0	0

[1] See Glossary for definitions of terms.

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1976 [1]

Action taken	Total cases closed
	13
Board would assert jurisdiction	10
Board would not assert jurisdiction	0
Unresolved because of insufficient evidence submitted	0
Dismissed	3
Withdrawn	0

[1] See Glossary for definitions of terms.

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